



3-23-2017

## In Transition? The Struggle for Socio-Economic Justice in South Africa

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### Recommended Citation

Jaichand, Vinodh (2017) "In Transition? The Struggle for Socio-Economic Justice in South Africa," *Notre Dame Journal of International & Comparative Law*: Vol. 7 : Iss. 1 , Article 3.

Available at: <http://scholarship.law.nd.edu/ndjicl/vol7/iss1/3>

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## IN TRANSITION? THE STRUGGLE FOR SOCIO-ECONOMIC JUSTICE IN SOUTH AFRICA

VINODH JAICHAND\*

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### INTRODUCTION

Without a deliberate policy of mainstreaming socio-economic rights, South Africa may have to retrace some of its failed practices. The practice of apartheid was brought into sharp relief in the Truth and Reconciliation Commission hearings where the compelling testimony illustrated how the majority were regularly (mis)treated in their quest to be regarded as ordinary human beings. While this was not the first occasion when the victims raised their concerns about their plight, the television broadcasts starkly unraveled their sufferings into the living rooms of every household.

With every anniversary of the new South Africa, questions are inevitably asked about how far it has come in terms of transformation as a new nation under the new dispensation. However, is the effluxion of twenty-two years an appropriate time to reflect on the maturity of South African democracy? Once, twenty-one years was regarded as rite of passage for adulthood. Some may therefore find this inappropriate in the history of any state, including the apartheid state, because twenty-two years is insufficient time to ameliorate centuries of socio-economic oppression of the majority. At the same time, one cannot ignore recent social events as possible indicators of the impatience of South African society.

The idea of transitional justice has gained momentum in the last two or so decades, even though its boundaries as a distinct discipline have yet to fully crystalize. The idea of transitional justice has gained momentum in the last two

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or so decades, even though its boundaries as a distinct discipline have yet to fully crystalize. The waves of transition that spread through many countries in the last few decades, whether from violent conflicts—Northern Ireland, Liberia, Guatemala, Colombia, and South Africa, as examples—or brutal dictatorships—Chile and Argentina—have brought the experiences of these different countries into sharper focus, and scholars have pored over the details of how the various countries managed the processes<sup>1</sup> for their respective countries. The Colombian example of Victims Law—with its emphasis on the restitution of land as a cardinal aspect of transitional justice—is a more recent example of a defined focus on an essential socio-economic right for that country.<sup>2</sup>

The use of transitional justice mechanisms has increased around the world, though with varying degrees of success.<sup>3</sup> Right from the Nuremberg Trials to the proliferation of international criminal tribunals since the 1990s, transitional justice has focused on violations of civil and political rights with the emphasis on criminal prosecutions and accountability in societies emerging from conflicts, but it has discountenanced the debilitating effects of socio-economic disempowerment occasioned by past structural injustices.<sup>4</sup> One commentator summarized the concern in the following language:

Prosecution and punishment are important components of justice, but they are only post hoc interventions. Justice encompasses the truth, reform of state institutions, reparation for victims and creative initiatives to forge reconciliation. Courts are crucially important in combating impunity, but we dare not confine the struggle for human rights to one set of institutions or one approach to deal with the past.<sup>5</sup>

The South African Truth and Reconciliation Commission was established with a focus on violations of human rights that occurred since March 1, 1960.<sup>6</sup> The Commission interpreted its mandate to exclude social and economic rights violations such as those arising from forced removals and discrimination in education and employment opportunities.<sup>7</sup> A more appropriate cut-off date might have been 1913, when the Natives Land Rights Act was enacted and began a

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<sup>1</sup> See, e.g., Alexander L. Boraine, *Transitional Justice: A Holistic Interpretation*, 60 J. OF INT'L AFF. 17 (2006) (citing 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., United States Institute of Peace Press 1995)).

<sup>2</sup> See Nicole Summers, Note, *Columbia Victims' Law: Transitional Justice in a Time of Violent Conflict?*, 25 HARV. HUM. RTS. J. 219, 220, 225–26 (2012).

<sup>3</sup> Makau Mutua, *What is the Future of Transitional Justice?*, 9 INT'L J. OF TRANSITIONAL JUST. 1 (2015).

<sup>4</sup> See Thomas Bundschuh, *Enabling Transitional Justice, Restoring Capabilities: The Imperative of Participation and Normative Integrity*, 9 INT'L J. OF TRANSITIONAL JUST. 10, 11 (2015); see also Louise Arbour, *Economic and Social Justice for Societies in Transition*, 40 N.Y.U. J. INT'L L. & POL. 1, 3, 5 (2007).

<sup>5</sup> See Paul van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission*, 52 J. OF INT'L AFF. 647, 667 (1999).

<sup>6</sup> Promotion of National Unity and Reconciliation Act, 34 of 1995 (S. Afr.).

<sup>7</sup> See Final Report of the Truth and Reconciliation Commission of South Africa, Vol. 5, Chap. 1, ¶ 48 (1998); see also Promotion of National Unity and Reconciliation Act, *supra* note 6, at § 3(1)(a).

systemic and institutionalized dispossession of Black South Africans of their lands. In most other parts of the world where transitional justice was implemented, it was perhaps less difficult to investigate the atrocities of the past than to craft and implement a program of action for socio-economic rights as a remedial measure. In South Africa, the criminal justice system was unlikely to deliver convictions at that time due to the difficulties of unearthing the evidence, the high time and cost factors and an inefficient criminal justice system.<sup>8</sup>

Transitional justice has since expanded in scope and contents, and some people now challenge the rationale for excluding economic, social, and cultural rights in such transitional justice processes.<sup>9</sup> Paul Gready has already drawn attention to the importance of the realization of socio-economic rights in his assessment of the work of transitional justice<sup>10</sup> in South Africa, but he is cautious about what can be achieved. It is against this background that this article revisits experiences in South Africa without the intention of apportioning all the blame for the lack of—or limited success of—South Africa's socio-economic transformation onto the transitional justice process where these concerns were also raised.

## I. SOCIO-ECONOMIC RIGHTS AND THE TRANSITION

It is significant that when asked about what form of reparation they wanted, most victims in the South African Truth and Reconciliation were concerned about the truth as it related to the loss of their loved ones and the reasons for their death. Alex Boraine also noted:

Others talked about the possibility of assistance in education, or, because of ill health, some guarantee of treatment for physical, mental, and spiritual problems. Some of course talked about money in order to repair housing or to assist them generally, because many of them were unemployed.<sup>11</sup>

David Backer found that almost all participants wanted financial contributions, 98%, as well as jobs, housing and education, 91%.<sup>12</sup> These requests are examples of the classical socioeconomic right to an adequate standard of living as envisaged in Article 11 of the International Covenant on Economic, Social and Cultural Rights. When the Interim Constitution in South

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<sup>8</sup> Van Zyl, *supra* note 5, at 651–53.

<sup>9</sup> See Ismael Muvungi, *Sitting on Powder Kegs: Socio-economic Rights in Transitional Societies*, 3 INT'L J. OF TRANSITIONAL JUST. 163, 163–182 (2009).

<sup>10</sup> PAUL GREARY, THE ERA OF TRANSITIONAL JUSTICE: THE AFTERMATH OF THE TRUTH AND RECONCILIATION COMMISSION IN SOUTH AFRICA AND BEYOND 211 (2011).

<sup>11</sup> ALEX BORAINED, A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION 334 (2000); see also JUAN CARLOS OCHOA S., THE RIGHTS OF VICTIMS IN CRIMINAL JUSTICE PROCEEDINGS FOR SERIOUS HUMAN RIGHTS VIOLATIONS 184 (2013).

<sup>12</sup> David Backer, *Victims' Responses to Truth Commissions: Evidence from South Africa, in SECURITY, RECONSTRUCTION AND RECONCILIATION: WHEN THE WARS END* 179 (Muna Ndulo ed., 2007).

Africa was replaced by the Constitution of 1996, many of these rights contained in the International Covenant on Economic, Social and Cultural Rights found their way, not coincidentally, into that Constitution. Some writers refer to such socioeconomic rights as issues of development and, therefore, take an economics approach—not a human rights approach. But, Amartya Sen has reminded us that, “liberty of political participation or the opportunity to receive basic education or health care . . . are among the constituent components of development . . . [and] these freedoms and rights are also very effective in contributing to economic progress.”<sup>13</sup> Therefore, a human rights approach, which is taken in this article, is not misplaced.

Apartheid was not an ordinary conflict in the usual sense of that word, or in the usual sense in which the term “conflict” is understood. In South Africa, colonialism laid the foundation for apartheid. Long before the National Party came to power, the colonial project had already created latent “conflict” in South Africa through laws and policies that dispensed social and economic benefits to the White minority while disenfranchising the Black population. It is important to emphasize this point because it underscores what transitional justice means—and should mean—in the South African context and why the transitional justice in South Africa cannot be the same as in a classical post-conflict or a “victor’s justice” situation.

The law, as an instrument of social engineering, became the most powerful instrument for the colonialist, and subsequently, the apartheid state. Through the enactment of various laws, including the Natives Land Act,<sup>14</sup> the Black Administration Act,<sup>15</sup> and the Group Areas Act,<sup>16</sup> apartheid literally confined the African population to the margins of socioeconomic opportunity. The policy of Bantustan education was designed by the apartheid regime to create a Black labor force educated enough to be exploited in the service of the system, but not sufficiently endowed to aspire to any career advancement beyond the lowest echelons. As Thomas Bundschuh argues, since law was used to orchestrate these historical injustices, law will also be required to address them.<sup>17</sup>

The nature of the “conflict” created by the structural disenfranchisement of Blacks by apartheid is such that the consequences are still very visible across South Africa twenty-two years after the fall of apartheid. Recent statistics indicate that Black South Africans still occupy the bottom rung in the socioeconomic ladder. For example, according to a survey conducted by Statistics South Africa on poverty trends between 2006 and 2011, nine out of ten poor South Africans were Black, representing an increase from 92.9% in 2006 to

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<sup>13</sup> AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 5 (1999) (emphasis omitted).

<sup>14</sup> Natives Land Act 27 of 1913 (S. Afr.) (repealed 1991) (dispossessing Blacks of their land and forbidding them from owning land outside areas demarcated by the legislation.).

<sup>15</sup> Black Administration Act 38 of 1927 (S. Afr.) (repealed 2006) (creating a different system of administration under which Blacks received inferior services.).

<sup>16</sup> Group Areas Act 41 of 1950 (S. Afr.) (repealed 1957) (confining Blacks to certain geographical areas).

<sup>17</sup> See Thomas Bundschuh, *Enabling Transitional Justice, Restoring Capabilities: The Imperative of Participation and Normative Integrity*, 9 INT’L J. OF TRANSITIONAL JUST. 10, 11 (2015).

94.2% in 2011.<sup>18</sup> This figure is the highest amongst the different racial groups in South Africa.<sup>19</sup>

The outcomes are comparable when using other indices such as household income and poverty levels.<sup>20</sup> The survey, however, also shows that the overall poverty levels amongst Black South Africans fell from 66.8% in 2006 to 54.0% in 2011.<sup>21</sup> According to the 2014 figures, unemployment amongst Black South Africans stood at 40%, again the highest, compared to 28% among Coloured, 18% among Indians and 8% among Whites.<sup>22</sup>

One finds similar results using other indices of measurement—access to land and other means of production; access to adequate housing, healthcare, and higher education; and participation and representation in senior management positions in corporate South Africa or academia. While these statistics may not be unexpected given the limited time period under review, there are signs of social disquiet that cannot be ignored. The discontent arising from this lack of progress has generated widespread protests across the country in recent years.<sup>23</sup>

Contrary to the dominant narrative, the slow pace of transformation is not necessarily for want of trying by successive administrations since 1994, nor is it the case that the time is too short to expect any remarkable improvement in the socioeconomic transformation of South Africa. Rather, the explanation for the current state of affairs lies in the nature of South Africa's transition. The lack of pace in transformation has been compounded by the appointment of ANC cadres that have limited management capacity. A sound plan for capacity development and training of managers has not been prioritized from the outset. As Patrick Bond explains, societies that embarked on the South Africa-style transition have remained volatile and unstable, which one critic labeled “choiceless democracy.”<sup>24</sup> Consequently, there is an urgent need to recalibrate the normative agenda and shift the paradigm, both at the national and—indeed—international levels, from one that seeks transitional process without a transformative change to a praxis of “transformative justice”<sup>25</sup> capable of addressing the kind of “conflict” a society like South Africa has undergone. This approach should have the capacity to address the “structural and everyday violence” through transformative

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<sup>18</sup> STATISTICS SOUTH AFRICA, *POVERTY TRENDS IN SOUTH AFRICA: AN EVALUATION OF ABSOLUTE POVERTY BETWEEN 2006 AND 2011*, at 27 (2014), <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-06March2014.pdf>.

<sup>19</sup> *See id.*

<sup>20</sup> *See id.* at 40–43.

<sup>21</sup> *Id.* at 27.

<sup>22</sup> Statistics South Africa, *Presentation on Employment, Unemployment, Skills and Economic Growth: An Exploration of Household Survey Evidence on Skills Development and Unemployment Between 1994 and 2014*, at slide 32 (2014), <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-06March2014.pdf>.

<sup>23</sup> Laura Grant, *Research Shows Sharp Increase in Service Delivery Protests*, MAIL & GUARDIAN (Apr. 12, 2014), <http://www.mg.co.za/article/2014-02-12-research-shows-sharp-increase-in-service-delivery-protests>; *see also* Johan Burger, *The Reasons Behind Service Delivery Protests in South Africa*, INSTITUTE OF SECURITY STUDIES (July 29, 2009), <http://www.issafrica.org/iss-today/the-reasons-behind-service-delivery-protests-in-south-africa>.

<sup>24</sup> Patrick Bond, *Reconciliation and Economic Reaction: Flaws in South Africa's Elite Transition*, 60 J. OF INT'L AFF. 141, 142 (2006).

<sup>25</sup> Paul Gready & Simon Robins, *From Transitional to Transformative Justice: A New Agenda for Practice*, 8 INT'L J. OF TRANSITIONAL JUST. 339, 340 (2014).

justice that “emphasizes local agency and resources, the prioritization of process rather than preconceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global level.”<sup>26</sup> This objective cannot be achieved without mainstreaming socioeconomic rights in the process.

A key aspect of this agenda must be to staunch the hemorrhaging of state funds. Auditor-General Kimi Makwetu reported that, in the 2013-2014 period, R62.7 billion worth of irregular expenditure was incurred and unauthorized expenditures totaled R2.6 billion—up from R2.3 billion the previous year. “And the bad news is that the worst government offenders, in terms of audits, are the departments arguably in charge of the most essential public services: health, education, human settlements and public works. Those departments have ‘largely failed the audit test’ . . .”<sup>27</sup> A state-driven anti-corruption drive, together with training for government officials on fiscal responsibility, should be part of the policy for all public administration.

The historical genesis of international human rights is largely responsible for categories of human rights that emerged with civil and political rights supposedly sitting at the top of the hierarchical order.<sup>28</sup> Therefore, it is understandable that transitional justice has traditionally focused on civil and political rights—as the idea of orthodox “justice” has been associated with excluding socioeconomic justice—mimicking the primordial notion of human rights as excluding economic, social, and cultural rights.<sup>29</sup>

Despite accepting the imperative of correcting the underlying socioeconomic rights violations that led to conflicts in transitional societies in the first place, some authors still question the place and efficacy of socioeconomic rights tools in transitional justice processes.<sup>30</sup> Lars Waldof, for example, is “wary of efforts to have transitional justice tackle historically constructed socio-economic inequalities” and would be comfortable to have legal reform permitting the courts to intervene.<sup>31</sup> Indeed, South Africa has such a legal system that permits the justiciability of socioeconomic rights—and some inroads have been made in this regard. The main argument against the inclusion of socioeconomic rights in transitional justice mechanisms and processes is imbalanced and only pays attention to the challenges that such a decision might face. That argument completely ignores that the consequences of the alternative—which is to leave socioeconomic injustices unaddressed—are arguably worse in some cases.

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<sup>26</sup> *Id.*

<sup>27</sup> Rebecca Davis, *2014 Auditor-General report: Improvements, but massive wastage*, DAILY MAVERICK (Nov. 27, 2014), <https://www.dailymaverick.co.za/article/2014-11-27-2014-auditor-general-report-improvements-but-massive-wastage/#.WGaqAVzkqAU>.

<sup>28</sup> VINODH JAICHAND, AN INTRODUCTION TO INTERNATIONAL HUMAN RIGHTS LAW 51 (Azizur Rahman Chowdhury & Jahid Hossain Bhuiyan eds., 2010).

<sup>29</sup> Louise Arbour, *Economic and Social Justice For Societies in Transition*, 40 N.Y.U. J. INT’L L. & POL. 1, 5 (2008).

<sup>30</sup> See, John Corntassel & Cindy Holder, *Who is Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala and Peru*, 9 HUM. RTS. REV. 465 (2008).

<sup>31</sup> Lars Waldof, *Anticipating the Past: Transitional Justice and Socio-Economic Wrongs*, 21(2) SOC. & LEGAL STUD. 1, 2 (2012).

Another rationale for excluding socioeconomic rights, the argument goes, is that “existing [transitional justice] mechanisms are already overcharged, their responsibilities too heavy, public expectations too unrealistic and finances already too lean.”<sup>32</sup> This argument is reminiscent of—and could well be borne of—the abhorrence for economic, social, and cultural rights in mainstream human rights discourse.<sup>33</sup> Current transitional justice mechanisms are too narrow because they focus only on retributive justice of uncovering the truth, holding perpetrators—which, in most cases, are only a handful—accountable, and facilitating institutional reforms that guarantee civil and political rights to avoid the recurrence of abuses of the past.<sup>34</sup>

Most transitional justice processes, even in the best of circumstances, have never been able to accomplish the minimum expectations of accountability promised for the victims.<sup>35</sup> Nor is there a universal frame of reference for what those expectations are.<sup>36</sup> What we find in most cases in transitional justice mechanisms is that victims of past abuses demand processes that would enable them to transcend that through socioeconomic incapacitation. In underscoring the imperative of this task, Rama Mani believes that transitional justice.

[W]ill lose credibility in the predominantly impoverished and devastated societies where it operates if these questions are not urgently and meaningfully addressed by practitioners and scholars. Conversely, efforts to find appropriate responses to these challenges could contribute greatly to the positive impact [transitional justice] mechanisms have on the lives of survivors and on the chances for a stable transition from conflict to peace.<sup>37</sup>

This is underscored in the case of South Africa where the system of apartheid was rooted primarily not just in the violation of civil and political rights, but even more in the economic deprivation and exclusion from the life of the state. Louse Arbour summarizes this in the following language:

Transitional justice must have the ambition to assist the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure equitable future. It must reach to—but also beyond—the crimes and abuses committed during the conflict that led to

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<sup>32</sup> Rama Mani, *Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development*, 2 INT'L J. OF TRANSITIONAL JUST. 253, 255 (2008).

<sup>33</sup> See generally AMARTYA SEN, *supra* note 13. For example, Amartya Sen argues that the “liberty of political participation or the opportunity to receive basic education or health care . . . are among the constituent components of development . . . [and] these freedoms and rights are also very in contributing to economic progress.” *Id.* (emphasis added).

<sup>34</sup> See U.N. Secretary-General, *The Rule of Law and Transitional Justice On Conflict and Post Conflict Societies*, Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004).

<sup>35</sup> See van Zyl, *supra* note 5, at 653.

<sup>36</sup> *Id.*

<sup>37</sup> Mani, *supra* note 32, at 254.

the transition, and it must address the human rights violations that pre-dated the conflict and caused or contributed to it.<sup>38</sup>

So, even if other societies in transition that have undergone what might be described as “conventional” conflict can hope to achieve socioeconomic justice through the process of development, South Africa stands a limited chance because of the very nature of apartheid. Apartheid policies did not just exclude the Black majority from economic development; they went further to seize from them the major means of production—land.

In many societies, socioeconomic grievances were underlying causes and civil and political<sup>39</sup> factors were immediate or trigger factors of the conflict. In the case of apartheid, the reverse was true. The only agenda was economic subjugation and dispossession. It was the end. Political exclusion was merely the means to that end. Therefore, any transitional justice mechanism in the South African context that merely addresses civil and political rights violations—without addressing economic, social, and cultural rights abuses—not only ignores the single most permanent destructive dimension of violence suffered by the victims of “conflict” under apartheid, but also actually prepares the country for another round of cataclysmic upheaval. To be viable and sustainable, the process must, among other things, address the “interpersonal and structural” violations brought about by the past regime.<sup>40</sup>

Even the United Nations seems to have reached this conclusion when it acknowledged that “[p]eace can only prevail if issues such as systematic discrimination, unequal distribution of wealth and social services, and endemic corruption can be addressed in a legitimate and fair manner by trusted public institutions.”<sup>41</sup> Even more recently, it acknowledged the fact that the development of transitional justice practice has been greatly influenced by civil and political rights discourse to the exclusion of economic, social, and cultural rights.<sup>42</sup> “[T]ransitional justice can contribute to the fight against impunity for violations of economic, social and cultural rights, and to their prevention, by laying the foundations for forward-looking reforms and agendas.”<sup>43</sup>

On the South African transitional justice process, Ben Okri rhetorically asked, “Has there been a reconciliation without proper consideration?”<sup>44</sup> Perhaps.

<sup>38</sup> See Arbour, *supra* note 29, at 3.

<sup>39</sup> See Office of the U.N. High Comm’r for Human Rights, *Transitional Justice and Economic, Social, and Cultural Rights*, HR/PUB/13/5, 6 (2014), <http://www.ohchr.org/Documents/Publications/HR-PUB-13-05.pdf>.

<sup>40</sup> Gready & Robins, *supra* note 25, at 344.

<sup>41</sup> U.N. Secretary-General, *GUIDANCE NOTE: United Nations Approach to Transitional Justice*, 7 (Mar. 2010), [https://www.un.org/ruleoflaw/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf).

<sup>42</sup> See U.N. High Comm’r for Human Rights, *supra* note 39, at 6.

<sup>43</sup> *Id.*; see also U.N. Secretary-General, *supra* note 41, at 7 (Paragraph 9 of the note states, “Violations of economic, social, and cultural rights not only exacerbate or spark civil or political tensions resulting in conflict or repressions, but conflict or repression often precipitate further violations of these rights. Successful strategic approaches to transitional justice necessitate taking account of the root causes of conflict or repressive rule, and must seek to address the related violations of all rights, including economic, social, and cultural rights (e.g., loss or deprivation of property rights).”).

<sup>44</sup> Ben Okri, *Biko: The Tough Alchemy of Africa*, Address at 13th annual Steve Biko Memorial Lecture (Sept. 12, 2012), in *CAPE TIMES* (Sept. 13, 2012), <http://www.iol.co.za/capetimes/full-speech-ben-okri-honours-biko-1.1382746#.VdncM7ew9sM>.

The one area in which this truth still needs to be told today is the aspect of socioeconomic inequalities in South Africa in which the legacy of apartheid is most visible. Structurally orchestrated socioeconomic disenfranchisement, deprivation, and dispossession of the means of production—such as land—and the denial of equal opportunity to participate in the social and economic life of the country was acknowledged—but unfortunately sidestepped—by the South African Truth and Reconciliation Commission.<sup>45</sup> Hence, while seeking redress for civil and political rights violations of the apartheid government—and long before mainstream transitional justice scholars and practitioners began to turn to economic, social, and cultural rights as components of transitional justice processes—activists had pressured the South African Truth and Reconciliation Commission to include violations of those rights in the scope of its work.<sup>46</sup> But these were not accepted in the victims' hearings by the Truth and Reconciliation Commission and the following text from the Commission's Report confirms this:

The Commission recognised that these issues formed part of the broader context within which the specifically defined gross human rights violations had taken place. It sought to give attention to them by receiving submissions from a number of organisations that had been particularly concerned with these issues in the past. These submissions made a valuable contribution to the section of the final report dealing with the broad context within which the gross violations of human rights took place, although they could not be considered as victim hearings. They gave depth to the larger picture, but they still excluded individuals from recognition and from access to reparations, and many people remained aggrieved.<sup>47</sup>

If indeed in 1994 it seemed that the enjoyment of civil and political rights would over time make the demands for socioeconomic justice vanish, the series of “service delivery” protests have proved such expectations to be misplaced. These are not matters of “service delivery” but violations of the socioeconomic rights by “organs of the state.”<sup>48</sup> Therefore, the state is complicit in the violation of human rights when it fails to implement the socioeconomic rights promised in the constitution. The apartheid regime created opportunities for only an exclusive section of society while concurrently depriving others—sentencing them to a vicious cycle of poverty from which they can only escape through structural reforms.<sup>49</sup> The current practices only exacerbate the existing deprivations. Perhaps the appointment of a Minister of Reconciliation and Transformation in South Africa, tasked with holistically addressing these fundamental human rights violations might have combatted this void—arising from the pernicious practice

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<sup>45</sup> See Final Report of the Truth and Reconciliation Commission of South Africa, *supra* note 7, at 11.

<sup>46</sup> See *id.*

<sup>47</sup> *Id.*

<sup>48</sup> CONST. OF THE REP. OF S. AFR., 1996 § 8(1).

<sup>49</sup> See generally Gready & Robins, *supra* note 25.

of apartheid since the report of the Truth and Reconciliation Commission was published. It can be said that even if such a minister was appointed today, it would not be too late for some sagacious thinking and implementation on the part of the government.

Time and again, economic and social goods such as housing, health care, education, and so on continue to dominate the list of demands of victims; not just in the work of the Truth and Reconciliation Commission in South Africa alone, but also in other transitional justice systems.<sup>50</sup> These, and a host of other demands, cannot be addressed on a sustainable basis through short-term reparation programs for individual victims, but require a long-term plan.<sup>51</sup> Instead of the socioeconomic rights the victims hoped for, however, they receive some legal assurances through constitutional reforms that their rights would never again be violated in the manner they had been in the past. Historically constructed structural inequalities will not disappear merely because there has been a transfer of political power from the oppressive regime to a popularly elected government.<sup>52</sup>

The racial tolerance and social cohesion South Africa sought through the Truth and Reconciliation Commission will continue to remain elusive so long as the vast majority of the victims of historical, social, and economic injustices feel their conditions are no better than they were before. While it is important to subject the implementation of the different programs in the transition mechanisms to public scrutiny, it is equally as detrimental to try to deny the conditions that made the policy necessary initially, because it is a first step toward discrediting the very notion of socioeconomic rights as necessary tools for societies in transition.

## II. SOCIO-ECONOMIC RIGHTS IN THE TRANSFORMATION OF SOUTH AFRICA

By the 1980s, it had become clear to the apartheid regime that the repressive strategy that underpinned apartheid policies was unsustainable and that it could no longer ignore the international isolation and the myriad of sanctions imposed by the international community. At the same time, the liberation movement had not been able to defeat the apartheid regime despite the armed struggle and escalation in the intensity of the conflict.<sup>53</sup> Given the circumstances, a deadlock-breaking mechanism—in which both sides to the conflict would be accommodated—had to be negotiated. Amongst other things, and for a variety of

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<sup>50</sup> *Id.* at 340; William A. Schabas, *Reparations Practices in Sierra Leone and the Truth and Reconciliation Commission*, in *OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS*, 289, 289–307 (K. De Feyter et. al, eds., 2005); Lisa J. Laplante, *On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development*, 10 *YALE HUM. RTS. & DEV. L.J.* 141, 141–77 (2007); Tafadzwa Pasipanodya, *A Deeper Justice: Economic and Social Justice as Transitional Justice in Nepal*, 2 *INT'L J. TRANSITIONAL JUST.* 378, 378–97 (2008).

<sup>51</sup> Pasipanodya, *supra* note 50, at 378–97.

<sup>52</sup> See Muvingi, *supra* note 9, at 169.

<sup>53</sup> See van Zyl, *supra* note 5, at 650.

reasons, the transition process had to guarantee amnesty to functionaries and operatives of the apartheid government in exchange for full disclosures and confessions before the Truth and Reconciliation Commission, as part of a transitional justice process. Thus, one of the mandates of the Truth and Reconciliation Commission was the “granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past.”<sup>54</sup> This was the atmosphere in which the South African transition process was negotiated, and it has arguably impacted how the transition process has since played out.

During the constitutional negotiation of a post-apartheid South Africa, there was a subtle struggle between the “leftists” in the African National Congress—whose Freedom Charter had been heavily influenced by the contents of the International Covenant on Economic, Social, and Cultural Rights—and the group whose economics and politics were based on neoliberalism. To all that were watching, it appeared as if the lure of political power was more attractive to the African National Congress than a clear economic policy. A compromise had to be reached to retain the neoliberal political economy of the new South Africa, but it was tempered by selected principles of socioeconomic rights that were then incorporated in the constitution to guarantee a modicum of social justice.<sup>55</sup>

Based on the contents of the Freedom Charter as its fundamental document, many in the liberation struggle—and the anti-apartheid movement—hoped to see a South Africa that would pursue social justice as an end, using the state apparatus constructed on the political economy of a developmental state model.<sup>56</sup> Although they thought they had ensured victory by including the protection of socioeconomic rights in Section 26 of the Constitution, South Africans have been disappointed to realize that “economics and law [have] evolved through different pathways” since the end of apartheid.<sup>57</sup> Naomi Klein describes this as “a process of infantilization that is common to so-called transitional countries—new governments are, in effect, given the keys to the house but not the combination to the safe.”<sup>58</sup> The South African Constitution has recognized socioeconomic rights as being justiciable: this has been elaborated by the Constitutional Court through world-acclaimed socioeconomic rights jurisprudence. In fact, the South African state has merely surrendered to neoliberalism and is incapable of transitioning constitutional mandates into reality without risking confrontation with global capital.<sup>59</sup>

Beyond constitutional recognition of socioeconomic rights and the radical approach of the Constitutional Court to constantly challenge the interface of law and economics, neoliberalism has trumped social justice and socioeconomic

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<sup>54</sup> See Promotion of National Unity and Reconciliation Act 34 of 1995 pmbl. (S. Afr.).

<sup>55</sup> See Muvingi, *supra* note 9, at 179.

<sup>56</sup> See Michael Humphrey & Estela Valverde, *Human Rights Politics and Injustice: Transitional Justice in Argentina and South Africa*, 2 INT'L J. TRANSITIONAL JUST. 83 (2008).

<sup>57</sup> Koldo Casla, *The Importance of a Socioeconomic Rights Approach to Transitional Justice*, E-INT'L REL. (Sept. 13, 2012), <http://www.e-ir.info/2012/09/13/the-importance-of-a-socioeconomic-rights-approach-to-transitional-justice>.

<sup>58</sup> NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* 204 (2007).

<sup>59</sup> Backer, *supra* note 12, at 179.

rights have made limited inroads.<sup>60</sup> Coupled with highly inefficient administrative and management personnel, efforts to redress historical injustices, poverty, and inequality have been largely unsuccessful. There are some who would argue that the government has the necessary enabling laws in the Constitution and other legislative frameworks to redress structural inequalities, such as the Restitution of Land Rights Act,<sup>61</sup> the Broad Based Black Economic Empowerment Act,<sup>62</sup> and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act,<sup>63</sup> amongst others.

No other issue of social and economic inequality in South Africa is as vexing as the land reform question. As James Gibson rightly observes, “South Africa’s past is now colliding with its present”<sup>64</sup> and “threatens its future because of the unresolved land issues.”<sup>65</sup> James Gibson further argues that land reconciliation brings into sharp focus the clash between legality and justice and involves resolving the “clash of rights.”<sup>66</sup> The future of South Africa will depend, to a large extent, on how it negotiates the nuances and resolves these issues. Because of the non-implementation of the constitutional principles on compensation and very poor management in the last twenty-two years, the response of the government on matters of acquisition of land for land reform and restitution may be characterized as unclear. Now the government has to scramble to come up with plausible policies to counter the threats of populist land occupation.

So, in one view, if the government is not utilizing these transformative laws effectively to deliver social justice, this is a dilemma that the government must resolve. At some stage, the electorate will have to indicate their displeasure and vote in a government who can deliver the promises inherent in the constitution.

Two recent events in South Africa disprove this reductionist approach and underscore the triumph of neoliberalism over the attempts to ingrain social justice through the weaving of socioeconomic rights into the Constitution.

First, in 2008, eight years after the Constitutional Court had declared that Irene Grootboom and her children were entitled to a decent house, she died in a shack dwelling.<sup>67</sup> She had not received that decent house by the time of her death.<sup>68</sup> The Court found that Ms. Grootboom and her family’s right to access adequate housing was violated.<sup>69</sup> Not even a Constitutional Court decision could manifest a house for her. In his book, Justice Sachs recounts the case: “[T]he

<sup>60</sup> Since the landmark judgment in *Soobramoney v. Minister of Health (Kwazulu-Natal)* 1997 (1) SA 1 (CC) at 17 (S. Afr.), the courts have tried to give effect to socioeconomic rights guaranteed in the Constitution, especially with respect to the right to adequate housing. See, e.g., *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 1 (CC) at 46 (S. Afr.); *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 1 (CC) at 43 para. 59 (S. Afr.); *Occupiers of 51 Olivia Road v. City of Johannesburg and Others* (3) SA 208 (CC) at 2 (S. Afr.); *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd.* 2012 (2) SA 104 (CC) at 33 (S. Afr.).

<sup>61</sup> The Restitution of Land Rights Act 22 of 1994 (S. Afr.).

<sup>62</sup> The Broad Based Black Economic Empowerment Act 53 of 2003 (S. Afr.).

<sup>63</sup> Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1997 (S. Afr.).

<sup>64</sup> JAMES L. GIBSON, *OVERCOMING HISTORICAL INJUSTICES: LAND RECONCILIATION IN SOUTH AFRICA* 1 (2009).

<sup>65</sup> *Id.* at 23–26.

<sup>66</sup> *Id.* at 1.

<sup>67</sup> *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 1 (CC) at 46 (S. Afr.).

<sup>68</sup> See Casla, *supra* note 57, at 7.

<sup>69</sup> See *id.*

fact that her family was not yet housed in reasonable accommodation showed how difficult it was to realize the socio-economic rights in the Constitution.<sup>70</sup> A more nuanced view might be that the case was a missed opportunity to calibrate a judicial decision on socioeconomic rights with the appropriate executive and management response.

Second, in August 2012, thirty-four miners were shot dead by policemen in Marikana<sup>71</sup>—the largest number of people killed by the state since the Sharpeville incident in 1960.<sup>72</sup> The circumstances surrounding the miners' deaths are unclear; the dominant view, however, is that they were shot and killed because they were demanding a living wage.<sup>73</sup> After a report on the killings was issued,<sup>74</sup> one journalist made the following comment, “No one has ever claimed responsibility for the Marikana massacre, even though several of the shootings were captured in real-time by television cameras. The victims were striking mineworkers, employed by Lonmin, a British platinum-mining company; those firing the guns were policemen, employed by the South African state.”<sup>75</sup>

These two cases illustrate that the rights of the poor are not being prioritized and that they continue to bear the brunt. There is a need to adopt a holistic approach to socioeconomic rights and deal with it as a structural problem that requires a systemic solution.<sup>76</sup>

Without trying to justify acts of xenophobia, twice in the past twenty-two years—in 2008 and 2015—some South Africans have unleashed barbaric violence on vulnerable foreigners perceived to be taking their jobs or other economic opportunities.<sup>77</sup> These perceptions were confirmed in a report by Navi Pillay, former UN High Commissioner for Human Rights and chair of the Special Reference Group on Migration and Community Integration in KwaZulu-Natal. One conclusion of that report was that poverty, socioeconomic inequality, and unemployment heightened tensions within and between many communities.<sup>78</sup> The likelihood of further recurrences cannot be discounted.

Finally, the rise in student protests in 2015 surrounding the cost of and access to higher education may be attributed to the impatience surrounding empowerment and economic opportunity. It is without doubt a right-to-education issue. As in 1976, students are calling for a transformation; this time, they are calling for the transformation of the culture and curricula of historically white

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<sup>70</sup> ALBIE SACHS, *THE STRANGE ALCHEMY OF LIFE AND LAW* 274 (2009).

<sup>71</sup> See Marikana Commission of Inquiry: Report on Matters on Public, National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province (Mar. 2015) (S. Afr.), <http://www.sahrc.org.za/home/21/files/marikana-report-1.pdf>.

<sup>72</sup> See Alex Perry, *South Africa's Police Open Fire on Striking Miners: The Video*, TIME (Aug. 16, 2012), <http://world.time.com/2012/08/16/south-africas-police-open-fire-on-striking-miners-the-video/> (last visited Jan. 2, 2017).

<sup>73</sup> See *id.*, at 49–50.

<sup>74</sup> *Id.*

<sup>75</sup> Jack Shenker, *The Marikana Report Has Brought No Justice and No Relief*, THE GUARDIAN (July 3, 2015), <https://www.theguardian.com/commentisfree/2015/jul/03/marikana-massacre-justice-south-africa-miners>.

<sup>76</sup> See Bond, *supra* note 24, at 141.

<sup>77</sup> *Report Blames Media for Xenophobic Panic in SA*, ALJAZEERA (Apr. 6, 2016), <http://www.news24.com/SouthAfrica/News/report-blames-media-for-xenophobic-panic-in-sa-20160406>.

<sup>78</sup> *Id.*

universities,<sup>79</sup> the removal of colonial thinking from their education,<sup>80</sup> and the fair opportunity for workers on the campuses who were outsourced to private companies.<sup>81</sup> The deferral of the promise of socioeconomic rights and their implementation are highlighted in these protests.

The current paradigm of transitional justice still views the state as a mere facilitator in social transformation through economic and social rights. In the case of South Africa, the facilitator is the very same state that was once the violator of these rights. There should be a shift in this paradigm to mainstream socioeconomic rights with the state serving as the duty-bearer—just as in cases of civil and political rights violations. The *Grootboom* case challenges this apparent effectiveness and illustrates the limitation of judicial intervention in social transformation because it “questions the power of law when political economy does not want to help.”<sup>82</sup> To expect constitutional litigation to solve this imbalance is unrealistic because the progress is slow and determined on a case-by-case basis. Instead more executive action is required.

## CONCLUSION

South Africa is a country still in transition, even with the assistance of the work of the Truth and Reconciliation Commission. Alexander Boraine views transition as a passing or passage from one condition, action, or—rarely—place to another. “It is a journey—never short—often precarious.”<sup>83</sup> For South Africa, twenty-two years after the end of apartheid, some contend that the transition was not a success—as though the transition had ended. While this might be a moment for us to pause and reflect on the transition, it would be too soon to conclude that it is a *fait accompli*.

At the same time the outcomes in the *Grootboom* case, the Marikana killings, and the two incidents of serious xenophobia may not be as disconnected as they appear to be at first sight. Even more, there are also the angry student protests that have resulted in burning of campus facilities. More importantly, are the cases indicators of something more precarious in South Africa’s transition from apartheid to democracy? The short answer might be that it is all too early to conclude.

Perhaps, it is in recognition of the fact that the transition has not ended that Cath Collins speaks of “Post-Transitional Justice” as a distinct frame for analysis that will examine the all-inclusiveness and adequacy of the early concessions

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<sup>79</sup> Vuyisile Msila, *#FeesMustFall is Just the Start of Change*, MAIL & GUARDIAN (Jan. 21, 2016), <http://mg.co.za/article/2016-01-20-fees-are-just-the-start-of-change>.

<sup>80</sup> See *Report Blames Media for Xenophobic Panic in SA*, *supra* note 77.

<sup>81</sup> See Thembi Lockett & Francesco Pontarelli, *#OutsourcingMustFall: Unity in Action in South African Universities*, THE BROOKLYN RAIL (Mar. 4, 2016), <http://www.brooklynrail.org/2016/03/field-notes/outsourcing-must-fall> (last visited Jan. 2, 2016).

<sup>82</sup> Casla, *supra* note 57.

<sup>83</sup> Boraine, *supra* note 1, at 17 (quoting *Transition*, SHORTER OXFORD ENGLISH DICTIONARY OF HISTORICAL PRINCIPLES (6th ed. 2007)).

made in the transitional justice process.<sup>84</sup> South Africa continues to witness widespread poverty and inequality. Political freedom for all arrived with democracy in 1994, but the economic power continues to lie in the hands of the group who were the beneficiaries of the previous order.

A great danger lies ahead if either the attempt to undermine the role of socioeconomic rights in the transition process succeeds or the implementation of such rights as components of the transition process fails. Political participation and a guarantee of civil and political rights are usually ineffective firewalls against the violent consequences of socioeconomic exclusion. Without taking a programmatic approach to addressing socioeconomic deficits—perhaps through the appointment of a Minister of Reconciliation and Transformation backed by effective implementation of socioeconomic rights—no assessment can be made of when any transition has ended, if it has at all.

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<sup>84</sup> CATH COLLINS, *POST-TRANSITIONAL JUSTICE* (2010).