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# Law and Economic Development in South Africa: An Assessment through the General Theory of Law and Development

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**Abstract:** The ascension of the African National Congress into formal politics through its electoral victory in 1994 resulted in South Africa adopting one of the world's most heralded social justice and human rights-based documents, the 1996 Constitution. Yet, two-decades of ANC governance this paper argues has not led to the types of economic development needed to advance the formerly oppressed African majority, Colored and Indian populations. This lackluster economic development is even more troubling when one considers the giant economic development steps Asian developmental states have made, without a human rights and social justice approach. It is the contention of this paper that the newly presented General Theory of Law and Development allows for a new type of analysis exploring the reasons why South Africa's economic development trajectory has been so lackluster, when so many authorities praise the South African legal framework. In making this argument using the General Theory South Africa's local governments sphere and local economic development will be the subject of analysis.

**Keywords:** local economic development, law and development, public policy, General Theory of Law and Development

## 1 Introduction

This paper, by applying the General Theory of Law and Development (referred to as the General Theory),<sup>1</sup> attempts to explain why South Africa, despite having one of the world's most lauded liberal constitution, has a paltry record of economic development post-1994. The Law aspect of development in South

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<sup>1</sup> Yong-Shik Lee, *General Theory of Law and Development*, 50 Cornell International Law Review, no. 3 (2017), 415–472.

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Africa is achieved and well explored, but economic development is sorely lacking as high unemployment numbers indicate (reaching 27.7% in 2017),<sup>2</sup> and poor spatial planning in rural and urban areas testifies. The lackluster economic development trajectory raises questions about whether the direction taken in promoting the South African Constitution ethos was the correct one. Following up on Professor Lee's work which adopted the General Theory to analyze the South African development issues at the national level,<sup>3</sup> this paper uses the prism of local governments to examine the elements of the general theory, namely (1) regulatory design (2) regulatory compliance, and (3) quality of implementation<sup>4</sup> to explore the current state of economic development of South Africa. Under the constitutional structure of South Africa, economic planning and implementation are undertaken at multiple echelons of national and local governments. This paper, by adopting Lee's General Theory to the operations of the local governments, provides a new approach in the analysis of South Africa's economic development trajectory.

## 2 Background and Source of the Problem

South Africa experienced what numerous analyst and academics call political miracle by avoiding civil war between the oppressed majority Black (African, Colored and Indian) population and oppressive white minority emanating from British Colonialism and Afrikaner Apartheid nationalist rule.<sup>5</sup>

The new South African State was formulated based on key legal instruments embedded in the liberal 1996 Constitution and its human rights approach. Former Constitutional Court Deputy Chief Justice Dikgang Moseneke gave some insight into this settlement and the resolve to use the Constitution of South Africa as the marker of South Africa's development:

Our constitutional democracy was forged on the anvil of division, past injustice and economic inequity, but also on the hope for reconciliation, nation building and social

<sup>2</sup> World Bank, *Unemployment, total* (% of total labor force) (modeled ILO estimate), available at: <<https://data.worldbank.org/indicator/SL.UEM.TOTL.ZS>>, accessed May 27, 2018.

<sup>3</sup> See Yong-Shik Lee, *Law and Development: Theory and Practice* (Routledge, forthcoming 2019), chapter 5, for the application of the general theory to the economic development of South Africa at a national level.

<sup>4</sup> Lee (2017), *supra* note 1.

<sup>5</sup> B. Levy, A. Hirsch and I. Woolard, *South Africa's Evolving Political Settlement in Comparative Perspective*, Southern Africa Labour and Development Research Unit, Working Paper Series, no. 138 (Cape Town, 2015).

cohesion. Notionally, our Constitution is premised on the will of the people expressed in representative and participatory processes. It does not only establish its supremacy, rule of law and fundamental rights but also recites our collective convictions. It contains our joint and minimum ideological and normative choices of what a good society should be. It enjoins the state, all its organs, to take reasonable steps without undue delay to achieve that good society.<sup>6</sup>

The vision of the Constitution expresses three key ideas as to how South Africa was and is envisioned as being. Firstly, South Africa, despite being a State founded on the underdevelopment of the African majority, desires that there be a political environment founded on non-retribution.<sup>7</sup> Secondly, and following on from the first point, notions such as reconciliation, nation building, and social cohesion are hallmarks of South Africa's constitution.<sup>8</sup> Thirdly, in order to promote these and other human rights-inspired concepts, the South African government has instituted and provided the necessary institutions to operationalize these concepts.<sup>9</sup> These three ideas are best expressed by the South African government's "Twenty Year Review," which details how notions such as nation building, human rights and other concepts have become operational in the South African government.

A Constitutional Court was set up as the apex court. Constitutional structures, such as the South African Human Rights Commission, the Public Protector and the Auditor-General, were established to enhance accountability. These institutions have been robust in looking after the public interest and holding the executive and bureaucracy accountable. An independent judiciary that adjudicates matters without fear, favour or prejudice has been established.<sup>10</sup>

It needs to be noted that the South African government has played a proactive and constructive role in promoting and creating the necessary institutions to promote human rights and other liberal legal instruments. The Twenty Year Review and an international jurist such as the United States Supreme Court Justice Ruth Ginsburg have expressed the viewpoint that the South African

<sup>6</sup> D. Moseneke, *Reflections on South African Constitutional Democracy-Transition and Transformation. Key Note Address at the MISTRA-UNISA Conference 20 Years of South African Democracy: So Where to Now?*, The University of South Africa (2014), p. 3.

<sup>7</sup> V. Gumede, *Political Economy of Post-Apartheid South Africa*, The Council for the Development of Social Science Research (Dakar, 2015).

<sup>8</sup> N. Rhoadie and I. Liebenberg, *Democratic Nation-Building in South Africa*, HSRC Publishers (Pretoria, 2004).

<sup>9</sup> Section 193(4) of the Constitution.

<sup>10</sup> Government of South Africa, *Twenty Year Review: South Africa 1994–2014* (2014), p. 11.

government has instituted the correct institutions and made a human rights-based approach.

Justice Ginsburg stated that “I would not look to the United States Constitution if I was drafting a constitution in 2012.” She recommended to the Egyptians to look, in her words, to “the South African Constitution and perhaps the Canadian Chapter on Rights and Freedoms, and the European Convention on Human Rights.”<sup>11</sup> The extent to which the South African Constitution has been seen as a global exemplar of a sound and good constitution can be found in the work of Law and Versteeg’s “The Declining Influence of the United States Constitution.” Law and Versteeg explain that perhaps the time has come to admit that their constitutional appeal has waned and that States like South Africa have a more formidable and noteworthy constitution.<sup>12</sup> It is quite evident that the South African Constitution is widely praised and lauded for its liberal interpretation of human rights and the consequential avoidance of bloodshed in the post-1994 narrative of South Africa. Moreover, in more recent times the Constitution and the legal institutions have been praised even more because they have appeared to keep political movers like the ANC and its leaders like the former President of South Africa Jacob Zuma accountable to the public<sup>13</sup>; the South African Constitution is lauded because it expresses the best ideals of what liberal ethos is supposed to be with actual implementation, such as the South African Constitutional ruling to hold the government responsible to provide free housing and water provision to the poor.<sup>14</sup>

Two decades have passed since the election of the ANC into the government and the adoption of the South African Constitution, and it is quite evident that the Law aspect of development has been successful. However, the key problem affecting the advancement of South Africa is the lackluster economic development and its adverse effect on the majority black citizenry. Economic development is a multifaceted concept, as described by Liu: “There are two basic

<sup>11</sup> A. Liptak, *We the People’ Loses Appeal with People Around the World*, available at: <[www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html](http://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html)>, accessed January 10, 2018.

<sup>12</sup> D. Law and M. Versteeg, *The Declining Influence of the United States Constitution*, 87 *The New York University Law Review*, no. 3 (2012), at 826.

<sup>13</sup> The Southern African Legal Information Institute (SAFLII), *Zuma v DA* (771/2016); *ANDPP V DA* (1170/2016), available at: <<http://www.saflii.org/za/cases/ZASCA/2017/146.html>>, accessed January 10, 2018.

<sup>14</sup> ESCR-Net-International Network for Economic, Social & Cultural Rights, *Government of the Republic of South Africa. & Ors v Grootboom & Ors* 2000 (11) BCLR 1169. (CC), available at: <<https://www.escr-net.org/caselaw/2006/government-republic-south-africa-ors-v-grootboom-ors-2000-11-bclr-1169-cc>>, accessed January 10, 2018.

components to economic development—engagement with markets and market actors to create growth, and purposeful organizing of the right assets and capacities to improve, sustain, and extend that growth to more participants.”<sup>15</sup> Economic development is thus not simply concerned with promoting high levels of gross domestic product (GDP), the prowess of States stock exchanges or high ratings by credit evaluating agencies such as Standard & Poor’s and Moody’s and Fitch Group. In fact, the GDP as a measure of economic development has been widely criticized.<sup>16</sup>

The concept is broader, and the definition and interpretation of economic development adopted by this paper centers on the following understanding:

Economic development is a government institution-led/guided policy process that is concerned with ensuring development is shaped to address various economic problems. These problems include unemployment, development of human capital, growth of individual and company wealth, and the development of physical structures to complement these endeavours.”<sup>17</sup>

Consequently, the poor government performance in economic development reflects three key weaknesses associated with the architecture of economic development, namely, poor policy articulation and translation, ineffective economic development institutions, and complicated multi-tier government system.

Firstly, over the last two-decades (1994–2018) the ANC-led government has drafted and implemented several national policy initiatives to achieve economic development, including National Development Plan (NDP), Growth Employment and Redistribution, Broad Based Black Economic Empowerment.<sup>18</sup> However, none of these policy initiatives have been able to solve the problem of poverty and poor capital accumulation for the majority of blacks in South Africa. This point is illustrated by the National Empowerment Fund:

The data shows that direct black equity control over the Johannesburg Stock Exchange’s (JSE) average market capitalisation of R11.9 trillion as of June 30, 2014 (for Listed Companies), stands at 3% (R358 billion) for shares directly held by black South Africans.

<sup>15</sup> A. Liu, *Remaking Economic Development*, The Brookings Institution Metropolitan Policy Programme (Washington D.C, 2016), p.11.

<sup>16</sup> Fleurbaey, M, *Beyond GDP: The Quest for a Measure of Social Welfare*, 47 *Journal of Economic literature*, no. 4 (2009), 1029–1075.

<sup>17</sup> T. Pooe, *Developmental State No Birth Right: South Africa’s Post-1994 Economic Development Story*, 10 *Law and Development Review*, no. 2 (2017), 371.

<sup>18</sup> H. Bhorat, A. Hirsch, R. Kanbur, and M. Ncube, *Economic Policy in South Africa: Past Present and Future*, Development Policy Research Unit Working Paper, University of Cape Town (2014).

To reach 25% of black control it requires an additional 22% worth R2.6 trillion at current estimated market capitalisation of the JSE. This is a gap that still needs to be addressed and funded in order to achieve transformation of up to 25% of JSE market capitalisation.<sup>19</sup>

Most of the major national economic development policies, without clear policy articulation and translation, have not been successful. Confirming this observation, the leading party in the government, the ANC stated that after two-decades of governing South Africa it struggles with the same unresolved tasks, including but not limited to: reducing unemployment and youth unemployment, returning land to our people and supporting land reform, increasing black ownership and control in the economy, activating small businesses and co-operatives, raising the level of investment, improving the employment impact of infrastructure projects, reducing inequality and poverty, and dismantling monopoly practices and structures.<sup>20</sup> The ANC's various national policies have failed to achieve economic development due to poor policy articulation and translation.

The South African government also has ineffective institutions to lead economic development, most of which nonetheless claim to play an active hand in economic development policies, activities, programs and funding. The institutional makeup in South Africa with respect to the planning and implementation of economic development is extraordinarily complex; for example, there are (a) 35 national ministries/departments; (b) 105 provincial departments in nine provinces; (c) 9 provincial legislatures<sup>21</sup>; (d) 8 metropolitan municipalities, 44 district municipalities and 205 local municipalities (there are 257 municipalities across nine provinces)<sup>22</sup>; and (e) plus-minus 700 State owned entities stretching across the three spheres of government.<sup>23</sup>

This represents an array of over-produced, ineffective institutions without a single key institution charged with shaping and crafting the direction of South Africa's economic development trajectory. As a result, the South African

<sup>19</sup> The National Empowerment Fund (NEF), NEF welcomes JSE's concurrence on 3% black ownership, available at: <[http://www.nefcorp.co.za/Portals/0/ResourceCenter/Media%20Statements/2015/MediaSt\\_March2015.pdf](http://www.nefcorp.co.za/Portals/0/ResourceCenter/Media%20Statements/2015/MediaSt_March2015.pdf)>, accessed January 18, 2018.

<sup>20</sup> African National Congress (ANC), *Economic Transformation*, Discussion Document, Gallagher Convention Centre (June 2017).

<sup>21</sup> provincialgovernment.co.za, Provincial Government of South Africa, available at: <<https://provincialgovernment.co.za/provinces/view/9/western-cape>>, accessed February 25, 2018.

<sup>22</sup> South African Government: *Speeches, Electoral Commission on 2016 Municipal Elections*, available at: <<https://www.gov.za/speeches/2016-municipal-elections-8-June-2016-0000>>, accessed February 25, 2018.

<sup>23</sup> South Africa Country Commercial Guide, *8-State Owned Enterprises*, available at: <<https://www.export.gov/article?id=South-Africa-State-Owned-Enterprises>>, accessed February 25, 2018.

government and its institutions have handled the lack of economic infrastructure and employment quite poorly over the last two decades.

The South African government has been slow to build the necessary infrastructure to facilitate and encourage economic development in disadvantaged communities. This problem is illustrated by the UNDP analysis of the World Bank Report, which looks at how the lack of infrastructure development is keeping the youth of South Africa from making full use of their capabilities. The report states:

In the World Bank's South African Economic Update: Focus on Inequality of Opportunity, the Human Opportunity Index looks at the factors that most influence equity of opportunity for children growing up in South Africa. According to the report, location is a crucial determinant of access to opportunity, particularly where such opportunity is linked to infrastructure. This includes inter alia access to clean water, sanitation, and energy. Children who grow up in townships, informal settlements and rural villages are at a distinct disadvantage.<sup>24</sup>

The lack of investment in poverty-stricken areas and the general neglect of much needed infrastructure to advance economic development, such as quality health-care facilities, modern educational services, rural infrastructure, and port facilities for export purposes, have had the negative affect on the South African economy. The Industrial Development Corporation of South Africa, which collects and reports various industrial and economic data in the country, explains that "South Africa recorded a 64% decline in Foreign Direct Investment (FDI) inflows in 2015, from R62.6 billion in 2014 to R22.6 billion in 2015. The inflows were mainly in the form of loans extended by foreign parent companies to local subsidiaries or via equity investments into local companies."<sup>25</sup> This report indicates how foreign investors are beginning to shy away from investing their money into the economy that is struggling to provide the necessities for its own population.

The current status of unemployment is also serious; the National Treasury of South Africa explains that as of 2016 in the fourth quarter unemployment stood at 26.5%.<sup>26</sup> Particularly, youth unemployment in a State that has a young (15–34 years old) populous is worryingly high. The Centre for Development and Enterprise reports:

<sup>24</sup> K. Philip, M. Tsedu and M. Zwane, *The Impacts of Social and Economic Inequality on Economic Development in South Africa* (New York: United National Development Programme, 2014), p. 35.

<sup>25</sup> Industrial Development Corporation of South Africa (IDC), *Economic Trends: Key Trends in the South African Economy* (2016), p. 24.

<sup>26</sup> National Treasury of South Africa, *Economic Overview*, Chapter 2 Budget Review (2017).

At the end of 2016, there were just over 20 million young people (*i.e.* people aged between 15 and 34 years) in South Africa. Of these, 6.3 million were employed, 3.7 million were unemployed but looking for work ... 2.1 million were unemployed but were no longer looking for work ... eight million were not economically active. Of those who were not economically active, five million were still in school and around a million more were in some other form of educational institution or engaged in adult basic education. Overall, about 7.5 million young people (nearly 40% of all young people) were so-called ‘NEETs’ – not in employment, education or training”.<sup>27</sup>

It is undeniably clear that South Africa’s State and government face the serious danger associated with this high unemployment; it is conceivable that South Africa could descend into utter chaos due to the problems associated with high unemployment rates, such as political instability,<sup>28</sup> loss of human capital,<sup>29</sup> increased pressure on fiscal resources<sup>30</sup> and other problems challenging State capacity.

It is against this ever worsening and complex background the dichotomy exists in South Africa’s development trajectory. While the Law aspect of development is celebrated and recognized as a possible model to export, South Africa’s economic development trajectory is paltry and lackluster. Therefore, using the General Theory this paper attempts to analyze and explore why South Africa has been unable to have the type of economic development that addresses its people’s dire economic needs. Local governments have been chosen as the unit of analysis, because the South African Constitution charges local governments with the duty to promote economic development at the local level.<sup>31</sup> This approach is known as Local Economic Development (LED). LED is a

<sup>27</sup> The Centre for Development and Enterprise (CDE), *No Country For Young People: The Crisis of Unemployment and What to Do About It* (2017), p. 1.

<sup>28</sup> T. Azeng and T. Yogo, *Youth Unemployment and Political Instability in Selected Developing Countries*, African Development Bank Working Paper, no. 171 (2010).

<sup>29</sup> N. Berthold and R. Fehn, *Unemployment in Germany: Reasons and Remedies*, Cesifo Working Paper, no. 871, Category 4, Labour Markets (2003).

<sup>30</sup> The Organisation for Economic Co-operation and Development (OECD), *Persistence of High Unemployment: What Risks? What Policies?*, Chapter 5, OECD Economic Outlook, volume 2011/1 (2011).

<sup>31</sup> Republic of South Africa’s Constitution, 1996 (Act No. 108, 1996) (Constitution, 1996), Chapter Seven, Section 152 (Subsection 1(c)) and Section 153 (Subsection (b)). 152 Objects of local government. (1) The objects of local government are-(c) to promote social and economic development; (2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1). 153 Developmental duties of municipalities. A municipality must-(a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and (b) participate in national and provincial development programmes.



field of study and practice that emphasizes the local economy as the basis for economic development and the foundation to set its trajectory. At the heart of economic development are local enterprises including small to medium and micro enterprises (SMME).<sup>32</sup> The South African government has over the last two decades ensured its institutions and policies are actively geared towards LED as a key economic development tool.<sup>33</sup>

To fully understand the implications of adopting the law and development approach underlying the General Theory, this paper offers an overview of the historical underpinnings. This will then be followed by the application of the General Theory in the context of South Africa's duality; the successful Law aspect of development and the lackluster economic development path it is currently on.

### 3 Historical Understanding of Law and Development

#### 3.1 An Overview

The law and development concept has its roots in an ambitious project sponsored by the United States of America's Agency for International Development (USAID), the Ford Foundation and various other private American donors.<sup>34</sup> At the heart of what has come to be called the law and development movement was the belief that "law is central to the development process. A related belief was that law was an instrument that could be used to reform society and that lawyers and judges could serve as social engineers."<sup>35</sup>

Therefore the law and development movement and concept were initially concerned with changing State's behavior and operations through setting up legal systems and processes. Yet, there was a negative underlying agenda behind the law and development movement, namely Western States and accompanying

<sup>32</sup> L. Marais, *Local Economic Development Beyond the Centre: Reflections on South Africa's Secondary Cities*, 31 *Local Economy*, no. 1–2 (2016), 68–82.

<sup>33</sup> The Department of Provincial and Local Government (DPLG), *National Framework for LED in South Africa 2006–2011* (2005).

<sup>34</sup> G. Barron, *The World Bank & Rule of Law Reform*, The London School of Economics Working Paper Series, no. 05–70 (2005).

<sup>35</sup> The World Bank, *Law and Development Movement*, available at: <<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/LawandDevelopmentMovement.pdf>>, accessed January 15, 2018.

institutions wanted to transpose not only their legal systems, but also their ethics and values to shape the development trajectory of developing States in Asia, Africa and other regions.<sup>36</sup>

Early law and development scholars, such as Trubek and Galanter,<sup>37</sup> wrote about the primary means by which this transposition of values, ethics and legalities took place.<sup>38</sup> Thus law and development in its initial version was heavily linked to the notion that the Western mode of thinking and action is the necessary precursor for development. Along this line, Western States and institutions advanced their agenda through actively lobbying and funding Western-type legal institutions, lawyers, companies and accompanying paraphernalia. Nevertheless, this initial version of law and development did not last long and were deemed as a failure as it did not take root as a solid field of scholarship and practice.<sup>39</sup>

Nonetheless, law and development did not perish but revived with the rise of neo-liberalism in the 1980s.<sup>40</sup>

The development of the latter versions of law and development has largely been a replication of what happened in the initial version of the law and development movement; Western States and international organizations, as they did in the past, encouraged and even coerced non-Western States to adopt their agendas and institutional preferences (e.g., liberal democracy and neoliberal economic policies).<sup>41</sup>

The late twentieth century ushered in a “global diffusion of markets and democracy”<sup>42</sup> in the current state of law and development, Western States and institutions still project their understanding of development on developing States. This is the context in which the General Theory by Professor Lee has emerged. Defining “development” in the context of law and development, the General Theory

<sup>36</sup> J. Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 *Journal of International Economic Law*, no. 2 (2007), 219–308.

<sup>37</sup> D. Trubek and M. Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development*, *Wisconsin Law Review* (1974), 1062–1101.

<sup>38</sup> J. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 *The American Journal of Comparative Law* (1977), 457–483.

<sup>39</sup> T. Mkandawire and C. Soludo, *Our Continent, Our future: African Perspectives on Structural Adjustment* (Trenton, NJ, and Asmara, Eritrea: Africa World Press, 1999), p.113.

<sup>40</sup> J. Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* (Madison: University of Wisconsin Press, 1980).

<sup>41</sup> Ohnesorge (2007), *supra* note 36.

<sup>42</sup> L. Cao, *Law and Economic Development: A New Beginning?* College of William & Mary Law School, Faculty Publications [1997], 329; B. Hauserman, *Review Essay—Exploring the New Frontiers of Law & Development*, *Reflections on Trubek/Santos eds, The New Law and Economic Development*, 8 *German Law Journal* no. 5 (2007), 533–547; and B. Tamanaha, *The Primacy of Society and the Failures of Law and Development* (2009), available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1406999](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1406999)> (link), accessed January 15, 2018.

emphasizes the importance of the local consensus and the socioeconomic conditions on the ground and concludes that the one-sided imposition of the Western preferences and institutions is not effective in the promotion of development.

### 3.2 Law and Development: South Africa

The law and development movement arguably had an effect on how the South African State and government were constructed post-1994. Certain institutional characteristics have emanated from the law and development movement and now characterize how the South African State operates.

Firstly, the initial version of the law and development movement impacted on the creation and development of liberal constitutional courts and systems.<sup>43</sup> Bogdandy et al. (2005) observed:

Following the establishment of a new constitutional order based on the unitary nation model, the South African Constitutional Court embarked on a project of constitutionalization of the entire legal order, hereby spreading the constitution and its principles throughout the society ... The Court's comprehensive jurisprudence on human rights, legal questions concerning the scope of economic and social rights as well as questions of affirmative action and remedial measures are all based on this concept."<sup>44</sup>

The South African leadership's effort to create a constitutional democracy in South Africa and the outcome of these efforts, the adoption of the exemplary South African Constitution, democratic institutions and legal system, were consistent with the objectives of the initial law and development movement; *i.e.*, bringing "modernization" to the host developing country by transplanting Western laws and institutions. South Africa promoted Western agenda and to some extent exceeded it as evidenced by the lauded Constitution.

The latter versions of law and development also influenced the South African State in that the government and the legal system operates on the premises advanced by their agenda<sup>45</sup>; *i.e.*, the adoption of this constitutional approach and the accompanying market-based approach leads to economic

<sup>43</sup> *Ibid.*

<sup>44</sup> A. Bogdandy, S. Häußler, F. Hanschmann, and R. Utz, "State-Building, Nation-Building, and Constitutional Politics in Post-Conflict Situations: Conceptual Clarifications and an Appraisal of Different Approaches," in A. von Bogdandy and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law* (2005), p. 606.

<sup>45</sup> M. Trubek, R. Coutinho, R. Schapiro and M. Gomes, *Towards a New Law and Development: New State Activism in Brazil and the Challenge for Legal Institutions*, Legal Studies Research Paper, no. 1207 (University of Wisconsin, 2012); and Ohnesorge (2007), *supra* note 36.

growth through foreign direct investment. Chief Justice Mogoeng, a key authority in constitutional court in South Africa, addressed this point:

Good governance stems from compliance with conventional, legislative and constitutional governance precepts. The entrenchment of the human rights culture, the observance of the rule of law and giving priority to, among others, the realization of the legitimate aspirations of the citizenry in terms of the law, transparency, accountability, responsiveness, the creation of a truly independent and effective corruption-busting machineries, protection of press freedom and the creation of an investor-friendly climate are some of the key ingredients of good governance ... When potential investors know that in Africa you will get justice against any law-breaker when defrauded, and when government, business partners or any entity tries to get an unjust or unlawful advantage of them, they will come in droves to invest, given the huge and diligent labour force, the fertile and productive land, the very rich minerals and abundant natural resources we have to offer.<sup>46</sup>

The South African State and government have adopted the basic tenets of the law and development movement and now believe that they can be transposed and promoted on the African continent. The law and development seems to have found fertile ground in the last two decades of ANC rule in South Africa. However, despite what seems like a model law and development experience there is a large and overarching problem; the law and development experience of South Africa has also shown the negative economic consequences of the poor economic development policy and ineffective action plans of the South African government. Using the General Theory, the rest of this paper explores why and how the South African government, despite having a lauded model constitution, has been unable to translate the dividends of political stability emanating from the Constitution into economic success.

## 4 Adoption of General Theory in South African Context

### 4.1 Contextualization of Development

The General Theory explains the need to contextualize development in accordance with the socioeconomic conditions on the ground. Professor Lee,

<sup>46</sup> M. Mogoeng, *The Rule of Law in South Africa: Measuring Judicial Performance and Meeting Standards, Transcript* (Chatham House, 2013), p. 5.

observing Asian developmental states (particularly South Korea) explains the need to set priorities among dissimilar development objectives. Lee states,

To achieve development goals effectively, one may have to set priorities among the constituent elements of development. It would be particularly necessary for developing countries without sufficient resources to promote all of the economic and social development goals simultaneously with equal focus and strength. The successful East Asian countries (NICs) have prioritized economic development. One may characterize this path as “development without freedom,” but the people of these countries secured political freedom, in addition to greater economic capacity and higher income, by the 1990s, after they achieved economic development and secured sufficient resources to meet social development goals, including more equitable and democratic political participation based on the rule of law.<sup>47</sup>

The context of development in South Africa was the emphasis on the Law aspect of development, as evidenced by the exemplary constitution and the development of democratic institutions, in contrast to the East Asian emphasis on economic development, as demonstrated by lack of institutional focus on economic development.<sup>48</sup> The successful aspect of South African development is the creation of a peaceful democracy after the end of Apartheid. This does not mean that economic development was not a development objective or no effort has been made in this area, but the outcome in this area, as explained earlier, was not a success. The analytical elements of Lee’s General Theory are useful to analyze the cause of this failure from legal and institutional perspectives. These elements are: (1) regulatory design; (2) regulatory compliance; and (3) quality of implementation<sup>49</sup> as further discussed below.

## 4.2 Regulatory Design

Regulatory design, which concerns how optimally a law is designed to achieve its regulatory objectives,<sup>50</sup> involves three sub-analytical elements. The first sub-element is anticipated policy outcome. Lee explains,

Anticipated policy outcomes are the specific outcomes that are anticipated to be delivered as a result of the implementation of such policies ... Anticipated policy outcomes are not always identified by the explicit regulatory objectives stated in laws or otherwise made clear by the legislature. Anticipated policy outcomes are identified by objective

<sup>47</sup> Lee (2017), *supra* note 1, p. 429.

<sup>48</sup> H. Nakaso, *Asian Economy: Past, Present, and Future*, Deputy Governor of the Bank of Japan, keynote address at the Securities Analysts Association of Japan International Seminar (April 24, 2015).

<sup>49</sup> Lee (2017), *supra* note 1, p. 418.

<sup>50</sup> *Ibid.*, p. 419.

assessment, often aided by the methods of social sciences as further discussed below, regardless of pronounced regulatory objectives.

As explained earlier, the General Theory is to be applied to the local government context. The South African State as conceptualized in the 1996 Constitution has three interconnected and interdependent spheres, namely national, provincial, and local governments [Section 40(1)].<sup>51</sup> There are various historical reasons for the ANC and South African government to favor this approach, Murray and Simeon (2011) explains:

In the end, South Africa did adopt a federalist model, but it carefully avoided the term federalism. Its constitution does recognize and affirm the country's diversity ... Similarly, as the government attests through its aggressive programme to encourage locally and provincially delivered development initiatives, regional development plans may be better able to exploit local entrepreneurship and involvement in growth than are policies and programmes organized by remote bureaucracies and corporations.<sup>52</sup>

The adoption of this model for local governments brings to the fore LED. LED is concerned with the “local economy’s capacity to create wealth for local residents.”<sup>53</sup> Local government policies, finances, institution and stakeholders like SMMEs and large scale industry to create this wealth. LED is a miniaturized attempt at economic development with the added complexity associated with different localities.

Chapter 7 (Local Government)<sup>54</sup> of the Constitution, particularly Sub-section (c) directs the South African government to promote social and economic development through LED. There has been a national policy to promote LED, namely “the National Framework for Local Economic Development (LED) in South Africa (2006–2011),” and provincial and local governments formulated Growth and Development Strategies to operationalize LED.

These policies have largely been a failure due mostly to (1) poor human capital in local governments; (2) inadequately constructed institutions; and (3) lack of coordination between the government and private sector.<sup>55</sup> For instance the LED

51 The Republic of South Africa Constitution. Chapter 3, Co-Operative Government (ss 40–41) 40, Government of the Republic.

52 C. Murray and R. Simeon, “Promises Unmet: Multilevel Government in South Africa,” in Rekha Saxena (ed.), *Varieties of Federal Governance* (Cambridge University Press, 2011), p. 235.

53 T. Bartik, *Local Economic Development Policies*, Upjohn Institute Working Paper no. 03–91, W.E. Upjohn Institute for Employment Research (2003), at 1.

54 Chapter 7 (Local Government), Section 152 (Objects of local government), particularly Sub-section (c).

55 C. Rogerson, *Reframing place-based economic development in South Africa: The example of local economic development*, 24 *Bulletin of Geography: Socio-Economic Series* (2014), 203–218; J. Meyer-Stamer, *The Hexagon of Local Economic Development and LED in South Africa*, Mesopartner

approach and action plan of the Lesedi Local Municipality in the Gauteng Province of South Africa has over the last 10 years actively pursued a LED policy action plan. The LED plan has centered on agricultural activity and the development of a transport hub.<sup>56</sup> Lack of monitoring and evaluation by both municipality and regional governments led to the failure of this project.<sup>57</sup> The aforementioned four problems were presented in the Lesedi LED plan.<sup>58</sup> The South African government arguably created a legal and policy device that did not understand the economic development complexities at local government level. Lack of clear policy direction also contributed to the failure of LED. Given these gaps, the anticipated policy outcome could not have been successful economic development.

The second sub-element for analysis under regulatory design is “Organization of Law, Legal Frameworks and Institutions (LFIs)”. In this sub-category Lee explains that law becomes ineffectual when the legal framework and institutions are inconsistent with the law.<sup>59</sup> In the case of economic development, Lee contends that it is possible to correct such a flaw by utilizing what he refers to as the Analytical Law and Development Model. Lee explains:

[The ADM] could be adopted for both diagnostic and implementation purposes: in the former mode, suppose that a country attempts to assess the effectiveness of a law that empowers a government agency to coordinate other government departments and agencies in the implementation of industrial development policies for their effective and consistent implementation. The ADM, by conducting comparative analysis of the LFIs in the successful development cases, could examine whether the applicable legal frameworks and the institutional arrangements adequately support the role that the legislation intends to perform.<sup>60</sup>

LED is not supported by effective legal frameworks and institutions. The Constitution and the policies charged local governments with the responsibility to promote LED, but there is no effective legal or institutional framework, such as specific and implementable LED directives or a central institutional point to oversee LED projects.<sup>61</sup> There is no leading institution in place that plans, advocates, and administers economic development generally and LED more specifically.

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Working Paper no. 5 (2006); and S. Koma, *Developmental Local Government: Issues, Trends and Options in South Africa*, 5 *African Journal of Public Affairs*, no. 2 (2012), 105–116.

<sup>56</sup> Lesedi Local Municipality (LLM), *Integrated Development Plan 2014/15* (Heidelberg, 2014).

<sup>57</sup> E. Njiro, T. Mazwai and B. Urban, B, *A Situational Analysis of Small Businesses and Enterprises in the Townships of the Gauteng Province of South Africa*, presented at the First International Conference held at Soweto Campus on 27–28 January (2010).

<sup>58</sup> *Supra* note 58.

<sup>59</sup> Lee (2017), *supra* note 1, at 441–444.

<sup>60</sup> *Ibid.*, p. 442.

<sup>61</sup> T. Van der Heijden, *Key Issues In Local Economic Development In South Africa And A Potential Role For SALGA*, Johannesburg: SALGA LED Position Paper (2008).

In contrast, economic development initiatives were supported by effective legal and institutional frameworks in East Asia, such as the Ministry of International Trade and Industry in Japan<sup>62</sup> and other similar institutional control towers for economic development in China, South Korea and Taiwan.<sup>63</sup>

This final sub-category of regulatory design, adaptation to socioeconomic conditions, refers to the conformity of the law and policy with the local context in which they operate. Lee concisely captures this need and explains the socioeconomic conditions:

The essential socioeconomic conditions may vary depending on the particular law to be implemented. They may include economic conditions, such as financial resources and the applicable stages of economic development, technical expertise, political and social support, administrative capacity, or cultural and religious acceptance of the particular law. This is a broad categorization, and more detailed identification may be required for the assessment of socioeconomic conditions relevant to the successful operation of a specific law. To perform this task, it would be essential to secure the participation of local experts in the analysis who have detailed knowledge of socioeconomic conditions on the ground.”<sup>64</sup>

This sub-element is particularly relevant to address the failures of the ANC government to address poor spatial planning problems originated from Apartheid and Colonialism.<sup>65</sup> In the context of LED, this sub-element indicates the necessity to focus on the need to cost, develop, and implement the type of infrastructure that addresses the disparities that exist between rural and urban South Africa. Moreover, a proper understanding of the socioeconomic context of South Africa could produce a specific rather than generalized form of LED that would be more effective on the ground.

### 4.3 Regulatory Compliance

The second element that is relevant to analyze the law’s impact on development is regulatory compliance. Lee explains:

[Regulatory compliance] refers to compliance with law by those who are subject to the application of law. This section also examines the factors influencing regulatory

<sup>62</sup> H. Kohama, *Growth Theories in Light of the East Asian Experience* (University of Chicago Press, 1995).

<sup>63</sup> J. Wong, *The Adaptive Developmental State in East Asia*, 4 *Journal of East Asian Studies* (2004), 345–362.

<sup>64</sup> Lee (2017), *supra* note 1, p. 444.

<sup>65</sup> S. Berrisford, *Unravelling Apartheid Spatial Planning Legislation in South Africa*, *Urban Forum* (2011), 247–263.



compliance, some of which are associated with historical, economic, cultural, and political conditions that may largely be immune to top-down attempts at reform and some others associated more directly with state action, such as regulatory enforcement.<sup>66</sup>

The assessment of regulatory compliance determines whether and to what extent policies and law have the support from citizens, companies and other stakeholders. Regulatory compliance is classified into general regulatory compliance, which refers to the general level of regulatory compliance in a given jurisdiction, and specific regulatory compliance, which pertains to a particular law.<sup>67</sup>

As to the general regulatory compliance, two factors, public knowledge and the general quality of law, are particularly important in the South African context. Lee explains:

[P]ublic knowledge and understanding of law influence general regulatory compliance. The public would be more inclined to comply with law in general if they believed, based on their knowledge and appreciation of law, that compliance is in the interest of their communities, families, and themselves ... Yet another element that affects general regulatory compliance is the general quality of law, including its design and implementation.<sup>68</sup>

In the context of South Africa, Nthekeleng observed that the LED projects in the Buffalo City Metropolitan failed due to the poor compliance with the laws and policies for the implementation of LED projects by business owners, even after so much political capital had been spent on the projects.<sup>69</sup> A cause of this weak compliance was that the stakeholders were not consulted or integrated into the implementation and monitoring process, and there was little sense of project ownership, which is relevant to the degree of compliance and participation.<sup>70</sup>

Specific regulatory compliance is concerned with the resource constraints that inevitably compel governments to prioritize laws for enforcement.<sup>71</sup> Laws supported by a stronger political will are more likely to be enforced as a priority and, in turn, result in stronger compliance.<sup>72</sup> Lack of political direction for economic development through LED and strategic investment in the

<sup>66</sup> Lee (2017), *supra* note 1, p. 446.

<sup>67</sup> *Ibid.*, p. 446.

<sup>68</sup> *Ibid.*, p. 447.

<sup>69</sup> L. Nthekeleng, *An Assessment of Local Economic Development (LED) for Sustainable Development and Poverty Alleviation in Buffalo City Metropolitan Municipality*, 2 Africa's Public Service Delivery and Performance Review, no. 4 (2014), 151–168.

<sup>70</sup> *Ibid.*

<sup>71</sup> Lee (2017), *supra* note 1, p. 448.

<sup>72</sup> *Ibid.*

implementing institutions indicates insufficient political will, which explains the weakness of compliance with LED project policies and regulations.

This point was highlighted by the Development Bank of Southern Africa in its strategic long term analysis of South Africa's State:

There was also no systemic approach to local economic development due to the predominance of micro-based pro-poor strategies after 1994. In addition, while some municipalities had adopted spatial development frameworks, infrastructure investments were uncoordinated and settlement development was largely driven by the demand for inexpensive land and housing, as well as private sector interests.<sup>73</sup>

To improve specific compliance by the stakeholders, there needs to be a focus on the strategy and planning of the LED projects, backed by sufficient political will. This focus will ensure the viability of the projects, open space up for small businesses, clarify material benefits for the participants, and contribute to overall economic development throughout the nation through LED.

#### 4.4 Quality of Implementation

The last analytical element under the General Theory is the quality of implementation. Lee explains that "implementation refers to the act of a state meeting the requirements of law and undertaking mandates under the terms of law to fulfil its objectives."<sup>74</sup> The constituent factors of the implementation are state capacity and political will.<sup>75</sup> The issues with implementation, such as weaker institutional frameworks, as well as insufficient political will, have also been discussed in the context of other problems identified in this article. The importance of implementation in the South Africa context has been widely discussed.<sup>76</sup> This analytical element requires the government to produce a catalogue of possible reasons for the failure of implementation of LED related matters. The poor implementation has been caused by the absence of effective

<sup>73</sup> Development Bank of Southern Africa, (DBSA), *Development Report: Prospects for South Africa's Future*, DBSA Development Planning Division (2011), p. 281.

<sup>74</sup> Lee (2017), *supra* note 1, p. 450.

<sup>75</sup> *Ibid.*, p. 451.

<sup>76</sup> PLAAS, PSPPD and EU, SAT, HSRC and EDD, *The Politics of Poverty Research and Pro-Poor Policy Making: Learning from the Practice of Policy Dialogue*, Report on an International Symposium, University of the Western Cape, November 19–20, 2012; and J. Seekeing, *South Africa: Democracy, Poverty and Inclusive Growth Since 1994*, *Democracy Works*, Conference Paper, Supported by Centre for Policy Research, India and Instituto de Estudos do Trabalho e Sociedade, Brazil [2014].

coordination and lack of linkage among the national, provincial and local governments. As discussed, the South African government has a three-tier system of government, along with numerous institutions empowered by constitutional and other legal mandates to administer economic development.<sup>77</sup> LED in South Africa fails primarily because no lead institutions exist within the government and there is no effective coordination mechanism among national, provincial and local government operations. As a result, poverty and unemployment increased post-1994. The Institute for Security Studies explains:

By 2015, 16.9 million South Africans were receiving social grants, compared to 4 million in 1994. Social security transfers rose to 3.5% of GDP, which is relatively high by international comparative standards. While costly, such grants have alleviated deep-seated poverty. They have also had limited impacts on reducing inequality, but none on unemployment, arguably the biggest challenge facing post-apartheid South Africa.<sup>78</sup>

While the South African government has done great work on social reforms and has developed a successful framework to separate government powers and achieve liberal democracy, it failed to implement LED successfully and achieve economic development due to insufficient implementation associated with the institutional fragmentation coupled with the absence of lead institution and lack of coordination among different layers of government.

## 5 Post-Reflections of General Theory In SA

The General Theory hypothesized by Professor Lee as has been contended in previous sections is a useful tool for analyzing and contextualizing socioeconomic development within States. In the context of a State like South Africa the three elements of the General Theory (Regulatory Design, Regulatory Compliance and Quality Implementation) assist in deciphering why economic development policy planning and implementation has been so lethargic in responding to the needs of the majority of citizens. This section contends that the General theory and its three elements ultimate use lie in the fact that they pin point two overarching and interlinking problems for why economic development (specifically Local Economic Development) policy making in South Africa is so lethargic.

<sup>77</sup> Minister for Provincial Affairs and Constitutional Development, *The White Paper on Local Government* (Pretoria, 1998).

<sup>78</sup> J. Cilliers and C. Aucoin, *Economics, Governance and Instability in South Africa*, ISS Paper 293 (June, 2016), p. 2.

## 5.1 Absent Lead Institutions for Planning and Executing Economic Development

The use of the General Theory in this paper has illustrated the fact that South African policy making and the government can be analyzed against the presented three elements. However, what is also seen is that while these three elements can give policy makers great insight into what and why South African Local Economic Development is failing, a much larger tool for analyzing its failing is presented by the General Theory.

This tool highlights the fact that when analyzing economic development and Local Economic Development in particular in South Africa no lead institution or institutions exist for explaining and determining why there has been such poor performance in administering LED and remedies for remedying certain elements highlighted by the General Theory.

Moreover, this section argues that the existing institutions seem to operate/exist only to appease quasi-legal reasoning's and are left unchallenged because the South African political and legal architecture enjoys the current status quo. Evidence of this is seen in the fact that LED in the countries stated long-term vision (National Development Plan 2030) is mentioned less than three times and no substantial debate is presented about why and how local government in South Africa unable to act as a catalyst for economic development currently. Evidence of this argument is seen in the fact Lee's Analytical Law and Development Model (ADM) would not work in the case of South Africa's LED and economic development arrangement as there is no supra-structure or institutions to carry out such an analysis that would hold all three levers of South Africa's government (national, provincial and local) to account.

Therefore in the absence of such an institution the South African government and its policy making architecture will continue to struggle in planning and implementing coherent and long term impactful LED and economic development policies. This contention premised on the current archaic institutional model of government, where national government has forty-one national departments (41), provincial government operates one hundred and five departments (105), whilst local government has two hundred and seventy eight (278) municipal entities and added to that the South African government in various guises owns and operates one hundred and thirty one State Owned Entities (131) across various industries from aviation, mining, telecommunications and sectors.

This means that the South African government which operates on a tight budget has seven hundred and thirty seven institutions/departments who all via and believe it is their responsibility to lead economic development and many of

them attempt but never master LED. It is for this reason this section argues that the General Theory and its elements greatly assist in seeing that one of South Africa's most pressing problems is the absence of a lead institution in planning and executing Economic Development more generally and LED specifically

## 5.2 Dogmatic Political Wishing, not Will

Lee on page 465 under the sub-heading *State Capacity and Political Will* details how the South Korean government and State despite lacking resources was able to move from being a destitute nation, to one of the most economically advanced and industries States. Lee argues that key to the success of Korea was “*state capacity, such as manpower, government organization, and administrative implementation*”. However, this section though encouraged by the correlation between human capital and lead institutions, is more interested in the role political will played and the influence political leaders like President Park Jung played.

Argued differently the success narrative of South Korea and many other Asian States can be argued to exist due to having a political elite that was able to take orders and sometimes give direction to politicians or some might argue dictators like President Park Jung, Lee Kuan Yew (Singapore), Deng Xiaoping (Peoples Republic of China), Chiang Ching-Kuo (Taiwan). The crux of this section is not to debate whether democratic or dictatorship

## 6 Conclusion

The South African development experience is one that excelled in the area of Law aspects of development, achieving liberal democracy and the political conditions in which formerly hostile groups of populations have co-existed in relative peace. However, South Africa has not been successful in achieving economic development and solving pressing economic problems such as unemployment and poverty affecting a majority of population. Poor spatial development patterns and general economic inequality persist, and there is a need for a new analytical approach to explain why despite having a model liberal constitution and laws economic development is so paltry.

This paper used the law and development framework and the newly developed General Theory to analyze why economic development has been lacking. The absence of lead institutions has adversely impacted LED and economic

development more generally. The lack of key institutions would have been overcome by better constitutional design which incorporates successful economic development experiences elsewhere, especially those of East Asian countries. Their experiences indicate that strategic institutions driving industrial and economic development, not necessarily constitutional liberalism, lead to successful economic development. The law and development approach that systematically explores the impact of law and legal institutions on development will assist policymakers in South Africa and other African States to understand what it means to promote economic development and how best one may do so. It is for this reason the General Theory is important as a new innovative analytical and development tool for the African approach to development. This new approach should be based on lead economic development institutions and the advancement of effective development strategies.

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