

(Conference Draft)

“A Tale of Four Mining Charters¹: The effect of the politics of development for benefit sharing with mining communities in South Africa”

Anri Heyns *

2017 Law and Development Conference

Cape Town, South Africa
September 2017

¹ Reference is made to the title of the classic novel: Dickens C, A Tale of Two Cities (London, Penguin Books 2000 (first published 1859)).

* Anri Heyns is currently a PhD candidate at the NRF/DST SARChI Research Chair: Mineral Law in Africa at the University of Cape Town.

1. Introduction

To break with colonial times, great emphasis has been placed on sharing the benefits of commercial endeavours with those affected by the exploitation accompanying these endeavours. Commercial exploitation of resources, both natural and human, characterised the relationship between the Western world and colonised nations.² It also manifests in the relationship between multinational corporations and local communities, indigenous or otherwise, living in the areas where these multinational corporations operate their commercial endeavours.

Mining is a very good example of such a commercial endeavour and its effects on local communities are well documented.³ In South Africa, benefit sharing in mining is currently pursued in terms of empowerment as provided for in the legislative system that was implemented on 1 May 2004.⁴ To promote empowerment, the legislative system specifically provides for the creation of a Mining Charter by the Minister of Mineral Resources.⁵

On 15 June 2017, more than a year after the controversial 2016 draft Mining Charter⁶ was released for comment, Minister Mosebenzi Zwane announced the 2017 final Mining Charter.⁷ The 2017 Mining Charter will be the industry’s third charter, replacing the 2004 and 2010

² Gordon RE and Sylvester JH, "Deconstructing Development" ' 2004 (22) *Wisconsin International Law Journal* 1-98, 53.

³ See in general Cronje F and Chenga C, 'Sustainable Social Development in the South African Mining Sector' 2009 (26) *Development Southern Africa* ; CALS, *Changing Corporate Behaviour: The Mapungubwe Case Study - A Research Report* (2014) CALS, ;CALS, *Changing Corporate Behaviour: The Mapungubwe Case Study - A Research Report* (2014) CALS, ;Esteves A, 'Mining companies as agents for social development: The case for more effectual corporate-community investments' in E. B, Walde T and Warden-Fernández J (eds), *International and Comparative Mineral Law and Policy - Trends and Prospects* (The Hague, Kluwer Law International 2005) ; Mbatha P and Wynberg R, 'Mining and the Myth of Benefits in South African Rural Coastal Communities' in Wynberg R and Hauck M (eds), *Sharing the Benefits from the Coast* (Cape Town, UCT Press 2014) ;TRC, *Truth and Reconciliation Commission of South Africa Report* (2003) <http://www.justice.gov.za/trc/report/> accessed on 6 March 2016

⁴ The Mineral and Petroleum Resources Development Act 28 of 2002 (“MPRDA”) became operational on this date. See discussion below regarding empowerment in the mining industry.

⁵ The Broad-Based Black Socio-Economic Empowerment Charter (“Mining Charter”) created in terms of s 100 of the MPRDA.

⁶ Draft Reviewed Broad Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry 2016 (GN 450 GG 39933 of 15 April 2016), The charter was released without any prior consultation with stakeholders in the industry and while court action, instituted by the Chamber of Mines against the Department of Mineral Resources, was still pending. Secombe A, 'Department blindsides miners with new charter' *Bdlive* (15 April 2016) available at <http://www.bdlive.co.za/business/mining/2016/04/15/departement-blindsides-miners-wit-new-charter?service=print> accessed on 30 July 2017.

⁷ Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry 2017

charters.⁸ The 2017 Mining Charter has been met with much criticism, causing the postponement of its implementation.⁹ Nevertheless, the Department maintains that this third charter will achieve growth and transformation in the mining industry while also promoting the socio-economic welfare of mining communities.¹⁰

Notwithstanding the implementation of this legislative system, the problem of poverty in mining areas persists and often causes conflict between mining companies and communities.¹¹ The empowerment of mining communities takes place mainly through development in terms of the Mining Charter.¹² This paper, therefore, proposes that an interrogation of the concept of development is required to understand why development problems faced under the previous charters will not necessarily be solved this time around.

2. **Benefit sharing with poor mining communities through empowerment**

Whereas benefit sharing in resource extraction primarily entailed restoring indigenous peoples’ sovereignty to their natural resources,¹³ benefit sharing can also be promoted in a less abstract manner. The term benefit sharing has been used to indicate different approaches to social responsibility or transformation. On the one hand, it is understood as practising greater social responsibility in a neoliberal, self-serving and reactionary sense.¹⁴ On the other hand, benefit sharing is compared with development, but without necessarily exploring the underlying cause for underdevelopment.¹⁵ In basic terms, however, benefit sharing merely

⁸ Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (GN 838 GG 33573 of 20 September 2010), ;Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry, 2004 (GN 1639 GG 26661 of 13 August 2004) ;Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry, 2004 (GN 1639 GG 26661 of 13 August 2004)

⁹ Timeslive, 'Mining minister suspends implementing new mining charter' *TimesLIVE* (14 July 2017) available at <https://www.timeslive.co.za/politics/2017-07-14-mining-minister-suspends-implementing-new-mining-charter/> accessed on 30 July 2017.

¹⁰ 2017 Mining Charter 1 (f).

¹¹ Between 2009 and 2015 labour unrest took place in reaction to low wages and poor working and living conditions. See Horne R, 'Patterns of ownership and labour unrest within the South African mining sector' 2015 (40) *Journal of Contemporary History*

¹² The Broad-Based Black Socio-Economic Empowerment Charter created in terms of s 100 of the MPRDA.

¹³ 1962 UN General Assembly Resolution 1803.

¹⁴ Wynberg & Hauck (2014) 6 refer to Jenkins 2004 and Merino A & Valor C “The potential of corporate social responsibility to eradicate poverty: an ongoing debate” (2011) 21 *Development in Practice* 157-167.

¹⁵ Wynberg & Hauck (2014) 6 referring to Altman J "Benefit sharing is no solution to development" in Wynberg R, Chennels R & Schroeder D *Indigenous peoples, consent and benefit-sharing: Learning from the San-Hoodia Case* (2009).

signifies “the division and distribution of monetary and non-monetary benefits in a way that has equitable outcomes and which is procedurally fair”.¹⁶

The Mineral and Petroleum Resources Development Act’s¹⁷ transformative nature is evident from its preamble, which acknowledges that South Africa’s mineral and petroleum resources belong to the nation. Section 3 specifically states that the State holds the mineral and petroleum resources in custody “for the benefit of all South Africans”.¹⁸ The preamble, furthermore, recognises the need to promote local and rural development, as well as social upliftment of communities affected by mining.

To achieve these transformative objectives, section 100 of the MPRDA mandates the development of the Mining Charter to promote the participation of historically disadvantaged South Africans in the mining industry. As will be shown in this paper, the MPRDA, together with the Mining Charter, promote black economic empowerment (“BEE”) in the mining industry, as espoused by the Broad-Based Black Economic Empowerment Act.¹⁹ It gives effect to the right to equality as set out in section 9 of the Constitution and aims to address the inequalities of the past.²⁰ The definition of “broad based economic empowerment” in the MPRDA includes as one of the objectives “the socio-economic development of communities immediately hosting, affected by supplying labour to the operations”.²¹

Benefit sharing in the mining industry, therefore, occurs by means of empowerment in terms of the Mining Charter.²² When it comes to mining communities specifically, benefit sharing

¹⁶ Wynberg & Hauck (2014) 8. Wynberg & Hauck (2014) 6 refer to Schroeder D “Environmental justice and the market: The politics of sharing wildlife revenues in Tanzania” (2007) 21 *Society and Natural Resources* 583-596. The theoretical basis of benefit sharing, as an idea, is still not well expressed and requires consideration.

¹⁷ 28 of 2002 (hereinafter “the MPRDA”).

¹⁸ Before the enactment of the MPRDA the owner of the land on which the resources were situated owned mineral resources. The MPRDA therefore brought about a very significant change to the way in which mineral resources are regulated. A detailed discussion regarding this matter, however, falls outside of the scope of the current discussion. See Van der Schyff E “Who ‘owns’ the country’s mineral resources? The possible incorporation of the public trust doctrine through the Mineral and Petroleum Resources Development Act” (2008) 4 *TSAR* 757 – 768 in this regard.

¹⁹ 53 of 2003 (“BBBEE Act”). The 2017 Mining Charter specifically states that its objective is to harmonise the provisions of the charter with those of the BBBEE Act.

²⁰ Department of Mineral Resources “Mining Charter Impact Assessment Report” October (2009) 2.

²¹ MPRDA s1.

²² The MPRDA is transformative in nature and include other measures, in addition to the creation of the Mining Charter that can also be regarded as benefit sharing. The socio-labour plan provided for in the regulations to the MPRDA is one example hereof. Regulations in terms of section 107(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 (GNR 527 GG 26275 of 23 April 2004) (hereinafter “Regulations”). Regulations 40-46. The objectives of the socio-labour plan are to “promote employment and advance the social and economic welfare of all South Africans; contribute to the transformation of the mining industry; and ensure that the holders of mining rights contribute towards the socio-economic

and empowerment take shape as the development of mine communities, either through projects implementing infrastructure or by allocating ownership in mine companies to mining communities.²³

The paper, therefore, proceeds with a discussion of the origin and meaning of the concept of development. The concept is furthermore analysed to expose the politics of development - that is that development is situated in a specific (Western) worldview and that it represents a specific construction of what it means to be underdeveloped or poor. The politics of development affect the manner in which development problems are framed and how the beneficiaries are represented, which inevitably affects how solutions are constructed.

After exposing the politics of development, the South African mining context will be considered. Empowerment as a concept will be investigated, firstly in the context of black economic empowerment in general, and then specifically, as it manifests in the Mining Charter regarding mining communities. The four versions of the Mining Charter are then considered to view how the empowerment of mining communities is framed in the different versions. Thereafter, it is argued that the differing approaches to mine communities included in the different charters constitute evidence of the politics of development, which create challenges for framing and addressing problems of development.

Neither the Mining Charter nor one single element of the Mining Charter,²⁴ such as mine community development, in itself, can address the problems²⁵ currently faced by persons living in mining areas. This paper, however, wishes to expose a kind of thinking that is represented by the way, in which the charter frames the problem of mining areas and represents the beneficiaries of the proposed solutions. It is therefore proposed that the empowerment of mine communities takes place from a development paradigm and that this framing may cause poverty and inequality to persist.

development of areas in which they are operating”. The content of a socio-labour plan entails measures promoting employee and local economic development.

²³ See discussion on the Mining Charter below.

²⁴ In terms of the Mining Charter, a mining right holder must promote different elements to be regarded as compliant. The different elements represent the different levels on which *broad-based* empowerment should take place. These elements are ownership, human resource development, mine community development, procurement supplier and enterprise development, employment equity and sustainable development and growth.

²⁵ Problems can include lack of access to basic services and infrastructure, poverty and exposure to environmental harm caused by mining.

3. A Critique of Development

Gordon and Sylvester distinguish between development as theory or idea,²⁶ as practice²⁷ and as a construction of the law.²⁸ For the purposes of this piece, development is approached as an idea or a theory, since the purpose of this paper is to locate the idea of empowerment, specifically the empowerment of mine communities, in the development paradigm. Development as a practice and legal construction will also be considered briefly, however, to illustrate the extent to which development as an idea is situated in a specific worldview.

The reason for this approach is to be able to critique the notion of development, as has been done by Gordon and Sylvester,²⁹ thereby exposing the politics of development. Analysing³⁰ the notion of development provides the opportunity to acknowledge that development is not a neutral and objective ideal. As will be shown in this section, the politics of development emphasise that the entire project is located in Western imagination and centres on a specific construction of poverty.

Development as an idea dates back to the European enlightenment philosophy.³¹ Whereas development as enlightenment covered a broad range of aspects,³² development in recent times has focused on addressing poverty and narrowing the gap between poorer and wealthier nations.³³ This gap was especially visible after the Second World War. Development,

²⁶ Gordon RE and Sylvester JH, "Deconstructing Development" ' 2004 (22) *Wisconsin International Law Journal* 9-22.

²⁷ Gordon and Sylvester (2004) 22-44.

²⁸ Gordon and Sylvester (2004) 49-64.

²⁹ See in general Gordon and Sylvester (2004).

³⁰ Gordon and Sylvester (2004) 72, footnote 316. They use the term “deconstructing” and consider a post-modernist approach to undermine the essentialising nature of enlightenment thinking that underpins development. They prescribe to an understanding of postmodernism as a rejection of modernity and undermining the proposition that there exists an all-encompassing theory of everything, a “metalanguage or metatheory through which all things can be connected or represented.” ; Sarup M and Raja T, *Identity, Culture and the Postmodern World* Edinburgh University Press 1996)

³¹ Gordon and Sylvester (2004) 76; Parpart J, 'Lessons from the Field: Rethinking Empowerment, Gender and Development from a Post- (Post-?) Development Perspective' in Saunders K (ed) *Feminist Post-Development Thought* (London & New York, Zed Books 2002) .

³² Enlightenment is a period of European thought during which various aspects regarding the individual subject’s relationship with its fellow humans and authority structures were contemplated, such as religion, political orderings and moral inclinations. Blackburn S, *The Oxford dictionary of philosophy* second ed (2005) Oxford, Oxford University Press, 115.

³³ Lee Y, 'General Theory of Law and Development' 2017 (50) *Cornell International Law Journal* 15; Gordon and Sylvester (2004) 22.; Trubek D, "'The 'Rule of Law' in development assistance: Past, present, and future' in Trubek D and Santos A (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge, Cambridge University Press 2006) .

therefore, became closely related to modernisation³⁴ and national economic growth.³⁵ It signifies progress or transformation of a society in both an economic and social context.³⁶

There, however, is no consensus on what would present transformation, especially social transformation.³⁷ Economic development is easily translated into economic growth that is measurable in terms of, for instance, gross domestic product.³⁸ It has been defined as the

“structural transformation of an economy from one based primarily on the production of primary goods...generating low levels of income for the majority of populations, to another based on modern industries, generating higher levels of income for the majority of populations”.³⁹

Defining the idea of social development or social progress is more difficult. There really are no objective means of measuring social progress since it is heavily dependent on the cultural beliefs and ideological setting of the specific society.⁴⁰ Lee, therefore, argues that a type of agreement amongst persons “sharing common cultural and ideological backgrounds” is required to classify social change as social progress or development.⁴¹

The idea or theory behind development has not been stagnant since its inception in the post war era. The initial focus of development initiatives on reducing gaps between developed and developing countries⁴² culminated into a view of development pursuing more than just economic values.⁴³ The United Nations Development Programme presented the idea “human development” that turns on the promotion of human abilities, such as the ability to live a “long and healthy life” and to have access to a “decent standard of living”.⁴⁴ Conditions for human development should be created for individuals to participate in life on community and

³⁴ Gordon and Sylvester (2004) 16. Modernisation is defined as “the process by which a society comes to be characterized by a belief in the rational and scientific control of man’s physical and social environment and the application of technology to that end” - Ziauddin S, 'Development and the Locations of Eurocentrism' in Munck R and O'Hearn D (eds), *Critical Development Theory: Contributions to a New Paradigm* (Zed Books 1999) 53.

³⁵ Gordon and Sylvester (2004) 9.

³⁶ Lee (2017) 15.

³⁷ Lee (2017) 15.

³⁸ See in general Sen A, *Development as Freedom* OUP Oxford 2001); Nussbaum MC, *Creating Capabilities* Harvard University Press 2011).

³⁹ Lee (2017) 19.

⁴⁰ Lee (2017) 19.

⁴¹ Lee (2017) 19.

⁴² Lee (2017) 15; Gordon and Sylvester (2004) 9-10; Trubek (2006).

⁴³ Lee (2017) 15; Gordon and Sylvester (2004) 7. Gordon and Sylvester also refer to the broader notion of development as means to promote participatory democracy in developing nations. See footnote 17.

⁴⁴ Lee (2017) 16; United Nations Development Programme “What is Human Development” <http://hdr.undp.org/en/content/what-human-development> accessed on 3 July 2017.

political level in a society pursuing “environmental sustainability, human security and rights, and gender equality”.⁴⁵

The proponents of a more “holistic view” of development include Sen, who regarded development as the freedom to choose one’s own economic destiny and freedom from poverty.⁴⁶ This view, therefore, signifies a move away from regarding economic growth as the only means to secure opportunities for everyone.⁴⁷ A more “holistic view” of development is also promoted in the World Bank’s Comprehensive Development Framework (CDF) & Sustainable Development Goals (SDG) promoted by UN.⁴⁸

The idea of development, therefore, has been conceived mostly from a Western perspective. Even when regarding development as a practice, this Western perspective becomes apparent. Here, consideration is given, on the one hand, to the institutions implementing development and these institutions’ interactions with developing nations. The institutions are for instance the International Bank for Reconstruction and Development (the World Bank) and the International Monetary Fund (the IMF).⁴⁹ On the other hand, looking at development as practice requires consideration of the changes in the global, economic, and social climate since the Second World War, since the development institutions had to respond to these changes.⁵⁰ Gordon and Sylvester identify four stages of development practice.

Initial development practices were state-led and focused on addressing income disparities.⁵¹ Pursuing economic growth, therefore, characterised the initial, golden age of development (1950-1970) but it soon became apparent that theories upholding the promised “trickle-down”⁵² effect of economic growth were inaccurate.⁵³

⁴⁵ Lee Y, 'General Theory of Law and Development' 2017 (50) *Cornell International Law Journal* 16; United Nations Development Programme “What is Human Development” <http://hdr.undp.org/en/content/what-human-development> accessed on 3 July 2017.

⁴⁶ Lee (2017) 16; Sen A, *Development as Freedom* OUP Oxford 2001). Also see Nussbaum MC, *Creating Capabilities* Harvard University Press 2011)

⁴⁷ Programme UN, *What is Human Development?* <http://hdr.undp.org/en/content/what-human-development> accessed on 3 July 2017.

⁴⁸ Lee Y, 'General Theory of Law and Development' 2017 (50) *Cornell International Law Journal* 16. The World Bank *Comprehensive Development Framework* http://www.worldbank.org/en/webarchives/archive?url=httpzxxweb.worldbank.org/archive/website01013/WEB/0_PAGEP.HTM&mdk=22201409 accessed 3 July 2017; United Nations *Sustainable Development Goals* <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> accessed on 3 July 2017.

⁴⁹ Gordon and Sylvester (2004) 22.

⁵⁰ Gordon and Sylvester (2004) 22.

⁵¹ Gordon and Sylvester (2004) 30 & 31.

⁵² Trickle-down theory implies that the actors in the economy with the most resources will promote economic growth, from which all members of society will benefit. Incentives to stimulate growth therefore focus on

The second phase of development, therefore, saw the amalgamation of social and economic development with a focus on bottom-up approaches and the empowerment of local communities.⁵⁴ These theories were all created in the West.⁵⁵

The third phase of development practice constitutes the antithesis of the earlier golden age. The effects of the developing world debt crisis largely negated the impact of development initiatives. Institutions such as the IMF had to intervene to assist developing countries to manage their debt, but these interventions did not have favourable outcomes for the debtor countries.⁵⁶

The fourth phase in development practice can furthermore be identified. This phase is characterised by an embrace of neoliberalism and, therefore, “denationalisation, deregulation and devaluation”.⁵⁷ The Washington Consensus⁵⁸ and the global dominance of American economic and political views meant that modernisation and development now required national economies to be integrated into the global economy, to lessen government regulation and to pursue free market principles.⁵⁹

Development is also constructed by the law. Three “moments” of law and development⁶⁰ have been identified that roughly correspond with the four phases of development practice

big business. Investopedia definition available at <http://www.investopedia.com/terms/t/trickledowntheory.asp> accessed on 30 July 2017.

⁵³ Gordon and Sylvester (2004) 32.

⁵⁴ Gordon and Sylvester (2004) 35.

⁵⁵ Gordon and Sylvester (2004) 36.

⁵⁶ Gordon and Sylvester (2004) 38 & 39, 43 – The oil crisis of the 1970’s resulted from spiking oil prices to the disadvantage of oil importing third world countries. The IMF responded to third world debt by implementing “structural adjustment”, as a means for countries in debt to address deficits. “Structural adjustment” entailed a range of free market economic policies enforced upon indebted developing countries, which caused macro-economic growth in certain instances, but little difference on micro level. See Konadu-Agyemang K, 'The Best of Times and the Worst of Times: Structural Adjustment Programs and Uneven Development in Africa: The Case of Ghana' 2000 (52) *The Professional Geographer* Since developing countries were worse off by then end of the 1980’s, with more debt and less capable of providing services such as health care and education, structural adjustment is regarded as a failure.

⁵⁷ Gordon and Sylvester (2004) 44, referring to Mittelman J and Pasha M, *Out from Underdevelopment Revisited: Changing Global Structures and the Remaking of the Third World* (United Kingdom, Palgrave Macmillan 1997) 42.

⁵⁸ The Washington Consensus consists of 10 policies that formed part of the reform package provided to developing countries by the World Bank and IMF. The policies advocate free-market and macroeconomic stability.

⁵⁹ Gordon and Sylvester (2004) 44, 46 & 48. World Bank policies in this regard include: 1989 Report Sub-Saharan Africa: From Crisis to Sustainable Growth, introducing “good governance”; the Comprehensive Development Framework, which promoted various aspects of development that are achievable through pro-market policies and incentives.

⁶⁰ Law and development studies consider the interaction between socio-economic development and international and domestic law.

mentioned above.⁶¹ During the first, postwar or neo-classical “moment”, the law was regarded as an instrument to achieve economic growth and development and was therefore used to regulate effective state intervention in the economy.⁶²

The 1980’s saw the second “moment” of law and development with the neoliberal market at its centre.⁶³ The law provided the foundation for market relations and a limitation of state intervention in the economy.⁶⁴ State intervention was allowed only to protect law and order, and more importantly, in terms of the private law, to protect property and contracts.⁶⁵ An important aspect of the second “moment” is that the modernization of the legal systems of developing countries was set as a prerequisite for development and a functioning market system. These countries had hoped that acceptance of the development ideal would bring about equality and freedom from poverty.⁶⁶ The law and development movement, however, remained firmly embedded in Western thinking.⁶⁷

A third “moment” in law and development emerged during the early 1990’s which moment corresponds with the current context.⁶⁸ Whether this moment constitutes an entirely new paradigm or merely another form of neoliberalism has not been confirmed.⁶⁹ The third moment constitutes a response to the critiques of the first and second moments, requiring the recognition of the limits of markets and the expansion of the definition of development.⁷⁰

Development and decolonisation required the reinstatement of countries’ permanent sovereignty over its natural resources.⁷¹ Thereafter, the developing nations demanded the

⁶¹ Trubek D, 'The 'Rule of Law' in development assistance: Past, present, and future' in Trubek D and Santos A (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge, Cambridge University Press 2006) ;Thomas C, 'Law and neoclassical economic development in theory and practice: Toward an institutionalist critique of institutionalism' 2011 (96) *Cornell Law Review* 967;Trubek D and Santos A, 'Introduction: The Third Moment in Law and Development Theory and the Emergence of New Critical Practice' in Trubek D and Santos A (eds), *The New Law and Economic Development: A Critical Appraisal* (New York, Cambridge University Press 2006)

⁶² Trubek and Santos (2006) 2; Thomas (2011) 970.

⁶³ Trubek and Santos (2006) 5.

⁶⁴ Trubek and Santos (2006) 6; Thomas (2011) 974. Thomas ascribes this to the influence of the work of Friedrich Hayek *The Road to Serfdom, The constitution of liberty and Law, legislation and liberty*. Hayek rejected centralized economic regulation for its association with totalitarianism.

⁶⁵ Trubek and Santos (2006) 5; Thomas (2011) 977.

⁶⁶ Gordon and Sylvester (2004) 18 & 19; Thomas (2011) 970.

⁶⁷ Gordon and Sylvester (2004) 20.

⁶⁸ Trubek and Santos (2006) 3.

⁶⁹ Trubek and Santos (2006) 3.

⁷⁰ Trubek and Santos (2006) 6.

⁷¹ Gordon and Sylvester (2004) 53.1962 UN General Assembly Resolution 1803. The effect of the declaration was, however, that post-colonialism translated into long-term concessions for the extraction of natural resources on very favourable terms for Western corporations

legal recognition of the right to development. If development is regarded as a legal right, the developed world is compelled to assist in the development initiatives of the developing world.⁷² The subsequent declaration of development as a human right⁷³ confirmed that development was an entitlement and a pre-condition for social life.⁷⁴ Other legal instruments⁷⁵ were also created to give effect to the ideals of development.

The responses to development from the non-Western (or developing) world have therefore also shaped development, but without necessarily challenging the Western or Eurocentric consciousness in which development theory is situated.⁷⁶ The industrialised world has also not necessarily accepted the acknowledgement of development as a right or their responsibilities in providing development assistance. Whether acknowledging development as a human right has substance, can, therefore, be questioned.⁷⁷

Development can consequently be seen as the Western ideal, discourse or ideology that argues for all societies transforming (and conforming) to reach a certain level of functionality. When development is regarded as an ideology, it means that development is presented as the ideas, attitudes and values of a specific group or class of people with significant power in society. These values or ideas may therefore not constitute an accurate depiction of reality, but because of the powerful interests that are being represented the values are held to be true and universal.⁷⁸

⁷² Gordon and Sylvester (2004) 49.

⁷³ In terms of the 1986 United Nations Declaration on the Right to Development Resolution taken on 4 December 1986 at the 97th plenary meeting available at <http://www.un.org/en/events/righttodevelopment/declaration.shtml> (accessed on 8 October 2016).

⁷⁴ Stevens C and Ntlama N, "An overview of South Africa's institutional framework in promoting women's right to development" (2016) (20) *Law, democracy and development* 52-54. The declaration defines the right to development as “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised”.

⁷⁵ See in general Gordon and Sylvester (2004) 52-60. During the 1970’s developing countries, using UNCTAD as platform put forward proposals for legal instruments to provide them with more control over multinationals operating in their countries and improving terms of trade. The New International Economic Order came into being and legal instruments were put in place, providing for the restitution of costs of colonialism and giving permanent sovereignty to developing countries, not only of natural resources, but also of all their economic activities.

⁷⁶ Gordon and Sylvester (2004) 75 & 76. In an attempt to protect and enforce their legal right to development and to demand reparations for colonialism, developing countries adopted the legal language of the West, and some might say, thereby also accepting the worldview of the West.

⁷⁷ See in general Gordon and Sylvester (2004) 52-63.

⁷⁸ Gordon and Sylvester (2004) 72. See footnote 315 for reference to Kohl H, *From Archetype to Zeitgeist: Powerful Ideas for Powerful Thinking* Little, Brown 1993).

As a discourse,⁷⁹ the concept development is not simply talked about but is actually given meaning or “brought into being” through the discourse.⁸⁰ Established practices are implied that determine who can participate in this discussion, from what points of view and with what authority.⁸¹ In the context of development, these practices cause the exclusion of certain points of view, therefore, resulting in the misrepresentation of the beneficiaries of development.⁸² Such misrepresentation leads to ineffective policies and presents developing countries and its citizens as objects of development.⁸³

The misrepresentation or misconfiguration of beneficiaries can be witnessed in the efforts to define poverty and underdevelopment. It is often argued that USA President Truman’s inauguration speech initiating the Point IV Program⁸⁴ in 1949 created the “underdeveloped” world.⁸⁵ He described the “economic life” of the poor as “primitive and stagnant” and “(t)heir poverty ... a handicap and a threat both to them and to the more prosperous areas”. Because of the advances that had been made in science and industrialisation, developed nations, such as the United States, had the duty “to relieve the suffering of these people”.⁸⁶ As part of the plan, various institutions and professions were to be created with the specific mandate to promote development.⁸⁷ The Bretton Woods institutions, the World Bank and IMF, were created during this time.⁸⁸

The World Bank subsequently quantified poverty and in so doing classified a large part of the global population as “poor” and “underdeveloped”.⁸⁹ The measures used reflected standards

⁷⁹ Gordon and Sylvester (2004) 72 refer to Ashcroft et al *Key Concepts in Post-Colonial Studies* 71 (1998) Routledge: Oxon in this regard. (newer edition 2000 p 62).

⁸⁰ Gordon and Sylvester (2004) 72.

⁸¹ Gordon and Sylvester (2004) 72 & 82.

⁸² Gordon and Sylvester (2004) 85.

⁸³ Gordon and Sylvester (2004) 85.

⁸⁴ The Point IV Program was, in President Truman’s words “a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped nations”, thereby constituting the first initiative towards modern global development. As part of the plan, various institutions and professions were to be created with the specific mandate to promote development. Gordon and Sylvester (2004) 10. Foreign Affairs Co, *Point Four Background and Program (International Technical Cooperation Act of 1949)* (1949) Washington, *Committee on Foreign Affairs*, http://pdf.usaid.gov/pdf_docs/Pcaac280.pdf. Accessed on 31 July 2017.

⁸⁵ Gordon and Sylvester (2004) 10. Escobar A, *Encountering Development: The Making and Unmaking of the Third World* Princeton University Press (2011) 3.

⁸⁶ Gordon and Sylvester (2004) 9. Truman’s Inaugural Address January 20 1949 available at *Harry S Truman Library & Museum* https://www.trumanlibrary.org/whistlestop/50yr_archive/inagural20jan1949.htm accessed on 26 July 2017.

⁸⁷ Truman (1949).

⁸⁸ Gordon and Sylvester (2004) 9.

⁸⁹ Gordon and Sylvester (2004) 11. In 1948, persons with an annual per capita income below \$ 100 were classified as “poor” by the World Bank. Two thirds of the world were immediately classified as poor.

of industrialised countries, inevitably disregarding how “the poor” viewed themselves.⁹⁰ The setting of a poverty threshold furthermore immediately created a gap between industrialised countries and the rest of the world,⁹¹ thereby actually constructing the problem of underdevelopment.

Poverty or underdevelopment, therefore, is a social construct. It, however, cannot be denied that there are concrete aspects of poverty, such as the lack of the basic means of life.⁹² The question is who is empowered to make this construction and to determine the nature and distribution of these basic means?⁹³

In a neoliberal system, in which the idea of development is embedded,⁹⁴ access to resources is determined by economic markets and the law regulating transactions between persons. Whereas economic markets represent certain economic and political power relations, the law regulates transactions between individuals and the state and its subjects, through the rules of property, contract and procedure law. The conclusion of these transactions has the effect of allocating resources.⁹⁵ The legal rules in terms whereof these transactions are concluded are based on ingrained ideas and assumptions about poverty and development.⁹⁶ If “the poor” are viewed only in terms of “their corporeal needs for shelter, clothing, food, medical treatment, ablution facilities, clean running water...” they are left objectified and dehumanised.⁹⁷ In this

⁹⁰ Gordon and Sylvester (2004) 13. Escobar (2011) 24.

⁹¹ Gordon and Sylvester (2004) 12.

⁹² Gordon and Sylvester (2004) 12 & 15. Also See Modiri J, 'Law's poverty' 2015 (18) *Potchefstroom Electronic Law Journal* 241.

⁹³ Gordon and Sylvester (2004) 12.

⁹⁴ Cammack P, 'Neoliberalism , the World Bank and the New Politics of Development' in Kothari U and Minogue M (eds), *Development Theory and Practice: Critical Perspectives* (Hampshire, Palgrave 2002) Development, is closely associated with neo-liberalism, the version of capitalism that became dominant in the Anglo-American context between 1960's and the 1990's. Neo-liberalist policies will promote free, open markets, with as little as possible government intervention. It, therefore, is possible for private actors to enter into transactions with one another freely, knowing that their property and contracts would be protected and enforceable under the law.

⁹⁵ Brand D and Van Marle K, 'Poverty and the ordinary law: Introduction' 2013 (29) *South African Journal on Human Rights* 465

⁹⁶ Brand and Van Marle (2015) 225.

⁹⁷ Modiri (2015) 241. Modiri warns against viewing “the poor” only in terms of a distributive paradigm and supports Cornell’s argument that it should be recognised that “hearts starve as well as bodies”. See Cornell D, *Just Cause* (New York, Rowman and Littlefield 2000); Cornell D, *Beyond Accommodation: Ethical Feminism, Deconstruction and the Law* (New York, Routledge 1999); Cornell D, *At the Heart of Freedom: Feminism, Sex and Inequality* (Princeton, Princeton University Press 1998). Gordon and Sylvester (2004) 85 & 86.

context, initiatives such as “development” and “empowerment” will not do much to restore agency.⁹⁸

Moreover, development problems are phrased in such way as to require external, expert intervention,⁹⁹ therefore necessarily disregarding local knowledge and experiences.¹⁰⁰ Governments of developing countries are not left without authority over their citizens, but their actions will be dictated by Western policy makers to a certain extent since Western powers still offer access to financial and other assistance.¹⁰¹ Development is consequently pursued by implementing ill-suited policies and, unsurprisingly, delivers unsuccessful results.¹⁰²

Therefore, the deconstruction of development shows that addressing poverty and inequality from within a development paradigm necessarily means adopting a specific (Western, neoliberal) worldview and understanding of what it means to be poor. The development “problem” to be solved and beneficiaries to be assisted are therefore framed in a very specific way, requiring a specific kind of intervention. The result is the creation of the inferior “Other” that requires the assistance of the developed world to achieve the same levels of development of the West.¹⁰³ The fact that development theory is situated in Western thinking need not mean that development should be disregarded, but it does mean that development is not necessarily part of the human condition, and can, therefore, be questioned.¹⁰⁴ Pursuing development in an African country, such as South Africa, also requires a critical and cautious approach, to ensure suitability for the local context.

In the following section, it is shown how the politics of development, as described in this section, also affect the relationship between mining company and mining community. It is argued that the notion of empowerment originates from within the development paradigm. In

⁹⁸ Modiri (2015) 242 referring to Van Marle K, "No Last Word': Reflections on the Imaginary Domain, Dignity and Intrinsic Worth" 2002 *Stellenbosch Law Review* 299-308.

⁹⁹ Gordon and Sylvester (2004) 81. They refer to experts such as economists, demographers, educators, anthropologists, sociologists, psychologists and specialists in agriculture, public health and nutrition that were involved in the promotion of modernisation as a project. Practitioners and academics involved in development were usually removed from the daily lives of those that were being targeted by development projects. Simon D and Narman A, *Development as Theory and Practice: Current Perspectives on Development and Development Co-operation* Taylor & Francis (2014).

¹⁰⁰ Gordon and Sylvester (2004) 81&82; Escobar (2011) 45.

¹⁰¹ Gordon and Sylvester (2004) 83; Escobar (2011) 41; Kothari U and Minogue M, *Development Theory and Practice: Critical Perspectives* (Hampshire, Palgrave 2002) 39. Some even view this as the continuation of the unequal relationship between the coloniser and the colonised.

¹⁰² Gordon and Sylvester (2004) 85 & 86.

¹⁰³ Gordon and Sylvester (2004) 80.

¹⁰⁴ Gordon and Sylvester (2004) 75.

addition, it is shown how the empowerment of mining communities as provided for in the Mining Charter, suffers the consequences of the politics of development.

4. **Black Economic Empowerment and the Tale of Three (and a draft) Charter(s)**

The concept of “black economic empowerment” has been very prominent in the South African economic landscape post-1994 and has found its way into the mining industry by means of the Mining Charter.¹⁰⁵ Nevertheless, even though the notion “empowerment” has been customised for the South African context as “*black economic* empowerment”, it is not a uniquely South African concept. In realising that the participation of poor citizens of developing countries is required for the larger development project to be successful, the World Bank’s policies have since the late 1990’s placed more focus on the “empowerment” of people.¹⁰⁶ Empowerment, therefore, constitutes a global approach to development that emphasises the importance of including the voices of the poor in global conversations about their well-being and development.¹⁰⁷

Empowerment, in this global developmental sense, is regarded as a means to improve efficiency and economic growth¹⁰⁸ but also as a “struggle towards new consciousness and actions” by poor groups and individuals.¹⁰⁹ The idea of progress or transformation that we find in the idea of development can therefore also be traced in the idea of empowerment.

Broad-based black socio-economic empowerment as included in the latest Mining Charter,¹¹⁰ therefore, can be situated in the development paradigm, as will furthermore be shown in the section that follows. The origins of black economic empowerment (“BEE”) as well as its conversion into broad-based black economic empowerment (“BBBEE”) will firstly be

¹⁰⁵ The Mining Charter is created by the Minister of Mineral Resources in terms of s 100 of the MPRDA. See discussion below.

¹⁰⁶ Parpart J, 'Lessons from the Field: Rethinking Empowerment, Gender and Development from a Post- (Post-?) Development Perspective' in Saunders K (ed) *Feminist Post-Development Thought* (London & New York, Zed Books 2002) 44&45; Bank W, *World Bank Participation Source Book* (Washington DC, World Bank, Environment Department Papers 1995); Bank W, *World Development Report* (New York, Oxford University Press 1999) 153; Bank W, *World Development Report: Attacking Poverty* (New York, Oxford University Press 2000/1) v.

¹⁰⁷ Parpart (2002) 45, 52. Bank W, *World Development Report: Attacking Poverty* (New York, Oxford University Press 2000/1).

¹⁰⁸ This is the way in which mainstream institutions such as the World Bank understands “empowerment”. Parpart (2002) 45.

¹⁰⁹ Parpart (2002) 41.

¹¹⁰ Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry 2017 (“2017 Mining Charter”).

expounded, where after the Mining Charter, and its different iterations,¹¹¹ will be discussed to determine how empowerment of mining communities is framed. The last part of this section includes an analysis of the trend, regarding mine communities, followed by the different charters.

4.1. BEE to BBEE – “Addressing the challenge of disempowerment”¹¹²

The Black Economic Empowerment Commission (“BEEcom”) issued its strategy for the implementation of BEE in 2001.¹¹³ The “vision and values” of BEE were provided for in the Reconstruction and Development Programme (“RDP”).¹¹⁴ The RDP was regarded as SA’s “blueprint for transformation”, but was not very successful in achieving its goals.¹¹⁵

In terms of the RDP, BEE was introduced in South Africa to deracialise business ownership.¹¹⁶ Hence, during the 1990’s BEE initiatives focused mainly on the ownership of businesses. The mining industry was first to comply and various transfers of stakes in mining companies to black persons took place.¹¹⁷

The hope was that these transfers of ownership would stimulate the growth of the South African economy that would lead to the eradication of poverty. Unfortunately, the outcome was different - only an elite few benefitted from these BEE ownership deals, therefore not doing much to address poverty.¹¹⁸ BEEcom conceded that BEE in this narrow sense had failed and proposed measures for the inclusion of black persons on all levels of the

¹¹¹ 2004, 2010 and 2017 charters as well as the 2016 draft charter.

¹¹² Reference to the title of Chapter 2 to of Commission BEE, *Black Economic Empowerment Commission Report* (Johannesburg, Skotaville Press 2001) 3.

¹¹³ See in general Commission BEE, *Black Economic Empowerment Commission Report* (Johannesburg, Skotaville Press 2001). The BEE commission was established under the Black Business Council, an umbrella body representing major black business organisations, in May 1998 and chaired by Cyril Ramaphosa, current day vice president of South Africa.

¹¹⁴ According to the BEEcom report, RDP has its origins in the Freedom Charter. The RDP is the result of various conferences, workshops and policy-making forums initiated by the ANC in the late 1980’s and early 1990’s and provides for the means to achieve national democratic transformation. The values underlying RDP are: meeting basic needs, developing human resources, building the economy and democratising the state and society. Commission BEE, *Black Economic Empowerment Commission Report* (Johannesburg, Skotaville Press 2001) endnote 9.

¹¹⁵ BEECom Report (2001) 1. See in general Bond P, *Elite Transition: From Apartheid to Neoliberalism in South Africa* (London, Pluto Press 2000)

¹¹⁶ BEECom Report (2001) 1.

¹¹⁷ Tangri R and Southall R, 'The politics of black economic empowerment in South Africa' 2008 (34) *Journal of Southern African Studies* 703.

¹¹⁸ BEECom Report (2001) 2; Horne R, 'Patterns of ownership and labour unrest within the South African mining sector' 2015 (40) *Journal of Contemporary History* 26.

economy.¹¹⁹ Black economic empowerment, therefore, underwent a transformation into *broad-based* black economic empowerment (“BBBEE”).¹²⁰ The verdict is still out as to whether the broad-based nature of empowerment has actually resulted in benefits for a broader spectrum of society, specifically persons living in rural communities, and not only an elite few.¹²¹

The “new” South Africa came into being during a time characterised by the world’s (especially the Western world) fascination with globalisation and neo-liberalism.¹²² Commentators have noted that during the transition negotiations in the early 1990’s, the ANC maintained a nationalist approach, firmly behind the ideals of the Freedom Charter (which included nationalisation of mines, banks and monopoly industries, and a somewhat leftist approach).¹²³ Post-1994, however, there was a shift to a more neoliberal or free market capitalist policy - probably in an attempt to retain investor and business confidence and to make the most of the current economic climate.¹²⁴ This setting also created the opportunity for many corporations to internationalise and to gain additional bargaining power.¹²⁵

Economic policies such as the RDP, from which BEE originated, and Growth Employment and Redistribution (GEAR), created during this time are often critiqued for following

¹¹⁹ In addition to the ownership of businesses, BBBEE also focuses on human resource development, the preferential procurement of goods and services, representation of black persons on management levels of businesses and investment in black owned enterprises. See the definition of “broad-based black economic empowerment” in section 1 of Broad-Based Black Economic Empowerment Act 53 of 2003,

¹²⁰ BEECom Report (2001) 2. The BEECom defined BEE as “...an integrated and coherent socio-economic process...located within the context of the country’s national transformation programme, namely RDP...aimed at redressing the imbalances of the past by seeking to substantially and equitably transfer and confer the ownership, management and control of South Africa’s financial and economic resources to the majority of its citizens...to ensure broader and meaningful participation in the economy by black people to achieve sustainable development and prosperity.” Broad-based black economic empowerment is provided for in the Broad-Based Black Economic Empowerment Act 53 of 2003,

¹²¹ In the mining industry, for instance, a continued emphasis on BEE ownership deals (in spite of the implementation of BBBEE) is blamed for the labour unrest that took hold of the industry in 2012. See Horne (2015).

¹²² Terreblanche S, *A history of inequality in South Africa 1652-2002* (Scottsville, University of Kwazulu-Natal Press 2002) 56; Bond (2000) 13&14.

¹²³ The Freedom Charter of the African National Congress was adopted on 26 June 1955 at the Congress of the People in Kliptown. The charter sets out certain core principles or “freedom demands” agreed upon by the African National Congress and its allies. Available at <http://www.anc.org.za/content/freedom-charter> accessed on 30 July 2017.

¹²⁴ Terreblanche (2002) 106.

¹²⁵ Terreblanche (2002) 54-56; Bond (2000) 13&14.

guidelines of institutions such as the World Bank (which is synonymous with the “idea of development”) and therefore for promoting a neo-liberalist agenda.¹²⁶

BEEcom frames “disempowerment” in the language of development by presenting BEE as a means to achieve sustainable development and to break “the cycle of underdevelopment”, specifically regarding rural areas.¹²⁷ The problem identified is low economic growth and poverty and investment and growth are prescribed as a new path to development.¹²⁸ BEEcom furthermore reiterates that the disempowerment of black people occurred because the South African economy was constituted on the “domination, exploitation and marginalisation of the black majority”.¹²⁹

In addressing the need for the development of rural areas, BEEcom places significant emphasis on the poverty by which these areas or communities are afflicted. Poverty measurements such as the “poverty line” are used to classify people as poor.¹³⁰ The report, however, does acknowledge that poverty is not only a lack of income but also a lack of opportunities and therefore requires not only an economic approach but also a social approach.¹³¹ The recommendations made included land reform, promoting economic opportunities and ownership by communities and investment in rural infrastructure.¹³²

4.2. Empowerment in the South African Mining Industry

The notion of BEE or BBBEE is therefore firmly situated in the development paradigm. It frames the problem to be addressed as “disempowerment”, which entails poverty, inequality and underdevelopment as a result of past racial discrimination. Empowerment entails focussing on investment, economic growth and efficiency and restoring ownership in businesses to black people.

¹²⁶ Programmes such as RDP and GEAR were based on models provided by the Development Bank of Southern Africa and the World Bank. Many commentators, however, argued that neoliberalist policies might not have been the most appropriate policies to address the problems South Africa faced at that stage. See in general Bond (2000) & Terreblanche (2002) chapter 11.

¹²⁷ BEECom Report (2001) 3&9.

¹²⁸ BEECom Report (2001) 9

¹²⁹ BEECom Report (2001) 3. See Terreblanche (2002).

¹³⁰ BEECom Report (2001) 48. The commission referred to the Poverty and Inequality Report prepared for the Executive Deputy President (1998). Making Democracy Work: A Framework for Macroeconomic Policy in South Africa (1993).

¹³¹ BEECom Report (2001) 48. The report refers to the Global Poverty Report, July 2000, which was submitted to the G8 Okinawa Summit by the African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, International Monetary Fund and the World Bank.

¹³² BEECom Report (2001) 48.

The history of the South African mining industry, unfortunately, epitomises the narrative of past racial discrimination and exploitation. The Truth and Reconciliation Commission branded mining in South Africa as “the blueprint for ‘grand apartheid’” because of its history of exploitation of cheap black labour.¹³³ The gold mining industry’s success has been ascribed to the availability of a large and affordable work force and not necessarily the size of the gold reserves.¹³⁴ While the mining industry boomed, the migration of black labour caused various injustices, such as the disruption of communities and family structures.¹³⁵ Mining also created new communities, heavily dependent on the activities of the mine for their livelihood.¹³⁶ Areas, previously poor and undeveloped, acquired economic importance because of mining and attracted labourers, traders and shopkeepers.¹³⁷

These newly created communities have been in conflict with government and mining companies since the dawn of mining in South Africa.¹³⁸ The recent labour unrest¹³⁹ and

¹³³ Howard J, 'Half-hearted regulation: Corporate social responsibility in the mining industry' 2014 (131) *The South African Law Journal* 11; refers to the findings of the Truth and Reconciliation Commission of South Africa TRC, *Truth and Reconciliation Commission of South Africa Report* (2003) <http://www.justice.gov.za/trc/report/> accessed on 6 March 2016 vol 6 (2003_section 2, chapters 5: Reparations and the Business Sector and 6: Reparations and Civil Society. The Truth and Reconciliation Commission (“TRC”) was created in 1995 by the Government of National Unity of South Africa to assist South Africans in dealing with the atrocities that occurred under apartheid. See <http://www.justice.gov.za/trc/> accessed on 30 July 2017.

¹³⁴ Howard (2014) 11 referring to Crush J, Jeeves A and Yudelman D, *South Africa's Labour Empire: A history of black migrancy to the gold mines* (Cape Town, Westview Press 1991) 1 and Hamann R & Bezuidenhout A “The mining industry” in Fig D, *Staking their claims: Corporate Social and Environmental Responsibility in South Africa* (Scottsville, UKZN Press 2007). South Africa has the largest deposit of gold reserves, but the reserves are not of a high grade and require costly and labour intensive endeavours to extract from deep lying reefs.

¹³⁵ TRC Report vol 6, section 2, chapter 5 151 – 155.

¹³⁶ The Mining, Minerals and Sustainable Development (“MMSD”) Project identifies three types of communities affected by mining: “occupational communities” who consist of households or families dependent on mining for all or most of their income; “residential communities” which refer to households or families living in the geographical areas of the mine, having settled in the area either before the mining activities have commenced or as a result of the mining activities and “indigenous communities” referring to households or families with ancient or cultural links to the land where mining takes place. MMSD Final Report “Breaking New Ground: Mining, Minerals and Sustainable Development” chapter 9 “Local communities and mines” 2002.

¹³⁷ Sutton IB “The diggers’ revolt in Griqualand West, 1875” (1979) *International Journal of African Historical Studies* 41-43. Sutton describes the influence of the discovery of diamonds in Griqualand West, the development of practices regarding the employment of labour and racial division and how these practices were transferred to the Rand where gold mining took place.

¹³⁸ The 1875 revolt of white diamond miners in Griqualand West against British Rule is regarded as the start of the white trade union movement in South Africa. The diamond fields saw conflict regarding African labour between government and white diggers, which conflict was later mimicked by gold miners in the 1922 Rand Revolt. Sutton (1979) 40-42.

¹³⁹ Between 2009 and 2015 labour unrest took place in reaction to low wages and poor working and living conditions. Horne (2015) 27.

continuous contestation of the right to mine in the light of the environmental and social impact¹⁴⁰ of mining, are current day manifestations of the conflict.

Nevertheless, mining remains an important economic activity that continues to yield some economic benefits.¹⁴¹ Given the history of South Africa and the mining industry specifically, the focus has shifted to sharing these benefits with historically disadvantaged persons and communities affected by mining. The mining industry, therefore, has been one of the cardinal targets of the larger drive for transformation in post-apartheid South Africa.¹⁴²

The link between the transformational aspirations of the Mineral and Petroleum Resources Development Act¹⁴³, benefit sharing and the development of mining communities has been set out in part 2 of this paper.¹⁴⁴ To reiterate, section 100(2) of the MPRDA mandates the Minister to create a broad-based socio-economic empowerment charter (“Mining Charter”) to provide for the historically disadvantaged South Africans to participate in and benefit from the mining industry.

This section will set out the tale of four Mining Charters by specifically looking at how the different iterations of the Mining Charter provide for the empowerment of mining communities. The purpose is to see how the rhetoric regarding mining communities has changed since the first Mining Charter. The hypothesis is that more emphasis is being placed on the hardship of mining communities, but that the framing of the problem that requires addressing, remains locked in developmental paradigm thinking. The four charters will be assessed briefly by looking at how broad-based socio-economic development is defined and

¹⁴⁰ Mbatha P and Wynberg R, 'Mining and the Myth of Benefits in South African Rural Coastal Communities' in Wynberg R and Hauck M (eds), *Sharing the Benefits from the Coast* (Cape Town, UCT Press 2014) 66.

¹⁴¹ The contribution of the mining industry to the GDP of the country has been declining steadily over the last two decades, but it remains important to SA’s economy. The mining industry currently contributes 8% to the country’s Gross Domestic Product and employs 5% of the formal workforce - Statistics South Africa “Mining: winners and losers of 2015” 2 March 2016; Statistical Release P 0441 “Gross domestic product – Fourth quarter 2015”; Statistical Release P 0277 “Quarterly employment statistics – December 2015”. The performance of the industry still dominates the JSE, as is evident from the effect the decline in the industry has on pension funds - Harvey R “Three mining changes that could net major investment” *Business Day Live* 8 February 2016 available at <http://www.bdlive.co.za/opinion/2016/02/08/three-mining-changes-that-could-net-major-investment> accessed on 31 July 2017. The mining industry is a great contributor in value to black economic empowerment and furthermore contributes extensively to the country’s foreign exchange earnings. - Smit C “The role of mining in the South African Economy” KPMG South Africa Blog 23 December 2013 available at <http://www.sablog.kpmg.co.za/2013/12/role-mining-south-african-economy/> accessed on 31 July 2017.

¹⁴² Southall R & Tangri R “The politics of Black Economic Empowerment” (2008) 34 *Journal of Southern African Studies* 703.

¹⁴³ 28 of 2002 (“MPRDA”).

¹⁴⁴ “Benefit sharing with poor mining communities through empowerment”.

how provisions pertaining to mine community development are constructed. The allocation of ownership in mining companies to mine communities is also considered briefly.

4.2.1. Defining Broad-Based Socio Economic Empowerment

Primarily, broad-based economic empowerment as provided for in the MPRDA focusses on addressing past and present discrimination against historically disadvantaged persons and the transformation of the minerals and petroleum industry.¹⁴⁵ Transformation includes the socio-economic development of mining communities and labour sending areas from the benefits arising from the mining activities.¹⁴⁶ The focus is on mining communities specifically but also includes all historically disadvantaged South Africans (“HDSA’s”).¹⁴⁷

The 2004¹⁴⁸ and 2010¹⁴⁹ Mining Charters define broad-based socio-economic empowerment (“BBSEE”) in the same manner as broad-based economic empowerment is defined in the MPRDA, but excludes reference to the socio-economic development of all HDSA’s. The 2016 Draft Mining Charter deviated from the previous charters by referring to “Broad-Based *Black* Economic Empowerment” (“BBBEE”), as defined in the Broad-Based Black Economic Empowerment Act instead of BBSEE.¹⁵⁰

The difference between the MPRDA’s vision of BBSEE and the 2016 Draft Mining Charter’s vision of BBBEE, regarding mining communities specifically, is that BBBEE does not refer to the socio-economic development of either mining communities specifically or HDSA’s generally. BBBEE focuses on the “empowerment of all black people...in particular ... people living in rural areas...” by means of “integrated socio-economic strategies” that include providing communities with ownership and management opportunities regarding enterprises.¹⁵¹ It is by no means denied that the various socio-economic strategies included as

¹⁴⁵ MPRDA s 1.

¹⁴⁶ The definition refers to “communities immediately hosting, affected by supplying of labour to the operations”.

¹⁴⁷ A “historically disadvantaged person” refers to a person or group of persons that was affected by unfair discrimination before the Constitution of the Republic of South Africa, 1996 came into force and includes associations and juristic persons in certain instances. MPRDA s 1.

¹⁴⁸ Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry, 2004 (GN 1639 GG 26661 of 13 August 2004) (“2004 Mining Charter”).

¹⁴⁹ Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (GN 838 GG 33573 of 20 September 2010), (“2010 Mining Charter”).

¹⁵⁰ Broad-Based Black Economic Empowerment Act 53 of 2003, section 1. Reference to “HDSA’s” is replaced with “Black People”, as defined in the Broad-Based Black Economic Empowerment Act.

¹⁵¹ Draft Reviewed Broad Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry 2016 (GN 450 GG 39933 of 15 April 2016), definition of Broad-Based Black Economic Empowerment 11.

part of BBBEE¹⁵² may also lead to the socio-economic development of mining communities, without making explicit reference to development. The proposed amendment, however, does digress from one of the stated objectives of the MPRDA.¹⁵³

The 2017 Mining Charter does not include a definition for BBSEE or BBBEE. A definition would have been expected, seeing that the name of the 2017 Mining Charter refers to “broad-based black socio-economic empowerment”. It is accepted that empowerment in this instance should encompass both the MPRDA’s definition of BBSEE as well as the BBBEE Act’s definition of BBBEE. The 2017 Mining Charter thereby retains the “social” aspect and focus of empowerment on mine communities explicitly, while very clearly prioritising the empowerment of Black persons.¹⁵⁴

4.2.2. Mine Community Development

Embracing the different elements of empowerment provided for by the Mining Charter¹⁵⁵ will ultimately benefit mine communities, be it indirectly. The 2004, 2010, 2016 and 2017 Mining Charters, however, specifically provide for the empowerment of mine communities through the promotion of mine community development. Mine community development is, therefore, a separate element that the holder of a mining right must promote in order to comply with the requirements set by the legislative framework.

The provisions and definitions contained in the four charters differ slightly, however, and the following aspects will now be considered: The description of mine community development, the definition of “communities”, the determination of compliance, and the interaction with

¹⁵² “(a) increasing the number of black people that manage, own and control enterprises and productive assets; (b) facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises; (c) human resource and skills development; (d) achieving equitable representation in all occupational categories and levels in the workforce; (e) preferential procurement from enterprises that are owned or managed by black people; and (f) investment in enterprises that are owned or managed by black people.”

¹⁵³ MPRDA preamble, section 2 (i) – it is an objective of the MPRDA to ensure that mining rights holders promote “the socio-economic development of the areas in which they are operating”.

¹⁵⁴ In the instance where a concept is not defined in the Charter, but it is defined in either the MPRDA or the BBBEE Act, the Charter must be read and interpreted together with the MPRDA and the BBBEE Act. 2017 charter 2.15, 27.

¹⁵⁵ In terms of the Mining Charter, a mining right holder must promote different elements to be regarded as compliant. The different elements represent the different levels on which *broad-based* empowerment should take place. These elements are ownership, human resource development, mine community development, procurement supplier and enterprise development, employment equity and sustainable development and growth.

other developmental initiatives such as the integrated development plan (“IDP”)¹⁵⁶ and the socio-labour plan (“SLP”).¹⁵⁷

To achieve “mine community and rural development” the 2004 Mining Charter stipulates that “stakeholders”¹⁵⁸ should cooperate with “all spheres of government” to formulate an IDP. The IDP should provide for the development of infrastructure regarding communities where mining takes place as well as for major labour sending areas.¹⁵⁹ The charter does not define “communities”, “host communities” or “mine communities” but regards “major labour sending areas” as the areas from where a lot of mine workers come from.¹⁶⁰ A mining right holder is regarded as having complied with “mine community and rural development” if the IDP has been agreed upon and implemented and if there is evidence that the mining company procured efforts to consult with mining communities.¹⁶¹

The 2010 Mining Charter places less emphasis on the IDP. It describes mine community development as the meaningful contribution to community development, enabling the holder of a mining right to retain its “social licence to operate”.¹⁶² The holder of a mining right must conform to “international best practice” by partaking in “ethnographic community consultative and collaborative processes”.¹⁶³ The charter does not define an “ethnographic community” but it does differentiate between a “mine community” and a “community”. Whereas “mine community” is defined as “communities where mining takes place and labour

¹⁵⁶ In terms of s25 of the Local Government Municipal Systems Act 32 of 2000, a municipal council must adopt an IDP regarding the planned development of a municipality. The IDP must align the municipality’s resources with the implementation of the plan, and it will serve as the policy framework on which the municipality’s annual budget must be based. The IDP must furthermore be compatible with provincial and national development plans. The aim of the IDP is to overcome the legacy of Apartheid planning and the impact that it has on the poor. The plan is made for 5 years and must be reviewed annually. It should promote effective use of scarce resources, speed up delivery, attract additional funds (private investors, such as mining companies), strengthen democracy (by promoting participation), overcome the legacy of apartheid and promote co-ordination between local, provincial and national government.

¹⁵⁷ To be submitted by an applicant for a mining right in terms of the Regulations in terms of section 107(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 (GNR 527 GG 26275 of 23 April 2004). Regulations 40-46 provide for the objectives and contents of SLP. The objectives of the socio-labour plan are to “promote employment and advance the social and economic welfare of all South Africans; contribute to the transformation of the mining industry; and ensure that the holders of mining rights contribute towards the socio-economic development of areas in which they are operating”. The content of a socio-labour plan entails measures promoting employee and local economic development.

¹⁵⁸ “Stakeholders” is not defined, but it can be accepted that reference is made to the mining company and mine communities.

¹⁵⁹ 2004 Mining Charter 12.

¹⁶⁰ 2004 Mining Charter 9. “Ghost towns” are described as areas, previously economically dependent on mining activities to such an extent that the closure of such mining activities threatens the survival of these towns.

¹⁶¹ 2004 Mining Charter scorecard.

¹⁶² Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (GN 838 GG 33573 of 20 September 2010), 6.

¹⁶³ 2010 Mining Charter 6. “International best practice” is not defined.

sending areas”¹⁶⁴ “community” is defined by relating it to land and custom.¹⁶⁵ “Ethnographic community” consultation may therefore actually refer to consultation, not with the broader “mine community” but with a specific traditional “community”.¹⁶⁶

A mining company must perform assessments to determine the mine community’s developmental needs and the promotion of projects should be aligned with the IDP for the relevant municipality.¹⁶⁷ A mining company will comply with its duties in terms of mine community development if the approved development projects are implemented.¹⁶⁸

In a response to the identified shortcomings of the 2010 Mining Charter¹⁶⁹ the 2016¹⁷⁰ and 2017¹⁷¹ charters both mention the plight of poor mine communities. The Charters claim to address this plight by promoting employment and the advancement of the social and economic welfare of mine communities and major labour sending areas.¹⁷²

The 2016 draft Mining Charter stipulates that mine community development requires “meaningful consultation and co-ordination” between the mine company, community and local municipality.¹⁷³ Other than is done in the 2004 and 2010 Mining Charters, no explicit reference is made to the relevant IDP. The 2016 draft Mining Charter furthermore provides that a specific percentage (1%) of a mining company’s annual turnover should be contributed to community development and labour sending areas.¹⁷⁴ Whereas mine community

¹⁶⁴ 2010 Mining Charter 4. “Labour sending areas” is defined as “areas from which a majority of mineworkers, both historical and current are or have been sources”.

¹⁶⁵ “a coherent, social group of persons with interest of rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law”. The definition is similar to the definition included in the MPRDA.

¹⁶⁶ 2010 Mining Charter 3. Traditional communities are recognised in terms of the National Traditional Leadership and Governance Framework Act 41 of 2003 if specific requirements are met as set out in section 2 of the Act.

¹⁶⁷ 2010 Mining Charter 6.

¹⁶⁸ 2010 Mining Charter scorecard.

¹⁶⁹ Assessment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry, 2015 .

¹⁷⁰ 2016 Draft Mining Charter ii -“a proliferation of communities living in abject poverty continues to be largely characteristic of the surroundings of mining operations”.

¹⁷¹ 2017 Mining Charter ii - “a proliferation of communities living in abject poverty continues to be largely characteristic of the surroundings of mining operations”.

¹⁷² 2016 Draft Mining Charter 1; 2017 Mining Charter 7. The charter claims that the 1% requirements is “(C)onsistent with international best practices”.

¹⁷³ 2016 Draft Mining Charter 23.

¹⁷⁴ 2016 Draft Mining Charter 23.

development was to make up 15% of a mine company’s empowerment spend in terms of the 2010 Mining Charter, the 2016 Mining Charter increased this percentage to 30%.¹⁷⁵

The 2016 draft Mining Charter defined “mine communities” in the same manner as it was done in the 2010 Mining Charter.¹⁷⁶ The definition of “labour sending areas” and “communities” also remained unchanged except that the definition of “communities” now specifically referred to a “coherent, social group of *Black* persons”.¹⁷⁷

The “Social Development Trust” is one of the funds to be established by the Minister specifically for the socio-economic development of local communities as well as for building capacity for black suppliers of goods and services.¹⁷⁸ The creation of a “Social Fund/Social Development Fund” was also mandated in terms of the 2010 charter, to finance commitments made by a mining company in its SLP.¹⁷⁹ The 2016 charter makes no mention of the SLP in describing the “Social Development Trust”. Other than in the case of the 2010 Mining Charter, it is explicitly stated that the fund is to be created by the Minister. It, however, seems as if it would have served the same purpose because 1 % of a mining company’s annual turnover was to be placed in this fund for socio-economic development of local communities and capacity building of BEE suppliers of goods. This provision, however, is not included as part of the mine community development provisions but forms part of the provisions pertaining to procurement, supplier and enterprise development.¹⁸⁰ It is, therefore, providing for a further contribution regarding socio-economic development of mine communities in addition to the 1% provided for regarding mine community development.

The 2017 Mining Charter once again refers to the fact that the holder of a mining licence must “meaningfully contribute” to the development of the mine community, but specifies that there must be “a bias towards communities where mining takes place”.¹⁸¹ Reference is furthermore made to company’s social licence to operate.¹⁸²

If it is considered how “mine communities” is defined, it becomes clear why development should be biased in favour of communities where mining takes place. Whereas the previous

¹⁷⁵ 2016 Draft Mining Charter 29.

¹⁷⁶ 2016 Draft Mining Charter 13.

¹⁷⁷ 2016 Draft Mining Charter 12.

¹⁷⁸ 2016 Draft Mining Charter 14.

¹⁷⁹ 2010 Mining Charter definition “Social fund”.

¹⁸⁰ 2016 Draft Mining Charter 18.

¹⁸¹ 2017 Mining Charter 18.

¹⁸² 2017 Mining Charter 18.

charters included under “mine community” the communities where mining takes place as well as labour sending areas, the 2017 charter also adds “adjacent communities within a local municipality, metropolitan municipality and/or district municipality”.¹⁸³ “Labour sending areas” is defined slightly differently to include areas from where the majority of South African mineworkers have been sourced, historically and currently.¹⁸⁴ No definition is provided for “community”, raising the question whether omitting a definition for community means that definition provided for in the MPRDA will also be applicable.¹⁸⁵

A significant amendment brought by the 2017 charter is that for the first time examples are provided of what kind of development projects a mining company must promote. Without providing a definition, the 2017 charter states that infrastructure projects, income generating projects and enterprise development should be pursued as part of mine community development.¹⁸⁶ Of specific interest is the link with enterprise development. It is not clear, however, if the element enterprise development (procurement, supplier and enterprise development) and mine community development should operate alongside each other in this regard.

The 2017 charter not only requires alignment with projects identified in the IDP¹⁸⁷ but also specifically mandates the mining company to develop mine communities by contributing to projects that are approved in terms of the relevant IDP.¹⁸⁸ Moreover, the 2017 Charter for the first time links compliance in terms of a company’s SLP with its contribution towards Mine Community.¹⁸⁹

To comply with mine community development, a mining right holder must contribute in proportion to the size of the holder’s investment.¹⁹⁰ If the holder does not make a contribution of this size, it will be regarded as non-compliant with the element of mine community development. Since mine community development, along with ownership and human

¹⁸³ 2017 Mining Charter 5.

¹⁸⁴ 2017 Mining Charter 4.

¹⁸⁵ Taking into consideration the provisions of clause 2.15 of the charter, the MPRDA definition will probably apply. The definition of “community” as included in the MPRDA is however amended in terms of the Mineral and Petroleum Resources Development Amendment Bill 2013, which bill has not yet been passed.

¹⁸⁶ 2017 Mining Charter 18.

¹⁸⁷ 2010 Mining Charter 10.

¹⁸⁸ 2017 Mining Charter 19.

¹⁸⁹ 2017 Mining Charter 19. The 2010 social fund/social development fund referred to the SLP, but did not form part of mine community development.

¹⁹⁰ 2017 Mining Charter 2.16 Scorecard: Mining Charter review 4.

resource development, is a ring-fenced element,¹⁹¹ non-compliance with mine community development will be regarded as non-compliance with the provisions of the Mining Charter.¹⁹²

No mention is made of the “social fund/social development fund” of the 2010 charter or the “Social Development Trust” provided for in the 2016 charter. Once more, a new fund is created, in this instance in the form of the Mining Transformation and Development Agency.¹⁹³ The definition does not provide any clarity as to what the agency’s purpose or mandate will be; it merely states that the agency will be created by the Minister.¹⁹⁴ Even though the name of the agency makes explicit mention of development, the agency is seemingly not involved with mine community development. From the provisions pertaining to the ownership element,¹⁹⁵ it can be deduced that the agency will be tasked with creating and managing trusts for keeping shareholding in mine companies that should be issued to mine communities as part of compliance with the ownership element.¹⁹⁶

4.2.3. Ownership

Along with the rule of law, in general, the protection of property rights is regarded as one of the prerequisites for development to occur as it provides a favourable environment for investment and securitisation for loans.¹⁹⁷ Owning capital, therefore, places an entity in a powerful position in the development context. In spite of the extended focus brought about by broad-based black economic empowerment, BEE (and current day rhetoric) still places a lot of emphasis on the ownership of the economy and the fact that this ownership is still held by a minority group or foreign investors.¹⁹⁸ To be empowered is therefore still often regarded as owning the means of production in the economy.

¹⁹¹ 2017 Mining Charter 2.16 Scorecard: Mining Charter review 1.

¹⁹² 2017 Mining Charter 2.12.27. Ring fencing an element means that if the holder of a mining right does not score between levels 5 and 8 of the Scorecard for any of the ring-fenced elements, it will be regarded as non-compliant with the Mining-Charter. Non-compliance is dealt with in terms of sections 47, 93, 98 and 99 of the MPRDA.

¹⁹³ 2017 Mining Charter 5.

¹⁹⁴ 2017 Mining Charter 5. Paragraph 2.11(a) provides for a transitional period of 12 months as from the date on which the charter is published.

¹⁹⁵ See discussion below.

¹⁹⁶ 2017 Mining Charter 8. The agency is furthermore mentioned as part of the human resource development element that requires that 2% of the leviable amount on essential skills development be contributed towards the agency. 2017 Mining Charter 18.

¹⁹⁷ Kennedy D, *"Some caution about property rights as a recipe for economic development"* (2011) Washington, .

¹⁹⁸ Umraw A, 'Elite ownership and control of the economy is a problem, says Zweli Mkhize' *Huffpost* (9 June 2017) available at <http://www.huffingtonpost.co.za/2017/06/09/ownership-and-control-of-the-economy-is->

The 2017 charter has therefore increased the percentage black ownership of mine companies for mining rights holders to be compliant. Ownership also remains a ring-fenced element. Whereas the 2010 charter implied broad-based ownership schemes by for instance benefitting employees in ownership deals,¹⁹⁹ the 2016 draft charter and 2017 charter make explicit provision for more broad-based ownership schemes by requiring the distribution of shares not only to workers,²⁰⁰ but also specifically to “communities” in the 2016 draft charter and “mine communities” in the 2017 charter.²⁰¹

Providing communities with shareholding in the mine companies, featured in the 2016 charter for the first time.²⁰² The 2016 charter provided for an ownership target of 26% whereof 5% had to be equally allocated in trusts²⁰³ for the benefit of workers, black entrepreneurs and the community.²⁰⁴

The 2017 Charter increases the target for ownership to 30% and 8 % of the total issued shares of a mining company must be issued specifically for the benefit of mine communities²⁰⁵ to a community trust.²⁰⁶ This is a much higher stake than provided for in the 2016 charter. The community trust must be created and managed by the Mining Transformation and Development Agency. Other than stating that the Mining Transformation and Development Agency must report to the Minister on an annual basis, the mandate of the Mining Transformation and Development Agency is not clear from the charter.

Until the mandate and powers of the Mining Transformation and Development Agency are known, it is difficult to assess what ownership in mine companies will mean for mine

[a-problem-says-mkhize_a_22134112/](#) accessed on 30 July 2017; Van Wyk A, 'Do 40 000 whites own 80% of South Africa?' *Mail&Guardian* (15 September 2014) available at <https://mg.co.za/article/2014-09-15-do-40-000-whites-own-80-of-south-africa> accessed on 30 July 2017.

¹⁹⁹ Tangri and Southall (2008) 701.

²⁰⁰ 2016 Draft Mining Charter 2.1 (b) 16, 2017 Mining Charter 2.1.1.3 (a) 8.

²⁰¹ 2016 Draft Mining Charter 2.1 (b) 16, 2017 Mining Charter 2.1.1.3 (b) 8.

²⁰² Ownership deals with traditional communities have however been in place, for instance the Bapo ba Mogale community that has obtain equity ownership in Lonmin in 2014. Boyle B, 'Bapo ba Mogale community loses out in Lonmin deal' *Groundup* (4 December 2014) available at http://www.groundup.org.za/article/bapo-ba-mogale-community-loses-out-lonmin-deal_2502/#sthash.rzkGQ4D5.dpuf accessed on 30 July 2017.

²⁰³ The shareholding was to be kept in a trust created in terms of the Trust Property Control Act 57 of 1988 for the benefit of the community and workers, respectively, and traditional authorities and unions had to be represented in these trusts. No details were provided on the trustees or their powers. It, however, was stipulated that the trusts were to report to the South African Revenue services and the Department of Mineral Resources.

²⁰⁴ 2016 Mining Charter 2. “Community” probably included only traditional communities as provided for in the National Traditional Leadership Governance Framework Act 41 of 2003 , and not mine communities

²⁰⁵ Ownership is therefore not allocated to “communities” (traditional communities), as provided for in the 2016 Draft Mining Charter.

²⁰⁶ 2016 Draft Mining Charter 8.

communities. In addition, the fact that the definition of mine communities has been broadened²⁰⁷ will complicate distributing the benefits of the shareholding significantly.

4.3. Analysis

The brief discussion of the four mining charters shows a certain progression in the approach to mine community empowerment. The rhetoric in favour of mine communities has certainly increased. Not only does the latest charter provide concrete examples of mine community development projects, but ownership in mine companies must also now be distributed to mine communities. As a ring fenced element, mine community development now makes up 30% of a mining company’s obligations in terms of the 2017 Mining Charter. The 2017 charter also attempts to align mine community development with other development initiatives such as the IDP and the SLP, therefore possibly promoting a more holistic approach to mine communities.

The empowerment of mining communities epitomises the broad-based focus of BBBEE. Other than in the instance of incorporating individuals into the ownership structure of a mining company, providing for the procurement of services from specific suppliers, or catering to the needs of specific employees of the mining company, the scope of the ideal of “empowering mining communities” is open ended. The scope is uncertain both regarding the nature of what should be done, and who should benefit. This problem is visible in the framework provided by the Mining Charter.

The argument forwarded in this paper is that the extent to which the provisions regarding the empowerment of mine communities have been altered over the years can be ascribed to the politics of development. The continual adjustments signify the difficulty in framing the problems faced by mining communities, but also in identifying and accurately representing communities, as the beneficiaries of development.

Plainly, the problem is framed as poverty and underdevelopment. The general rhetoric regarding mining areas confirms that poverty is the main problem.²⁰⁸ Within the empowerment context, it is acknowledged that poverty is the legacy of apartheid and in the

²⁰⁷ The previous definition of “mine community” has been broadened by adding “adjacent communities within a local municipality, metropolitan municipality and/or district municipality”.

²⁰⁸ The South African Human Rights Commission has even held hearings regarding the conditions of mine communities see <https://www.sahrc.org.za/index.php/sahrc-media/news/item/460-sahrc-resumes-hearings-into-mining-community-problems> accessed on 30 July 2017; Parker F, 'Lonmin mining communities: A powder keg of inequality' *Mail&Guardian* (27 August 2012) available at <https://mg.co.za/article/2012-08-27-lonmin-mining-communities-a-powder-keg-of-inequality> accessed on 30 July 2017.

instance of mining communities, the exploitation that accompanied mining. The purpose here is not to deny that rural areas, specifically those where mining takes place, may lack basic infrastructure and other resources. To frame the problem exclusively as poverty and underdevelopment, however, means that a specific kind of intervention is required namely the allocation or reallocation of resources.²⁰⁹

A mining company has to conceptualise “mine community” to be able to identify the beneficiary of the prescribed reallocation of resources.²¹⁰ “Mine community” is defined in an open-ended manner to reflect the effects of mining.²¹¹ A mine community, however, may also include a “community” in a narrower, more formalised sense. The definition of community in the MPRDA refers to traditional communities and has been amended a couple of times²¹² and the Mining Charter has oscillated between benefitting “communities” and “mine communities”.²¹³ Thus, it is clear that it is not that easy to draw boundaries for communities on paper.

Not only does the difficulty in conceiving “community” allow for abuse by mining companies,²¹⁴ but, also, poverty and underdevelopment cannot be contained or addressed within boundaries created by mining legislation. The 2017 Mining Charter acknowledges this by trying to align the objectives of mine community development with those of the SLP and the IDP. Consequently, whether a mining company complies with a ring-fenced element of

²⁰⁹ See discussion under part 3 above.

²¹⁰ Kapelus P, 'Mining, Corporate Social Responsibility and the ‘community’: The Case of Rio Tinto, Richards Bay Minerals and the Mbonambi' 2002 (39) *Journal of Business Ethics* 280.

²¹¹ The 2017 Mining Charter’s definition differs slightly, but the main elements remain the same: communities where mining takes place and labour sending areas.

²¹² Humby T, 'The Bengwenyama trilogy: Constitutional rights and the fight for prospecting on community land' 2012 (15) *Potchefstroom Electronic Law Journal* refers to the current definition of “community” in the MPRDA. The definition was amended as a result of the *Bengwenyama* cases (*Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* TPD 39808/2007; SCA 71/09 31 March 2010 & *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC)). Humby argues the amendment provides a link with “the chaotic state of communal land tenure in South African Law”. In terms of the Restitution of Land Rights Act 22 of 1994 “community” means “any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group”. Section 2(1)d makes provision for a claim for the restitution of land to be instituted on behalf of such a community dispossessed of a right after 19 June 1913 as a result of past racially discriminatory laws or practices. The definition for “community” in the Mining Charter is the same as the proposed definition for “community” in the MPRD Amendment Bill 2013.

²¹³ Whereas the 2016 Draft Mining Charter provided for traditional communities to obtain equity ownership in mine companies, the 2017 Mining Charter determines that mine communities should obtain equity ownership in mine companies.

²¹⁴ Mining companies will opt for a narrower definition of community in contrast with more abstract and inclusive notions of community in policy statements and legislation, which often means that traditional communities benefit to the detriment of other communities in mining areas. See Kapelus (2002) *JBE* 282 & 284. Mbatha and Wynberg (2014) 84.

the Mining Charter is dependent on the successful creation and implementation of the IDP, which is primarily the duty of the relevant municipality. The framing of “mine community development” thus may put a mine company in a precarious position and may also lessen the benefits received by mine communities.

Conceiving “community” or “mine community” also poses a challenge for allocating equity ownership in mine companies to communities, as prescribed by both the 2016 and 2017 Mining Charters. As indicated above, the 2016 charter possibly envisaged the distribution of equity ownership only to traditional communities, whereas the 2017 Mining Charter clearly speaks of mine communities. Symbolically, awarding (partial) ownership of a mining company to the mine community in which it is operating is significant, especially in a neoliberalist development paradigm. The difficulty in determining the extent of the mine community that must benefit from this empowerment initiative, however, may negate the significance thereof. In a context where rights and right holders must be clearly defined in order to enforce and benefit from rights, the open-endedness of “mine community” may prove difficult to manage.

5. Conclusion

The mining industry has experienced some of its worst of times²¹⁵ over the last couple of years. Recent unrest and weaker economic performance in the extractive industries²¹⁶ have caused substantial conflict between mining companies and mine communities. The “miner spring” of 2012²¹⁷ shows how mine communities still direct their anger at mining companies for representing the dark side of capitalism and the legacy of colonialism and apartheid. The apparently increased focus on mining communities in the Mining Charter can, therefore, be interpreted as an attempt to find new means of addressing the unsolved problems faced by mining communities.

Nevertheless, the current fragility of the larger South African political landscape creates a vacuum that is easily filled with populist rhetoric aimed at the poor and rural masses, of

²¹⁵ Dickens C, *A Tale of Two Cities* (London, Penguin Books 2000 (first published 1859)) 1.

²¹⁶ Kubheka T, '8500 AngloGold workers may face retrenchments as mine, unions begin talks' *Eyewitness News* (30 June 2017) available at <http://ewn.co.za/2017/06/28/8-500anglogold-workers-may-face-retrenchment-as-mine-union-begin-talks> accessed on 30 July 2017.

²¹⁷ Howard (2014) 11 referring to Stoddard E “‘Miner Spring’ may lead to more unrest” *Mail & Guardian* 6 September 2012 and Kane P “Could we be about to see a Miners Spring?” *Huffington Post* 25 June 2012.

which mining communities form part – making this “the best of times”²¹⁸ for desperate revolutionary calls. The political opportunism reflected in the timing of the release of the latest charter can therefore not be ignored.

Whereas broad-based BEE was introduced to counter the creation of a black elite, the ironic result of the politics of development (and of the day) is that the empowerment of mine communities, as it is framed currently, will result in just that. The beneficiaries of mine community empowerment remain misrepresented and misconfigured, causing that only some receive the actual benefits of development. Viewed from a development perspective, the rest remain poor and underdeveloped.²¹⁹ It is therefore questionable whether there really is any progress in the way in which the latest charter approaches the empowerment of mining communities, or whether it is mere rhetoric, amounting to more of the same.

Has the moment arrived to call for post-development (or even post-empowerment) initiatives? A move out of the development/empowerment paradigm may risk losing accountability on the part of mining companies for the current state of mining communities.²²⁰ Nevertheless, the politics of development require us to take a cautious approach to mine community development and to seek ways in which these communities can indicate how they view their own situations and futures.

Bibliography

Dickens C, *A Tale of Two Cities* (London, Penguin Books 2000 (first published 1859)).

Gordon RE and Sylvester JH, "Deconstructing Development" ' 2004 (22) *Wisconsin International Law Journal* 1.

Cronje F and Chenga C, 'Sustainable Social Development in the South African Mining Sector' 2009 (26) *Development Southern Africa* 413.

CALS, *Changing Corporate Behaviour: The Mapungubwe Case Study - A Research Report* (2014) CALS, .

²¹⁸ Dickens C, *A Tale of Two Cities* (London, Penguin Books 2000 (first published 1859)) 1.

²¹⁹ Case studies in areas where certain communities benefit from empowerment initiatives to the detriment of those not qualifying as members, confirms this. See Kapelus (2002) and Mbatha and Wynberg (2014).

²²⁰ Gordon and Sylvester (2004) 90.

Esteves A, 'Mining companies as agents for social development: The case for more effectual corporate-community investments' in E. B, Walde T and Warden-Fernández J (eds), *International and Comparative Mineral Law and Policy - Trends and Prospects* (The Hague, Kluwer Law International 2005) .

Mbatha P and Wynberg R, 'Mining and the Myth of Benefits in South African Rural Coastal Communities' in Wynberg R and Hauck M (eds), *Sharing the Benefits from the Coast* (Cape Town, UCT Press 2014) .

TRC, *Truth and Reconciliation Commission of South Africa Report* (2003) <http://www.justice.gov.za/trc/report/> accessed on 6 March 2016.

Draft Reviewed Broad Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry 2016 (GN 450 GG 39933 of 15 April 2016), .

Secombe A, 'Department blindsides miners with new charter' *BDlive* (15 April 2016) available at <http://www.bdlive.co.za/business/mining/2016/04/15/departments-blindsides-miners-wit-new-charter?service=print> accessed on 30 July 2017.

Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry 2017 .

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

Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry, 2004 (GN 1639 GG 26661 of 13 August 2004) .

Timeslive, 'Mining minister suspends implementing new mining charter' *TimesLIVE* (14 July 2017) available at <https://www.timeslive.co.za/politics/2017-07-14-mining-minister-suspends-implementing-new-mining-charter/> accessed on 30 July 2017.

Horne R, 'Patterns of ownership and labour unrest within the South African mining sector' 2015 (40) *Journal of Contemporary History* 25.

Sarup M and Raja T, *Identity, Culture and the Postmodern World* Edinburgh University Press 1996).

Parpart J, 'Lessons from the Field: Rethinking Empowerment, Gender and Development from a Post- (Post-?) Development Perspective' in Saunders K (ed) *Feminist Post-Development Thought* (London & New York, Zed Books 2002) .

Blackburn S, *The Oxford dictionary of philosophy* second ed (2005) Oxford, Oxford University Press, .

Lee Y, 'General Theory of Law and Development' 2017 (50) *Cornell International Law Journal* 1.

Trubek D, 'The 'Rule of Law' in development assistance: Past, present, and future' in Trubek D and Santos A (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge, Cambridge University Press 2006) .

Ziauddin S, 'Development and the Locations of Eurocentrism' in Munck R and O'Hearn D (eds), *Critical Development Theory: Contributions to a New Paradigm* (Zed Books 1999) .

Sen A, *Development as Freedom* OUP Oxford 2001).

Nussbaum MC, *Creating Capabilities* Harvard University Press 2011).

Programme UND, *What is Human Development?* United Nations Development Programme “What is Human Development” <http://hdr.undp.org/en/content/what-human-development> accessed on 3 July 2017.

Konadu-Agyemang K, 'The Best of Times and the Worst of Times: Structural Adjustment Programs and Uneven Development in Africa: The Case of Ghana' 2000 (52) *The Professional Geographer* .

Mittelman J and Pasha M, *Out from Underdevelopment Revisited: Changing Global Structures and the Remaking of the Third World* (United Kingdom, Palgrave Macmillan 1997).

Thomas C, "Law and neoclassical economic development in theory and practice: Toward an institutionalist critique of institutionalism" 2011 (96) *Cornell Law Review* 967.

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

Stevens C and Ntlama N, "An overview of South Africa's institutional framework in promoting women's right to development" (2016) (20) *Law, democracy and development* 46.

Kohl H, *From Archetype to Zeitgeist: Powerful Ideas for Powerful Thinking* Little, Brown 1993).

Foreign Affairs Co, *Point Four Background and Program (International Technical Cooperation Act of 1949)* (1949) Washington, *Committee on Foreign Affairs*, http://pdf.usaid.gov/pdf_docs/Pcaac280.pdf accessed on 31 July 2017.

Escobar A, *Encountering Development: The Making and Unmaking of the Third World* Princeton University Press 2011).

Modiri J, 'Law's poverty' 2015 (18) *Potchefstroom Electronic Law Journal* 224.

Cammack P, 'Neoliberalism , the World Bank and the New Politics of Development' in Kothari U and Minogue M (eds), *Development Theory and Practice: Critical Perspectives* (Hampshire, Palgrave 2002) .

Brand D and Van Marle K, 'Poverty and the ordinary law: Introduction' 2013 (29) *South African Journal on Human Rights* 465.

Cornell D, *Just Cause* (New York, Rowman and Littlefield 2000).

Cornell D, *Beyond Accommodation: Ethical Feminism, Deconstruction and the Law* (New York, Routledge 1999).

Cornell D, *At the Heart of Freedom: Feminism, Sex and Inequality* (Princeton, Princeton University Press 1998).

Van Marle K, "No Last Word': Reflections on the Imaginary Domain, Dignity and Intrinsic Worth" 2002 *Stellenbosch Law Review* 299.

Simon D and Narman A, *Development as Theory and Practice: Current Perspectives on Development and Development Co-operation* Taylor & Francis 2014).

Kothari U and Minogue M, *Development Theory and Practice: Critical Perspectives* (Hampshire, Palgrave 2002).

Bank W, *World Bank Participation Source Book* (Washington DC, World Bank, Environment Department Papers 1995).

Bank W, *World Development Report* (New York, Oxford University Press 1999).

Bank W, *World Development Report: Attacking Poverty* (New York, Oxford University Press 2000/1).

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

Bond P, *Elite Transition: From Apartheid to Neoliberalism in South Africa* (London, Pluto Press 2000).

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

Broad-Based Black Economic Empowerment Act 53 of 2003, .

Terreblanche S, *A history of inequality in South Africa 1652-2002* (Scottsville, University of Kwazulu-Natal Press 2002).

Howard J, 'Half-hearted regulation: Corporate social responsibility in the mining industry' 2014 (131) *The South African Law Journal* 11.

Crush J, Jeeves A and Yudelman D, *South Africa's Labour Empire: A history of black migrancy to the gold mines* (Cape Town, Westview Press 1991).

Fig D, *Staking their claims: Corporate Social and Environmental Responsibility in South Africa* (Scottsville, UKZN Press 2007).

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

Assessment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry, 2015 .

Kennedy D, "*Some caution about property rights as a recipe for economic development*" (2011) Washington, .

Umraw A, 'Elite ownership and control of the economy is a problem, says Zweli Mkhize' *Huffpost* (9 June 2017) available at http://www.huffingtonpost.co.za/2017/06/09/ownership-and-control-of-the-economy-is-a-problem-says-mkhize_a_22134112/ accessed on 30 July 2017.

Van Wyk A, 'Do 40 000 whites own 80% of South Africa?' *Mail&Guardian* (15 September 2014) available at <https://mg.co.za/article/2014-09-15-do-40-000-whites-own-80-of-south-africa> accessed on 30 July 2017.

Boyle B, 'Bapo ba Mogale community loses out in Lonmin deal' *Groundup* (4 December 2014) available at http://www.groundup.org.za/article/bapo-ba-mogale-community-loses-out-lonmin-deal_2502/#sthash.rzkGQ4D5.dpuf accessed on 30 July 2017.

Parker F, 'Lonmin mining communities: A powder keg of inequality' *Mail&Guardian* (27 August 2012) available at <https://mg.co.za/article/2012-08-27-lonmin-mining-communities-a-powder-keg-of-inequality> accessed on 30 July 2017.

Kapelus P, 'Mining, Corporate Social Responsibility and the ‘community’: The Case of Rio Tinto, Richards Bay Minerals and the Mbonambi' 2002 (39) *Journal of Business Ethics* 275.

Humby T, 'The Bengwenyama trilogy: Constitutional rights and the fight for prospecting on community land' 2012 (15) *Potchefstroom Electronic Law Journal* 166.

Kubheka T, '8500 Anglogold workers may face retrenchments as mine, unions begin talks' *Eyewitness News* (30 June 2017) available at <http://ewn.co.za/2017/06/28/8-500anglogold-workers-may-face-retrenchment-as-mine-union-begin-talks> accessed on 30 July 2017.

Merino A & Valor C “The potential of corporate social responsibility to eradicate poverty: an ongoing debate” (2011) 21 *Development in Practice* 157-167.

Altman J "Benefit sharing is no solution to development" in Wynberg R, Chennels R & Schroeder D *Indigenous peoples, consent and benefit-sharing: Learning from the San-Hoodia Case* (2009) Springer: Berlin.

Schroeder D “Environmental justice and the market: The politics of sharing wildlife revenues in Tanzania” (2007) 21 *Society and Natural Resources* 583.

Department of Mineral Resources “Mining Charter Impact Assessment Report” October (2009) 2.

Ashcroft et al *Key Concepts in Post-Colonial Studies* 71 (1998) Routledge: Oxon.

Truman’s Inaugural Address January 20 1949 available at *Harry S Truman Library & Museum* https://www.trumanlibrary.org/whistlestop/50yr_archive/inagural20jan1949.htm accessed on 26 July 2017.

The Freedom Charter of the African National Congress available at <http://www.anc.org.za/content/freedom-charter> accessed on 30 July 2017.

MMSD Final Report “Breaking New Ground: Mining, Minerals and Sustainable Development” chapter 9 “Local communities and mines” 2002 Earthscan Publications Ltd and available at <http://www.iied.org/mmsd-final-report> (chapter 9 available at <http://pubs.iied.org/pdfs/G00901.pdf>) accessed on 22 April 2016.

Sutton IB “The diggers’ revolt in Griqualand West, 1875” (1979) *International Journal of African Historical Studies* 41.

Statistics South Africa “Mining: winners and losers of 2015” 2 March 2016 available at <http://www.statssa.gov.za/?p=6247> accessed on 21 April 2016.

Statistical Release P 0441 “Gross domestic product – Fourth quarter 2015”; available at <http://www.statssa.gov.za/publications/P0441/P04414thQuarter2015.pdf> accessed on 21 April 2016.

Statistical Release P 0277 “Quarterly employment statistics – December 2015”. available at <http://www.statssa.gov.za/publications/P0277/P0277December2015.pdf> accessed on 21 April 2016.

Harvey R “Three mining changes that could net major investment” *Business Day Live* 8 February 2016 available at <http://www.bdlive.co.za/opinion/2016/02/08/three-mining-changes-that-could-net-major-investment> accessed on 7 April 2016.

Smit C “The role of mining in the South African Economy” KPMG South Africa Blog 23 December 2013 available at <http://www.sablog.kpmg.co.za/2013/12/role-mining-south-african-economy/> accessed on 21 April 2016.

Local Government Municipal Systems Act 32 of 2000,

Mineral and Petroleum Resources Development Amendment Bill 2013.

National Traditional Leadership Governance Framework Act 41 of 2003

Stoddard E “‘Miner Spring’ may lead to more unrest” *Mail & Guardian* 6 September 2012 available at <http://mg.co.za/article/2012-09-06-miner-spring-may-lead-to-more-unrest> accessed on 6 March 2016.

Kane P “Could we be about to see a Miners Spring?” *Huffington Post* 25 June 2012 available at http://www.huffingtonpost.com/patrick-kane/south-africa-mine_b_1967275.html accessed on 6 March 2016.