

Submission

To the

Presidential Climate Commission (Secretariat)

On the

Draft Framework for a Just Transition in South Africa

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A) INTRODUCTION

About the Centre for Applied Legal Studies

1. The Centre for Applied Legal Studies (“CAL S”) welcomes the opportunity provided by the Presidential Climate Commission (“PCC”) to make comments on the Draft Framework for a Just Transition in South Africa (“draft Framework”)
2. In the event that the PCC hosts public hearings on the draft Just Transition Framework, CAL S hereby requests that it be included in any opportunity to make oral submissions, electronically in the event there is a resurgence in the COVID-19 pandemic.
3. CAL S is a human rights organisation and registered law clinic with the Legal Practice Council of the Northern Provinces, based at the School of Law at the University of the Witwatersrand. CAL S is committed to the protection of human rights through partnering with individuals and communities in the pursuit of systemic change.
4. CAL S’ vision is a country and continent where human rights are respected, protected and fulfilled by the state, corporations, individuals and other repositories of power; the dismantling of systemic harm; and a rigorous dedication to justice. It fulfils this mandate by –
 - 4.1. Challenging and reforming systems within Africa which perpetuate harm, inequality and human rights violations;
 - 4.2. Providing professional legal representation to survivors of human rights abuses; and
 - 4.3. Using a combination of strategic litigation, advocacy and research, to challenge systems of power and act on behalf of vulnerable persons and communities.’
5. CAL S operates across a range of human rights issues, namely home, land and rural democracy, business and human rights, environmental justice, gender justice, as well as civil and political justice. It adopts a gendered and intersectional approach to interpreting, implementing and – where necessary – promoting the development of the law.

6. The environmental justice programme aims to counter this injustice and make environmental rights a reality for all who live in South Africa. We aim to change the behaviour of both the corporate actors that make use of natural resources, and the state which regulates this process. Our focus remains on the mining sector, which is a major contributor to economic growth in the country, but is also responsible for environmental harm and exploitation. We work specifically on the social and labour plan system and other models for community benefit sharing, placing the issues of voice, participation and transparency at the centre of our work.

Background

7. As the draft Framework recognises, in addition to climate change mitigation and adaptation strategies, it is crucial to ensure that the social impacts of the transition are addressed in an equitable manner and that the new green economy is one that benefits the majority hence the concept of a just transition.
8. We have structured these comments as follows: Section B of the comments contains our more overarching observations while the sections that follow are organised according to the sections of the draft Framework.
9. The essence of our comments are the following: On the positive side, the draft Framework contains appropriate high-level principles and goals. Further, the framework identifies the key sectors and interests groups where communities and workers will require assistance to mitigate the impacts of the transition to a carbon neutral economy and climate change itself. The main deficiencies of the framework are its lack of guidance on the concrete mechanisms to ensure justice (distributive, restorative and procedural), in particular the absence of a clear stipulation on who should bear the costs (i.e. large corporations and the wealthy). We will suggest, in our overarching comments, that these deficiencies can be linked to the broader neo-liberal policies of the South African government.

B) OVERARCHING COMMENTS

Draft framework acknowledges pivotal environmental justice principles

10. The framework recognises fundamental principles of social justice that cascade into environmental justice and the more specific question of climate justice namely distributive (present and forward looking distribution of benefits and harms),

restorative/restitutive (compensation for past injustice and losses) and procedural (the meaningful participation of those with the greatest interest in climate justice).

Draft Framework does not depart from neo-liberal capitalism and austerity

11. As questions of just transition are at their core about the distribution of harm and benefits, wealth and ownership, and power, they also require an economic policy framework that leads to greater equality rather than inequality. The neo-liberal economic policy that has been a persistent element of the post-1994 order and the global order has been associated with the concentration of wealth and ultimately power. The economic geographer David Harvey defines neo-liberalism as essentially an approach in which markets are assumed to be the best way of organising society and the main role of the state is to facilitate markets.¹ Associated policies include low taxation on corporations and wealthy, a focus on deficit reduction and reduction of government expenditure, privatisation of government functions and liberalisation of trade and capital flows. For example, despite the imperative of redistribution, corporate tax rates today are far lower (28%) than they were during apartheid when they averaged around 45%.² Neo-liberal policies have been associated with the concentration of wealth, incomes and power with an extremely wealthy minority globally and in South Africa. In South Africa, the adoption of such policies including the dramatic reduction in corporate taxes since apartheid and liberalisation of trade that have contributed to it becoming the world's most unequal society³ – a betrayal of liberation struggle aspirations. Associated impacts on communities and workers have included strains on government services and decaying public infrastructure due to insufficient investment, increasing user-tariffs for fuel and basic services, and job losses.
12. It is submitted that the manner in which neo-liberal policies channel ownership, control of the economy, income and resources into the hands of the few make them incompatible with climate justice. Therefore, if a transition is to be a just one, there needs to be a commitment at all levels of government to depart from neo-liberalism

¹ David Harvey 'Neo-liberalism as creative destruction' (2006) 88 *Annals of the American Academy of Political and Social Science* 22-23.

² <https://www.ftomasek.com/olderrates.html>; <https://www.ftomasek.com/rates.html>.

³ Victor Sulla; Previous Zikhali; & Pablo Facundo Cuevas (for The World Bank) *Inequality in Southern Africa: an assessment of the Southern African Customs Union* (2022) 11.

pursue an economic policy framework that prioritises meeting the needs of the majority and closing the wealth and income gap.

Draft Framework does not address distributive and restitutive justice in sufficiently concrete manner

13. By definition the concepts of distributive and restitutive justice, when applied to a society as unequal as South Africa require redistribution from the best off to the majority. Those who should pay include the companies that have benefited from the exploitation of resources and labour as well as the wealthy shareholders into whose bank accounts the proceeds have flowed.

14. While a framework cannot, by itself, create taxes and budgetary allocations, it is incumbent on a framework about climate justice to provide direction on concrete mechanisms to put distributive, restorative and procedural justice into practice to ensure the new green economy does not replicate the inequalities of the old.

Draft Framework does not acknowledge Free Prior and Informed Consent (critical to procedural justice)

15. It is unfortunate that the draft Framework does not directly speak to what is arguably the most prescient issue of procedural justice in the landscape, namely the struggle of communities for companies to respect their right to Free Prior and Informed Consent (“FPIC”) regarding all development on their land. The FPIC principle is continuous – consent and participation at all stages of a development. FPIC is an emerging international human rights norm and, domestically, is supported by the Interim Protection of Informal Land Rights Act (IPILRA).⁴ This principle is, however, is not recognised by the Act regulating mining, the Mineral and Petroleum Resources Development Act (“MRPDA”)⁵ nor by the Department of Mineral Resources (“DMRE”). The right of historically disadvantaged communities, households and individuals to decide on whether invasive developments occur on their land would increase their leverage to decide on their form of development, increase their ownership and control over developments and also could be used as a tool for halting developments (e.g. new coal mines) that are contrary to the just transition.

⁴ Act No. 31 of 1996.

⁵ Act No. 28 of 2002.

Draft Framework thorough in identifying the economic linkage and vulnerable sector

16. The draft framework accurately identify the sectors at the centre of the transition including the coal, auto, agriculture and tourism value chains and which are especially vulnerable either/both to the transition away from the fossil fuels-based economy and the direct impacts of climate change.

Draft Framework Provides insufficient guidance on community participation and measures to support it

17. The fundamental question of funding and capacitation of community organisations is under-acknowledged but an absolute precondition for meaningful involvement of those most affected. The recognition of this issue in the draft Framework therefore represents a step forward.

18. However, as outlined above, meaningful community participation requires concrete measures directed at removing persistent barriers to accessing information and providing capacitation to communities.

19. In relation to access to information, a just transition framework should be recommending a range of legislative, policy and practical measures to ensure transparency. These would include identifying a wide range of information pertaining to climate change and the just transition (impacts, license conditions, social and labour plans, compliance reporting etc.) for placement in a central platform/s that is available to the entire public (through websites and other platforms). This would also include measures to disseminate information to impacted communities without ready internet access.

20. The capacitation of communities to ensure they are able to capitalise on available information and participation processes should encompass resourcing community-based organisations, education and training, and enabling communities to access technical and legal expertise. Given disparities of power and influence, this will not happen automatically unless frameworks, policies and legislation provide direction on mechanisms to ensure this. These could include a ring-fenced tax on fossil fuel corporations to fund community movements and pay for popular education and technical and legal specialists chosen by communities. The draft Framework unfortunately does not take the step of providing suggestions in this regard.

C) VISION

21. The vision set out under heading four of the draft Framework contains four elements. In terms of this vision the just transition:

'...aims to achieve a good life for all South Africans, in the context of climate resilient and zero-emissions development

'...contributes to the goals of decent work for all, social inclusion, and the eradication of poverty

'...puts people at the centre of decision making, especially those most impacted, the poor, women, and youth...'

builds the resilience of the economy and people through affordable, decentralised, diversely-owned renewable energy systems; the conservation of natural resources; equitable access of water resources; and sustainable, equitable and inclusive land-use for all, especially for the most vulnerable'⁶

22. The aspirations of a good life for all, decent work and poverty eradication, and the most affected and especially vulnerable groups at the centre of decision-making are laudable and essential pillars of any just transition worthy of the name.

23. The fourth aspiration of the vision also speaks to fundamental questions regarding ownership of energy systems, equitable distribution of water systems and land use that prioritises the most vulnerable.

24. However, the concept of 'decentralised' and 'diversely owned' energy systems can mean many things. They can refer to historically disadvantaged persons being represented in ownership structures; they could refer to community and worker ownership. They can, however, also be read to mean the break-up/unbundling of ESKOM and greater privatisation of energy systems, which is likely to have the opposite effect of greater equality and instead lead to an increase in inequality given the tendency towards greater concentration of ownership in the capitalist system.

D) PRINCIPLES

25. Under the fifth heading, the strategy provides for three 'core principles' of the just transition, namely distributive justice, restorative justice and procedural justice.⁷

⁶ Draft Framework at 7-8.

⁷ Draft Framework at 8-9.

We welcome all three as vital pillars of a just transition. Further, each principle has a theory of change outlined in table 1 to support it comprising in addition to the principle itself, a description of the principle, outcomes and means of achievement.

Distributive Justice

26. Distributive justice is a central pillar of environmental justice more broadly and a central principle for CALS and many others in civil society, community-based organisations and organised labour. Here it is defined as:

‘An equitable distribution of risks and responsibilities that addresses the direct impacts resulting from the transition. As noted above, a successful transition necessitates an all-of-society approach, so this distribution must cover all levels of government, corporates, and citizens.’⁸

27. We would suggest, however, that the draft Framework specify that distributive justice should encompass gender as well as race and class inequality. The endemic problems of marginalisation of women in decision-making, gender wealth and pay gaps and gender-based violence.

28. In relation to the theory of change, two outcomes are envisaged. First ‘Increased resilience of workers and communities to shifts in economic activities and employment, as well as the physical impacts of climate change.’ This is obviously a vital component of distributive justice.⁹ Second ‘a higher share of the working-age population is in employment, in low carbon industries, with better quality of work, and stable or increasing incomes.’ We would propose going further and require a living wage.

29. Two means of achievement are cited. First, ‘implementing sound economic and social policy, coupled with increased corporate responsibility and a diversified economy.’¹⁰ While theories of change are by their nature not highly detailed, a ‘sound economic and social policy’ is a very ambiguous formulation. In fact ‘sound policy’ is often used, in the business press, as a code word for neoliberal policy, which we have submitted above, is a key contributor to South Africa’s shameful status as the world’s most unequal society.¹¹

⁸Draft Framework at 8.

⁹ Ibid.

¹⁰ Ibid.

¹¹World Bank op cit note 3.

30. Second, 'assets, and opportunities to participate in industries of the future, with particular attention on impacted groups, the poor, women, and the youth.'¹² We agree with the emphasis on training and resourcing the most impacted and the focus on people living in poverty, women and youth.

Restorative Justice

31. Restorative justice, especially in a society recovering from colonialism and apartheid, is a necessary pillar of any just transition vision. The draft Framework defines the concept as:

'The redress of historical damages against individuals, communities, and the environment, with the goal of rectifying or ameliorating the situations of harmed or disenfranchised communities. This is about moving forward constructively, in a manner that appropriately rectifies the harms of the past.'

32. Where the draft framework falls short is specifying who needs to make redress, and suggesting the types of mechanisms for achieving this redress.¹³ We would suggest that the large corporations and wealthy individuals¹⁴ who have profited from colonialism, apartheid, and extractive capitalism should pay costs associated with financing a just transition. Moreover, given the continued race and gender inequalities in wealth and income, this apportionment of costs will contribute towards eradicating white and male domination of the economy together with class inequality.

33. The question of economic policy is fundamental to whether redress is possible. The continuation of neoliberalism would make any aspirations of redress a fiction, as under this system the wealthiest shareholders would not pay the costs of the transition. Instead, the bill would be left with the state and ultimately passed down through austerity measures to workers and communities with a disproportionately negative impact on women.

34. The theory of change that is outlined includes four outcomes namely 'less land degradation, improved air quality, energy access, water quality and access', 'a lower Gini co-efficient', 'a quantitative improvement in income equality' and 'more

¹² Ibid.

¹³ While the legal basis and intricate details of mechanisms belong elsewhere in budgets, the eventual Climate Change Bill and its regulations etc., a framework should preferably suggest at least the type of basic mechanism/s that should be followed, e.g. wealth taxes and community capacitation funds.

¹⁴ Draft Framework at 9.

equitable ownership of productive and other assets.’¹⁵ These are all very important outcomes that are required for restorative justice (and distributive justice).

35. Two means of achievement are specified. The first is ‘Creating a more decentralised, zero-carbon economy, which allows for greater economic inclusion, ownership, and participation, especially for women and the youth.’¹⁶ All the above are vital but do not go far enough in providing guidance on how the outcomes will be achieved. Public ownership of renewable energy sector, community and worker control over the energy provider, the promotion of co-operatives and just transition taxes on large corporations and high net worth individuals to fund it are some elements that could ensure a fair economy.

36. The second means of achievement listed is ‘Shifting away from resource intensive sectors and fossil fuels to (1) free up natural assets as public goods and (2) create opportunities for rehabilitation of degraded land, air sheds, and water systems.’¹⁷ We would strongly welcome such a shift, which also has implications for the existing legislative framework for mining in particular. For example, the framework under the MPRDA is designed to promote mining. The MPRDA does not explicitly require that decision makers, when considering a license application for a new mine (e.g. a mining) right, draw a distinction between a proposed mine that would produce inputs for clean energy (platinum, vanadium, cobalt, copper, manganese, and lithium) and mining for minerals not required in a green economy.

37. The principle of restorative justice could be strengthened by providing for the review of legislation to provide for strengthened penalties for non-compliance with environmental and climate obligations including civil and criminal director liability.

Procedural Justice

38. Third, the concept of procedural justice of empowering the beneficiaries of development (i.e. workers and communities) to define their own development trajectory is a critical component. This principal is vital to the justness of any transition and has been central to the demands of communities and civil society. It is further an emerging norm of international and regional human rights law, as evidenced in the United Nations Guiding Principles on Extreme Poverty and

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

Human Rights¹⁸ and the jurisprudence of the African Commission on Human and Peoples' rights.¹⁹

39. In the theory of change, procedural justice consists of two key outcomes. First, 'inclusive and participatory decision-making structures.'²⁰ Second, processes at national, regional, and local levels that allow people to take charge of their economic destiny, with a responsive and effective state that engenders a more dynamic and equitable economy.²¹ These components are both vital to procedural justice.
40. Two main means of achievement are provided, the first being 'Supporting worker and community organisations (unions, civics, advocacy groups, etc.) to participate actively in just transition policy-making processes, ensuring decisions are made in their best interests and allow them to take advantage of opportunities.' The active participation of worker and community organisations in decision-making is critical. For community-based organisations, in particular this requires material support (capacitation/education, transport to meetings etc.). We would call for the framework to go further and suggest that large companies be required to contribute (possibly in the form of a levy) to funding the autonomous organisation of communities (including training and capacitation, administrative and organisational etc. needs)
41. The second goal is 'collaborating actively with a range of stakeholders allowing each to play to their respective strengths, fostering a more dynamic, competitive, diversified, and equitable economy.'²²
42. We would suggest strengthening the formulation of this principle further to include the right to free prior and informed consent of communities where mining and other invasive activities occur. This would bring the draft Framework in alignment with the United Nations Declaration of the Rights of Indigenous Peoples²³, Section 25 (6) of the Constitution²⁴ and the Interim Protection of Informal Land Rights Act.²⁵

¹⁸ Paragraphs 36-41 of the United Nations Guiding Principles on Extreme Poverty and Human Rights A/HRC/21/39.

¹⁹ Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya para 226..

²⁰ Draft Framework at 9.

²¹ Ibid.

²² Ibid.

²³ Article 32 of the United Nations Declaration of the Rights of Indigenous Peoples 61/295.

²⁴ Constitution of the Republic of South Africa, 1996.

²⁵ Act No. 31 of 1996.

As the framework acknowledges mining for clean energy inputs (platinum, vanadium, cobalt, copper, manganese, and lithium) will be a fixture of a green economy but for it to occur in a just way, communities need to be afforded the leverage provided by their continuous consent right.

43. Another barrier not addressed in the framework is lack of transparency and access to relevant information environmental and economic information both within government and held by corporations.

E) AT-RISK GROUPS

44. Any just transition framework, plan or law needs to anticipate which sectors stand to be either negatively impacted by climate change itself or by the measures to address climate change on their value chain. This is a necessary step in identifying vulnerable workers and communities whose ability to earn a livelihood requires protection. The draft framework in this regard identifies the coal, auto, agriculture and tourism value chains as particularly vulnerable.

45. Crucially the just transition framework does recognise that burdens are disproportionately borne by vulnerable groups such as women and youth as well as the need to design just transition initiatives (whether in relation to skills development, job creation or ownership) in a manner that targets them as beneficiaries (e.g. training).²⁶ For example, it acknowledges that climate change will have an especially acute impact on women in communities relying on subsistence/small-scale farming.²⁷ These women do not have access to capital/financing, education (majority have not matriculated) and feasible alternative sources of employment where they²⁸. The framework recognises environmental rehabilitation of land as a possible source of livelihoods.²⁹

46. There are, however, still important aspects to the intersection of gender oppression and the effects of climate change that are not acknowledged in the framework including vulnerability to gender-based violence as well as a holistic account of the

²⁶ Draft Framework at 3, 8, 9, 12, 18, 19, 22.

²⁷ At 12.

²⁸ Ibid.

²⁹ Ibid.

heightened care burden on women as a result of declining access to water and other resources critical for this work.

F) PLANNING ELEMENTS

47. The draft Framework provides for five planning elements in order to ensure the identified at risk groups have the necessary skills and resources to enjoy.³⁰ Our comments in this regard are limited to the elements of governance and financing.

Governance

48. The element of governance is defined in the framework as inclusive of national governance, provincial and local governance, corporate governance and multi-stakeholder governance. CALS has gained insight into multi-stakeholder fora and community participation processes through our research and advocacy activities. We have observed both the achievements and the challenges.³¹

49. We welcome the Strategy's recognition of the need to address several of the issues that CALS and other partners in civil society and communities have identified as frequent challenges that need to be overcome for the interests of communities and vulnerable groups to be represented and influence decision-making. One of these issues is transparency. Transparency of multi-stakeholder bodies has internal and external aspects. First, internal transparency entails dissemination of all critical information to all representatives on multi-stakeholder bodies. Second, external transparency regarding the proceedings and decisions of the body itself. This is vital because community-based organisations as well as organised labour answer to broad constituencies. A free flow of information strengthens the ability of membership to hold leaders to account.

50. Another very important matter is clarity on the relationship between the outcomes of multi-stakeholder processes and formal decision-making processes by government entities. A PhD thesis on environmental spatial planning processes and tools by Dr Louis Snyman of CALS has found that clarity regarding the status of planning tools emerging out of multi-stakeholder frameworks such as Environmental Management Frameworks (EMFs), Spatial Development Plan (SDFs) and Bioregional Plans is one of the important factors in them having their

³⁰ Ibid at 17-23.

³¹ See, for example, Centre for Applied Legal Studies *The Mapungubwe story: a campaign for change* (2015).

intended impact.³² We are therefore pleased that the framework states that government should clarify these questions when setting the multi-stakeholder bodies up.

51. Another set of challenges we have often observed in multi-stakeholder processes³³ pertain to community capacitation and the design of the process to maximise community participation and vulnerable groups within communities including women, youth and persons living with disabilities in particular. Too often we have seen a number of recurring problems including very short notice of meetings (2 days or less), an absence of materials/drafts to be able to prepare before the meeting, the failure to provide transport to independent grassroots activists, and the proceedings not being conducted/translated into the predominant first language of communities. We are encouraged that the draft Framework provides that

‘...deliberate efforts should be made to identify vulnerable groups and tailor-make processes to include them in consultation (e.g., provision of childcare, travel support, multiple languages) and implementation of policy.’³⁴

Financing of a just transition

52. A shift to an entirely new economy and ensuring that the economy benefits workers, communities and marginalised groups (including women, children and people living with disabilities) requires major shifts in the flow of capital to finance it. The draft Framework therefore provides for measures to finance the just transition. These measures are divided into three strategies, namely the preparatory (‘research, analysis and engagement’), ‘regulations, reporting and decision-making’ (“greening finance”) and setting up ‘instruments and institutions’ (“financing green”).³⁵

53. The focus of the research, policy/decision making and instruments/institutions do, however, appear to be primarily on financing a transition to a climate neutral energy system and economy rather than on the justness of such a transition in line with the principles of the framework such as distributive justice, restorative justice and

³² LG Snyman *Environmental Spatial Planning: Achieving Sustainable Development in Sensitive Areas* (PhD Thesis, University of Witwatersrand, 2019).

³³ But, also, official public participation processes more broadly.

³⁴ Draft Framework at 23.

³⁵ Ibid at 24.

procedural justice. One of the only specific measures clearly linked to the justness of the transition is:

‘Creating a business case for just transition projects that ameliorate the negative impact on workers, communities and SMMEs in the fossil fuel value chain, with a particular focus on identifying financing mechanisms for projects that might not be commercially viable on a stand-alone basis.’³⁶

54. This, however, is a measure that seeks to rely on the goodwill of the same for profit companies that have created the climate crisis, other current and past environmental injustices and the hyper-exploitation of labour in the pursuit of profits. What appears absent, are measures that specifically give effect to distributive and restorative justice by requiring the same companies and their wealthiest shareholders to finance the justness of the transition – including the funding of a green ESKOM and community and worker-controlled co-operatives – through taxation.

G) POLICY MEASURES FOR IMMEDIATE EFFECT

55. The draft Framework usefully sums up all proposed concrete policy measures to achieve a just transition in the form of a table (‘Action Plan for a just transition’).³⁷ The plan is organised into a clear logical flow. It identifies many of the most important imperatives in achieving a just transition. In these comments, we shall not discuss every imperative in the programme, but will discuss just one of them namely the need to address the ‘limited success to date of efforts to diversify the economy and promote engagement by working people on economic policy.’³⁸

56. Some important shorter-term measures are identified to achieve this. The first is the PCC’s establishment of networks/forums to bring together affected workers and communities with officials and policy researchers to share information and ideas.³⁹ Second the PCC’s establishment of an annual conference on strategies for the just transition.⁴⁰ Third, the building of capacity to develop strategies from these engagements.⁴¹ Fourth capacitating membership organisations who are listed as

³⁶ Ibid at 24.

³⁷ Ibid at 26-32.

³⁸ Ibid at 31-32.

³⁹ Ibid at 31.

⁴⁰ Ibid.

⁴¹ Ibid at 31-32.

small business association, unions, civics, cooperatives, ward committees and community-based organisation.⁴² Funding for such membership-based grassroots and working class organisations is a major challenge presently which is recognised by the plan which provides that the ‘PCC to engage with Presidency on financing for membership-based organisations).⁴³ We are of the view that such funding is required and not a nice-to-have. We would suggest, as stated above in our comments in relation to procedural justice that this might be financed as a levy on companies as part of a broader fund for community capacitation.

H) CONCLUSION

57. Thank you for providing the opportunity to provide input. For queries and further information, please contact Robert Krause (Researcher) at Robert.Krause@wits.ac.za or 081 427 7818 or Dr Louis Snyman (Head of Programme) on Louis.Snyman@wits.ac.za or 083 355 6482. CALS welcomes any opportunity for further engagement on this Just Transition Framework.

⁴² Ibid at 32.

⁴³ Ibid at 31.