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Business rights and ethnic exclusion in sub-Saharan Africa

Addressing group-based inequality through business rights reform

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Abstract: The business rights pillar of the Legal Empowerment of the Poor agenda is not preoccupied with equality of outcome; it concentrates instead on equality of opportunity. This paper addresses the lacuna in the business rights literature by ‘bringing outcomes back in’. Certainly, equal outcomes are difficult to achieve and require understanding of a host of group as well as individual characteristics, and the complex obstacles to distributing benefits more broadly and beneficially, especially to members of groups that have faced historical discrimination in business. In order to understand some of the ways in which the interests of the poor can be advanced in business, and how mere business *rights* might be complemented, this research extends the analysis to include what I call *active* business rights reforms.

Keywords: Africa, legal empowerment, business rights, entrepreneurship, empowerment, affirmative action

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1 Introduction

Despite the growth of business in Africa and celebratory assertions of an ‘Africa Rising’ in the past two decades, certain communities on the continent have been systematically excluded from pursuing or benefitting from opportunities in business and entrepreneurship. These groups, whether defined in ethnic or racial terms, historically have been denied, explicitly or implicitly, the ability to alleviate their poverty through access to entrepreneurship and, more formally, private sector development opportunities. By contrast, those opportunities have been afforded to individuals from groups that enjoy more economic and political power, including privileged immigrant minorities, those connected with government, and foreign investors.

A legal empowerment agenda that aims to confer business rights to these marginalized groups was spearheaded by the UNDP’s Commission on Legal Empowerment of the Poor (CLEP) in 2007, paralleling the new enthusiasm for business embedded in the Africa Rising narrative. Yet, even where ostensibly equal opportunity may be *formally* granted to all¹—and this is the case in a growing number of African countries—certain groups remain effectively excluded from advancing in, or in some instances even entering, business, exacerbating inequalities. Specifically, the conferral of ‘business rights’ is a lofty goal whose actual application encounters severe limitations borne of Africa’s political economy and diversity. Thus, in order to be practicable, business rights also must be accompanied by a more complex, comprehensive set of empowerment-focused reforms not typically understood by scholars or practitioners as part of the business rights agenda. The latter include, specifically, policies such as affirmative action. Yet this added complexity—a reframed and broadened scope that renders business rights more actionable—introduces a host of new challenges. This paper elucidates these challenges; quite simply, business rights and legal empowerment are easier said than done.

2 Legal empowerment of the poor: an incomplete framework

In recent years, the concept of legal empowerment has received considerable policy attention as a core component of inclusive development and poverty alleviation. A ‘Legal Empowerment of the Poor’ (LEP) agenda has been advanced that tries to address some of these deficiencies. According to USAID (2007: 29), LEP occurs when the poor, their supporters, or governments—employing legal and other means—create rights, capacities, and/or opportunities ... that give [the poor] new power to use law and legal tools to escape poverty and marginalization’. LEP, in turn, has four pillars, one of which, business rights, is the focus of this paper.

The objective of the business rights pillar is inclusivity—to extend to the poor a broad range of business opportunities generally unavailable to them. As noted by UNDP, ‘Economic policies and commercial law, which in the great majority of poor countries are most often geared to large enterprises, have to change to become inclusive of the vast numbers of business owners at the base of the economic pyramid’ (UNDP 2008: 71). The latter are mostly micro- or small-scale

¹ The distinction between ‘equality of opportunity’ and ‘equality of outcome’ raises both ethical considerations as well as legitimate questions of whether equal opportunity actually exists following the (mere) bestowal of business rights. Business rights themselves are *not* equal opportunity: a child from townships like Mtendere in Lusaka or Kayeletsha in Cape Town does not have the same opportunity as one from the upscale communities of Kabulonga or Constantia.

enterprises (MSEs), and typically concentrated in the informal sector; the business rights agenda is targeted at uplifting nascent, or even established, entrepreneurs at the head of these MSEs.

Several authors seek to expand on the intersection of LEP and business rights; however, they do little to clarify and distil the concepts into practicable form. In fact, the further one looks, the more diffuse and amorphous the usage becomes. At its most fundamental, the legal empowerment framework includes basic business rights, including ‘the right to vend, have a workspace and access to necessary infrastructure’ (Singh 2009: 150); such rights are sufficiently straightforward, if incomplete. Beyond that interpretation, however, the definition of business rights becomes all-encompassing, bearing some resemblance to Susan Strange’s (1996: xiii) quip about the definition of globalization: it ‘can refer to everything from the Internet to a hamburger’.

Indeed, additional elements of business rights include a litany of prescriptions: the establishment of regulatory bodies and streamlined administrative procedures, such as those captured in the World Bank’s *Doing Business* reforms; strengthened economic governance; access to inclusive financial services; programmes that provide advice and consultation, especially to new small businesses; the establishment of corporate laws, for example, those protecting shareholder rights (USAID 2006: 6), and those enabling limited liability companies to separate business and personal assets (UNDP 2008: 71–3; USAID 2006: 6; and Singh 2009: 150). Ironically, this expansive interpretation still leaves considerable gaps in research on legal empowerment and business rights, especially on how these elements work, or fail to work, *in practice* in terms of delivering pro-poor, business-enhancing outcomes.

Actual initiatives that fall under the business rights umbrella tend to occur at the lowest common denominator: narrow, procedural change, such as *Doing Business*, and a focus on the achievement of equality of *opportunity*, rather than equality of outcomes. This interpretation of business rights—as largely legal and regulatory in nature and that business rights reforms have a salutary impact on poverty and exclusion—is an argument consistent with the notion that a level playing field is all that is required for the poor to achieve success in business. Yet when the goal is merely equal opportunity, the business rights agenda is inadequate to deliver poverty reduction and inclusion. Importantly, there seems to be tacit consensus in some analytical circles that simple legal, bureaucratic-administrative reforms are insufficient. However, there is scant agreement about how to address this insufficiency, particularly when it comes to fostering inclusion for marginalized communities. Where the business rights literature does offer some nods in the direction of inclusion, such elements appear to fall more squarely under the rubric of what Lyons (2013) labels ‘advanced’ business rights (Lyons 2013: 78).² These are designed to place MSEs in a more viable position vis-à-vis large-scale enterprises, including elimination of ‘criteria in competitive bidding that provide inherent advantages for large-scale operators’, as well as alteration of licensing requirements or quality control provisions that discriminate against smaller firms (USAID 2006: 6). Prescribed interventions also include expanded ‘access to new business opportunities to familiarize entrepreneurs with new markets’ (Singh 2009: 150).

Although occasionally articulated in the literature, however, these more advanced business rights are delinked from the kind of proactive, affirmative and purposeful policy making required to effectuate them. It is likely no coincidence that such full-throated ‘affirmative action’ programmes are the most challenging to enact. Whereas this may be a truism in most polities, it

² She notes: basic commercial rights, intermediary commercial rights, advanced commercial rights.

poses particular challenges in Africa's ethnically plural, often divided, and weakly institutionalized political economies.

Discussions about business rights in the literature and among policy makers tend to consider 'the poor' in a rather holistic way, without regard for group-based inequalities, or the covariation between poverty and ethnicity (and race) in the African context. I go beyond the conventional understandings of 'the poor', as well as of 'empowerment', to examine a broader range of programmes, namely, ethno-racial empowerment programmes, intended to remediate these inequalities. That such programmes sit largely outside the typical understandings of LEP is a major shortcoming of the business rights/LEP framework. The LEP agenda tends, in practice, to treat race and ethnicity as epiphenomenal: all the poor, regardless of ethnicity and identity, can be empowered—and, ipso facto, reduce their poverty—through legal reforms, and the extension of business rights. In reality, however, this is not the case; those who are best positioned prior to reforms are usually the best able to take advantage of them.

In general, therefore, the literature on business rights is not preoccupied with equality of outcome, concentrating instead on equality of opportunity. However, the *right* to do something is of little practical worth without the ability to do such a thing. Hence, this paper addresses the lacuna in the business rights literature by 'bringing outcomes back in'. Certainly, equal outcomes are difficult to achieve and require understanding of a host of group as well as individual characteristics, and the complex obstacles to distributing benefits more broadly and beneficially. Thus, we must ask: What are some of the ways in which the interests of the poor can be advanced in business? How can business rights be complemented? Part of the answer lies in extending the analysis to include what I call *active* business rights reforms.

3 Beyond business rights: context, constraints, and a broader frame

The literature tends to de-emphasize the kind of activist approaches necessary to effect change in the form of entrepreneurial emergence and business growth that, in turn, have a salutary impact on poverty reduction (e.g. USAID 2006). Although some authors (e.g. Singh 2009; USAID 2007: 6) explicitly cite interventions that *sound* like activist policies, none try to link the notion of LEP/business rights to established policies, such as affirmative action, that have essentially sought the same goals. Nor do scholars writing about affirmative action and 'indigenization' in Africa use the framing of LEP. This is a puzzling disconnect, inasmuch as one can draw a direct line, both analytically and practically, from an LEP agenda to affirmative action and black empowerment.

The conventional business rights agenda is a passive one. It can include everything from the World Bank's *Doing Business* reforms, to formalization, to micro- and SME-credit expansion, but such adjustments do not lead to genuine transformation (Lyons 2013).³ This paper agrees with those analysts who emphasize the insufficiency of business rights. The weakness in these arguments, however, is that, whereas they tell us what is not sufficient, they fail to elucidate even the scope of what is *necessary*. Indeed, existing critiques of business rights elide the fact that what 'the poor'—especially those whose poverty is exacerbated by their ethnic marginalization—need to genuinely expand their business rights, and be better able to *act* on those rights, is more muscular action to change the status quo. A priori to political or policy prescriptions, therefore,

³ For example, the percentage of Enterprise Survey respondents who rank obstacles such as access to finance, trade regulations, and tax administration, practices of the informal sector, and licences and permits remains high, even in countries, such as Rwanda, considered top performers in terms of *Doing Business* reforms. See: World Bank (n.d.a).

is critical analysis of the social, demographic, and political economy constraints that typically render conveyance of business rights in Africa problematic.

Thus, in addition to understanding shortcomings of business rights as an agenda for poverty reduction among marginalized groups, we must also understand the subsequent stages of the process, as well as the risk, rewards, and opportunities generated by interventions geared toward the *affirmative* expansion and enforcement of those business rights—especially on a group basis. This is an *active* agenda that also demands understanding of the state role, policy, and political limitations of state power.

A simple bivariate relationship between business rights and poverty alleviation obscures this complexity. Although this paper is not concerned with policy prescriptions, affirmative action is a logical ‘product’ for African states defined by ethnic pluralism and a history of discrimination in business on the basis of identity. Indeed, affirmative action is the product of an aggressive, active state role.⁴

Yet here lies a paradox. These types of policies and programmes aimed at building inclusiveness in business and entrepreneurship—as noted, generally outside the scope of legal empowerment of the poor—would seem to be essential complements to business rights, but they have an undeniably poor record in Africa (Taylor 2002; Iheduru 2004; Taylor 2012). Whereas empowerment initiatives such as affirmative action strive to construct an equality of both opportunity *and* outcome, typically they collide with the entrenched self-interest of those who benefit from the financial and political status quo. In other words, such policies often fail to account for the identity-based and material interests that define the local political economy and create foundations of resistance. Under these circumstances, it is easier to see how genuine equality, let alone poverty reduction, one of the principal aims of legal empowerment, lags. In short, African political economy constrains and perhaps even obstructs such activist approaches.

This dilemma leaves us with the following set of propositions. Defined in ethnic terms, many African communities can be considered poor and lacking full business rights. Importantly, their very economic and business marginalization is inextricably linked to their ethnic identity, historically, socially, demographically. The extension of business rights in the form of legal empowerment programmes, therefore, is more likely to have a successful impact on poverty reduction when they are directed at populations that are seen as politically ‘palatable’ and economically tenable within the prevailing status quo. This would exclude, therefore, those groups, whether minority or majority, whose growing wealth and influence might threaten the status of the dominant group. It would also tend to exclude the most marginal communities, often geographically and politically isolated populations at the periphery of the modern economy, whose predicament generates little interest or support from core, national actors.⁵

Empowerment programmes aimed at women, on the other hand, generally can be tolerated, if not embraced, by both prevailing elites and the wider citizenry. While women’s economic empowerment programmes have had some success, any such success does little, *directly*, for the marginalized poor identified by race or ethnicity. Any positive impact on group-based exclusion, therefore, is incidental. Nonetheless, because they tend not to incite the same kind of defence of the status quo as racially or ethnically based programmes, gender-based approaches to

⁴ The pursuit of business rights comprises a policy agenda that is, itself, intrinsically teleological. Yet advocates fail to articulate the full picture of that telos, and what challenges might obstruct its realization.

⁵ Thus, potential interventions—however necessary and morally defensible from a poverty-reduction perspective—which pose threats to the political economy are imperilled.

affirmative action in business may offer a partial corrective to less effective remedies targeting ethnic exclusion.

I divide initiatives intended to entrench LEP/business rights into two distinct categories: ‘passive’ and ‘active’. Passive business rights reforms entail principally regulatory changes—most prominently, along the lines of the World Bank’s *Doing Business* reforms. Passive reforms are intended, ostensibly, to redound equally to the benefit of the entire population (and external investors). The paper proceeds with a deeper investigation of these passive versus active dimensions, beginning with a more in-depth examination of LEP, particularly in its framing of business rights. Passive measures have tended to predominate.

The principal focus of the paper, however, is on more active business rights. My main objective is to offer a critical assessment of leading arguments. Thus, the paper situates broader notions of ‘empowerment’—variously labelled as affirmative action, black economic empowerment (BEE), indigenization, and so on—within this conventional understanding of business rights, thereby placing two concepts, LEP and affirmative action, and their corresponding literatures, in dialogue with one another. Drawing on illustrations of several African empowerment programmes, I review examples of three principal intervention types: majority-, minority-, and women-focused. Although the evidence is somewhat contradictory, this research finds the greatest potential for the objectives of LEP in *gender*-based empowerment programmes.⁶ Specifically, I hypothesize that women’s empowerment offers a more viable approach to business rights.

4 Passive and active business rights reforms

4.1 Passive business rights and empowerment

The preponderance of recommendations by UNDP in its seminal report characterize the principal constraints as legal and regulatory and thus, as the term suggests, elevate legal and regulatory solutions. Many of these solutions resonate with the reforms advanced in the World Bank’s annual *Doing Business Report* (see Singh 2009: 150). These include various dimensions of regulation and regulatory quality, procedural obstacles to starting, operating and closing a business, and so on. *Doing Business* is intrinsically linked to formalization; the economies that rank highest on legal, regulatory, and procedural metrics correlate with lower informality (World Bank 2015: 22). The *Doing Business* indicators have some inherent value, though they have also been subject to criticism on a number of fronts.

For many observers, LEP/business rights—with their emphasis on ‘regulatory bodies’, ‘administrative procedures’, and the like (UNDP 2008: 71–3), laws, ‘economic governance’ (Singh 2009: 150), establishment of limited liability companies, and so on—are practically synonymous with formalization. Certainly, formalization is one of the major (if somewhat contested) planks of LEP/business rights (Banik 2011),⁷ and there is an assumption, in the

⁶ In addition to the existing literature from these fields, I draw also on insights gained from my own field research on indigenization and BEE in Zimbabwe (2012), Zambia (2010), and South Africa (1999–2002), respectively, as well as on small business development in Ghana (2012–present) and Rwanda (2011–2015), including interviews and primary sources.

⁷ Importantly, however, the CLEP apparently was not preoccupied with formalizing *all* informal enterprises: ‘informality is here to stay’ (Lyons 2013: 77, citing UNDP 2008: 200). Lyons is one of few to note this apparent inconsistency.

tradition of Peruvian economist Hernando de Soto, that more formalization is good.⁸ Yet using passive, procedural reforms as the principal route to formalization can actually backfire. Indeed, Lyons (2013: 76) argues that *Doing Business* may actually make it harder for informal to formalize. In Arusha, Tanzania, for example, Lyons (2013: 83) found that nearly two-thirds of vendors were afraid that accessing credit mechanisms via formal loans would actually leave them vulnerable to losing both their inventory and personal possessions.⁹ As a result, they eschewed microfinance services intentionally, even when they were available. Moreover, formalization is expensive.¹⁰

Doing Business is also criticized for celebrating a basket of neoliberal reforms that favour, almost inevitably, already deep-pocketed foreign investors over indigenous entrepreneurs (Elsheikh n.d.). Hence, as Lyons observes, ‘reforms designed with large business in mind cannot “be sufficient to cause the small-scale economy to flourish” without additional government support’ (Lyons 2013: 79, citing Altenburg and von Drachenfels 2006: 388). Several studies, including those conducted by World Bank economists, find that improved *Doing Business* measures can contribute to growth (Djankov et al. 2006; Haidar 2012; World Bank 2012). However, the link to poverty reduction appears more ambiguous (Elsheikh n.d.; Barder 2005).¹¹ Yet, whatever its impact on or depiction of the investment climate, *Doing Business* does nothing explicitly to serve the interests of the poor, and certainly the indicators themselves offer little respite for marginalized ethno-racial communities.

More damningly, there is an implicit and somewhat teleological assumption common to both the *Doing Business* indicators and much of the LEP literature that passive approaches, by enabling only ‘the market’, can address the myriad needs of the poor. In other words, enable property rights, business rights, and the proper regulatory framework, and the poor can readily avail themselves of the ‘equal opportunity’.

In fairness, some of the extant research accommodates the more expansive interpretation I hew to in this paper, and criticizes the CLEP for its ‘narrow conception of legal empowerment’ (Golub 2012: 39). These critiques take us part way. Indeed, some interlocutors have maintained that it is also not *just* the enactment of laws and legal reforms to help the poor, but the creation and enhancement of *the capacity* to utilize those laws and regulations for their benefit. But given that ‘the field’ is comprised more of ‘an inchoate array of initiatives than a cohesive set of programmes’ (Golub 2012: 40), there is scant articulation of how to move this agenda forward, whether in terms of theory *or* application.

4.2 Active business rights and empowerment

Singh (2009) enumerates five key measures that constitute LEP, one of which is to ‘Expand access to new business opportunities to familiarize entrepreneurs with new markets...’ (Singh 2009: 150). Certainly, notions of ‘access’ and ‘familiarization’ could be stretched to include various forms of empowerment that target specific groups. Indeed, Singh even makes an explicit

⁸ De Soto’s (2000) *Mystery of Capitalism*, with its emphasis on the establishment of property rights and formal title for the poor, pervades this literature. Indeed, as Lyons (2013: 78) notes, the CLEP was co-chaired by de Soto.

⁹ Promoting the establishment of LLCs might provide a counterweight, but such legal changes will not, in and of themselves, shift actual *behaviours*.

¹⁰ Lyons (2013: 86) documents the huge costs of formalization—licenses, permits, approvals, and opportunity cost, which she measures in person-hours at 50 years, or approximately US\$180,000 of lost income. In this view, one of the main pillars of business rights appears to be unviable.

¹¹ Barder is a senior fellow at the Center for Global Development. His analysis appeared on his blog; see Barder (2005).

case for the legal rights and representation of groups that face widespread discrimination, specifically identifying women and indigenous people. Yet Singh (2009: 148) situates groups' interests under the LEP pillar of property rights, rather than business rights. Whereas the two are inextricably linked, his framing superordinates passive policies over active ones. By this logic, and in keeping with the de Soto tradition, the mere entrenchment of property rights means empowerment will follow.¹² Yet property rights without empowerment of these groups is pointless (Moore and Schmitz 2008: 55–6; Assies 2009: 574)¹³

Golub's (2012: 38) interpretation of business rights goes further to include a wider variety of initiatives and actions under the LEP rubric. Golub's definition of legal empowerment favours *'the use of law and rights specifically to help increase disadvantaged populations' control over their lives'* (emphasis in original). Moving beyond passivity, Golub acknowledges that simply relying on rule of law approaches—investment law reform or judiciary reform, for example—in the hopes that their benefits will 'trickle down to the poor' is inadequate; legal empowerment, therefore, must directly engage and benefit the disadvantaged (Golub: 38). Notably, Golub and others eschew the logical next step toward affirmative action and other direct empowerment strategies, although these clearly can fit within in his categorization.

One of the first political cases for affirmative action was made by US President Lyndon Johnson in a speech delivered at Howard University in June 1965 (LBJ Presidential Library n.d.). 'Freedom', Johnson noted, 'is not enough':

You do not wipe away the scars of centuries by saying: now you are free to go where you want, and do as you desire, and choose the leaders you please.

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others', and still justly believe that you have been completely fair.

Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.

We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.¹⁴

President Johnson recognized explicitly that equal opportunity itself was a chimera given the grossly unlevel historical playing field. He pushed for a *state* role in guaranteeing not only equality

¹² Notably, Singh (2009: 147) goes beyond mere technical improvements to advocate 'the systemic legal and political transformations required so that the poor and all others can use the instruments of the law to reduce poverty and create wealth and prosperity', although he does not employ the mechanism of affirmative action.

¹³ CLEP focused on the three basic categories or levels of commercial rights—from basic, to intermediary, and finally, advanced (Lyons 2013: 78), following a de Soto-esque teleology. Dan Banik's *The Legal Empowerment Agenda* (2013), similarly elevates the notion of property rights as the key element in legal empowerment for the poor. Focusing on the informal sector in several South African Development Community (SADC) countries, the book's case studies elucidate the ways in which regulation can decrease transaction costs for the informal sector, yet the authors are realistic about the unlikely prospects for rapid poverty reduction.

¹⁴ 'President Johnson's commencement address at Howard University: To Fulfill these Rights' (4 June 1965). See LBJ Presidential Library (n.d.).

of opportunity, but equality of *outcomes*, a much more ambitious task (Scanlon 2003; Phillips 2004).

Revisiting Johnson through the lens of LEP, it is evident that similar efforts to affect both opportunity and outcome undergird what I term ‘active’ pursuit of business rights—entailing explicit, programmatic, *affirmative* policies to secure business rights of specific groups or sections of the population.

Since 1965, affirmative action policies have been replicated across the globe, including in sub-Saharan Africa. Africa has a long history of ‘empowerment’-type programmes based on race (i.e. the empowerment of black African populations), gender, and, to a lesser extent, indigenous minorities. I argue that these are in fact quite consistent with the LEP tradition. It is ironic, therefore, that the CLEP was also criticized for its ‘top-down, government-centered approach’ (Golub 2012: 39). Yet an activist role of government in disseminating *and actualizing* business rights may be required, beyond mere legislative and regulatory changes.

Surprisingly, one of the most visible state-led vehicles for this type of empowerment—BEE, affirmative action, and so on—is conspicuously absent from much of the LEP–business rights literature. Although, as noted above, Singh (2009) and Golub (2012) offer two *partial* exceptions, thus opening the door for consideration of active policies, neither author specifies state-led affirmative action-style programmes explicitly as a policy tool.¹⁵ In sum, ideas that might be ascribed, however loosely, to CLEP and its analytical progeny are insufficiently attentive to political economy constraints on reform, as well as the outsized role of the African state in allowing, shaping, or constraining major economic development initiatives (Kelsall 2013).

The varieties of active empowerment initiatives, falling broadly under the rubric of affirmative action, can be situated in a business rights framework. This is an illuminating exercise, and an improvement over CLEP’s deterministic portrayal of poverty reduction, inasmuch as affirmative action has had numerous real-world applications. Such programmes highlight the outsized role of the state in allowing or shaping economic development initiatives, offering a partial corrective to passive, market-based prescriptions that may not even reach implementation. Yet neither can affirmative action be regarded as a panacea for business growth or poverty reduction. Whereas affirmative action programmes hold some potential for positive contributions to these needs, in African contexts especially, political economy constraints often impede the successful fulfilment of these objectives. These constraints are elucidated below.

5 Beyond LEP: active empowerment programmes in Africa

5.1 Three sub-types

‘Active’ business rights initiatives can be divided into three sub-types, ordered here from the most to least constrained in terms of the local and international political economy. First, are broad-based empowerment programmes, often under the rubric of ‘affirmative action’, aimed at ‘marginalized’ communities. In the African context, these are typically programmes targeting *majority* populations, namely black Africans, whose access to business rights has been inhibited historically, leaving them disadvantaged relative to resident minority groups, such as South

¹⁵ In fact, consistent with his criticism of government-centred approaches, Golub (2012: 40) instead advocates a major role for civil society (CBOs and NGOs) to implement and oversee ‘effective LE operations’—whatever those effective operations might entail.

Asians, people of Arab descent, whites, as well as more recent immigrants, multinational corporations (MNCs), and other international investors. Thus, in the most broad and encompassing sub-type, 'the group' may be defined racially. The disadvantages to black African or 'indigenous' entrepreneurs and their firms are well documented, including smaller firm size, high levels of informality, limited access to credit and education, less firm longevity, low networking capacity, and so on (see Ramachandran et al. 2009; World Bank n.d.b).

A second sub-type encompasses narrower programmes aimed at *national minorities*. These are more aligned with the original USA model inasmuch as they aim to combat systematic discrimination against minorities in business through explicit, targeted initiatives. In the African context, these can be defined ethnically. Arguably, there are manifold groups that might fall into this category and warrant some form of affirmative action in business including relatively large groups like Lozis, Karamojong, Jola, Turkana, and others, or comparably tiny groups like the Batwa, Basarwa, or Baka. In general, such communities are less able to engage in modern business and commerce, and are *on the whole* poorer than other groups that have greater representation in national political and economic life.

A third way we can define groups is not ethnically at all, but by gender. Most African women entrepreneurs face considerably more obstacles to business success than their male counterparts, including lower access to credit, networks, and innovation, as well as sociocultural pressures (Spring 2009). Programmes designed to address discrimination and disparities against women's business rights and access seem to be the most prolific.¹⁶ These can attract substantial international funding and they are the most politically saleable domestically. Since the larger research project of which this paper is part focuses on groups defined by identities other than gender, I draw on observations from gender-based programmes only briefly. But the lessons are valuable for comparative purposes.

The risks of elite capture and neoliberal backlash

The various forms of positive discrimination aimed at each of these groups are hardly unproblematic. In theory, such empowerment strategies are a reasonable attempt to use legislation to compensate for structural disadvantages among black Africans, who have been historically excluded from market participation. Yet the promotion and expansion of business rights targeting specific sub-groups can be antithetical to entrenched neoliberal elite interests, resulting in elite capture or neoliberal backlash.

Even the most well-meaning affirmative action initiative is potentially vulnerable to various forms of elite capture, such that programmes redound to the advantage of a narrow elite, rather than benefitting intended recipients. The record includes abuse by its state sponsors, by dominant, non-African firms, or by opportunistic indigenous elites who are able to divert benefits. Pressure from both state and societal actors may be placed on existing firms that are owned and controlled by non-Africans, in the form of thinly veiled threats, to open their doors to black politically connected elites, who then acquire deeply discounted or even cost-free shareholdings or managerial positions. Conversely, non-African owned companies, which typically have far greater business experience and access to capital, can exert both licit and illicit influence over state officials to avoid meaningful compliance with indigenization legislation

¹⁶ Women's empowerment in Africa encompasses an enormous list of donors and programmes. Sponsors include African Development Bank, World Bank, the US State Department's AWEP, UNDP, SADC (following the SADC protocol on gender and development and the SADC gender and development index), among many others.

(Bierwith 1999; Taylor, 2012). These strategies maintain the veneer of affirmative action, but subvert its purpose.

There are numerous illustrations of this elite capture, with two examples being the former settler states of Namibia and South Africa. In Namibia, according to Melber (2007), BEE policies facilitated the emergence of a ‘crypto-capitalist, petty-minded, self-enriching new black elite, which expends its energy of exploiting the public purse’. South Africa’s BEE efforts have garnered the same criticism, despite years of policy research and sustained debate (Taylor 2002; Iheduru 2004; Natrass and Seekings 2005). Thus, while elite capture of empowerment benefits can lead to wealth creation and the development of an elite black business class, it does not directly facilitate poverty reduction among the most marginalized members of the populace. In fact, it exacerbates inequality (Taylor 2012).

Another inhibitor of empowerment reforms is neoliberal backlash, incited by leading beneficiaries of the liberal economic status quo. These include international donors and trade partners, who may perceive their interests to be threatened if ‘empowerment’ becomes ‘redistribution’. In addition, the domestic private sector, which in many countries is controlled by minorities, will also resist changes to the status quo. Where external actors are anxious to maintain their policy and commercial interests, and local firms are eager to preserve their economic and business hegemony, the state typically acquiesces to the tacit and explicit demands of its financial benefactors by diminishing its empowerment activities or dismantling them altogether (Taylor 2001; Chua 2003).

To some extent, each of the sub-types identified above is potentially subject to these political economy dynamics; however, the broad, national-level ethno-racial empowerment programmes are the most vulnerable. Affirmative action programmes aimed at small local minority populations, in contrast, are likely simply to be ignored by local political actors.

The discussion that follows addresses each of the three respective sub-types: programmes aimed, broadly, at the black African population; those steered toward small local minority groups; and those oriented toward promoting women in business. The first section draws on evidence from more conventional black empowerment programmes in Zimbabwe and South Africa, as well as the more encompassing scheme adopted in Zambia that also aims to assist the disabled, people with HIV, and other marginalized groups. The second section turns to more numerically limited cases of minority programmes found in other states. Third and finally, I consider the performance of business empowerment initiatives aimed explicitly at women. Although of widely varying scope, the latter tend to be more widespread across the continent.

5.2 Enabling business rights via pan-ethnic and-racial empowerment programmes¹⁷

Businesses occupying the so-called formal sector in Africa have long been dominated by foreigners—European colonial heirs, Northern MNCs, immigrant minorities—or in some cases, ethnic minorities.¹⁸ By intention or poverty, or typically a combination thereof, the vast majority of potential entrepreneurs and businesspeople have been excluded from formal business activity historically. The legal and regulatory environment has not enabled business formation/access by marginalized communities—with some partial exceptions—and the cumulative effect of

¹⁷ Portions of this section draw from Taylor (2012: 139–142).

¹⁸ This is revealed quite starkly in John Sutton’s *Enterprise Maps* book series, which currently covers three countries. See, e.g. Sutton and Kpentey (2012), *An Enterprise Map of Ghana*. See also, Ramachandran et al. (2009) and Bierwith (1999).

generations of discrimination has placed these actors at a severe disadvantage relative to non-black African firms (Taylor 2012). Thus, today these same actors find themselves constrained even further by pervasive problems of limited access to finance, economic and lack of physical infrastructure, including power and transport (Ramachandran et al. 2009; World Bank n.d.b). Moreover, those that do attempt to formalize may find themselves especially vulnerable, caught between the unregulated behaviours of the informal sector on one hand, and the market power of larger firms on the other.

In their recent manifestations, African attempts at affirmative action and BEE, sometimes under the banner of indigenization or ‘Africanization’, present a logical complement to business rights. Empowerment’s intrinsic rationale is that in an increasingly private sector-driven economy, the need to include more black Africans is an economic necessity (as well as a sociopolitical one). At their broadest, empowerment schemes encompass public sectors, social welfare, employment, capital, subcontracting, or entrepreneurship. In general, the underlying principles of such policies are entirely commensurate with poverty reduction. They rest largely on rectifying historical exclusion of black Africans from certain economic sectors. Typically, a vestige of colonial regimes, such exclusion was often continued by post-colonial socialist regimes to which Africans’ private accumulation was anathema (Taylor 2007, 2012).

My concern here is with the specific application of contemporary mechanisms to eradicate discrimination and the effects of discrimination against black entrepreneurship and businesses. In theory, the private sector dimensions are fundamentally about directing resources toward black business and entrepreneurship so as to facilitate the achievement of *equal outcomes*, including the encouragement of up-scaling from microenterprise to small- and medium-sized firms, and ultimately, the creation of a black business class and a corresponding reduction in black African poverty. But this has proved challenging, as the cases of Zimbabwe, Zambia, and South Africa reveal. Each exemplifies different shortcomings of empowerment programmes and the difficulty of their success in Africa: Zimbabwe’s *Indigenization* reveals a form of deliberate capture by elites connected to state and ruling party; Zambia’s *Citizens’ Empowerment* reveals an initiative that was never suffused with sufficient political and financial capital to succeed because of threatened backlash from neoliberal development partners; and South Africa’s BEE provides an example of both neoliberal accommodation and capture by both black and white elites.

Zimbabwe: elite capture

Zimbabwe formally adopted its Indigenization and Economic Empowerment Act in 2007, after almost three decades of independence, and nearly a century of systematic exclusion based on race. Implementation of the law did not begin formally until 2010.¹⁹ Black Zimbabweans were barred from most economic sectors by law until independence, and faced restrictions on landholdings that largely precluded commercial farming activity. A white settler class of fewer than 300,000 at its peak controlled private property and the private sector (Moyo 1995; Taylor 2007). Even after independence in 1980, the black majority remained poor and alienated from land and many commercial activities, as the ZANU-PF (Zimbabwe African National Union-Patriotic Front) government, ironically, sought to maintain the stability of the economic status quo (Taylor 2007).

¹⁹ Seizures of white-owned farms began in 2000, ostensibly justified by different legislation, the Land Acquisition Act (1992), and in a climate of unprecedented political contestation. This radical land reform can be seen as a precursor to the 2007 Indigenization Act.

Zimbabwe reveals a highly cynical example of elite capture from the very start. Indigenization has been associated most closely with the 2000 seizures by regime loyalists of white-owned commercial farms and later the seizure of other firms, albeit incompletely implemented. The land seizures and reallocation of farms has been widely addressed by scholars and erstwhile bilateral partners (Moyo 1995, 2007). Yet whereas black Zimbabweans have faced gross historical inequities, the putative remedies have been disastrous economically, contributing to severe economic decline and increased poverty (World Bank n.d.c).

The Indigenization and Economic Empowerment Act (2007) aimed, among other objectives, 'to provide for support measures for the economic empowerment of indigenous Zimbabweans' (Act 14/2007). The law empowered government to compel that at least 51 per cent of every public company and any other business be owned by 'indigenous Zimbabweans'. The latter is defined as 'any person who, before the 18th April, 1980, was disadvantaged by unfair discrimination on the grounds of his or her race, and any descendant of such person, and includes any company, association, syndicate or partnership of which indigenous Zimbabweans form the majority of the members or hold the controlling interest'. As the law was clearly intended to exclude white Zimbabweans regardless of how long their families had lived in the country, it constituted indigenization by subtraction: zero sum.

The indigenization law applied to all business with a net asset value of US\$500,000 and existing firms were initially given a period of five years from March 2010 to fully comply, while new businesses were expected to achieve the same target within five years from commencing operations. Businesses were required to submit an indigenization plan to the Minister of Youth Employment and Indigenization, outlining how they intended to meet the 51 per cent target. Not surprisingly, many firms balked at this requirement and others found political avenues to avoid them. Yet the impact on Zimbabwe's already dire economic scene was grave, further cementing the country as a place *not* to do business.²⁰

The government's stated objective in pursuing the 2007 Indigenization Act was based on the need to foster mutually beneficial partnerships between indigenous Zimbabweans and non-indigenous investors. Yet ZANU-PF's indigenization scheme²¹ emphatically rejects the tenets of the economic world order, including liberal niceties like property rights, contributing to plummeting foreign direct investment (FDI), actually reaching *zero* in 2009.²² Even accounting for the effects of the 2008 recession, this is a remarkable decline. Zimbabwe pursued a populist quest to curry favour with the black majority. There is little evidence, however, in terms of non-farm industries, that this populism served more than the narrow political interests of the ruling

²⁰ Zimbabwe's *Doing Business* scores reflect this undesirable investment environment (World Bank n.d.d). Unemployment, economic growth, doing business, and virtually every other metric is worse today in Zimbabwe than when indigenization began. Of course, this fusillade of bad news is not solely attributable to indigenization; those policies contributed to it.

²¹ In 2012, the leading opposition party, the Movement for Democratic Change (MDC) devised an alternative indigenization strategy entitled 'Jobs, Upliftment, Capital Investment and Ecology' or 'JUICE', which was much more in line with conventional approaches to affirmative action. JUICE advocated growing the pie by expanding the economic and productive base and promoting entrepreneurship, *then* uplifting the ordinary citizens: a fairly orthodox, centre-right economic policy. Rather than distributing an already small economic pie. Empowerment policy should be 'people-centred' and focus on job creation, skills development, support to the informal economy, rather than for the benefit of a small number of elites based on unsustainable extraction and exploitation, symptomatic of the ZANU-PF patronage system. In a political context dominated by ZANU-PF, however, JUICE was effectively dead on arrival.

²² It has since rebounded (Indexmundi.com n.d.). This is due in part to increased investment from Chinese interests, which, not coincidentally, are exempted from compliance with the Indigenization Act.

party, and the economic opportunism of political insiders who were able to grab companies for themselves (Taylor 2012; unpublished interview with John Makumbe, University of Zimbabwe, 22 June 2012). Thus, Zimbabwe's indigenization programme can be described as nakedly political (Dawson and Kelsall 2011; Taylor 2012). Moreover, rather than reduce poverty, it has led to firm closures, displacement of workers, and threats to the economy through sanctions, divestitures and lost investment (unpublished interview with Jimmy Psillos, Chair, Confederation of Zimbabwe Industries, 26 June 2012).

To conclude that Zimbabwe's approach to empowerment was inconsistent with business rights is a mammoth understatement. Instead of promoting entrepreneurship, it encouraged predation. Instead of empowering black Zimbabweans, writ large, it further impoverished them. Rather than emphasize the nurturing of business among marginalized communities, indigenization instead represented a radical—and politically corrupted—reallocation of existing capital. Historical claims against the country's economically dominant white minority were conflated with foreign-owned businesses.²³ Hence, western investors fled (or avoided) the country that could no longer guarantee property rights protections.

Questions about the legality of the statutory instruments and threats to property rights have been particularly grave concerns; self-imposed, if largely unintentional, autarky provides a cautionary tale for countries that would pursue a radical 'empowerment' scheme in which potential benefits to the poor are subverted to the interests of elites who extract both political and personal economic gain. Business rights-cum-empowerment in Zimbabwe is undermined by the intersection of electoral politics and economic populism, and elites' opportunity for personal enrichment, or that of key constituencies (Kelsall 2013).

Although 'indigenization' was part of ZANU-PF's lexicon since independence, the party legally barred affirmative action in the 1980s and eschewed meaningful land reform in the 1990s despite having a legislative framework allowing it (Taylor 2002). For a generation, then, ZANU-PF's economic interests actually aligned with status quo actors: white industrialists and agriculturists. Only when the opposition MDC emerged as a credible political threat did indigenization finally become politically salient. The promise of more equitable economic outcomes appealed to Zimbabwe's disadvantaged and marginalized majority. However, the capriciousness with which indigenization has been pursued *after* elections indicates that indigenization was always less about alleviating poverty than about the economic and political self-interest of ZANU-PF elites, enshrined in campaign strategy.

Zambia: neoliberal backlash

Zambia's establishment of the Citizens' Economic Empowerment Commission (CEEC) was a surprisingly short-term political expedient. The announcement of its formation was greeted with some scepticism by Zambia's immigrant communities and its development partners (World Bank 2008). Unlike Zimbabwe, once the political rationale for the programme was met, the government acquiesced to neoliberal pressures.

The CEE Act, passed by parliament in February 2006, triggered the establishment of the CEEC, with its mandate to 'empower persons who are "historically marginalised or disadvantaged with no access to economic resources or opportunities"' (quoted in Kragelund 2012: 448). The programme has nine pillars, five of which relate to business: equity ownership, preferential procurement, access to finance, greenfield investments, and joint ventures with foreign investors

²³ Reflected in interviews with managing directors of two South Africa-based multinationals (Harare, June 2012).

(Kragelund 2012: 454). Although the country has not been beset by the same degree of problems as South Africa, Namibia, or Zimbabwe, which experienced extended settler rule, Black Zambians likewise have been historically excluded from business, either directly or indirectly. Unlike entirely race-based programmes, however, the target populations include women, youth, the disabled, and people with HIV/AIDS.

The relative exclusion of indigenous Zambians from the private sector is in part a legacy of colonial rule, as well as under the African socialism of founding president, Kenneth Kaunda (1964–1991). Survey data from the Zambia Business Survey, for example, shows that Zambians are ambivalent about the private sector, or at least their potential role in it: even among small business owners, nearly half preferred a government job to entrepreneurship (ZBS 2009). Liberalization policies and economic growth in the 2000s have helped attract considerable FDI, particularly in the copper mining industry. Chinese firms, some of which are state-owned or partly state-owned, have been leading investors in mining, as well as in commercial sectors and construction. However, as Zambians remain poorly represented in business, certain aspects of foreign domination have engendered a degree of popular distrust. The Chinese presence in particular has fomented some popular resentment, especially over labour practices and price competition among small-scale traders (HRW 2011; Kragelund 2012). In short, Zambia lacks a legacy of black entrepreneurship. The establishment of the CEEC was, in part, to stimulate business as well as allay latent popular scepticism by providing a vehicle to promote Zambian participation in the private sector.

In backing CEEC, the ruling Movement for Multiparty Democracy (MMD) and then-president Levy Mwanawasa were also clearly responding to their own threatening opposition, led by populist presidential candidate Michael Sata who surged in the 2006 electoral cycle. Sata denounced the Chinese, openly expressed support for a Zimbabwe-like programme, and he nearly outflanked the MMD on its left. Sata's Patriotic Front (PF) captured 58 per cent of the vote in Lusaka and majorities in other urban areas, partly by playing on popular ambivalence about economic reforms, persistent urban unemployment, and disaffection with Chinese investors and the accompanying labour disquiet (Resnick 2013: 72–3).

Although the MMD incumbents won in 2006 and the special election in 2008, the CEEC was rolled out as planned. Its creation sparked fears in some neoliberal constituencies of a Zimbabwe-like indigenization programme characterized by asset seizures. Development partners were prepared to punish the government for discriminating against investors, perhaps using the WTO's Dispute Settlement Body. The World Bank suggested that Zambia would not enjoy 'the goodwill among WTO members that has prevented them so far from challenging South Africa's BEE under WTO rules: sympathy with the South African efforts to redress historical inequities' did not apply in Zambia (World Bank 2008: 25). CEEC officials sought successfully to placate these concerns by ensuring that CEEC was decidedly *unlike* Zimbabwe (unpublished interview with Mabel Mung'omba, CEEC Managing Director, 21 January 2010). As Kragelund (2012: 462) notes, 'the CEE policies were cast in very broad terms. Specific aims and measures would simply scare away investors and that was not the ambition. The goal [of the MMD] was to stay in power and make sure that all critique was curbed'.

Thus, the scope and intent of CEEC was always more limited—perhaps reflecting its short-term, *political* rationale—than empowerment institutions in countries like Zimbabwe or South Africa. Fears about the CEEC quickly subsided once it came into being, and it became clear that it would not threaten the liberal status quo dominated by leading international investors, donors, and major clients among domestic monopoly players.

Kragelund's (2012) analysis highlights important issues with empowerment agendas in African states: namely, the CEEC was portrayed by its proponents mainly in the then-ruling MMD as an imperative institution for advancing the business and private sector (and other) interests of indigenous people. Yet its profile rapidly diminished, thereby raising questions about the state commitment to empowerment in the first place. The MMD was unwilling, when all was said and done, to challenge the neoliberal orthodoxy that ultimately undergirds the entire economy. Once the competitive political period that drove a threatened President Levy Mwanawasa to adopt the Commission had subsided (Kragelund 2012: 449), the CEEC became a far less visible and controversial institution. Although it persists, actual disbursements, in the form of both loans and grants, tend to be small, and CEEC has hardly been the transformative body imagined by its proponents or feared by its detractors.

South Africa: the nexus of elite capture and neoliberal accommodation

South Africa provides an example of an aggressive and comprehensive system of affirmative action, institutionalized within the country's BEE framework. South Africa's BEE emerged in the early 1990s, a necessary reaction to the pervasive inequalities between the races, which, of course, also included the marginalization and lack of opportunity for black entrepreneurs.²⁴

The South Africa case illustrates some of the constraints on success of even a major—and by all accounts serious—initiative of the South African Government. Space does not permit a detailed exposition of the history and trajectory of BEE over its two-decade existence. Yet the South African example illuminates how elite capture *and* acquiescence to neoliberal pressure can combine to inhibit the success of arguably Africa's most elaborate affirmative action policies. Importantly, however, the elite capture that characterizes BEE in South Africa is not the outright state predation seen in Zimbabwe. Instead, the elite beneficiaries of BEE in South Africa are predominantly *private* sector denizens, both black and white, who are able to manipulate the system.

BEE at first emphasized shareholding and black ownership, via equity markets, in historically white corporations. By the late 1990s, however, it was apparent that BEE, as practised, was enriching mainly a small coterie of black individuals, largely those with some connection to the ruling ANC (Ponte et al. 2007: 934). In 2003, amid widespread public and political recognition, including by then-president Thabo Mbeki, that BEE was not fulfilling its intended goals (Taylor 2002), a new Broad-Based BEE (BB-BEE) was initiated. The promulgation of BEE Act 53 of 2003 and the passage of companion legislation, legal codes, and regulations, placed the original BEE focus on equity ownership alongside seven other criteria used to assess firms' empowerment credentials. "The South Africa Department of Trade and Industry defines BB-BEE as a socio-economic process that directly contributes to the economic transformation of South Africa and brings about "significant increases in the number of black people that manage, own and control the country's economy, as well as significant decreases in income inequalities"" (DTI 2007, quoted in Juggernath et al. 2011: 8,226). Of the seven assessment criteria, two relate plainly to affirmative action for potential entrepreneurs: preferential procurement, and enterprise development (Ponte et al. 2007: 934).

Less than a decade following its inception, evidence of BB-BEE's 'broad' success was lacking. Juggernath et al. (2011: 8,228) suggested that only an 'elite few [seemed] to have benefited from

²⁴ Although the term 'black' is sometimes defined as including 'black people, women and disabled people, the ANC has interpreted BEE to relate particularly to the need for empowering African people within the "black community in general"' (Ponte et al. 2007: 940, citing ANC 2002).

Black Economic Empowerment'. They sit atop an emergent black middle class, referred to somewhat derisively as 'Black Diamonds'. There is no consensus on the size of this new middle class, but it is variously estimated at between 9 and 10 per cent of the population (BusinessTech 2015). Though BEE has played some role, generally that has not been in entrepreneurial arenas. In any event, it is the tiny black elite that is best positioned to benefit from BB-BEE (Juggernath et al. 2011: 8,829). Yet their spectacular ascent echoes earlier cautions of Iheduru (2004: 1), who criticized the 'neopotic accumulation' of the original BEE. Iheduru (2004) was over-optimistic in predicting that BB-BEE might unfold in a more inclusive way. Indeed, not long after the emergence of BB-BEE, it became apparent that 'politically well-connected figures such as Cyril Ramaphosa, Patrice Motsepe, Tokyo Sexwale and Saki Macozoma' had 'remained in the forefront of empowerment deals' (Ponte et al. 2007: 947).

BEE in South Africa, like public policy in general, thus has a Janus-faced quality about it, resulting from the need to balance the socio-economic needs of both the black majority and the demands of the private sector. The government's relationship with the private sector is complicated by the still outsized economic role played by historically white conglomerates and MNCs (Taylor 2007) and, more recently, the nascent black elite, who are themselves deeply integrated into and dependent on the neoliberal foundations of the economy. The resistance of these actors to a truly inclusive, developmental, and more equitable capitalism means that an undiluted and potentially redistributive BB-BEE would run counter to liberal interests. Hence, 'as BEE is applied in the context of neoliberal economy policy and of more general constraints (including mobility of capital and investment, risk rating), it can only take specific forms and achieve limited results' (Ponte et al. 2007: 936).

According to Kleynhans and Kruger (2014), it is commonly believed that South African BEE 'encourages disinvestment from foreign investors'. In fact, this trope was disproven in 2004 through research that 'indicated that regulatory and restrictive incentives implemented by countries via the framework of their economic policies had little effect on levels of foreign investments... [Furthermore], in South Africa specifically, the volatility of the South African rand has a stronger effect on FDI than BEE'. That BEE appears to have had no impact on FDI indicates that, as implemented, South Africa's empowerment strategies accommodate, rather than threaten, neoliberalism. This default toward the neoliberal status quo, coupled with the effects of elite capture, both black and white, means that genuine empowerment remains elusive in South Africa. White firms will continue to 'link up with an appropriately "black empowered" group through a joint venture or sale of equity rather than [seek] to concretely change the way they operate in training, staff advancement and procurement' (Ponte et al. 2007: 949). The national interests of poverty reduction and the achievement of a more equitable society cannot be outsourced to self-interested private firms.

In sum, the state has ceded much of the management of BB-BEE to the market, such that the government's control over or engagement with BEE is 'an illusion' (Ponte et al. 2007: 950). White capital is thus reassured that its interests will be preserved and that a Zimbabwe-style 'radical redistribution of assets will not take place' (Ponte et al. 2007: 950).

The general preservation of neoliberal, white interests and the capture of BB-BEE by a handful of black elites is potentially destabilizing (Chua 2003; Ponte et al. 2007). Moreover, although the ruling ANC clearly is trapped between the interests of its leading financial backers and those of its main electoral constituency, maintenance of the status quo may be short-sighted, as recent elections suggest (BBC News 2016). For their part, private sector elites are not taking advantage of the many gaps in the system established by the ANC. Yet as Juggernath et al. (2011: 8,233) rightly argue, 'Companies should be driving meaningful and substantive BBEEE programmes that will create value and wealth in the hands of the majority that were previously disadvantaged.

This will assist in alleviating poverty and creating job opportunities for South Africans'. It may be a choice between higher returns in the short term, and national stability in the long term.

Taken together, these three cases illustrate a number of critical aspects of empowerment programmes in contemporary Africa. First, broad affirmative action, while theoretically attractive to a wider populace, often suffers from mandates that are too diffuse, and insufficient funding. Politicians get cold feet as they confront their development partners, who may perceive such programmes as threats to the economic status quo, neoliberalism, and property rights. South Africa offers a partial exception, inasmuch as there was some consensus among the political class, the majority population (and some white firms, albeit grudgingly) that BEE and BB-BEE were necessary interventions. But even here, the focus has been overwhelmingly on jobs—diversification of the executive class, at least visually, board memberships and 'equity' ownership in the form of shareholding—than on empowerment of a new class of black entrepreneurs (Iheduru 2004; Ponte et al., 2007).

Thus, all affirmative action programmes are vulnerable to elite capture, such that benefits accrue to political and/or economic elites rather than their nominal beneficiaries. As practised in Africa, indigenization is also rife with potential for abuse by the state itself, as in Zimbabwe most egregiously, or by politically connected elites, and their private sector counterparts, as in South Africa; BEE in Namibia, with its similar demographic profile, is subject to elite capture (Melber 2007). Empowerment policies often serve as a system for wealth circulation rather than wealth creation.

5.3 Business rights and ethnic minorities

If large-scale 'black empowerment' programmes are problematic because of political capture and neoliberal backlash, more narrowly focused business rights programmes aimed at national minorities pose different challenges. Remedies aimed at groups that are clearly relatively poorer, but prominent nationally and historically, such as the Lozi in Zambia, Zimbabwe's Ndebele, Kenyan Somalis, and so on, are unlikely to gain any traction: despite the fact that these are minorities in the national context, they are sufficiently large that inter-ethnic tension and rivalry would not permit any group-specific affirmative action programmes that benefited only those groups. Moreover, even absent affirmative action, there are high numbers of individuals from these groups who have succeeded in business, notwithstanding their group's collective poverty.

It is plausible that empowerment programmes aimed at tiny national minorities—the Basarwa of Botswana, the Batwa of the Great Lakes region, the Baka of Cameroon, the Hamar of Ethiopia, and similarly peripheral groups—may be less threatening to status quo interests, although establishing a precise cut-off (for example, based on percentage of the national population) between 'tiny minority' and mere 'minority' is not possible here. Regardless, historically marginalized groups tend to remain marginalized in terms of programming, which suffers from indifference—insufficient funding and national attention. In addition, ethnic-based remedies aimed at tiny minorities may spark resentments and hostility from the larger majority population and/or their state representatives.²⁵ Thus, narrower programmes aimed explicitly at promotion

²⁵ Although they do not focus on the ethnicity of entrepreneurs, several analyses of street vendors actually illustrate this problem. Lyons (2013) on Tanzania and Nchito (2013) on Zambia (see also Banik 2013) demonstrate that government treatment of street vendors has vacillated between persecution and assistance with organizing, depending on the mood of the regime. In Lusaka, they were coddled at one point because of worries about their support for opposition, but later effectively outlawed. The group has been similarly oppressed (suffering 'brutal evictions') across Tanzania at times, while at other times 'afforded a measure of protection' by government (Lyons 2013: 82). Indeed, though street vending is *constitutionally* permissible in Tanzania, it is often delegitimized in practice

of business rights for marginalized communities are not more likely to be successful than large-scale black empowerment programmes, because the factors that contributed to their marginalization—small population, lack of demographic influence, geographic isolation lack of political power—persist. The following discussion highlights two cases that clearly illustrate this challenge, Botswana’s Basarwa community and Cameroon’s Baka people.

The Basarwa

The economic condition of the Basarwa, also known as the San, came to international attention more than a decade ago through a legal case. The Central Kalahari Game Reserve (CKGR) case arose out of the maltreatment of the Basarwa by the majority Tswana—including infringement on their land use and displacement. The famous court ruling in December 2006 in favour of the San established indigenous rights to development. The 242 claimants in the High Court case, Roy Sesana v. Attorney General, won the right to live on ancestral lands and the right to enjoy a traditional way of life. Yet the favourable legal outcome did not necessarily signal a shift to an ‘empowerment’ agenda on the part of majority Tswana state and society.

Indeed, Lucas (2008) finds that various entrenched ‘power blocs’—elite constituencies—in Botswana have sought explicitly and implicitly to *disempower* the Basarwa and maintain the status quo in which Basarwa interests have been manipulated or exploited for other individual or group gain, resulting in systemic poverty and marginalization (Lucas 2008: 124). The Botswana majority-dominated government zealously sought to obstruct the Basarwa land claims. The case would seem to suggest that extension of privileges—falling, admittedly, under a fairly elastic interpretation of business rights—to such minority groups can face resistance from defenders of the status quo, who still view ethnic economic opportunity as zero sum.

Despite winning the case, the overall treatment of the Basarwa community improved little. In fact, the CKGR legal victory—the case was spearheaded by Survival International, a human rights organization—may actually mark a setback for Basarwa business rights. In addition, Survival International’s public relations portrayal of the Basarwa in the case risks over-romanticizing and over-essentializing San culture, making it ‘timeless’ (Ndahinda 2011: 341–2). Thus, whereas individuals from the community may succeed, the Basarwa find themselves locked into ‘traditional’ roles whose economic options are often limited to ‘sustainable tourism’—using a community-based natural resource management (CBNRM) model (Brockington et al. 2008).

CBNRM can be an effective tool for conservation, but it is unlikely to yield widespread opportunities for entrepreneurship, and therefore poverty reduction. ‘Tiny minority’ groups in particular are *further* disadvantaged by neoliberal conservation models precisely *because* this can lock them into a perpetually peripheral relationship with the modern economy, which requires them to inhabit roles as the ‘timeless’ stewards of the land (see Brockington et al. 2008). Comparable examples include the Ogiek people in Kenya (Awuh 2011; Awuh 2015), or the Batwa of Rwanda and the Great Lakes region, along with many others. Awuh’s (2015: 152) analysis of the Baka in Eastern Cameroon suggests that these tiny minorities need not be so one dimensional—that is, timeless and stuck. Indeed, displaced Baka actually showed substantial capacity to adapt in terms of livelihoods, although Awuh acknowledges these are a privileged few.

(Lyons 2013: 85). This suggests small, micro, and informal actors, and their enterprises are subject to the prevailing political winds and whether incumbents need their support.

These cases present something of a paradox. The sustained encounter of such tiny, rural minorities with the ‘modern’ economy and the confluence of states’ interests alongside those of their international partners (business, international environmental NGOs, and others) degrades these minority communities further. The groups are thereafter in need of ‘empowerment’, which usually takes the form of social programmes and welfarism, or the promotion of neo-traditional occupations, like CBNRM. Paradoxically, such ‘sustainable livelihood’ type programmes keep them at the margins of the modern economy and, effectively, deny the capacity to exploit or enhance ‘business rights’.

Cameroon’s community forests provide another example of an attempt to deliver empowerment, albeit not ‘business rights’ per se, to rural communities at the margins of the modern economy. Legislation establishes ‘a community forest (CF) [as] “a forest of non-permanent forest estate, subject to a management agreement between a village community and the forestry authority”’. CFs aim to create jobs and generate income in rural areas; to improve the livelihoods and sustainable management of the environment while meeting the basic needs of rural communities’ (Belibi et al. 2015: 382).

Aimed measurably at the Baka, CF actually seems like a bona fide LEP/business rights-type initiative, though it eschews that terminology. It offers a modest counterpoise to the Basarwa experience. Yet this is the exception that proves the rule. The variable success of the Baka is nonetheless fairly small and results are not extremely robust (Belibi et al. 2015: 385–6), but CF did achieve substantial price increases for products and for revenues, which rose by 210 per cent from 2011 to 2012 (Belibi et al. 2015: 387).

The initiative can hardly be counted as a resounding success, however, and in fact reveals some of the limitations of LEP and tiny minorities. But many of the 182 CFs as of 2011 are not able to exploit the timber resources due to cost. ‘Revenues generated were lower than foreseen’ (Belibi, et al. 2015: 382). The situation for non-timber forest products (NTFP) is even less commercial (despite the lesser legal and regulatory requirements for NTFP) and tends to be dominated by women and Baka.²⁶ In addition, Belibi et al. (2015: 388) note that business opportunities can be captured by better-positioned entrepreneurs, typically those representing less impoverished groups. Indeed, Belibi et al.’s (2015: 388) research ‘shows that NTFPs can be important sources of revenue for social groups normally not included in forest management initiatives’, but he also notes those groups can be victims of their own success. As these initiatives gain value, the very activities that contributed to their empowerment ‘may be captured by dominant groups’.

The Baka experience raises genuine questions about the limits of empowerment, the commitment of local political elites, and, as in the CKGR case, the essential stimulus provided by international actors, in this case, the Dutch aid organization SNV. Neither example augurs positively for ‘empowerment’ that needs to be locally owned, and state- (nationally) driven to ensure successful empowerment and poverty reduction.

5.4 Women’s empowerment programmes: cause for optimism?

Like BEE, ‘women’s empowerment’ is an all-encompassing concept. As Esther Duflo (2012) points out, there are manifold dimensions—education, politics, economics, and so on—but I delimit the scope by focusing on affirmative action-type programmes that endeavour to increase the role and number of women-owned businesses, beyond the mere conferral of business rights.

²⁶ The project in question is supported by SNV, a Belgian NGO and a local women-focused NGO.

Gender-oriented affirmative action may have much to teach us about the prospects of business rights, for example. One could hypothesize that gender-based programmes should be the most successful, capturing ‘the poor’—or at least the largest share of a vulnerable segment of the poor—since women make up the poorest segments of society, regardless of race or ethnicity. Moreover, because gender cuts across ethnic identity, gender empowerment should be less threatening to political and material interests of status quo elites, in contrast to broad-based empowerment programmes, which domestic and international elites worry may threaten property rights, or minority-oriented programmes, which can be regarded as zero sum. While it is comparatively easy to demonize members of an ‘undeserving minority’, in most countries it is more difficult for political and economic leaders to advocate that women should be kept marginalized or portrayed as a threat. Thus, ‘women’s empowerment’ can be more politically feasible and economically saleable to both elites and the population at large. However, even gender-based affirmative action comes with certain trade-offs: gains for women from specific affirmative action policies can come at the expense of men—in politics, education, direct transfers (Duflo 2012: 1,063). As Duflo argues, to achieve equity between men and women, ‘it will be necessary to continue to take policy actions that favor women at the expense of men, and it may be necessary to continue to do so for a very long time’ (Duflo 2012: 1,076).

Although ‘equity between men and women... [is] a very desirable goal in and of itself’ (Duflo 2012: 1,076), it may not be as developmental as many scholars and practitioners believe. Problematically, Duflo (2012: 1,075, citing Fafchamps et al. 2011) finds that cash transfers to women-owned microenterprises have a *zero* impact on profit,²⁷ and that in-kind grants only helped female firms that were *already profitable*.²⁸ Thus, even when aggressive affirmative action for women exists, female-headed firms may struggle. Duflo suggests a number of possible explanations for her tepid findings—different sectors, less commitment to business, less managerial knowledge, etc.—many of which would also be germane to recipients identified ethnically.

Rather than reject affirmative action completely, however, Duflo herself regards this as a call to redouble such efforts. Even if tenuously linked to business growth, *genuine* equality of opportunity—which simply cannot be derived from mere establishment of basic business rights—is worth pursuing as a social good. Moreover, women’s increasing equality itself may have a salutary impact on poverty.²⁹

Realistically, it is ‘not clear that a one-time impulsion of women’s rights will spark a virtuous circle, with women’s empowerment and development mutually reinforcing each other and women being equal partners in richer societies’ (Duflo 2012: 1,076). What such findings suggest is that not only are basic business rights not sufficient, affirmative action as conventionally

²⁷ Versus 5 per cent reported monthly returns to male-owned microenterprises.

²⁸ On the other hand, Morrison et al. (2007: 18) offer a more positive view. They note that ‘when women were the direct beneficiaries of credit, it had a positive effect on virtually all of the women’s latent empowerment factors—women’s access to markets (labor, land, and credit) and women’s decisionmaking power within households—examined; when men were the direct beneficiaries of credit, it either did not have an effect or had a negative effect on these same factors for women’ (Morrison et al. 2007: 1). Importantly, however, Morrison et al do *not* address effects on *profit*. Moreover, at the macro level they found ‘little evidence documenting that increased gender equality under the law translates into more rapid economic growth’ (Morrison et al. 2007: 33).

²⁹ Morrison, et al. (2007: 28) find that ‘developing countries with higher gender equality tend to have lower poverty rates’. They make this determination by comparing the poverty headcount ratio (US\$2/day) and gender equality, as measured by the female-to-male ratio of sex-specific Human Development Indices for a set of 73 countries circa 1997.

understood and variably practised in sub-Saharan Africa and elsewhere also is not sufficient—even for women, despite their unassailable demographic heft. Marginalized firms, like marginalized individuals and entrepreneurs, need not just set-asides and shareholding, but aftercare, including business development services, financial and human management education, a pool of suppliers and customers that enable the value chain. This more expansive menu will better enable them to survive and grow, and thereby contribute to poverty reduction.

An illustrative example of this is a medium-sized, Ghanaian shea butter manufacturing firm, Ele Agbe, which I first encountered in 2012. Founded by female entrepreneur Comfort Adjahoe, Ele Agbe grew from a handful of employees to several hundred, in two regions of the country. Adjahoe is a genuine entrepreneur, but driven by community service as well as the profit motive (unpublished interview with Comfort Adjahoe, 25 July 2012). With the assistance of the USAID-supported West African Trade Hub and the State Department’s African Women’s Entrepreneurship Program initiative, she established an effective supply chain, as well as marketing and distribution channels; Ele Agbe gained access to export markets in the United States and in the region. Adjahoe’s business contributes to poverty alleviation in Ghana’s Northern Region, where she employs more than 300 women as shea cultivators and harvesters.

The sheer enormity and multifaceted-ness of the need means that African *states* especially may have less capacity to implement affirmative action after all. State resources are both too politicized and too constrained. Consequently, despite women-oriented affirmative action being less overtly political than the models described earlier, the scope of the constraints suggests that women’s empowerment may yet remain the preserve of international organizations and donors—and thus subject to the vicissitudes of that domain.

The magnitude of the challenge, and the inconsistency of state response, suggest that women’s economic empowerment is politicized after all. It is laudable to talk about positive sum scenarios and growing the pie, but status quo elites perceive that they have to surrender something if the marginalized group is to gain. While this is partly a function of African state capacity and historical relative scarcity, such resistance is also found in the OECD, including the US (Fisher v. University of Texas, 2016).

Women’s economic empowerment programmes can be decried as not sufficient, given persistent poverty and entrepreneurship gaps. But in fact they appear far more concordant with the complex political economies of African polities than do ethno-racial LEP solutions. Although they may still become enmeshed in politics, they do not face the other major constraint that bedevils empowerment programmes based explicitly on racial or ethnic group inequities, that is the threat to the liberal status quo. Because of this, and because of the appeal of women’s and gender equity programmes especially to NGOs and development partners, whether or not they generate positive returns to business, they will remain fixtures of the African landscape. The lessons are not replicable for affirmative action programmes based on ethno-racial identities, but gender-oriented empowerment may snare some of the same target groups.

6 Conclusion: the political economy of business rights

‘Business rights’, a broadly encompassing notion, have to be implemented in a *positive sum* environment. That is, business rights are unlikely to be measurably expanded for ‘the poor’ if their expansion threatens or reduces the interests of status quo players. Domestic and international actors who benefit from the neoliberal status quo will see ‘empowerment’ as threatening to the prevailing property rights/business rights regime. This need not be rooted in cynical, narrow self-interest. Governments may find themselves legitimately caught in the middle,

trapped between political and economic justice and equity obligations to the majority and financial-economic obligations to their principal (neoliberal) benefactors, be they the international community in the Zambian case, or the domestic business class in South Africa.

The irony of Golub's (2012: 40) critique of the UN's initial CLEP report and the policies that stemmed from it as too much of a 'top-down, government-centered approach' again becomes clear. LEP is at once top down, and yet not top down enough. Golub both overestimates the potential and the power of 'grassroots' initiatives and overstates the government role. In terms of local and non-state initiatives, some countries have a context for these. For example, Nigeria's Tony Elumelu Foundation provides extensive support to nascent entrepreneurs, as do other business-oriented philanthropies. Others, however, do not. Regarding the latter, a strong case can be made for a more robust state role and presence: *affirmative* policy-making to affect outcomes, that is, business *establishment and proliferation*, not merely business *rights*. But we must be clear eyed about the limits, both in capacity and in will, of states to play such a substantial role. As Lyons (2013: 79) notes, business rights, from basic to advanced, to complex interventions like BEE, all depend on *government*.

But government and national political authorities lack systemic commitment to 'empowerment' and 'business rights' of any measure. Thus, it is not about, as Golub would claim, the *appropriateness* of a government role, but the interest and capacity of government to effect business rights reforms in plural contexts. Reforms cannot be simply titular in nature, or exogenously driven (e.g. by donor pressure). Unfortunately, however, states typically lack capacity, tend to be dominated by the same resistant, self-interested economic elites. Local and international proponents of reforms have to be cognizant of the political obstacles, yet, as Lyons (2013: 92) notes in her study of Tanzania, the results suggest 'that the political ground for these reforms had not been prepared'.

The bulk of this paper argued that while robust empowerment schemes must accompany mere regulatory reforms, even those affirmative action initiatives often face severe constraints imposed by the local and international political economy. One final consideration is that in discussing business rights as a route to meaningful, sustainable poverty reduction comes from the emergence of a business *class*, not merely a relatively modest proliferation of marginal microenterprises unlikely to outlive their founders. Implicit in this analysis, therefore, is the assumption that demand for business and interest in entrepreneurship is a prerequisite for even a modicum of success; it must be organic. High-growth entrepreneurs cannot be crafted out of populations comprised of entrepreneurs-by-necessity who do not aspire to business success or who lack entrepreneurial zeal, regardless of the progressivity of the business rights regime (see Global Entrepreneurship Monitor n.d.). For those for whom high-growth entrepreneurship is a desirable objective, however, affirmative action, especially one based on gender, can offer a more promising route to genuine equality of opportunities, if not always outcomes. Indeed, as Lyons (2013: 79) observed, there are entrenched 'cultural and political barriers to legal empowerment' underestimated by UNDP. This would seem to be a substantial understatement.

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