

# **Expanding the Scope for Social and Economic Rights**

## **Litigation in Ghana and South Africa**

### **South Africa Workshop White Paper**

#### ***Toward a New Constitutional Political Economy – Transition and Transformation***

Dennis Davis, Julia Dehm, William Forbath & Lucie White

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##### **INTRODUCTION**

South Africa is in the thick of crisis. It goes without saying that great economic inequality is a longstanding legacy of apartheid. Yet even so, the present crisis is marked by deepening antagonism between social classes, an ever-growing distrust toward government and political elites, and mounting rage and despair among the poor black majority. Indeed, many claim to distrust the possibilities of democratic politics to make good on the egalitarian promises of the nation's twenty-one year old Constitution. The most thoughtful observers and farsighted participants in the nation's public life doubt that its democratic institutions can endure without radical reform. As we set about planning the first workshop of the South African leg of this project, in late 2016, the moment seemed to call out for a somewhat broader conversation than the ones we staged in Ghana. The interplay of constitutional social and economic rights and political economy – and the uses of “heterodox” economics to pursue generous social entitlement and equitable economic development - would remain the focus. But rather than centering the first South African workshop on extractive industry alone, we decided to begin with more fundamental questions.

Our thinking started here: The South African Constitution is celebrated for its transformative vision of egalitarianism, economic and social rights, redistribution and restitution. Yet much of this vision seem as remote as ever. South Africa has undertaken a social grants program to alleviate extreme poverty, as large as any the world has seen; it has made major leaps in employment. But the leaps fall far short of the nation's population growth; and South Africa, despite its enormous wealth, remains

one of the most economically unequal and divided countries, with mass joblessness and underemployment, enormous shortfalls in basic education, levels of economic inequality higher than in 1994 and tepid levels of economic growth. The growth of the black middle class and the emergence of a new black professional class and a wealthy black economic elite: all have unfolded alongside continued dispossession and deprivation for a majority of black South Africans. Black dispossession and deprivation remain engrained in structures of economic and social life inherited from Apartheid. Yet, these structures are ones that the Constitution itself, at least in its aspirational language and its promises of social and economic rights, seems to condemn. They are structures of profoundly unequal wealth, power and opportunity that repeated programmatic statements and grand policy initiatives of the ANC also have promised to upend.

Alongside these grand policy initiatives, there continue to be great investments of hope, resources and formidable legal talent in the sphere of constitutional social and economic rights (SER) litigation and advocacy. Yet, the transformative potential of both has come to seem blocked, constrained and stymied – by the politics of corruption, cronyism and “state capture,” by the limitations of current judicial doctrine, and by the broader constraints, both real and imagined, of market “imperatives” and fiscal “responsibility.”

There is thus a concurrent need to rethink national strategies of inclusive, equitable development and of SER realization within the Constitutional framework. Our wager is that one fruitful exercise for getting beyond this impasse is to consider what kinds of political-economic arrangements the Constitution may demand and depend on to bring its social democratic and egalitarian aspirations down to earth. Such an inquiry would require real give-and-take among both economists bold enough to challenge the taken for granted constraints that their discipline demands and equally heterodox constitutional scholars and lawyers, who dare to rethink both the text and the practice of South Africa’s constitutionalism in ways that both open up and move beyond the so-called courthouse doors. This project relies on understanding economics as not just rule and calculation. It calls for “reading” the Constitution not just as text and doctrine, but also as an articulation of the values and principles through which South Africans aspire to constitute themselves as a polity and society.

Subject to a new form of critique to be discussed in this White Paper, such a robust conception of constitutional identity has been, and still remains active, for the time being at least, in South African politics. This conception of the Constitution as a project of social justice has shaped the nation's legislative practices and conventions as well as its judicial lawmaking. This conception has always called upon the constitutional project to ensure more than "formal" rights. Thus, in turn, it is meaningful, if not imperative, for us to consider the constitutional project as an *economic and social* as well as a *legal and political* challenge. Put differently, we must envision the "progressive realization" of SER that is entrenched in both UN Human Rights treaties and South African jurisprudence not only as a legal question but also as a question of economic design. The question of "redeeming" South Africa's constitution, then, must be a project that forthrightly pursues its SER promise in many registers, including what empirical economists might call downright "material" terms. That means more than feel good rhetoric. It also means moving people closer to full "capacitation". It means enabling them to experience better housing and healthcare and education. It means enabling them to get better work and come closer to a fair and decent way of life. Only as we, as legal scholars, listened to the workshop discussion did we absorb the depth of this challenge; only then did we fully comprehend the need for our project. For the collaboration of South African constitutional lawyer - scholars and heterodox economists, like those who took part in this project, at this juncture in South Africa's history is not a luxury; for the deep rethinking of South Africa's living *constitution* that the current crisis calls for cannot be done by lawyers alone.

This hope cannot be realized, virtually all the participants agreed, without some dramatically new forms of equitable and sustainable economic "growth." There was much fruitful debate, though, about the visions and strategies for how best to achieve it. And setting forth that debate in greater detail is a chief object of this Paper.

We titled the May, 2017 workshop "Toward a New Constitutional Political Economy – Transition and Transformation," and our invitation asked "a small number of heterodox social and economic thinkers and leading policymakers together with prominent social and economic rights advocates to step back from our everyday work and explore the prospect of reconstructing the South African political economy." It continued with an account of what seemed improbably "large ambitions" for a two-day workshop:

We are convinced that South Africa cannot make good on the egalitarian commitments in its Constitution without political-economic transformation. The mining sector must be decentered from its current role; at the same time, it must be radically reformed; other sectors, formal and informal, must combine growth and equity in dramatic new ways...We hope to use the workshop's first day to explore the broadest visions of transformation through conversations led by several of you. The second day will focus on such themes as: a democratic transition away from a mining-centered economy; reimagining a new social contract in the mining sector; reimagining taxation, competition law, and property; and reconceiving the future of work, livelihoods and the distribution of wealth and economic power – and the roles of organizing, legal advocacy and policymaking, as well as institution building in these pursuits.

As signaled above, this decision to think large proved wise. An extraordinary group of leading state officials and policymakers, along with state-, university-, and NGO-based economists, sociologists and attorneys agreed to participate; and from all quarters we heard that the far-ranging exchange of ideas, rival visions and practical insights could not have been deeper or more fruitful. The enthusiasm for continued cross-disciplinary collaboration on the part of prominent and seasoned – and intensely busy and over-burdened – participants seems remarkable.

The workshop took place at the Kramer Law School at the University of Cape Town on May 21-22, 2017. (See appendix A for the workshop program and appendix B for the workshop participants and their biographies.) What transpired was an exploratory effort that brought legal and constitutional thought and practice into conversation with heterodox development economics in order to imagine new theories, pathways, projects and strategies aimed at bringing the social democratic and egalitarian aspirations of the twenty-one-year-old Constitution down to earth.

To make the two days' of talks and exchanges as candid and freewheeling as possible, participants agreed to observe "Chatham House rules." Thus, information and ideas were deemed open for common use and reporting, but not the sources or identity of speakers. Thus, in what follows we frequently make mention of what one or more "participants" discussed, observed or had to say, but never in a fashion that identifies who they were. The one exception is with respect to Minister Ebrahim Patel's opening keynote, which is described in some detail, with his permission.

## SUMMARY OF WHITE PAPER

The Paper's first section is a sketch of the Workshop's remarkable plenary session. The session began by our setting forth our own understanding of the present conjuncture, our motivations for calling the group together, and our working hypotheses for the workshop.

Then, Ebrahim Patel, South Africa's Minister of Economic Development, delivered the workshop's keynote address, which offered a remarkably provocative set of reference points for the entire workshop. Patel's address offered a detailed reflection on the history of the democratic transition in South Africa, first exploring four key moments of missed opportunities and thwarted initiatives for more equitable economic development between the early 1990s and the present, and then offering a broad range of future possibilities. Patel's remarks, in turn, opened up an initial exchange about the nature of the constraints and barriers that thwarted these missed opportunities, and stood to stymie future ones. Because of the significance of Patel's remarks to the entire workshop, the White Paper's first section maps it. The paper's second section tersely sets out participants' views about the nature of past and present barriers to radical reform on the South African scene – and the key impediments to overcoming the nation's enduring mass deprivations and deep asymmetries of wealth and power.

Running through the second section is a deep cleavage in the current thinking among South Africans, and thus workshop participants, about the very capacity of present national institutions for deep structural – constitutional – change. Quite simply: Does South Africa's democracy have the leadership and institutional arrangements at present that are capable of overcoming the most challenging barriers and enacting the kinds of deep, redistributive political-economic reforms that participants agreed were necessary to realize its constitutional aspirations? Or will such measures come about, if at all, only as a result of far deeper rupture and crisis, some greater series of upheavals and even episodes of constitutional breakdown – “states of emergency” – and subsequent reconstruction? Put differently, many participants insisted that the “primary distribution” of wealth and power over the nation's economic resources and productive property must be revisited. As one put it, evoking the metaphor of a “new social compact”: the owners of capital and labor must be willing to “put everything on the table” and decide together upon “what they can give up” for the common good. Yet

this very participant doubted whether the “leadership” existed for any such new deal. Others, of course, demurred, insisting that all politics is a wager, betting on deep reform remains a decent wager, and there are no responsible alternatives.

Inter alia, this party of hope suggested, it would help if more highly educated and reform-minded young South Africans were inspired to enter government, thereby enhancing the capacity of state institutions to function efficiently in pursuit of the overall transformative objectives foreshadowed in the Constitution.

For our part, what we – as a group of constitutional thinkers – took away from this strand of conversation was this. “Peaceful revolution” captures the combination of radical redistribution and non-violent action that embodies what all agreed would be the best – and only non-catastrophic – way out of the present impasse – however, long a wager that outcome may be. And, as the subsequent parts of the discussion, and this Paper go on to show, participants were not shy about the daunting challenges of institutional reform that the path of “peaceful” reform appeared to them to entail. In particular, what the “peaceful revolution” path seemed to them to demand, as a matter of institutional reform, is a devilishly tricky combination of making institutions of governance (i.e., both state institutions and “private” ones, like the unions and corporations) at once more deeply democratic and accountable, and, at the same time, more autonomous vis some vis one another and thus more “capable” of instituting serious economic and social reform. The participants’ idea here was to overcome the “capture” of institutions by powerful, self-aggrandizing oligarchic actors through a process and practice of reinvigorating democratic processes at each level. This would entail two recursive moves: (a) reinvigorating democratic processes at every level by opening up such institutions far more fully to engagements “from below” while also (b) using such democratic forms of engagement to empower reform-minded state elites to undertake redistributive reforms while protecting them from would-be oligarchs.

Tricky but hardly unprecedented. This has been the general path of major “New Deal” style reforms in democratic capitalist nations for over a century. It has always involved messy compromises amongst social movements, radical reformers and so-called “machine politicians”. But such a path of non-violent change is indeed a potential, if not a certainty, for South Africa, despite its grave problems, continues to have a robust social movement culture, a remarkable complement of gifted and

responsible radical reformers – in high state positions as well as in NGOs and the universities – and a decent array of “machine politicians” who remain committed to democratic institutions and are not given over to rank self-aggrandizement.

We will return to this idea of deep-democratization-as-undergirding-for-more-capable-statecraft throughout the Paper. Following our recap of participants’ views about the barriers to deep economic reform, and a mapping of the ensuing debates, we turn to a ruthlessly distilled account of participants’ distinctive visions of just what kind of new economic order, based on what paths of development, logics of growth (and imperatives of sustainability), the nation should strive for. Some of these visions of development stand sharply at odds with one another, while others were complementary. A major feature of the Paper analyzes these patterns of convergence and tension, which taken together comprise a larger landscape of untested political / economic innovations.

From visions, we turn finally – and, again briefly - to arraying the strategies, projects, sites and goals of legal advocacy, policy-making and institution-building that arose from and instantiated these visions in the course of discussion. Here, we start from a sphere of broad strategic consensus – and critical theoretical importance, a site where the bridge-building between the development conversation and the constitutional one could begin in earnest. As noted in the introduction above, above, that is the sphere of social and economic rights (SER). Three central points which emerged early and often over the course of the workshop, have particularly rich implications for revising constitutional discourse and doctrine. Thus they are set forth in detail below.

The first of these points is Minister Patel’s suggestion that along with the conventional focus on welfare and social provision, SER discourse must embrace a right to decent work. South African constitutional rights discourse is notably less focused on the sphere of decent work and livelihoods than other social-democratically-inflected constitutional traditions. The second point is the notion that the dichotomy between social and economic policy is false, or at least overdrawn. We have already noted that *economic* policy must be reconceived in order to underwrite the South African constitution’s social rights guarantees. So too, in the words of a workshop participant, what is conventionally considered to be “social policy is [and must be reconceived as] economic policy”. In other words, the provision of education, healthcare, housing and the like consists of the “endowment” of “goods” that not only



underpin human dignity but also foster equitable economic growth and development. Put in more traditional constitutional terms, these SER-based individual entitlements – or endowments” – equip people to participate fully – and with a fair measure of equal opportunity – in economic, social and political life. The third and related point arose from Judge Dennis Davis’s elaboration of this point in the key of Amartya Sen. SER should be understood as “capacitating” individuals as fully as possible for participation in political, social and economic life. The idea here is that SER are essential to human dignity and welfare, but not only that. They also sound in the key of equality of opportunity in the sphere of work, livelihoods and rewards to effort and social contribution. What is more – and this is Patel’s and the other participant’s point – SER should also be conceived – in both their statutory and judicial/doctrinal elaborations and administration – as elements in broader strategies of inclusive and equitable economic development.

Such an approach to SER, Judge Davis pointed out, is quite harmonious with South African jurisprudence; it is already implicit in some doctrine, and seems ripe for deepening and extending. Consider, for example, the theme of proximity to job opportunities in the jurisprudence of housing rights. While this theme sounds in the key of fair equality of opportunity in the sphere of work and employment, it also fits with the developmental idea of making good use of human and social capital.

Beyond this core theme of recursive action between social endowment and economic “development,” a second element of broad strategic consensus, also addressed in the Paper, returns us to the idea that deep democratization must undergird the project of “capacitating” the South African state. For it is only through this process of deep democratization that state *craft*, rather than state *capture*, becomes possible.

In short, what emerged over this strategy-focused part of the workshop was the idea that the constitutional political-economic project should aim for what economic and social theorists often call a “virtuous circle” or “cycle,” wherein democratizing reforms might evolve in tandem with “capacitation”-based reforms, so that social movements of poor citizens striving for SER (thus conceived) find an increasingly more responsive and participatory set of governance institutions through which to demand and authorize and also participate in the design and administration of more adequate forms of social provision and economic opportunity.

Because this hope of a “virtuous circle” – among social movement, state action, individual endowment, and economic opportunity – is key to our concept of “capacitation,” let us elaborate more fully how the dynamic can work. To enter the process, robust social movement can challenge institutions of governance to strengthen the state’s capacities while expanding individuals’ discrete endowments such as housing, healthcare, and education. Then, as both people *and* the state enhance this respective “capacitation,” the people can act more effectively in every sphere. For instance, they can more easily pursue formal channels of legal engagement such as litigation and legislative advocacy. They can more readily take part in arenas of democratic opportunity in workplaces, local government, faith communities, and the like. They can come together more powerfully, in social movement perhaps, to secure better individual endowments. They can become more committed and creative as economic players and more “present” as members of families, communities, worker organizations, participatory governance bodies and other domains of their lives. Such dynamics of multiplex “capacitation” of the state, constitutional culture, governance institutions, political opportunities – and individuals – can in turn drive an increase in individual endowments, an expansion decent work opportunities, an enrichment of democratic constitutional culture. What would then follow is the even greater capacitation of individuals, social movement, a wide range of institutions, and the state.

Following our sketch of this broad strategic outlook, we turn, in the Paper, to the array of more specific economic reform strategies and projects discussed during these remarkable two days. Our object here is to set out the range of these ideas with just enough specificity to enable readers to comprehend the range and depth of the discussion while also helping the South African participants bring them back to mind. Even while this Report is written, this group is considering whether to hold a further workshop devoted to one or more of them, for as we were reminded at the workshop, the Devil is always in the details. The idea here is to make choices with an eye for those projects, which show the greatest possibility for seasoned activists, advocates and policy-makers to reckon with the political and institutional facts on the ground in a way that can lead to collaborative efforts that harness heterodox visions of development to innovative advocacy.

## **A STARTING POINT: MINISTER PATEL'S KEYNOTE**

Many participants share direct experience of Apartheid era struggles and post-1994 service in the ANC government. As such, they have seen what is possible when law is joined with robust social movement, bold social rights jurisprudence, and emancipatory political vision. They rejoice in South Africa's accomplishments, which have been enabled by a social democratic political consensus, with a Constitutional Court willing to enforce doctrinal SER guarantees. At the same time, though, they are deeply aware that, for most of South Africa's people, those hopes were not experienced in their everyday lives. Participants are acutely aware of the widespread distrust of government and other representative institutions, disengagement, and anger that pervades society. People feel an overwhelming sense of fatigue over the gap between the government's rhetoric and its service delivery, let alone the more capacious promises of the post-Apartheid Constitutional order. Tension is increasing, not just between socioeconomic classes, but also between workers and managers, traditional authorities and villagers, and similar groups. Participants agreed that in the face of this crisis progressive scholars and activists must work on two fronts at once: building the power of individuals and communities in inclusive ways – we call this “capacitation” – and reconceiving South Africa's Constitution as constitutive of a bold “economic” vision in which law and the economy work together to capacitate individuals, institutions, and the state. The group believes that such change, though sweeping, is also feasible, particularly if set forth deliberately and realized through pragmatic pathways of change. This was the group's broad consensus. What follows is an account of the debate and conversation through which participants reached it. We begin with a point by point summary of the keynote intervention by Minister Ebrahim Patel. The sections that follow will use his remarks as a springboard for setting forth several contrasting “visions of growth” followed by the key “strategies for change” that we recommend in order to realize their potential.

Minister Patel began by posing the question of why South Africa is in its current crisis. In response he identified four moments of “missed” opportunity to reshape the political economy that the South African government did not take after the Apartheid government lost power in 1994. These are:

1. *The Period immediately after the 1994:* This was a period of violent struggle in communities and workplaces. The ANC's Reconstruction and Development Program (RDP) was an ambitious plan for addressing needs that had been denied during Apartheid by expanding the economy, employing more people, creating programs to meet basic needs, and developing human resources. It laid out proposals to expand the manufacturing base within a framework of worker rights and the right to participate in economic decision-making. Important changes were made to labor law. The competition law was changed to reflect a novel approach to the public interest embracing employment and entrepreneurial opportunity along with controlling cartels and other dominant market forces in the interest of the public. But there was a strong push-back against the vision of the RDP from holders of economic power. During this time, the Washington Consensus promoted by the World Bank and the International Monetary Fund (IMF) gained a dominant place in the nation's macroeconomic planning. Thus, fearing collapse in the value of the currency and a resulting failure to attract foreign investment, key figures in the ANC felt increasing political pressure to adopt an approach more focused on macroeconomic "fundamentals," in the hopes of creating a "business-friendly" environment. As a result, the Growth, Employment and Redistribution (GEAR) strategy was adopted in 1996. Its goal was to attract foreign investment by demonstrating "responsible" management of the economy. This led to trade liberalization, arguably without the countervailing industrial policies required for social protection. Thus, the RDP vision was torn apart and a decade-long internal "civil war" within the ANC about policy direction ensued.
2. *The Period of the Resource-commodity boom:* The 2000s saw what many commentators have described as a "once in a generation" commodity boom or "supercycle", principally fueled by Chinese industrialization. As a result, export earnings from South African mineral commodity exports grew substantially, enabling greatly increased programs of social spending and the repayment of significant levels of apartheid-era debt. The mineral boom allowed for increased social spending and poverty reduction. But it was not mobilized in strategic ways to address inequality or to restructure the

economy through investment in industrial capability and infrastructure such as electrification. Now that the commodity boom has ended, it is evident that the broader opportunity it presented was at least partially missed.

3. *The Global Financial Crisis*: When the Global Financial Crisis (GFC) hit, South Africa was vulnerable. The economy lost about a million jobs. Following the 2009 elections, South Africa went into recession for the first time since the democratic transition. In response, three policy positions emerged within the ruling ANC party: (1) a fairly orthodox position, with a strong focus on social welfare provision, that sought to continue previous policy frameworks; (2) a strong call for nationalization of key industries, driven primarily by the ANC Youth Wing; and (3) a focus on active industrial policy and “decent work” that sought to revive the spirit of the RDP. The third ultimately prevailed. The “New Growth Plan” (NGP) was adopted approximately a year later. It proposed a new “grand bargain” where key actors – labor, big business and the state – would all have to give something up for the common good. It promoted industries that would be “job drivers” as well as targeted skill development while also advocating infrastructure development, rural development (agriculture and tourism), and space for a more accommodating monetary policy and competitive exchange rate. But the grand bargain failed to materialize because labor was suspicious of the plan as “neoliberalism in drag” while business resisted the degree of state involvement in its activities.
4. *The Period of the National Development Plan 2030*: The National Development Plan 2030, developed by the Planning Commission and released in 2013, offers a long-term development strategy. Its objective is not GDP growth, but job creation. A key concept is the “capable state” – one that can implement as well as enact policy. The Plan includes several innovative ideas, especially around urban spatial development. Although both the ANC and Democratic Alliance (the ANC’s major opposition) supported the Plan, it received a lukewarm response from organized labor and emerging opposition parties. Now, four years into the plan, it is clear that several of the plan’s foundations have eroded; the governance crisis is deeper than ever, nowhere more so than in state-owned companies; and the nation needs significant institutional reforms.

After mapping this history, the Minister identified several priorities for moving forward. The most important is to promote a vibrant public sphere which can encourage broad-based commitment to the Constitution, plural visions of the economy, and core social values such as the right to decent work, thus relinking people's sense of effort and reward. He pointed to the Indian government's rural employment scheme and other public employment programs around the globe, and also noted that the social costs of firms shedding workers as firms become more efficient has not been factored into the cost of doing business.

At the same time, he urged the public to rally against state dysfunction, thus drawing more bright young thinkers into government service. Finally, he called for policies to target economic concentration, so as to allow more players to enter the market, thus decreasing extreme economic inequality and increasing domestic capital investment and job creation.

To address the challenges that Patel outlined, the participants agreed substantial change is needed. But "transformation" is a vague way to describe it, for the term invites a false sense of agreement across disparate perspectives. Thus, some participants preferred the language of "liberation" or "democratization". In this White Paper we use "capacitation" – of the state, economic, social, "cultural," and community institutions, and individuals themselves. As we explain below, we use that term across these spheres to convey capacitation's multi-layered meanings and synergies.

During the discussion following Patel's remarks and continuing through the workshop, participants repeatedly called for such "capacitation" in the domain of the state. Everyone shared the sense that the state's incapacity might be the trigger point for its current crisis. One theme that participants linked to the state's incapacity is that of "state capture." Several forms of state capture were given. One is the familiar example of state officials "capturing" bribes and formally "legal" "rents" by exploiting their positions. A second form of state capture is particular to South Africa and other post-colonial nations. This is the way that the "customary" legal systems and tribal authorities set up by colonial and apartheid-type post-colonial governments have been delegated state power that they then "capture" to promote their own rather than their "subjects'" well-being.

In many state systems, the first form of “capture” can be addressed by existing anti-corruption law enforcement. But where such capture is formally “legal” a deeper challenge is presented, for all “corrupt” state officials – and colluding private actors – are, as one participant observed, responding not to the public interest but instead to a parallel set of norms. Challenging this “mafia” style system, as one participant named it, presents a conundrum. The reason was explained by another speaker: South Africa now has parallel and mutually entangled systems, namely a constitutional system founded on the rule of law, and an informal political system of patronage, rent-seeking and violence. This “informal system” blocks the formation of a unified – and “capacitated” – state because deeply entrenched interests benefit from the formal state’s failure to implement progressive policy objectives. The systems keep each other going because as the formal system enacts redistributive policies, the informal system blocks them, thus increasingly forcing people to access entitlements through the “corrupt” informal system.

This “distribution through informality” takes place at all levels, including the local. The method is used by both elites and the poor to make claims – both authorized and illegitimate – on the state. The danger of this system of pervasive patronage is great, for it embeds both chronic instability and the continual risk of violence into the interstices of governance. Representation at all levels of government, as well as unions and other institutions, becomes a nexus of informal patronage economies in which value is eroded, the social fabric frayed, and democracy subverted.

The other process that might be called state capture is South Africa’s system of chieftaincy and customary law. This presents its own challenges, for it requires teasing apart pre-colonial lifeways from (post) colonial strategies of domination. Such sorting is critical if rural land reform, for instance, and people’s economic empowerment more generally, are to be accomplished. Yet to make progress on this front requires challenging not just statutes, institutions, and (failures) of implementation, but the parameters of statutory and constitutional deference to customary legalism at its foundation. The depth of this conundrum of “customary law” was manifest at the the workshop. Participants experienced in this area explained how land policies adopted by the government have replicated apartheid power structures, authorizing chiefs at the expense of local populations, and thus embedding gender and power hierarchies and ensuring the underfunding and inadequate implementation of restitution.

The problem of state capture raises broader challenges about how to develop a “transformative” – or even more modestly “reform” – oriented – agenda when state leadership, personnel, and institutions are crucial to the enactment and implementation of any such initiative. If the current state apparatus is “captured” and its capacities undermined in the ways set forth above, why talk about ambitious policies at all? For over and over again, participants reminded us that any ambitious program, of redistribution, for instance, or of state capacitation itself, would in turn depend on a “capable state” for its realization. The only rejoinder was that one could not be caught up in this logical quagmire: substantive economic reform had to go forward while state capacitation was also taking place – both at the same time. Thus, only the concurrent reform of both state institutions and substantive policies could drive a “virtuous” circle of progress that might move the South African state beyond its current crisis over time. Such a project in turn requires two kinds of diagnostic “mapping.” On the one hand, the best substantive economic policies for enhancing equitable distribution must be identified, at least provisionally. And at the same time, promising sites for progressive state action must be targeted. Thus we have a “two-pronged” policy project – creative economic policy and astute institutional reform programs – both of them in motion at the same time.

### **VISIONS OF GROWTH WITH REDISTIRBUTION**

As a preface to this section it is worth noting that although Minister Patel referenced the influence of the IMF and World Bank on South Africa’s neo-liberal turn, the group did not discuss this turn at length. Nor did participants speak more generally about how global institutions or geo-political forces have affected South Africa’s political economy, constraining economic pathways that might otherwise be available to it. It is puzzling why more conversation did not focus on such global contexts for South African national policies. Such questions are among those that warrant follow up workshops.

What participants did discuss, however, in addition to “state capture” and capacitation, was the multiple growth visions that South Africa might pursue. The discussion was rich and far reaching. In this section we sketch several of these visions. Pushing beyond this most basic question, participants zeroed in on the crisis of inequality and the challenge of redistribution that it presents. Another recurring theme



is the concentrated power of “big” capital, particularly when it monopolizes entire sectors and industries. A third is the urgency of land restitution and urban spatial reform in the post-apartheid state. And the overarching theme which links all three is the need for a capacitated state to dismantle the deep structural legacies of colonialism and Apartheid, *tout court*.

Participants emphasized the urgency of such deep structural reform. They called the current distribution of land and wealth “flagrantly illegitimate” among non-elites. Indeed, according to some participants, a great many of the least privileged South Africans believe that “all property is theft.” While this belief is grounded in the colonial and apartheid-era land policies, particularly expropriation, removal, and population registration, the belief has endured because of persistent inequality, consolidation of wealth by black elites, and profound state incapacity. One noted that “opportunities were lost before they even came. Outcomes were constrained in advance. We haven’t addressed the roots of the current situation, including colonial dispossession. We need to decolonize, first.”

It is striking that none of the participants believe that the Constitution’s property clause impedes redistribution. Rather, they agree that the clause’s redistributive potential has not yet been tested by creative advocates before the Constitutional Court. That is, the group’s legal scholars noted that the Constitution’s current, common law-based property jurisprudence is amenable to far more progressive interpretation within the Constitution’s existing frame. Such points are important to the overall White Paper’s project because they suggest that deep redistributive reform in the law of property may not require replacing or dramatically changing the current Constitution, as some might argue, but rather reinterpreting – re-litigating – it in more creative ways. Such legal strategies must in turn be shaped in dialogue with visionary strategies of both economic growth and equitable redistribution, taking place in synergy. But, to return to the prior theme, such a jurisprudence will have little meaning in the long run unless implemented by a state that is capable of the task.

The precise link between growth and redistribution provoked a lively conversation. One point of consensus was that redistribution of a minimally adequate endowment of social goods for each person could not be accomplished without *some* form and “amount” of “growth.” The “no-growth” position, though one hears it today,

was, in their unanimous view, a non-starter. Beyond that consensus, though, there were multiple visions for how growth might best happen, as set forth below. Throughout the discussion of each separate vision though, the underlying question where redistribution fits in to each vision repeatedly recurred. Briefly set forth: should we pursue GDP growth and wealth / income redistribution in sequence, with one or the other delayed, or should we undertake them at once, so as to build on one another? And how much redistribution is optimal, and with what targets, from a growth policy perspective? Such questions are critical in order to map out alternate growth/redistribution policy alternatives. Yet a two day workshop did not give us time to take on this project with any rigor: it, like several other questions, must be deferred and revisited in a follow up workshop.

In broad outlines, though, a debate emerged about the urgency of redistribution “first.” Participants repeatedly reminded the group that South Africa is a “society characterized by profound dispossession that has not been dealt with.” They noted how policies that tried to put off redistribution had invariably failed. The “growth and” camp argued that rapid growth was urgent, noting that “demographics” create a need to “grow the pie” right now, at least enough to drive down the jobless rate and keep up with population growth. If we follow the IMF’s dogma, such a position might – but need not – call for holding back on “too much” redistribution until growth “takes off.”

The precise relationship between growth and redistribution became more and more nuanced as the conversation proceeded. Some participants stressed the imperative that growth with redistribution be crafted so as to provide for the most disenfranchised and thus quell unrest. These participants noted that “addressing inequality without growth could be catastrophic for society.” They highlighted how the state depends on growth in order to sustain South Africa’s social transfer program, the largest in the world, a source of survival for many, and a major factor in reducing inequality. To foot the bill for such large public largess, political will for the current levels of taxation must be maintained (the top 10% of individuals currently pay 70% of non-company tax) and the tax base must be expanded. But because of deep inequality, the bottom tiers of the income pyramid cannot bear high taxation. And those who are currently most highly taxed benefit least from social transfer programs. Yet at the same time participants noted that there is a huge political constituency for redistribution and almost no constituency for growth without substantial redistribution at the same time.

On a different key, however, some participants noted how redistribution of even small amounts of capital, if smartly targeted, could “capacitate” individuals to enter the economy as small to medium players, so as to make a decent living via small and/or informal enterprise, contributing to overall economic “growth”, and helping to democratize the economy at the same time. Social grants and capital enhancements are not mutually exclusive though, so long as good social policy can ensure their coordination. In short, participants discussed a large number of strategies for what might be called “growth with redistribution”.

### **(1) Manufacturing-based industrial policy**

This strategy would enlist the state in crafting policy that catalyzes industrial development from the anchor-point of a specific sector. Historically, the South African state, in both the apartheid and early post-apartheid eras, relied on the mining sector to anchor this form of development. More recently however, leading development economists, including those at the workshop, have looked toward manufacturing rather than mining to drive this development vision. The idea is for the state, generally in partnership with technocratic economists and astute private sector players, to identify a promising sector that might anchor forward-looking industrially-centered development. The development itself would be driven by carefully crafted state policies for maximizing “upward”, “downward”, and lateral linkages, both domestically and internationally, that can multiply and “capture” surplus value produced throughout the “spin off” chain.

Many participants appeared to endorse this vision of development, either as the best pathway for rapid jobs-oriented development, or in combination with the others outlined below. Within the contours of the vision, however, there were many vectors of debate. First, there was discussion about how the dynamic would be situated in the global economy. Would the relevant state policy look primarily toward the export market – and spin off products in a free-trade oriented, hyper-competitive global economy or would state policies be more oriented toward building domestic markets, thus protecting chain products from global competition through tariffs, subsidies and the like? If the latter, how would the nation negotiate around the bilateral investment treaties (BITs) and WTO conditions it is obliged to follow?

Second, there was the question of what anchor industry should be favored? What governmental processes would be used to decide which industries to champion? How could the developmentalist process be “democratic,” and through what specific policies would the favoring take place? How would that favoring keep from disrupting the overall market equilibrium, disrupting prices and supply chains for non-chain products needed by domestic consumers? Participants cited to prior failed efforts to anchor such a “developmentalist” vision in mining, and to on-going developmentalist experiments with the automotive industry as the anchor. The bottom line in this discussion assessment in the workshop was that developmentalist policy judgments must be astute, and only a “capable state” that is free from “corruption” can successfully guide them, particularly over the long term.

Finally, there was some normative and political concern about what *kinds* of spin off industries were most likely to emerge from different potential anchor industries. For instance, how many jobs would be created from all of the spin offs that auto manufacture might generate? What kinds of jobs would they be, in terms of work quality, safety, and wage levels, for instance, and demographic composition of the workforce? What kinds of products and services would both anchor and spin off production put into domestic and international markets in terms of social as well as economic value? What kinds of inputs would the production chain require, in terms of mineral resources and the like? What externalities would it produce? And what levels of health, basic education, and higher order skills would the workers – the “labor inputs” – require in order to access the jobs?

By the end of the discussion there was little consensus and few definitive answers. Among the points of clear consensus were that in today’s global economy any value chain – however “domestically” intentioned – is inevitably sited in a complex transnational economic and social nexus; mining was not the right anchor industry; too heavy a bet may have been placed in automotives as the anchor industry, particularly in terms of spin-off jobs; and the “spill-overs” from any value chain must include the entire domestically sited value that is produced from all spin-off economic activities, including transferred technologies, skills, and and peripheral service-sector jobs like professional services and tourism.

Participants assumed, without much discussion that mining is not a good candidate for the main anchor industry in a democratic developmentalist vision. This is true for several compelling reasons such as: global price volatility and limited value-added in mining and other commodity sectors on global markets; work-site and community unrest in South Africa mining in particular, with related increases in labor and community – development costs, political imperatives, and normative/moral obligations; contested environmental externalities; limited job quality and diversity; and as well as the fact that deep-shaft mining will inevitably be automated, with sharp cuts in job opportunities in the foreseeable future. These factors are present in the most economically promising mineral sub-sectors like platinum and rare metals which are in demand globally and in monopoly supply in South Africa. (Indeed, South Africa has almost 88 per cent of the global platinum supply; furthermore, it is estimated by some that US \$2.5 trillion of South Africa’s mineral wealth remains untouched, and that the industry could last for another 150 years.)

A major theme throughout the workshop was the passion of mining community activists among the participant group. They spoke from first-hand experience about negative impacts of mining on workers and communities, with regard to health, environmental degradation, pollution of water, soil, and air, and land dispossession. The group debated familiar issues such as whether the overall value of mining outweighs these externalities and whether the state should address these impacts on a local, regional, or national level. Participants stressed the distributional consequences of mining, with negative impacts overwhelmingly affecting workers and mining communities, rather than more remote populations. Meanwhile, many of the gains of mining are either privatized through regressive tax and licensing policies or captured by corrupt officials, often in back-room deals with industry in dysfunctional state institutions. Participants further reminded the group that despite a legislative framework designed to address needs of affected communities, through ‘Social and Labor Plans’ and the like, the bitter truth is that “mining leaves communities poorer.” “It seems that the way we produce [in mining], whether it’s for another 150 years...there are victims- those victims are invariably black, women, and poor and they die very young.”

Policy is inadequate to clean up mining sites and rehabilitate communities after production ends. Community participation is only nominally provided. Regulatory

bodies, including the South African National Human Rights Commission, are under-resourced. Even where mining jobs are available, mineshaft and community conditions are often atrocious and the workforce lacks all form of diversity. One participant summed the resulting frustration up well: By right, “South Africa’s mineral wealth belongs not to the state, but rather to the “people and peoples of South Africa.”

Thus, though we had expected that mining-based development would be a central theme, for all of these reasons, it became more a source of policy challenges than a potential anchor-site for the sort of robust industrial policy – and consequent growth with redistribution – that participants sought.

## **(2) Building sustainable local economies**

A second and complementary vision of development is to build sustainable community-based economies. One participant gave the example of a community on South Africa’s southeastern coast which is creating a locally-based social economy that features inclusive, sustainable, generally agriculturally-based growth-seeking activities linked to equitable distribution. This approach requires (and in this case, generated) community ground rules that enable broad participation and shared benefits, rather than distribution to a narrow set of local elites and remote private interests. In order to achieve such inclusive development, the group must survey the current contexts to map out the resource base and forms of economic participation that already exist, however “informal.” They must then develop pragmatic strategies to build from that base. Production could serve both local needs and regional or national markets, with the primary goal being not mere subsistence, but equilibrium with gradual growth. This is a vision of development rooted in highly participatory democratic practices which seeks to “capacitate” local “governance” practices and institutions, both state-based and informal. Economic reform is fundamentally linked to grassroots institutional change, with state-based political and economic power devolved to the community level. The premise is that this process is a prefiguration and perhaps a prerequisite, or necessary complement, for “higher-level” and “larger-scale” economic change.

Evoking the theme of “rupture” from this introduction, some suggested that this vision might be enacted on a wide scale only if there were a prolonged period of “rupture” – or uncertainty – in the existing political-economic balance. Without such a turning point, there would be little impetus to break out of the current vicious cycle of

state incapacity, dearth of political imagination, persistent poverty, and run-away inequality.

### **(3) Promoting Demand-driven growth**

The third vision that participants set forth was demand-driven growth. Proponents of this vision saw the key drivers of growth to be the development of South Africa's domestic markets, sustained by a high national minimum wage. Currently 47% of South Africans who have a job earn less than R3500/month (about xxxx USD). This low level speaks both to the failure of redistributive policy and the economic challenges faced by the "working poor" and "forgotten middle." The difference between this median wage of R3500/month and the mean wage of R10,000/month also highlights glaring inequalities in income, as the discrepancy is explained by the large number of people earning very low wages alongside extremely high wages of the top income tier. The very low level of most consumers' income produces macroeconomic constraints, as there is limited purchasing power within the economy to generate growth. To combat this problem some participants argued for a minimum wage of R3500/month. This would boost everyone to the current median, thus driving market demand in ways that potentially also might undergird growth in the under-developed space of small and medium-sized manufacturing, producing and retail sectors.

At the same time as thus boosting the wages of those at the bottom, some participants suggested that to combat gross inequality and the "conspicuous consumption" of the wealthiest, such moves should be coupled with wage restraint amongst high income earners, especially those in sectors that compete internationally. The suggestion that wage restraint would also need to come from professional civil servants like teachers, nurses, and the like, was very controversial. Indeed, some felt strongly that a system of highly trained and fairly remunerated public sector professionals was key to capacitating individuals, enhancing both their productivity and well-being. In particular, some insisted that linking public sector wages with performance in some fairly crafted way that all parties could accept was a practicable idea.

### **(4) Unleashing the informal sector**

Several participants outlined ways that so-called "informal" economic sectors could enhance equitable growth. One idea was to foster vastly more small-scale

producers and traders to produce and market more goods like bread and furniture: “Go to rural India or almost any other country; and in every village you’ll see a small bakery...Try to buy bread in rural South Africa...and that bread - I am 100% sure - is made in a large industrial factory by one of three firms who have colluded for a long time [and have fashioned needless, vast] distribution channels [In South Africa,] the informal sector is so small because the formal sector is so big there’s simply no space for a small person to bake bread.”

Law is one key factor in explaining what one participant dubbed the “informal economy gap” – the puny scale and scope of South Africa’s informal sector and the meagerness of the jobs and income it generates, compared to other middle-income countries. Consider the local government regulation of parking lots. One participant remarked: “Why does this parking lot look different from a parking lot in Indonesia? Or India? It’s because there are not people selling anything, right? We have this notion of economic development which is about keeping the informal sector away...But [my] idea is to put the informal sector front and center as an engine of growth and employment...and we just don’t have that. And I think there is a sequence of policy interventions that can be undertaken.”

Unleashing informal sector potential requires the “smart” reform of the entire regulatory context, both to remove barriers and to provide needed infrastructure, training, and other public goods. For instance, rigid licensing requirements, or local rules preventing informal vendors from selling their wares outside malls could be rescinded or reformed. Many such economic activities could be decriminalized. Private sector conglomerates that are threatened by small-scale competition would have to be cabined and constrained, or, even, broken up (see below).

In addition to removing such barriers, small-scale entrepreneurs must have access to the material and social capital and trade skills required to be productive economic players. Thus, one skeptical interlocutor in this conversation objected that

When you have someplace like India...people are inheriting a lot of things from their parents who are involved in the informal...[or]...small business sector. A lot of that is inherited whether it’s the social capital in terms of knowing how to run an enterprise [and] the networks or the institutions or the assets or even just knowing the [open urban space] in Delhi where you’ve got a shop [or stall] that



you inherit. And I think to [ignore how] Apartheid smashed all of that for most people [and to think you can] just start spontaneously and do it [is naïve and destined to fail].

But others demurred, insisting that social and economic policy combined with civil society associations can overcome the indisputable facts that in many other developing economies, such assets are passed down across generations, and that one of the enduring legacies of Apartheid follows from the deliberate dispossession and deskilling of blacks and other disfavored peoples.

In addition to building local and regional markets for small scale local production, another untapped strategy for expanding small to medium scale production is to target government procurement contracts to this sector. Participants noted that even though current procurement regulations list considerations of equity and public interest as criteria for awarding contracts, such considerations are routinely ignored. For example, participants highlighted the fact that contracts for laundry for public hospitals in Johannesburg currently go to a “top 40 listed company”:

It’s laundry. It’s not software...It’s a semi- to unskilled service; yet, we find the public sector procurement system [giving] contracts...to formal, corporate entities, and [not to] micro-enterprises or the informal sector. It [may not be] deliberate...but there’s something in the way public sector procurement works that isn’t redistributive enough... And there are remedies. You can find ways in which you...ensure that [some portion of the big firm’s] contract value goes to micro-enterprises or to have an enterprise development program and so on. [After all,] public sector procurement is the largest purchaser in the economy, and [should] become a key route through which you can pursue a more jobs-rich [and broad-based and equitable] growth strategy.

In this way, government procurement could help create jobs, diversify the economy and support the entry of smaller businesses into the market. Participants stressed that the success of such strategies depends not only on enacting policy, but also on monitoring implementation.

### **(5) Encouraging and growing small and medium sized enterprises**

Disrupting the concentration of economic power and supporting South Africa's small and medium sized firms go hand in hand. With regard to limiting the domination of large businesses, more interventionist policy is needed. At the same time targeted policies are called for to open space for entry and innovation by smaller enterprises, particularly in key market sectors. Participants noted several aspects of this vision, each of which calls for further collaboration between progressive lawyers and economists.

One key topic that warrants such attention is competition law, which is now primarily focused on redressing abusive or coercive behavior in the marketplace. This singular focus on behavior fails to address the ways in which the structure of certain markets and the domination of key firms can operate to stifle equitable growth, shaping both markets and society at large in deeply problematic ways.

Thus, several participants, notably Judge and workshop convener Dennis Davis, chair of the South African Competition Commission, and Professor William Forbath, another convener and an expert on the history of competition law in the US, advocated expanding competition law's scope to target firm and sector structure as well as corporate behavior. Over the course of the workshop several participants ran with this idea by giving examples of cases here and elsewhere, past and present, in which this expansion of competition doctrine from wrongful behavior to structural effect of market concentration had already been made. Also interesting as examples of neo-Brandeisian heterodoxy were a few recent competition law cases, such as *Walmart*, in which the public interest branch of South Africa's 1990s competition law, already mentioned, was put to work to exact employment and local manufacturing commitments, as well as commitments for the distribution of local manufacturers abroad.

Some participants also spoke of the need for carefully tailored or "smart" tariffs. These would be neither uniformly high nor always low. Rather, they would be protective of domestic industry where an emerging industry needs protection from cheap foreign competition, while low where the domestic economy seeks inexpensive inputs or products from abroad. Tariff policy might also be used to offer leverage in negotiation between business and labor about wages. That is, the government could use an offer of increasing a sectorial tariff as leverage to encourage management to

raise wages. How such moves might fare in the face of international constraints bears shrewd consideration.

### **(6) Carefully tailoring urban space to drive equitable growth**

In order to take advantage of expanding employment opportunity, people must have not just the required skills. They must also have housing and other amenities along with the capacity to get to and from the job site in a reasonable time. The regulation of urban space in the apartheid era entrenched a deep spatial structure in which the housing and community infrastructure for working people is sited far from their places of employment. In the case of mining, this structural distance between agricultural home communities and male miners' worksites has eroded people's and communities' capacities in multiple ways. In urban areas, the historical regulation of blacks' movement, employment and residence in urban areas has produced an enduring legacy of spatial segregation that undermines growth in profound ways. Black workers must often rely on grossly inadequate vehicles and roads to travel for hours to reach their job sites. New housing and community infrastructure such as water, sanitation, power, and communication networks, even when provided by the state, are often sited in apartheid-era "townships" with few work opportunities nearby. Meanwhile economic growth policy, geared as it is to create job positions, is not coordinated with the design and construction of either housing, public transportation, or urban infrastructure. Participants were adamant that coordinated planning of the geographies of households, communities and workplaces must be a priority in both economic planning and SER advocacy.

## **STRATEGIES**

Though distinct in their theoretical logic and policy manifestations, the six visions of growth with redistribution that participants set forth are not really in tension. Rather, when set forth at once, it is clear that they work together. Thus, the legal policies and advocacy strategies that are called for to realize these visions will also overlap in mutually reinforcing ways. Three big strategies in particular recur across the entire field. The first is that peoples must be granted the endowments that will enable them to develop their multiple capacities to take part in social and economic life. The second is that the state, and with it the institutions of governance and the economy on every level must be capacitated to create and implement the opportunities, policies and

projects that can, in turn, enable and engage that individual capacitation. And finally, the institutions of both the state and the economy must be democratized in deep and pervasive ways. This is needed not merely to enable democratic accountability for the activities of governance, thereby grounding the state's capacity and consequent authority. This deep enactment of democracy is also called for to empower people to commit themselves to the ambitious, equitable, and comprehensive re-constitution that is mandated by South Africa's current predicament.

What follow are some brief summaries of specific ideas for strategic action that emerged from the conversation.

**(1) Capacitating people to participate fully in economic, social and political life**

“Capacitation” of individuals involves the provision of public goods to support their development and empowerment in work, family, community, civil society, state activity, and other domains of life. At its core, it focuses on measures to provide for both individual “endowments” and the provision of public services such as social housing, public transportation, adequate health care and education as a public good. However, when we discuss capacitation we have in mind a much more ambitious agenda that involves not only providing people with social goods necessary to live a dignified life, but more extensively equipping people with the resources (both material and more intangible: human capital and voice) to equip them to fight for a more egalitarian society. The inequality of South Africa society is not only manifest in the inequitable distribution of wealth and income, but also in the very unequal share of power South Africans have in economic, social and political realms. Redressing this requires ensuring that all South Africans have meaningful voice and participation in decisions that affect them and their country, while also ensuring that they have the real freedom, capacity and support to shape their own lives.

The idea of capacitation is one which is hospitable to the Constitution and South African constitutional tradition, and is therefore easily incorporated into both constitutional jurisprudence and social policy. As such, the concept of capacitation opens strategic possibilities for litigation strategies, statutory frameworks, social policies, and advocacy campaigns that support greater redistribution, equitable growth, and the greater empowerment of all South Africans.

## **(2) Democratizing institutions at every level of governance and the economy**

The inequalities in South Africa relate not just to wealth and income but also to power, voice, participation and the freedom to have real agency in the world. An adequate response requires not just the capacitation of individuals but also a radical democratization of both political and economic institutions at every level. This requires not just deep reform of government agencies and other institutions. It also requires reform of trade unions, the need for which is palpable from: a deepening alienation of employees from managers and “captured” union leadership, bureaucratic union structure, repeated worker uprisings, insurgent worker movements, wildcat strikes, and police violence in response to worker demonstrations.

But economic democratization is not just about union reform. It also involves deep reform in the organization of production, management, ownership structures such as cooperatives, and the like. And it involves introducing a greater measure of democracy of opportunity into entire sectors of economic activity by breaking up concentrations of power through vigorous enforcement of a reformed law of competition, as set forth above.

Finally, deep democratization means taking on customary authority, particularly in rural areas where autocratic forms of chiefly power often control land and other resources in ways that deprive constituents not just of democratic opportunity but also of the means of subsistence in agricultural economies. Such governance practices, rationalized as “traditional,” continues the apartheid practices of quasi-indirect rule, and risks perpetuating stereotypes that rural South African have no identities other than apartheid and colonially imposed tribal labels.

It is clear that in South Africa today, pervasive and historically-embedded extremities of inequality produce bitter resentment, feed unrest and alienation, undermine the state’s legitimacy, and erode its capacity. Though deep democratization is not a panacea, it can help break this vicious cycle. Yet we know that democratization has not taken place on a wide scale. Poverty and inequality exclude the effective participation of tens of millions of South Africans. Globally we are witnessing the rise of authoritarian governments and autocratic responses to crises, and there are real risks this may prove to be an attractive model for those who wish to repress new forms of

protest and internal dissent. Democratizing state institutions is both dependent upon and supportive of an engaged – and critical – civil society.

But there is a Catch 22 here. Civil society cannot flourish if the state fails to endow individual citizens because of its incapacity. Participants observed that the South African state serves the needs of a small comprador class which collects rents by capturing public resources for personal gain. This contrasts with the apartheid state, which accumulated by exploiting policing functions to turbo-charge elites' business interests. Thus, in the current state every form of state activity, from tenders, procurement, dipping into social provisioning, the hijacking of public positions at national and local levels – via all of these methods and more – are used to divert public goods for private gain.

### **(3) Capacitating the state**

Among the dilemmas presented by state capture is this. Bold ideas for transformation make significant demands on the state; such tasks cannot be entrusted to a broken, captured state. Thus, participants spoke of the unfulfilled need for a “capable state”. What we are calling here “capacitating the state” is simply a rubric for the menu of potential reforms that would contribute to that endeavor. Broadly stated, these might include: new constitutional doctrines, ethical norms, statutes, regulations, and institutions (and reforms of existing ones), dedicated funding streams, the development of highly skilled and committed civil servants and other government officials, measures to ensure transparency and accountability, and the like. All are required to enable the state to function at the highest possible level and at the same time to ensure that it not be captured by actors or interests that do not have the public interest at the center of their own.

### **(4) Devolving democratic governance and provision to the local level**

This strategy complements greater democratization and state capacitation. It is a pathway toward capacitation through a specific form of democratization that enlists people directly in state activity. Participants suggested the need for greater devolution of decision-making, implementation, and oversight authority to the local level, as this is the sphere of politics that is most closely connected to people's lives and thus enables more empowered engagement on an everyday basis. Yet such devolution can also be a fraught endeavor, for local institutions can be captured if functions are devolved to

people and institutions that do not have appropriate capacity to fulfill them. The contribution that radical lawyering can make to this endeavor is at least two-fold. The first one is easily stated, for many participants had seen instances of this in rural South Africa, Ghana and elsewhere. This involves SER advocates working with organized community groups and local officials to design local public institutions such as schools and public health centers in which service recipients and other community-members can participate in service provision, management, and oversight roles.

But the impact of this first exercise will be limited if these outposts operate in isolation from similar sites in neighboring communities, and if each individual community lacks the capacities and public goods to do their jobs. At the same time that they need community-based autonomy, then, these initiatives also require mutually supportive lateral linkages through which “cross – learning and mutual support can take place, as well as a positive “macro” level policy environment. Most importantly, though, they also need the redistribution of human and material resources, including public goods, from the national state. Without these “contextual” goods, the risk is that these experiments in locally – based “social democracy” will fail, for local government and its community partners will not have the drugs, staff supervision, school texts, and teacher-training, for instance, to make the local projects work. This obvious but too often overlooked imperative ensures that such projects will ultimately fail, discrediting both the individual projects and delegitimizing the entire devolution imperative. To avert the risk, communities’ advocates must work on multiple levels as well as the local. They must especially work with national legislatures and regulatory agencies to ensure that the funding follows with the service devolution, from the center to the ground.

**(5) Enabling small and medium producers as forms of economic citizenship via procurement, tender processes, smart tariffs and competition law**

The South African focus on broad-based economic development has so far failed to address the fact that too many sectors of the economy remain needlessly dominated by a few large corporate firms. There is thus an urgent need to generate more market openings for small and medium producers through carefully geared policy. The domination of sectors by monopolistic firms and structures is a form of private domination through coercion -- whether deliberate or incidental -- in the market. An expanded view of economic citizenship requires that this form of domination be

addressed, but the question is how? One ready – at-hand answer is government procurement, as discussed above. Procurement policies (such as the failure to list “public considerations” as a top criterion for the government’s choice of firms with which to do business) are not carefully tailored to promote small sector growth.<sup>1</sup> Whether the failure is at the level of statute, policy or regulation, one economist stated that there is a significant failure in using government procurement to drive equitable growth, support small business and promote the informal economy. There is therefore a need for fine-grained, reform-minded work which reconsiders the services and goods that are purchased by government from the informal sector, small and medium sized firms, and black owned businesses. This task also requires that creative and economically astute lawyers to take it on.

Another strategy entails changing competition law to open market space for small and medium sized local firms and to address economic dominance within specific sectors. Since the 1970s, competition law in the global North has had consumer welfare as the dominant touchstone. South Africa’s competition law has a richer sets of touchstones that recall the original inspiration for antitrust law in the USA. Thus, the law supplies some tools for creating more ample space for small and medium producers to take their place in a democratic and equitable economy. These provisions also help prevent the domination of the polity itself by outsized corporations. And finally, South African competition law has shown a concern for the impact of corporate mergers and acquisitions on workers and communities, as well as concerns for the social effects of shared oligopolistic dominance in specific sectors. Participants recounted a few striking examples, in which imaginative provisions for workers were included in the competition law settlement. In one case involving Walmart, the merger and acquisition underway had led to retrenchment and discharge of several hundred workers. However, the settlement of the matter before the competition law commission led to the fired workers’ reemployment. More interestingly, Walmart also was constrained to agree to two commitments involving its supply chains. It bound itself to take a certain percentage of what it sold from local firms, and to establish mechanisms to give South African firms to access Walmart’s supply chain. In another case, involving Coca Cola,

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<http://www.treasury.gov.za/legislation/pfma/supplychain/General%20Procurement%20Guidelines.pdf>



based on analysis that the company's real power operated through its distribution network, a settlement required that one-fifth of space in Coca Cola branded refrigerators in townships be available for merchants to use for other drinks, such as milk).

## **(6) Reforming Taxes**

Participants underscored the importance of tax reform with several goals. One is to maintain and expand the tax base and increase the state's capacity for collection so as to fund social grants, public goods, and other policies at current or higher levels. The second is to use taxes to promote wealth redistribution, through a wealth tax and the like. The third is to expand the tax-payer base into the middle classes without sacrificing progressivity so as to promote a sense of shared-burden and joint-ownership, and overall social cohesion. The fourth is to reform taxes on extraction and other corporate activities to ensure fair licensing fees, transfer pricing, royalties, income taxes, income expatriation fees, and the like, and to negotiate beneficial trans- and bi-lateral tax treaties. We could not cover all of these topics in detail. Therefore in this White Paper we will elaborate on only a few.

First, through a panelist's detailed presentation, the group examined specific forms of a wealth tax. When the idea was proposed during the democratic transition, it was rejected without proper debate. Given shifts in the balance of power and broader macroeconomic contexts some participants think it might now be feasible. Historically, there have been three main phases for wealth tax implementation:

- (1) post World War I when a number of countries in Europe adopted wealth taxes in order to deal with war-related debt;
- (2) post World War II when a number of countries adopted wealth taxes for the purpose of reconstruction, with France introducing a 25% tax on capital as well as a 100% tax on additions to capital during the Occupation, and Germany introducing its 1948 equalization laws;
- (3) post Global Financial Crisis when some countries have introduced relatively high wealth taxes.

Wealth tax policy should ensure the tax is both sufficiently progressive (by having a fairly high cut off rate) and paid off gradually over time, thus operating more as a surcharge on income than a tax. At the same time, to minimize the risk of capital

flight, such a tax might be imposed only once a generation. Given current challenges of state capture and ensuring equitable sustained growth, a wealth tax must be accumulated carefully in a segregated fund with clear oversight provisions and a carefully monitored investment policy attached. Though people discussed the idea of “ring-fencing” such a fund for land redistribution, others saw fiscal objections to such a proposal. Some participants suggested that in lieu of a wealth tax, transferring a certain portion of corporate assets and shareholding into a public investment trust could be used to drive innovation and redistribution.

As noted above, in the context of resources extraction and global value chains, participants emphasized the importance of reforming transfer pricing, corporate income taxes and exemptions, royalty rates and the like. Furthermore, international tax arrangements that ensure the taxing of corporate profits transferred to off shore tax havens must also be addressed. Finally, the “smart” tax policies must be devised to anticipate and manage the overall flow of value – and the patterns of behavior – that are enabled and incentivized by the matrix of South Africa’s tax policies taken as a whole. Who is paying tax and where do the ultimate burdens of specific taxes ultimately fall? What about the capacity of the the state’s tax institutions to implement the policies that the law mandates? And how well do specific tax schemes actually produce the behaviors that they seek to elicit? For example, while a wealth tax might not raise large sums for revenue purposes, it might have other important objectives, such as inducing certain behavioral changes and promoting important norms. In contrast, while the VAT (currently at 14%) is the largest single source of government revenue, it is also regressive. Participants differed substantially about how well the VAT could be reformed in progressive fashion.

Overall, the deep inequality in South Africa presents a vexing equity challenge for the nation’s tax policy. The need for more broad-based participation in the tax system is needed for the sake of social cohesion. But both the legitimacy and effectiveness of such a policy calls for more progress with redistribution. Furthermore, the state’s incapacity creates both real and perceived risks that the tax that is collected will be misspent and that the entire tax system is therefore fundamentally illegitimate at its very foundation. This highlights the need to consider taxing strategies alongside the strategies listed above, regarding the capacitation of the state and citizenry and the democratization of institutions.

### **(7) Reconstituting Land Policy**

There remains an urgent need to dismantle the colonially and apartheid-era orderings of land ownership, control and access that prevail. Yet in spite of this widely recognized – though contested – imperative, participants noted how successive post-apartheid land reforms have failed to achieve their own objectives, let alone promote redistribution and transformative change. Participants debated whether the current policy of restitution of land expropriated during the apartheid era goes far enough to achieve justice. Some urged that a more robust policy of redistribution is called for to right historical wrongs while also addressing current normative and policy needs. Yet even restitution policy remains both blocked in its implementation and inadequate in its design.

For instance, one participant, an expert on rural land policy for three decades, noted that extreme, sometimes sub-subsistence poverty is pervasive in rural areas, with many people surviving on social grants. Apartheid-era patterns of land distribution and control remain intact in former homelands. Key elements of the apartheid property regime have not been dismantled. Property rights and land governance remains a bifurcated system, in which people in former homelands are granted only communal “customary” rights over their land, while others are legally entitled to unencumbered “fee simple” ownership as individuals when they qualify. Customary rights are exercised by “chiefs” as autocratic forms of legal power. There was debate about whether this practice violates provisions of the Constitution which grant all South Africans the right to formal land tenure at the same time that they recognize “customary” law.

In addition to this entrenchment of apartheid-era power in former homelands, participants who worked with mining communities reported how the Department of Rural Development and Land Reform refuses to enforce informal land rights. Furthermore, the Mineral Resources and Petroleum Development Act (MPRDA) is sometimes permitted to override regulatory requirements for gaining community consent before undertaking new mining project.

Finally, though participants mainly focused on current legal barriers to dismantling apartheid-era land policies and redistributing land, both jurisprudence and heterodox theory are moving toward a radical rethinking of property itself. The

contours of this thinking goes beyond the scope of this Paper, but given its salience at the current moment, it is worth noting.

### **(8) Resituating litigation**

While questions of legal advocacy were not central to the lawyer/economist exchange, the lawyers agreed that current modes of public interest litigation have great limits. For instance, relying too much on litigation to drive implementation or nudge systemic reform is a dangerous strategy because it might move the nation toward the sort of “push-back” that might prompt the appointment of non-progressive partisan judges who could respond to such lawsuits on the basis of political calculation rather than jurisprudential deliberation. At present participants agreed that South Africa’s courts, particularly the Constitutional Court, still command greater public trust than other branches of government. However, this is contingent on the judicial branch’s actually delivering on its promise of dispassionate adjudication, for otherwise its legitimacy will be gradually eroded.

In addition to the risk that overuse of the courts could contribute to the politicization of the judiciary, participants observed how litigation has become elite-driven and is often – but not always – unaccompanied by and untethered to social movements on the ground. More specifically, such impediments as court costs and counsel expenses, even when these fees are formally waived, as well as the inadequacy of legal representation for indigent people, especially in rural areas, the dearth of local courts, and people’s lack of awareness of their rights, all mean that the “courthouse doors” are, as a practical matter, open only to those who are endowed.

### **CONCLUSION**

In spite of participants’ keen awareness of the challenges of the current moment, at the end of the day they joined in strong consensus that creative legal policy making and advocacy, particularly but not limited to litigation in the Constitutional Court, is a critical tool for transformation. To realize that potential, both advocates and judges need to much bolder. They must frame “smart”, expansive claims, which stretch the progressive potential of the Constitution’s provisions in forward thinking ways. Yet such claims will not make much difference unless they go hand in hand with the work of equally creative economists working to reshape the terms on which the political economy is conceived and instantiated. The workshop’s contribution was to enable

such a meeting – of – minds: to start the conversation. The task now is to continue this dialogue so that the political economy which must ground the lawyers’ “transformative” SER claims can be voiced by the people so starkly disfavored in South Africa’s current regime. It is only in this sort of hard and gradual work that these people can access the endowments they deserve, the state acquire desperately needed capacities, the economy gain new options, and the democracy find its way toward a renewed Constitution

Yacoob J in the *Grootboom* case reminds us of the urgency of this project when he wrote:

The issues here remind us of the intolerable conditions under which many of our people are still living. The respondents are but a fraction of them. It is also a reminder that unless the plight of these communities is alleviated, people may be tempted to take the law into their own hands in order to escape these conditions. The case brings home the harsh reality that the Constitution’s promise of dignity and equality for all remains for many a distant dream.

# **Expanding the Scope for Social and Economic Rights**

## **Litigation in Ghana and South Africa**

### **South Africa Workshop White Paper – Appendix A – LIST OF WORKSHOP PARTICIPANTS**

#### ***Toward a New Constitutional Political Economy – Transition and Transformation***

##### **Zackie Achmat**

*Activist and Film Director*

Zackie Achmat is a South African activist and film director. He is a co-founder the Treatment Action Campaign and known worldwide for his activism on behalf of people living with HIV and AIDS in South Africa. He currently serves as Board member and Co-director of Ndifuna Ukwazi (Dare to Know), which is an organization which aims to build and support social justice organisations and leaders. He is also the Chairperson of Equal Education.

##### **Raymond Atuguba**

*Team Leader, Law and Development Associates; Senior Lecturer, School of Law, University of Ghana*

Raymond Atuguba is a Team Leader at Law and Development Associates in Ghana and a Senior Lecturer in Law at the University of Ghana, where he teaches Conflict of Laws, Administrative Law and several Human Rights and Law and Development Seminars. Dr. Atuguba co-founded the Legal Resources Centre, a human rights and development organization in Ghana. His research focuses on the intersection of law, policy and human rights, and the politics and economics of development, institutions and institutional change. Between 2008 and 2010, he was a member of the United Nations High Level Task Force on the Implementation of the Right to Development. Between 2010 and 2012, he was appointed by the President of Ghana as the Executive Secretary of the Constitution Review Commission, which was charged with reviewing the 1992 Constitution of Ghana. Atuguba is a Sheila Biddle Ford Foundation Fellow and holds a Bachelor of Laws from the University of Ghana and an LLM and SJD from Harvard Law School.

**Penelope Andrews**

*Dean of the Faculty of Law, University of Cape Town*

Penelope Andrews is the Dean of the Faculty of Law at The University of Cape Town. Andrews is the former Dean of Albany Law School and has taught at many universities including La Trobe University in Melbourne, City University of New York School of Law and Valparaiso Law School. Her legal scholarship focuses on justice for women and people of color around the world. She is the author of *From Cape Town to Kabul: Rethinking Strategies for Pursuing Women's Human Rights*. Professor Andrews holds BAs in Economic History and Comparative African Government and Administration and an LLB from the University of Natal in Durban. She also earned an LLM from Columbia University School of Law.

**Haroon Borat**

*Professor of Economics, University of Cape Town*

Haroon Borat is Professor of Economics in the School of Economics and Director of the Development Policy Research Unit (DPRU), at the University of Cape Town, South Africa. His research interests cover labour economics, poverty and income distribution. Haroon is a member of the World Bank's Advisory Board of the Commission on Global Poverty as well as a member of the World Bank Group's Program Committee of the 2017 International Economic Association (IEA) World Congress. He sits on the Advisory Committee of the joint United Nations and World Bank Policy Study on the role of Development in the Prevention of Violent Conflict. Haroon was recently appointed an Advisor on the South African Parliament's High Level Panel on Acceleration of Change and Transformation. He has co-authored two books on labour market and poverty issues in South Africa, and has published more than 150 academic journal articles, book chapters and working papers. He recently co-edited *The Oxford Companion to the Economics of South Africa*. He studied at the Massachusetts Institute of Technology and was a Cornell University research fellow. Haroon has his PhD in Economics through Stellenbosch University in South Africa.

**Daniel Brinks**

*Associate Professor of Government and Co-Director, Rapoport Center for Human Rights and Justice*

Daniel Brinks is Associate Professor of Government, in the fields of Comparative Politics and Public Law. Dan's research focuses on the role of the law and courts in supporting or extending human rights and many of the basic rights associated with democracy, with a primary regional interest in Latin America. Some of his projects address the use of courts and law to enforce social and economic rights in the developing world, the development of the rule of law in Latin America, the judicial response to police violence in Brazil, Argentina and Uruguay, judicial independence, and the role of informal norms in the legal order. He is also interested in the study of democracy more generally, and has written on the classification of regimes in Latin America, and on the global diffusion of democracy. Professor Brinks was born and raised in Argentina and practiced law in the U.S. for nearly ten years before turning to

academia. He received his Ph.D. in Political Science from the University of Notre Dame and his J.D. from the University of Michigan.

**Geoff Budlender**

*Capebar Society of Advocates*

Geoff Budlender SC is an advocate practising in Cape Town. He works mainly in the areas of constitutional law, human rights, administrative law, and other aspects of public law. He is one of the founders of the Legal Resources Centre (LRC), which focused on litigation with an impact on people's conditions under apartheid. and a former director-general of the Department of Land Affairs and the senior evidence-leader for the Commission of Inquiry into the events at Marikana in August 2012.

**Aninka Claassens**

*Rural Women's Action Research Project, University of Cape Town*

Dr. Anika Classense leads LRG's Rural Women's Action Research Project. Her research primarily focuses on land rights, and she has been engaged in land issues in South Africa for 25 years. Much of the research conducted under the RWAR is done to complement strategic litigation and to support advocacy concerning traditional courts, women's rights, land rights, citizenship, governance problems and the nature of living customary law. During South Africa's transition Aninka participated in working groups that developed proposals pertaining to legislation dealing with restitution and the protection of labor tenant and farm worker rights. She was a member of the ANC's land desk and was a technical expert to the Constitutional Assembly on land rights and the property clause. From 2000-2003 she undertook various research projects with PLAAS at UWC, and also worked on urban land issues. From 2003-2009 she worked for the Legal Resources Centre, where she coordinated the rural consultation and research process pertaining to a legal challenge to the Communal Land Rights Act and other customary law related cases. In 2009 she moved to the Law Race and Gender Unit at UCT and founded the Rural Women's Action Research Project (RWAR) there. She studied African languages at UCT, Sociology at Wits, and has a PhD in Development Studies from Roskilde University in Denmark.

**Dennis Davis**

*Judge, High Court of Cape Town; Chair, Davis Tax Committee; Visiting Professor, Georgetown Law School*

Dennis Davis is a judge at the High Court of Cape Town, appointed by former South African president Nelson Mandela, as well as Judge President of the Competition Appeal Court of Cape Town, South Africa's specialized anti-trust tribunal. He teaches constitutional law and tax law at the University of Cape Town, and currently hosts a South African television program on current political and economic issues entitled "Judge For Yourself." He has been a visiting professor at the Universities of Cambridge, Florida, Toronto, Georgetown, and Harvard. Judge Davis' research interests include constitutional law, socioeconomic rights, and human rights and litigation. He served as a legal advisor on electoral law and federalism to the Constitutional Assembly during



the formation of South Africa's new constitution. Judge Davis has extensively published in academic journals and co-written eight books on a number of legal subjects including *Rights and Constitutionalism* (Jutas, 1994), *Beyond Apartheid* (Ravan, 1991), and *Detention and Torture in South Africa* (St. Martin's, 1987). Judge Davis earned a BCom and LLB from the University of Cape Town and an MPhil from the University of Cambridge.

### **Julia Dehm**

*Postdoctoral Fellow, Rapoport Center for Human Rights and Justice*

Julia Dehm is a Postdoctoral Fellow at the Rapoport Center for Human Rights and Justice, working on a multi-year project rethinking human rights for the 21st century. Dehm was previously a Resident Fellow at the Institute for Global Law and Policy (IGLP) at Harvard Law School. Her doctoral dissertation, "Reconsidering REDD+: Law, Life, Limits and Growth in Crisis," examined the social implications of a specific carbon offset scheme under the United Nations Framework Convention on Climate Change umbrella called Reducing Emissions from Deforestation and Forest Degradation (REDD+). She has published academic articles in an array of journals, including the *Journal of Human Rights and the Environment*, the *London Review of International Law*, and the *Macquarie Journal of International and Comparative Environmental Law*. She also co-edited a report *Occupy Policing: A Report into the Effects and Legality of the Eviction of Occupy Melbourne from City Square on 21 October 2011* and was a member of the Occupy Melbourne Legal Support Team that was awarded the 2012 Tim McCoy Award for human rights work by the Federation of Community Legal Centers. She has been active with climate justice groups, co-authoring a Friends of the Earth International Report, *In the REDD+: Australia's Carbon Offset Projects in Central Kalimantan* (2012). She holds a BA, LLB (Hons), and PhD from the University of Melbourne.

### **Rudi Dicks**

*Outcome Facilitator, Department of Performance Monitoring and Evaluation in the Presidency*

Rudi Dicks works with the Department of Performance Monitoring and Evaluation in the Presidency as an Outcome Facilitator for Employment and Inclusive Growth. He has been involved in the trade union movement for most of his life. He held the position of Executive Director of the National Labour and Economic Development Institute (NALEDI) for four years, up until 2013. He was a member of the Management Committee, Executive Council, Labour Market Chamber, Demarcation Committee and S77 Standing Committee at NEDLAC. Rudi currently serves on the Advisory committee of the Jobs Fund and the Employment, Income Distribution and Inclusive Growth Research Initiative. Prior to this, he was the Labour Market/Trade Policy Co-ordinator at COSATU. He was a member of the board of trustees of the ComMark Trust, a DFID-funded programme. Rudi also worked for Fair Share, a unit of the School of Government, University of the Western Cape as the Research Coordinator. He was also the Industrial Chemicals National Sector Co-ordinator at CEPPWAWU. Dick's holds a postgraduate Diploma in Economic Principles from the University of London.

**Jackie Dugard**

*Associate Professor of Law, University of the Witwatersrand, Johannesburg*

Jackie Dugard is an Associate Professor of Law at the University of the Witwatersrand, Johannesburg. Her research interests include property law reform, socio-economic rights, the courts and access to justice, and the role of law in social change. Previously, Dugard served as Editor-in-Chief of the South African Journal on Human Rights and Acting Director of the Centre for Applied Legal Studies. She also co-founded the Socio-Economic Rights Institute of South Africa (SERI), which focuses on advancing access to socio-economic rights through advocacy, research and public interest litigation. She is a two-time recipient of the Christian Michelsen Institute visiting research fellowship and her work has appeared in *Social Research*, *Review of Radical Political Economics* and *Leiden Journal of International Law*. Dugard holds an LLB from the University of Witwatersrand, an LLM from the University of Essex, and a MPhil in Sociology and Politics of Development and PhD in Social and Political Sciences from the University of Cambridge.

**Karen Engle**

*Minerva House Drysdale Regents Chair in Law and Founder & Co-Director, Rapoport Center for Human Rights and Justice*

Karen Engle is Minerva House Drysdale Regents Chair in Law and Founder and Co-director of the Bernard and Audre Rapoport Center for Human Rights and Justice. She is also an affiliated faculty member of Latin American Studies and of Women's and Gender Studies. She teaches courses and specialized seminars in public international law, international human rights law, and legal theory. She is at the Institute for Advanced Study in Princeton during the 2016-17 academic year, where she is the Deborah Lunder and Alan Ezekowitz Founders' Circle Member. She was Professor of Law at the University of Utah prior to joining the University of Texas in 2002. Engle received a Bellagio Residency Fellowship from the Rockefeller Foundation in 2009 and an assignment as a Fulbright Senior Specialist in Bogota in 2010. Professor Engle writes on the interaction between social movements and law, particularly in the fields of international human rights law, international criminal law, and Latin American law. She is author of numerous scholarly articles and *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press, 2010), which received the Best Book Award from the American Political Science Association Section on Human Rights. She is co-editor of *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press, 2016) and *After Identity: A Reader in Law and Culture* (Routledge, 1995). Professor Engle received her J.D. magna cum laude from Harvard Law School and a B.A. with honors from Baylor University.

**Alan Fine**

*Communications Executive, Russell and Associates*

Alan Fine is a Communications Executive at Russell and Associates. From 2002 to 2013, he was the Public Affairs Manager at AngloGold Ashanti, where he focused on matters of sustainability and public policy in South Africa. Prior to that Fine worked as a journalist for 18 years, writing primarily about labor and politics. He served as Deputy

Editor of Business Day newspaper and a trade unionist for the Commercial, Catering and Allied Workers' Union. Fine holds a degree in Economics from the University of Witwatersrand.

### **William Forbath**

*Associate Dean for Research & Lloyd M. Bentsen Chair in Law, University of Texas School of Law*

William Forbath is an Associate Dean for Research and the Lloyd M. Bentsen Chair in Law at the University of Texas School of Law. Professor Forbath came to Texas in 1997 after more than a decade on the faculties of law and history at UCLA. Among the nation's leading legal and constitutional historians, he is the author of *Law and the Shaping of the American Labor Movement* and his scholarly work has appeared in *Yale Law Journal*, *Harvard Law Review*, *Stanford Law Review*, *Law and Social Inquiry*, and the *Journal of American History*. Professor Forbath visited at Columbia Law School in 2001-02 and at Harvard Law School in 2008-09. He is on the Editorial Boards of *Law & History*, *Law & Social Inquiry: Journal of the American Bar Foundation*, and other journals, and on the Board of Directors of the American Society for Legal History, Texas Low-Income Housing Information Services, and other public interest organizations. Forbath holds a JD and PhD from Yale University.

### **Duma Gqubule**

*Founder, Center for Economic Development and Transformation*

Duma Gqubule is the Founder of Center for Economic Development and Transformation. He has spent the past two decades as a financial journalist, analyst, advisor and consultant on issues of economic development and transformation. As a financial journalist, he has written for numerous publications including Business Day, Business Report, Fortune Magazine and Africa Today. He co-authored the landmark Black Economic Empowerment (BEE) Commission report in 2001 and has served as a member of the Congress of South African Trade Unions (COSATU) Panel of Progressive Economists. He also co-founded KIO Advisory Services, which specializes in the use of technology to facilitate economic transformation. Gqubule is the editor of *Making Mistakes, Righting Wrongs: Insights into Black Economic Empowerment* and holds an MA in Economics from Aberdeen University in Scotland.

### **Kathleen Hardy**

*Attorney, South African Human Rights Commission*

Kathleen Hardy is an attorney representing the South African Human Rights Commission at the Marikana Commission of Inquiry, forming part of a team that has produced important expert evidence on policing. In 2015, she joined the Socioeconomic Rights Institute of South Africa. Prior to this, she ran the Rule of Law Programme at the Centre for Applied Legal Studies (CALS) and was a part-time lecturer at the Wits Law School and the University of Pretoria. Kathleen has consulted for the UN Office of the High Commissioner for Human Rights and the UN Special Rapporteur on

extrajudicial, summary or arbitrary executions, Christof Heyns. She holds an LLB and an LLM in Public International Law (with distinction) from the University of Pretoria.

**Gavin Hartford**

*Principal Consultant, Stakeholder Solutions*

Gavin Hartford is the Principal Consultant at Stakeholder Solutions. He is the founder of The Esop Shop and provides strategy consulting in the broad arena of industry and enterprise transformation, employee ownership solutions, employee performance and reward strategy to facilitate enterprise growth in South Africa. He has worked for the National Automobile and Allied Workers Union, the National Union of Metalworkers of South Africa, and served as a National Senior Commissioner of CCMA, where he successfully mediated numerous major industry and company wide disputes. Hartford holds an Industrial Sociology Honors degree from the University of Cape Town.

**Hassan Lorgat**

*Bench Marks Foundation*

Hassan currently works with the Bench Marks Foundation (part time) in research and strategy issues regarding building community power and activism for the Bench Marks Foundation in relation to the state, corporations and media. Lorgat's research interests include building power and democracy amongst the poor and the working class, and class bias in media coverage.

After being expelled from Teachers Training college, Lorgat was propelled into activism having worked as an organizer, legal officer and media and communications manager for various trade unions. Lorgat also worked for SANGOCO, on various campaigns it was engaged with, and served as chair of the board of Transparency International South Africa. Hassan Lorgat has a BA Hons (Unisa). Masters at University of Warwickshire.(United Kingdom), and is currently reading for a doctorate at Rhodes in politics.

**Neva Makgetla**

*Program Manager: Trade and Industry, Trade and Industrial Policy Strategies (TIPS)*

Neva Makgetla is a Program Manager at Trade and Industrial Policy Strategies (TIPS), an independent, non-profit economic research institution based in Pretoria, South Africa. Until 2015, she was Deputy Director General for economic policy in the Economic Development Department. Dr. Makgetla has undertaken extensive research into South African economic issues, lectured at various universities in Africa and the United States, and co-authored *Outposts of Monopoly Capitalism: Southern Africa in the Changing Global Economy* with Ann Willcox. Previously, she worked as the Lead Economist for the Development Planning and Implementation Division at the Development Bank of Southern Africa and head of the Congress of South Africa Trade Unions Policy Unit. Makgetla has a BA from Harvard University and a PhD in Economics from Berlin.

**Christopher Malikane**

*Associate Professor, Wits University*

Christopher Malikane is an Associate Professor of Economics at the University of Witwatersrand, Johannesburg. He is also the Director of the Macro-Financial Analysis Group at the School of Economic and Business Sciences at the University of Witwatersrand. His research interests include political economy, macroeconomics, development economics, growth and business cycles. In addition to teaching, Malikane serves as an economic advisor to South Africa Finance Minister Malusi Gigaba and is commissioner on the National Planning Commission. He is the 1997 recipient of the Edith Henry Johnson Memorial Award for an Outstanding PhD Dissertation in Economics. Malikane holds a BSc, MCom, MA and earned his PhD in Economics from the New School for Social Research in New York.

**Bonnie Meyersfeld**

*Director, Centre for Applied Legal Studies; Associate Professor of Law, University of Witwatersrand, Johannesburg*

Bonnie Meyersfeld is the Director of the Centre for Applied Legal Studies and an Associate Professor of Law at the University of Witwatersrand, Johannesburg, where she teaches international law, business and human rights and international criminal law. She is an editor of the South African Journal on Human Rights and the founding member and chair of the board of Lawyers against Abuse. Previously, Meyersfeld worked as a legal advisor in the House of Lords in the United Kingdom and the gender consultant to the International Centre for Transitional Justice in New York. She is the author of *Domestic Violence and International Law*. Meyersfeld received her LLB from the University of Witwatersrand School of Law and her LLM and JSD from Yale Law School.

**Mike Morris**

*Professor, University of Cape Town*

Mike Morris is a professor within the School of Economics and the director of Policy Research on International Services and Manufacturing (PRISM). Prior to this was the founder and Head of School of Development Studies, University of KwaZulu-Natal from 1995 – 2002. His research focuses on the power dynamics of global value chains, industrial restructuring and international competitiveness. During his career, he has published in journals such as: World Development, European Journal of Development Research, Competition and Change, Industrial and Corporate Change, Oxford Development Studies, Geoforum, International Journal of Technological Learning, Innovation and Development, Institute of Development Studies Bulletin and others. Morris has undertaken research and policy work for a number of international organizations such as, World Bank, ILO, DANIDA, UNIDO, and ITC. He has been the recipient of a number of major international research grants and managed or participated in a large number of research projects. These include: ‘Making the Most of Commodities Program for Africa – industrialization and linkages’ (DFID funded); ‘Asian Drivers (China) Impact on Africa’ (funded by Rockefeller Foundation and the

International Development Research Centre of Canada), and African Clothing and Footwear Research Network (funded by the IDRC).

**Jeremy Perelman**

*Professor, Paris Institute of Political Studies*

Jeremy Perelman is Assistant Professor at Sciences Po Law School, where he teaches or has taught International Human Rights Law (College), and seminars on "Human Rights, Global Poverty & Development" (Law School) and "Advocating for Human Rights to Challenge Global Poverty" (PSIA). He is also the Faculty and Executive Director of the Sciences Po Law School Clinic, and the scientific and pedagogical supervisor for the clinic's HEDG and RISE programs. His research focuses on the intersection between human rights based approaches to development, global economic governance, and social change advocacy in the Global South. Perelman has been involved in a variety of research, teaching, and advocacy projects in the fields of human rights and development in the U.S., South Africa, Ghana and Latin America. He notably co-directed a research project for French institutions on access to justice in South Africa in 2000-2001, and was a researcher and consultant for the Center for Economic and Social Rights, an international NGO based in New York.

Perelman is the co-editor of *Stones of Hope: How African Activists Reclaim Human rights to Challenge Global Poverty* (with Lucie E. White eds., Stanford University Press, November 2010), a volume co-authored by African human rights advocates and social justice scholars. He is since 2012 a Faculty Member of Harvard Law School's Institute for Global Law and Policy (IGLP)'s Annual Workshop, and has received an IGLP grant to co-direct a research project on Human Rights, Poverty and Heterodox Approaches to Development. He also sits on the Editorial Committee of the *European Journal of Human Rights*. Perelman holds Masters degrees in International Law and International Affairs from Stanford Law School and the Fletcher School at Tufts University, as well as a Doctorate (S.J.D.) from Harvard Law School

**Michael Sachs**

*Deputy Director General, Budget Office at the National Treasury of South Africa*

Michael Sachs is the Deputy Director General of the Budget Office at the National Treasury of South Africa. Prior to his appointment he was the Chief Director of Fiscal Policy. Sachs has also worked as Coordinator of the Economic Transformation Committee at the African National Congress. Between 2008 and 2009 he contributed to South Africa's response to the global financial crisis through the G20 and other multilateral institutions as the National Treasury's Chief Director for International Finance and Development. Sachs holds an MSc in Economics from the University of London School of Oriental and African Studies and an MPA in International Development from Harvard Kennedy School of Government.

**Henk Smith**

*Attorney, Legal Resources Centre*

Henk Smith is an attorney in the Cape Town office of the Legal Resources Centre, South Africa's largest human rights law clinic. He has worked with the LRC for more than two decades and focuses on issues of land and mineral rights. Previously, the Minister of Land Affairs appointed him as a member of the National Development and Planning Commission. He was also involved in the litigation in the Constitutional Court, which repealed the Communal Land Rights Act. Smith has been published in the *African Human Rights Law Journal*. He holds a BA and LLB from Stellenbosch University and an LLM from the University of Warwick.

**Kate Taylor**

*Postgraduate Fellow, EarthRights International, Myanmar*

Kate Taylor is a lawyer and researcher in human rights from Melbourne, Australia. She holds a Bachelor of Arts and Law from Monash University, and a Masters of Law (International Legal Studies) from New York University. Her research focuses on non-judicial grievance mechanisms and the role of international finance in the mining sector, through case studies spanning India, Indonesia and Haiti. Kate is currently a postgraduate fellow at EarthRights International in Myanmar, where she works with mining affected communities and has been consulting on law reforms to the regulation of foreign direct investment. She will join the Rapoport Center for Human Rights and Justice as a research fellow in August this year.

**Imraan Valodia**

*Professor, University of the Witwatersrand, Johannesburg*

Professor Imraan Valodia is the Dean of the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. His research interests include development economics, employment, the informal economy, gender and industrialization. He serves on a number of economic policy forums and has worked with leading international development organizations, including the United Nations Research Institute for Social Development, the United Nations Development Programme, UN Women and the World Bank. His articles have been published in *African Affairs*, *Social Dynamics* and *Margin: The Journal of Applied Economic Research*. Valodia holds a BCom and DEcon from the University of KwaZulu-Natal in South Africa and an MSc in International Trade & Finance from Lancaster University in England.

**Karl von Holdt**

*Director, Society Work and Development Institute, University of the Witwatersrand, Johannesburg*

Karl von Holdt is the Director of the Society Work and Development Institute at the University of the Witwatersrand, Johannesburg, where he has been a senior researcher since 2007. Prior to that he was a senior researcher for NALEDI, the policy institute of

the Congress of South African Trade Unions and Editor of the South African Labor Bulletin. He is the author of *Transition From Below: Forging Trade Unionism and Workplace Change in South Africa* and *Conversations with Bourdieu: The Johannesburg Moment* (with Michael Burawoy). His current research interests include the functioning of state institutions, health system functioning, sociological activism, and the connection between violence and democracy. Von Holdt is a member of the International Sociological Association Research Committee on Labor Movements (RC44) and has a PhD in Sociology from the University of Witwatersrand.

**Lucie White**

*Louis A. Horvitz Professor of Law, Harvard Law School*

Lucie White is the Louis A. Horvitz Professor of Law at Harvard Law School and Executive Committee member of the Harvard Center for African Studies. After working for two decades on critical lawyering and client voice in the context of US poverty, she turned to the issue of extreme poverty in sub-Saharan Africa. Thus, for over a decade she has worked with Ghanaian partners on an interdisciplinary Right to Health project that challenges the ways that Ghana's health finance system contributes to economic and social inequality. She has been a Fulbright Senior Africa Scholar, a Carnegie Scholar on Teaching and Learning, a scholar in residence at the Harvard Divinity School, and a Bunting Scholar at Radcliffe College. In 2006, with support from the Rockefeller Foundation's Bellagio Center, she initiated "Stones of Hope," a collaboration among African human rights activists and distinguished human rights scholars to examine African innovations in Economic and Social Rights advocacy.. She has been a Fulbright Senior Africa Scholar, a Carnegie Scholar on Teaching and Learning, a scholar in residence at the Harvard Divinity School, and a Bunting Scholar at Radcliffe College.