The Role of Constitution Making and Institution Building in Furthering Peace, Justice and Development: South Africa's Democratic Transition

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Abstract[1]

The international community accepts that peace, justice and development are indivisible properties of human freedom and thus wants a more coordinated approach to post conflict recovery. Today, transitions to democracy are typically launched through constitutional negotiations and anchored in efforts to fix broken state institutions or create new ones. These are settled strategies for addressing the social and economic causes of conflict in troubled societies. Transitional justice (TJ) has been slow to appreciate or capitalize on the inherent potential of these political processes to further justice and peace. By not taking a wider view of the opportunities for change that are presented by the transitional moment, TJ limits its capacity to construct the institutions that must work if a return to conflict is to be prevented. With this in mind, prominent practitioners have begun to look at how to extend TJ's brief to include a wider set of issues linked to social justice. They are also looking for concepts and tools to bridge the divide between the field and

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[1] This article draws extensively on the author's personal experience as a senior official and policy advisor in the South African government from 1996 to 2009 and, prior to this, as the head of the research department of the Constitutional Assembly of South Africa, which drafted the country's constitution.

related disciplines. This article presents South Africa's transition as a case study of this wider view and is written from the perspective of a practitioner who was involved in building the post-apartheid democratic state. It aims to contribute to the current debate about TJ's stake in post conflict transitions.

Introduction

A country seeking to leave conflict behind and build a just, inclusive and democratic society must make hard political choices under difficult circumstances. Typically, these are choices about the institutions that will steer the country to peace and constitute the new order. The field of transitional justice (TJ) aims to ensure that political choices made during transition do not come at the expense of either accountability for the perpetrators of conflict crimes or justice for their victims. Recently, some practitioners have begun to argue for increasing TJ's reach to include the socioeconomic injustices that enable conflict but survive transitions to threaten peace.[2] They are concerned about TJ's silence and impotence in the face of actual injustices of this kind. These concerns have provoked a debate about TJ's aims and capabilities in post conflict situations. Wider enquiry has led to growing interest in the other facets of transition that help to promote social justice and peace, and in the possibility of closer linkages with other fields involved in the study of political transitions.[3] With approximately 50 percent of troubled countries returning to conflict within a decade and the costs of aid rising each year, the international community also wants stronger coordination amongst peace building, development and justice responses in fragile situations.[4] These convergent aspirations offer the

[2] Rama Mani, 'Dilemmas of Expanding Transitional Justice,' *International Journal of Transitional Justice* 2(3) (2008): 253–265.
[3] Kirsten McConnachie and John Morison, 'Constitution-Making, Transition and the Reconstitu- tion of Society,' in *Transitional Justice from Below: Grassroots Activism and the Struggle for Change,* ed. Kieran McEvoy and Lorna McGregor (Oxford: Hart Publishing, 2008); Louise Arbour, 'Eco- nomic and Social Justice for Societies in Transition,' *Journal of International Law and Politics* 40(1) (2007): 1–28; Pablo de Greiff and Roger Duthie, eds., *Transitional Justice and Development: Making Connections* (New York: Social Science Research Council, 2009).
[4] Paul Collier, *Development and Conflict* (Oxford: Centre for the Study of African Economics, 2004). See, Organisation for Economic Co-operation and

possibility to think in new ways about the scope and limits of TJ. That project, however, is larger than my ambition for this article. What I aim to show is that in spite of the privileged place South Africa's experience holds in the TJ literature, in important ways the reality of South Africa's transition *challenges* more than it *supports* the normative aims of transitional justice.

My case rests on three arguments. The first is that agreement on a formula for redistributive justice was the central problem of the South African transition and therefore a precondition for any political settlement. Apartheid was a system of racial oppression that served to facilitate economic exploitation. That fact shaped the character of the liberation struggle, as well as the nature of the justice sought in the post-apartheid moment. TJ's concept of justice in transition, however, excludes socioeconomic injustice from its list of actionable wrongs and redistributive justice from the valid aims of democratic transition. With these omitted from its conceptual framework, TJ was and is unable to offer a plausible account of the reality of either racial injustice or political transition in South Africa.
The second argument is that, in addition to conventional TJ measures, South Africa created legal and political institutions *specifically* to remedy the socioeconomic injustices of apartheid. Chief amongst these were the human rights and political institutions that emerged out of the constitution-making process and a parallel process to transform the apartheid state machinery in order to redress past injustices and guarantee non repetition. The third argument is that racial inequality not only survived the transition to democracy, with the help of a conservative macroeconomic policy and a weak state, but also deepened in the 16 years after independence. South Africa today continues to be one of the most unequal countries in the world. These inequalities have fuelled political divisions within the ruling elite and racial and class divisions in society. The situation is both unsustainable and dangerous –

Development (OECD), *Principles for Good International Engagement in Fragile States and Situations* (April 2007). Ashraf Ghani and Clare Lockhart, *Fixing Failed States: A Framework for Rebuilding a Fractured World* (Oxford: Oxford University Press, 2008).

social unrest is common, widespread and often violent. These realities make South Africa a supportive case study for those who believe that political transition without social justice in countries where socioeconomic injustice sustained violence is at best a suspension of conflict, but not a deterrent. I conclude the article by drawing out the practical lessons that underscore South Africa's relevance to the TJ debate.

Structural Injustices and TJ's Silence

The 2008 special issue of this journal, on 'Transitional Justice and Development,' carried an important contemporary debate: Does TJ further or frustrate the cause of justice by concentrating on past human rights abuses while ignoring the socioeconomic injustices that fuel internal conflict? The debate has arisen because TJ activists and scholars today are faced with a different set of political problems to those that inspired the emergence of the field two decades ago, and some are arguing that the tools conceived in response to those original dilemmas do not necessarily 'fit' current transition contexts or their dilemmas.

Paige Arthur traces the origins of the field to a specific set of problems that con- fronted human rights activists in various countries during the late 1980s and early 1990s, when these countries were going through transition from authoritarian rule to democracy.[5] The countries shared a common problem: finding a way to hold the former regimes accountable for their human rights atrocities in 'exceptionally precarious political situation[s].'[6] Arthur argues that the way the dilemma was understood and framed reflected the ascent of two particular discourses in that period. The first discourse viewed the end result of transitions as democratic government. This view had widespread legitimacy because people in these countries wanted democratic government and activists and scholars promoted that goal. With the entrenchment of this ideology came acceptance that the most appropriate mechanism for

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[5] Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice,' *Human Rights Quarterly* 31(2) (2009): 321–367.
[6] Lawrence Weschler, quoted in Arthur, supra n 5 at 321.

achieving stability and then democracy is through elite pacts: political choice making through negotiations. The second discourse on the rise was that of international human rights law. Networks of human rights activists and non-governmental organizations concerned that the atrocities of authoritarian regimes might go unpunished set about defining an acceptable set of international justice measures to deal with the perpetrators, redeem victims and secure lasting peace.

The two discourses converged to form the intellectual paradigm that has come to define both the nature of political transitions (democratization) and the concept of justice during political transitions (prosecutions, truth telling, reparations and so forth). Each of the discourses would infuse something of itself into the two normative aims of the new field of transitional justice: 'achieving justice for victims, and achieving a more just political order: a democratic one.'[7] The field would propagate these aims through the devices of international legal norms and institutions, whose function was to condition the process of political choice making during transitions by setting an acceptable level of obligation for successor states. How did this storyline about the meaning of justice during a process of political transition in troubled countries become the hegemonic paradigm? And what was left out? Arthur posits that four conditions in this period provide the answer to
why the 'transitions to democracy' paradigm was so attractive at the time:

> the fact that in most of the countries undergoing political change, democracy was a desirable goal for many people; the delegitimation of modernization theory; the trans- formation of the 'transitions' concept from a tool of socioeconomic transformation to one of legal-institutional reform; and the global decline of the radical Left.[8]

The conceptual foundations of TJ thus rest upon a particular theoretical construction of conflict, justice, human rights and political transition that gained currency and legitimacy in the

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[7] Arthur, supra n 5 at 44.
[8] Ibid., 23–24.

last two decades of the 20th century. The field's normative goals were formulated to address specific political dilemmas of that period: securing justice for victims of abuse and establishing a more just political order in times of political transition. These aims would be universalized as norms of international law and pursued through a particular set of legal and institutional instruments. For the purposes of this article, I refer to this as the narrow view of TJ.

Critics of the narrow view focus on what is left out of the paradigm.[9] The impact of the global economic context on political transitions is left out, which in turn leaves out a wide sweep of political choices, in particular those that encourage the reproduction of structural inequalities in the name of market liberalization, the ruling economic paradigm. Even though it might entrench preexisting inequalities, the narrow view is upheld because systematic economic exploitation is not an injustice that TJ validates, even when it can be shown to have induced human rights abuses during conflict. At best, it is regarded as a contributing factor in conflict, which truth telling and reparations ought to take into account, as opposed to a substantive form of injustice worthy of its own specific measures of redress. What sorts of political choices are made during transitions to democracy?[10] Four sets of choices can be identified as typical. First, elites must choose the political institutions that will preside over the shift from conflict to a new order.

That is, they must agree on the necessary first steps that will instate a process of transition and mark it as a progression away from conflict and towards democratic government. Institutional forms at this stage are generally contingent, tentative and focused on immediate political concerns – the steps that must be taken to end hostilities and create the right conditions for

[9] Zinaida Miller, 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice,' *Inter- national Journal of Transitional Justice* 2(3) (2008): 266–291.

[10] Transition to democracy is the original and still dominant conception of transition, but transitional justice mechanisms are also used in established countries or pretransition countries.

dialogue and arrangements for interim power sharing, negotiations or elections. Familiar political institutions include talks about talks, road maps to peace, ceasefire and power-sharing agreements, multiparty negotiating forums, interim or transitional governments and interim constitutions.

The second set of choices concerns the political institutions of a future dispensation. These are the rules and institutions that will both govern the distribution of political power in the state and validate the government's ongoing political authority. Here the negotiating parties must make substantive decisions about the form of democratic government under the new order, key public institutions (such as the rule of law and human rights) and how public services will be provided. The institutions that result from these choices embody the final pact, and for that reason are commonly enshrined in a constitution, law or written agreement to put the seal on the new order and draw a line after the old.

The third set of political choices deals with how the economic wealth and resources of the country will be distributed amongst political groups, social classes or constituent units of the state in the aftermath of conflict. When economic exploitation or inequality underpinned conflict and human rights violations, and redress for economic injustices is a condition for peace, it is likely that redistribution and the form it takes will rank high on the agenda of political negotiations. The parties may expressly provide for wealth sharing in the constitution, as was the case in Sudan.[11] The settlement may also address the issue indirectly, leaving it to the market and the economic policies of a future government to determine the form of economic redress.

The fourth set of choices arises where human rights have been violated during the conflict, which is the case in most, if not all, conflicts. A country must decide how to address culpability for these violations, the appropriate form of redress for the

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[11] The 2005 Comprehensive Peace Agreement and the 2005 interim constitution of Southern Sudan both include wealth-sharing arrangements.

victims and what steps to take to prevent similar abuses from occurring in the future. International law and practice have created specific mechanisms for addressing issues of justice during transitions, such as international tribunals, truth commissions, domestic prosecutions and reparations for victims.

A transition to democracy is fundamentally a process of political change, and successful transitions are predicated on political elites making tough choices and striking deals. Without a ceasefire and negotiations actually taking place, the moment of transition either does not arise or does not survive, and a return to conflict is inevitable. Without agreement on the political institutions of the new order, there is no framework for lasting peace and democracy to give concrete form to the will to change. If the economic and social structures that contributed to the conflict are not addressed, inequalities in the society will survive intact despite any political settlement that is reached, and will pose a latent threat to one of the chief goals of transitional justice, non-repetition of conflict. If redress for human rights violations is not offered, victims will have no remedy or closure and perpetrators of abuse will evade accountability for their crimes.

But it is a rare transition that is a neat, linear progression from one discrete set of rational choices to the next. Negotiated settlements are messy affairs in which ideologies, tensions, economic factors, vested interests and pressure groups shape the course of events, and progress is often made in fits and starts. Countries have different capacities to make and follow through on choices made during negotiations, and fragile states, to a greater or lesser extent, rely on support from the international donor community. Compromise on difficult political issues is also inevitable. Amnesty for perpetrators of political crimes may be seen as a necessary trade-off for ensuring that a ruling elite surrenders or shares state power. Protection of existing property rights and economic interests may be necessary to achieving stability, even if this means living with inequality in the short term. Choices like these are and must be made for a transition to make headway.

According to the narrow view, TJ is directly concerned with the fourth set of choices described above. It is here that TJ has an organized, normative response to choices that pertain to securing justice for victims and a just political order, as well as a suite of measures in its armoury for achieving those aims. TJ is mindful that broader issues of justice – particularly issues concerning redistributive justice – invariably will arise in the context of the other three sets of choices, it simply hopes that these are somehow addressed justly by elites, under the watchful eye of one of the other fields concerned with political transitions, including development and post conflict reconstruction.

A black woman in South Africa who was tortured by the apartheid state is thus covered by TJ's remit. The fact that the state wilfully stripped her of political rights, denied her a proper education and basic social services and dispossessed her family of its land to further its policies of racial exploitation is not. The fact that these systemic abuses were designed to serve and preserve white privilege is not. Nor are her expectations that the post conflict state will take positive steps to redress the inequalities forced upon her by virtue of her skin colour and ethnicity.

The net effects of these omissions are twofold. First, TJ has no response to real injustices and the political choices that could result in their redress or entrenchment under the new order. Second, TJ is complicit in perpetrating injustice, albeit unwittingly. Both instances imply an ethical dilemma. Some TJ practitioners, therefore, want a larger 'footprint' for TJ, more finely calibrated tools and far stronger linkages with the other three sets of choices that shape the transitional landscape. The arguments for expanding the frontiers of TJ beyond political and civil violations share the conviction that any account of justice in a post conflict setting that ignores the relationship between structural inequalities and conflict is selective and irresponsible. Rama Mani is a key proponent of what, for present purposes, I will call the wide view of TJ:

> While the narrow and finite objective of TJ might be accountability for past crimes in the best way

conceivable in a particular context and culture, the encompassing aim of the field is a just and sustainable peace that enables all survivors in society tolive fully and coexist in dignity, without recrimination, fear or suffering. If advocated measures of TJ − whether truth commissions, trials, rule of law reforms or reparations packages − were to achieve their mandated objectives while patterns of systematic injustice and suffering, oppression and domination continued unfettered in this broader society, this would not provide satisfaction even to avid human rights advocates.[12]

Louise Arbour, the former UN High Commissioner for Human Rights, also 'advocates a different vision of justice, which includes social justice.' She argues for a comprehensive approach to justice that has 'the ambition to assist the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future.'[13] TJ has the responsibility, as Mani puts it, 'to widen the space for justice in the widest sense − social, economic, cultural, legal.'[14]
This call is sometimes countered with the caution that to follow it will raise difficult questions about how TJ can advance towards social justice without be- coming all things to all people, or losing the gains it has made under international criminal law. The answer often given to this dilemma is to recalibrate the mandate of existing TJ instruments to encompass socioeconomic injustices, for example, by extending the brief of truth commissions or reparations programmes to include redress for the victims of social and economic injustice.[15]

Although I support the sentiments of wide-view proponents as well as share the concern of others about the risk of asking TJ to

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[12] Mani, supra n 2 at 264–265.
[13] Arbour, supra n 3 at 3–5.
[14] Mani, supra n 2 at 265.
[15] Lisa J. Laplante, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework,' *International Journal of Transitional Justice* 2(3) (2008): 331–355.

do more for justice than it can, my interest here is not the debate itself but the paradigm TJ has constructed to render and reproduce a particular account of the South African transition. In the section that follows, I argue that neither the narrow nor the wide view of TJ does justice to the reality of South Africa's history of exploitation, its transition to democracy or its efforts to secure 'justice' in that transition.

It escapes the narrow paradigm that South Africa's transition was concerned with securing precisely those forms of justice (redistribution and social justice) that were not validated when the field was formed. The wide view in turn misses the fact that South Africa actually developed a set of instruments for social justice that went far beyond conventional TJ measures and yet was fundamentally about redress for a legacy of past violations. Chief amongst these was a constitution-making process that laid the tracks for political freedom, national reconciliation and social justice. There followed an extensive process aimed at transforming the apartheid state into a democratic state capable of leading redistribution and economic development. When the political choice making involved in creating these institutions is brought into view, a much richer understanding of what justice meant in the South African context begins to emerge. Despite this disjuncture between the conceptual structure of the field and the political context of South Africa's transition, it is the narrow slice of the story, namely a focus on the South African Truth and Reconciliation Commission (TRC), which has traction in the literature and practice of TJ.

Justice in the Time of Transition: South Africa's Road to Democratic Government

Over centuries, colonialism and its successor, apartheid, systematically constructed an unjust political system in South Africa to foster racial economic exploitation. The liberation struggle turned these wrongs into universal claims for human freedom, equality and justice. The negotiated settlement forged these claims into an acceptable formula for freedom, national reconciliation and justice in a future, democratic South Africa. A line of political and discursive continuity linked these events, which spanned many decades.

Based on that line, South Africans formed a consensus about what injustice, freedom and a just political order meant in our context.

Apartheid was not an aberrational policy choice imposed on an otherwise normal society by an irrational government, but a comprehensive system of social engineering and racial exploitation that was deeply embedded in the basic fabric of society at every level. All institutions of the state, economy and society and every human relationship bore apartheid's imprint in one way or another. Whether you were black or white, to live in South Africa under apartheid was to have a group identity and racial classification imposed on you by the state. Your classification determined your status in society, your prospects of living a fulfilled life, your friends and who you could marry, where you could live and the type of work available to you. The consequences of racial classification were, of course, very different for whites and blacks. Being white entitled you to all the rights of citizenship, including the right to vote, access to economic opportunities and the best jobs, a superb education and world-class infrastructure and public services. If you were black, your life and your future prospects were limited and often bleak. You were not a South African citizen, you could not live in white South Africa, you were dispossessed of your land and business and forced to live in an overpopulated and impoverished ethnic homeland. These homelands served as labour reserves, supplying the cheap labour needed by the white economy, which meant that the state had no incentive to develop them and thus invested little or nothing in education or social services for black people who lived there. These predominantly rural areas remain the poorest and most impoverished parts of the country.[16] Your choices as a black South African were to support the system, to acquiesce and get by or to resist. But if you resisted you could be imprisoned indefinitely without trial, tortured with near impunity and even 'disappeared.'

The structural nature of the injustice perpetrated on the black

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[16] Presidency of the Republic of South Africa, National Spatial Development Perspective (2006).

population explains why the transformation of society lay at the very heart of the struggle to overcome apartheid, and why political reforms of the apartheid system aimed at accommodating black representation without abolishing the system, as the Botha regime tried to do in the mid-1980s, were always rejected.[17] No reform that left the structure of social and economic exploitation intact could ever have formed a legitimate basis for political settlement with the apartheid government. For this reason, the conception of justice as legal redress for individual human rights abuses that, as Arthur shows, formed the basis for the field of transitional justice simply does not fit with the South African case. In the context of a state that wilfully and systematically set out to dehumanize, oppress and exploit the majority of its population, the violent abuses of the apartheid regime were only one chapter of the story in South Africa's case, never the whole justice storyline.[18]

The strategy and tactics of struggle were forged in response to these wrongs. It is necessary to understand three facts about the nature of the struggle against racial domination, and the African National Congress (ANC) that led it, to appreciate the true nature of the political transition that ensued.[19] First, the

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[17] In a bid to reform apartheid by creating representative structures for the coloured and Indian population groups (but not for Africans), the apartheid government established a tricameral parliament in 1985, despite low voter turnout within these two communities during the inaugural election. The United Democratic Front, a broad-based anti-apartheid movement aligned to the banned ANC, was formed in response to these reforms and mounted a successful campaign to encourage coloured and Indian voters to stay away. For concise accounts of this period, see, http://www.sahistory.org.za for a concise account of this period of South Africa's history.

[18] Mahmood Mamdani, 'Reconciliation Without Justice,' review of *Reconciliation Through Truth: A Reckoning of Apartheid's Criminal Governance* by Kader Asmal, Louise Asmal and Ronald Suresh Roberts and *The Healing of a Nation?* ed. Alex Boraine and Janet Levy, *Southern African Review of Books* 46 (1996): 3–5.

[19] The official website of the African National Congress (http://www.anc.org.za) is a rich repository of primary sources relating to the movement's history and liberation doctrines. Especially important documents are: the 'African Claims in South Africa' of 1943 (the first time the organization claimed the right to self-determination for African people and demanded an end to racial discrimination); the 'Freedom Charter' of 1955 (proclaiming a nonracial agenda for South Africa); the 'Morogoro Consultative Conference' of 1965 (when the organization's 'strategy and tactics

ANC was (and still is) a revolutionary movement. It sought to overthrow the entire system of racial oppression in order to achieve freedom, equality and justice for the black majority under a future democratic order. These aims were pursued politically and, when those efforts failed, through guerrilla warfare. Second, the ANC was a nationalist liberation movement with a mass base that represented an alliance of African nationalists, communists, workers, intellectuals and civic activists across race, class, gender and ethnic divisions. Within the alliance, there was (and still is) a particularly close but often difficult relationship between the ANC and the South African Communist Party, meaning that the latter had a profound influence on the strategy and tactics of the struggle.[20] Third, these elements came together in a political manifesto, one for a National Democratic Revolution (NDR), which defined the character of the struggle and, in time, powerfully shaped the character of the political transition. The NDR had two substantive attributes that later enabled and facilitated a political settlement in important ways. One was that a future South Africa would be a democracy of equal citizens irrespective of race or gender, whites included. This commitment was proclaimed in the Freedom Charter, which was adopted by a Congress of the People in 1955 and which has been the basis for ANC policy to the present. This ideology

document,' setting out its programme of action, was first adopted); the 'Kabwe Consultative Conference' of 1985; and the 'Harare Declaration of 1989' (setting out constitutional guidelines for South Africa and paving the way for a negotiated settlement with the apartheid government). For a critical history of the ANC until 1990, see, Dale T. McKinley, *The ANC and the Liberation Struggle* (London: Pluto, 1997). For an analysis of internal political struggles within the movement under the Mbeki government (1999–2004), see, William M. Gumede, *Thabo Mbeki and the Battle for the Soul of the ANC* (Cape Town: Zebra, 2005). For a comprehensive analysis of the evolution of ANC economic policy since 1995, see, Ben Turok, *The Evolution of ANC Economic Policy: From the Freedom Charter to Polokwane* (Cape Town: New Agenda, 2008). For a current examination of the impact of ANC policies and politics on the state of South Africa, see, Mamphele Ramphele, *Laying the Ghosts to Rest: Dilemmas of the Transformation in South Africa* (Cape Town: Tafelberg, 2008).

[20] At present, there are growing tensions between the SACP and the ANC on particular issues of economic policy, such as whether mines should be nationalized, but they are increasingly due to personal spats between senior leaders in the two parties.

would open the way for national reconciliation and ethnic accommodation, and gave both a doctrinal basis within a framework of national unity. The other attribute was that the abolition of racism would require the transformation of South Africa to secure political and economic justice for blacks, especially Africans.[21] Transformation was seen as a two-stage process: political freedom through democracy, followed by economic freedom through state-led redistribution and structural economic reform.[22]

Here, too, the TJ paradigm misses two basic properties of the political context that underpinned South Africa's transition. First, the Left in South Africa did not decline, as it was in a strong alliance with the dominant force for democratic change and had a powerful political say in the course of struggle and transition. Second, political transition as a strategy – focused on legal-political institutions – did not replace structural transformation. It was the first station in a long-term process of social and economic transformation that lay at the heart of the political programme of South Africa's first democratic government in waiting, the ANC.

By 1989, it was apparent that a negotiated settlement was the only option for solving the country's problems.[23] The ANC was unbanned, which paved the way for negotiations between the apartheid government and the liberation movement led by the ANC. Five years later, in 1994, the country elected its first democratic government of national unity under President

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[21] Deep divisions exist between the nationalist elements within the ANC and the ANC's left-wing partners within the Tripartite Alliance, the SACP and the Congress of South African Trade Unions (COSATU), over the issue of whether the NDR is a programme of action for African nationalism within a free market system or nationalism as the first stage of class struggle leading to socialism. See, Ngoako Ramatlhodi, 'The ANC is the Strategic Political Centre,' *Politicsweb*, 24 January2010,http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page7165 6?oid=157122&sn=Detail   (accessed 15 February 2010).
[22] See, ibid.; Turok, supra n 19.

[23] See, Allister Sparks, *Tomorrow is Another Country: The Inside Story of South Africa's Negotiated Settlement* (Johannesburg: Jonathan Ball, 1995), for an acclaimed account of this period.

Nelson Mandela. The years between these two events were a period of intense political negotiation, marked by sporadic political violence and instability.

At first, the positions of the main political actors appeared to be irreconcilable and deadlock seemed inevitable. The apartheid government sought to reform the existing system and wanted checks on majority rule, including constitutional protection for minority groups in a federal system of government. To secure that goal, it wanted an agreement with the ANC on a new constitution before the first democratic elections took place. This was in sharp contrast to the position of the ANC, which wanted an elected constitutional assembly to draft the constitution, a unitary state and protection for individual rights, not group protection.

In part, these opening positions reflected two political concerns that forced both sides to take a hard line. First, each party had to build political consensus between the hawks and doves within its ranks. The apartheid-era ruling party, the National Party, ran the risk of alienating the public service and its militant Right wing. The latter posed a risk to stability because of its powerful influence in the military and security establishment. The ANC had to knit together a broad movement of civil society organizations, trade unions, its military wing and political alliances into a negotiating consensus whilst at the same time building its internal organizational capacity inside the country. Second, both sides wanted to control the pace and terms of the transition. The ANC wanted a popular mandate for any constitutional settlement, on grounds of principle as well as for tactical reasons, because it was likely to emerge from elections as the dominant political party in the country, which would give it a strong hand in the constitutional negotiations. The National Party believed that it could negotiate itself into a position from which it could retain effective control over state power by creating the strongest possible checks and balances against majority rule and exerting its experience and influence in a government of national unity.

The opening negotiations occurred in fits and starts, during

which political violence, election boycotts and even military takeover were regarded as very real threats. These threats ended up driving the parties closer together and impressing upon them the urgency of finding a workable solution. The more time the parties spent together, the better they got to know each other and the easier it was for them to develop the trust they needed to have in reserve when it came down to solving the really tough political problems. Beyond securing a pact between political parties, the process inspired a new culture of democratic engagement by creating opportunities for civil society and the public at large to influence the final constitution, which in turn generated broad popular legitimacy for the constitution that emerged.

What occurred was a compromise in the form of a two-phase negotiation process, with some unique features. In the first phase, a multiparty forum negotiated an interim constitution that provided for a government of national unity, the election of a Constitutional Assembly that would write South Africa's constitution within two years and 34 constitutional principles to provide a binding framework for negotiations within the Constitutional Assembly.[24] Uniquely, the interim constitution provided for a Constitutional Court to certify that the text adopted by the Assembly complied with the 34 principles.[25] The ANC thus secured a Constitutional Assembly to write the country's constitution, and the National Party secured institutional checks in the form of binding principles and judicial certification.

The second phase began with the election in 1994 of a democratic government and a Constitutional Assembly to draft

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[24] For a comprehensive analysis of the principal events in both the multiparty forum and the Constitu- tional Assembly from an insider's viewpoint, see, Hassen Ebrahim, *The Soul of the Nation: Constitu- tion Making in South Africa* (Cape Town: Oxford University Press, 2000). Ebrahim was the executive director of the Constitutional Assembly's administration, which managed the constitution-making process, and a key official in both processes.

[25] For a description of the full range of institutions created during the transition, see, Mac Maharaj, 'Peacemaking and Power Sharing: Building on the South African Experience' (paper presented at the 31st Conference of the African Studies Association of Australasia and the Pacific, Monash University, Australia, 26–28 November 2008).

the constitution. It ended when the constitution was promulgated into law in 1996 after being certified by the Constitutional Court. The Constitutional Assembly saw the process as an opportunity to involve ordinary South Africans in writing a constitution and as a platform for educating the public about constitutional democracy. By the end of the process, two million submissions and 800 civil society bodies had made formal submissions to the Constitutional Assembly.[26]

The new constitution reflected the delicate balance the negotiators had struck between the demands of peace, democracy, human rights and social justice in a racially divided and highly unequal society. Political power was decentralized and shared by elected national, provincial and local spheres of government, but within a strong unitary state. The jobs of existing public servants were protected in the short term, with a longer-term commitment to building a public service that represented the population as a whole. Whilst property rights were protected, the state was placed under the obligation to pursue social justice through policies of national redress linked to the realization of socioeconomic rights.

The constitution-making process fulfilled three important functions. First, the transition was a product of a negotiated political settlement that led to compromises. The preparedness of political leaders to weigh up and make the trade-offs necessary to achieve peace, stability and transformation was there from the start. TJ concerns were thus from the outset only one part of a much larger process of political and economic change in the country. Consequently, TJ stakeholders who focused only on specific TJ mechanisms without taking a broader view of what was happening ran the risk of missing the political shifts that were forging a new national consensus, and hence the trade-offs that were being made. As one of the architects of the transition, Mac Maharaj, notes in a recent conference paper, 'an often misunderstood feature of the South African transition' was that 'amnesty for past atrocities

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[26] Derek Powell, 'Public Participation in Constitution-Making Is Critical,' *Zimbabwe Times*, 24 April 2009. The Constitutional Assembly also utilized new information technologies to create an online submissions facility.

and the healing role of the [TRC] only featured tangentially in the agreements. The TRC acquired form and content under the Government of National Unity.'[27]

Second, the privileges that had accrued to the white minority had been secured through the use of state power, which entrenched structural inequalities between black and white South Africans.[28] A settlement would have been unimaginable without freedom, democracy and redistributive justice for the majority black population being treated as indivisible rights and placed at the top of the negotiation agenda. Because the negotiations hinged on the question of social justice, opportunities were opened to shape the institutions that would protect and further the cause of justice under the new dispensation. This, in turn, exposed human rights advocacy and scholarly investigation to a much wider set of techniques, strategies and institutions aimed at securing equality and justice for oppressed groups than the conventional instruments of TJ alone. For example, historically oppressed groups, such as women and gays, lobbied successfully for explicit protection in the constitutional clause on equality. A broad coalition of human rights lawyers, political activists and development practitioners also fought successfully to include social, economic and cultural rights in the bill of rights in order to secure positive redress for groups that had suffered discrimination at the hands of the state, and to minimize the possibility of similar violations in the future.

Third, constitution making became the focal point in the search for an acceptable political compromise and a formula for democracy, justice and development that would enjoy popular legitimacy and thus form the bedrock for nation building.[29] The

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unique set of institutions for power sharing that served the negotiations helped to contain political pressures, kept the parties focused on achieving measurable progress and provided the framework within which a new national consensus could emerge. The political leaders of the day understood that to unite the country, the negotiations had to culminate in a constitution for a new democratic society that enjoyed popular legitimacy.[30] A legitimate constitution-making process meant having an elected Constitutional Assembly to write the constitution and an inclusive drafting process to encourage broader civil society to influence the outcomes. A transformative constitution meant entrenching the rule of law and basic human rights, and establishing a state that was sufficiently decentralized to accommodate political and cultural diversity but strong enough to build national unity and lead transformation. The window of opportunity to embed principles of justice in the sinews of new public institutions and the nascent democratic culture thus opened early on in deliberations on the form of the state and the role it would play to reverse the wrongs of the past, not in 2003 when the TRC released its report.

State building was the key priority for South Africa's first

political and social behaviour, does not exist. Erin Daly, 'Constitutions in Transition' (paper presented at International Studies Association's 49th annual convention, San Francisco, CA, 26 March 2008). For a compendium of constitutional provisions dealing with transitional justice drawn from numerous constitutions, see the website of the Constitutional Design Group (http://www.constitutionmaking.org). On the role of constitution making in peacebuilding, see, Kirsti Samuels, 'Post-Conflict Peace-Building and Constitution-Making,' *Chicago Journal of Inter- national Law* 6(2) (2006): 663–682. For a comparison of Israel and South Africa with particular relevance to transitional justice and social justice, see, Aeyal M. Gross, 'The Constitution, Reconciliation and Transitional Justice: Lessons from South Africa and Israel,' *Stanford Journal of International Law* 40 (2009): 47–104.

[30] The chairperson of the Constitutional Assembly, Cyril Ramaphosa, explained in January 1995, 'It is important that as we put our vision to the country, we should do so directly, knowing that people out there want to be part of the process and will be responding, because in the end the drafting of the constitution must not be the preserve of the 490 members of this Assembly. It must be a Constitution which they feel they own, a Constitution that they know and feel belongs to them.' Paul Bell, ed., *The Making of the Constitution: The Story of South Africa's Constitutional Assembly, May 1994 to December 1996* (Cape Town: Churchill Murray, 1997).

democratic government (1994–1999). A driving role for the state in post-apartheid South Africa was inevitable. One reason for this is that the ANC was now the majority party in government and could, through the legitimate use of state power, implement its policies of social justice for the black majority. Another reason is that within ANC circles the market was not widely trusted to be a progressive force for redistribution because of its former cozy relationship with the apartheid regime and the fact that the economy was largely controlled by whites. The problem for the new government was that the state was not in a fit condition to implement its policies for national redress. The reality of fragile or nonexistent government institutions at precisely the moment when citizens are making unprecedented calls for a better life is a common challenge for post-conflict societies. South Africa's problem was not institutional fragility, however, but a civil service that was racially constituted and a badly fragmented state.[31] An additional obstacle was that the government did not trust the old-order civil servants to implement its policies faithfully but was forced to rely on them nonetheless, because protecting their jobs for five years was one of the deals it had struck in the political settlement.[32]

In 1994, and in tandem with the final phase of the constitution making process, the first democratic government adopted a policy framework for the comprehensive transformation of post-apartheid South Africa. The Reconstruction and Development Programme (RDP) sought to achieve five transformation objectives:

> democratizing the state and society, meeting basic needs, deracializing the economy, developing human resources and nation building. The first three objectives were directly concerned with redressing the political and economic injustices of the past and underpinned an extensive programme of policy and institutional

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[31] For example, 15 separate education departments and entities were responsible for the education of different ethnic groups in the country.

[32] Jonathan Klaaren, 'Institutional Transformation and the Choice against Vetting in South Africa's Transition,' in *Justice as Prevention: Vetting Public Employees in Transitional Societies*, ed. Alexander Mayer-Rieckh and Pablo de Greiff (New York: Social Science Research Council, 2007).

reform. The immediate tasks linked to democratization were reintegrating the ethnic homelands into South Africa and restoring full citizenship in those areas, creating a single public service for the country out of the ethnic fragments and guillotining the racial laws on the law books.

Local government was given a special role to play in deepening democracy and inclusive citizenship. The apartheid government's attempts to prevent the influx of black work-seekers into the country's towns and cities was quixotic but had disastrous consequences for effective urban management. By the 1980s, the urban landscape consisted of white areas with good public infrastructure and services and high property values, with large black townships and informal settlements on their outskirts that enjoyed none of these same benefits.[33]

The toll that apartheid took on the lives of black people is truly staggering. In 1994, a third of the population was living in deep poverty and had no access to basic household services such as water, sanitation, electricity and shelter. The backlogs in infrastructure and services in the former homelands were huge. Literacy and school enrolment were low as a result of massive under expenditure on black education by the apartheid government. Similarly, underinvestment in public healthcare for black people had led to low life expectancy, high infant mortality and a high rate of malnutrition amongst children. These realities made social justice for black people a line in the sand for ANC negotiators during the constitution-making process. The constitution cemented that principle by making social justice a founding value of the new order and the key link between past injustices and reconciliation. It also linked

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[33] The RDP envisaged local government as playing a pivotal role in promoting redistribution, social cohesion and community development by integrating fragmented communities under a single government, equal citizenship and common tax base. Such comprehensive policies of institutional and structural reform are precisely the kind of justice responses required in transitioning societies. This furthers the argument that institutional reform in the ambit of TJ needs to move beyond the limitations of justice and security sector reform to engage the very structures of government that were used systematically to under develop, marginalize and exclude victimized populations in the past in order to deliver targeted redress.

social justice to human development and democratic government by making access to basic services a fundamental human right and imposing a duty on the state to take positive action to realize these rights. The effect of this was to give the democratic state the lead responsibility of pursuing social justice through the public budget.

The RDP set the standards for national redress, and social policy and public expenditure provided the mechanisms for meeting the basic needs of citizens. Over time, social policy has evolved into a normative framework for poverty reduction that is linked to the Millennium Development Goals and centred on two key institutions: a system of redistribution that taxes the rich and redirects public expenditure to the poor, through, for example, spending on primary education and public health, and a social wage consisting of direct income support for vulnerable members of society (children and the aged) in the form of social security grants and pensions, housing subsidies to low-income groups and a basic level of water, electricity and sanitation provided free to the poor.

The task of tackling the economic injustices of the past was more difficult. The democratic government inherited a stagnant, uncompetitive and insular economy at a time of growing global economic interdependence. The distribution of in- come, wealth and economic opportunity between blacks and whites was unequal and the inequality was extreme. But, at a time when the peace dividend ought to have translated into increased social expenditure, government introduced a macroeconomic policy framework focused on market liberalization, curbing inflation and fiscal austerity with economic growth as the long-term objective. The Growth, Employment and Redistribution strategy (commonly known as GEAR) introduced in 1996 is one of the most controversial and divisive South African government policies of the past 15 years.

South Africa's Transition: Political Freedom, but Not Transformation

What was won and what was lost in the name of justice

during the transition and afterwards is a bitter, divisive debate in present-day South Africa. The fact that South Africa is a stable, peaceful, vibrant democracy 16 years later is ground gained, for many even a great victory. The majority of the population attained political freedom, and has exercised that freedom on four occasions to elect the government of its choice. The political violence that characterized the years of apartheid and transition has given way to political contestation through the ballot box. The constitution-making process contributed to this outcome by fulfilling three tasks that were vital in giving hope and direction to the country in a fluid, pressurized and volatile political context. First, it secured a pact between the main protagonists, including potential spoilers, and engaged the country in a national debate about its future. Second, by purposefully creating opportunities for civil society and the general public to influence the content of the country's new constitution, the process generated broad popular legitimacy for the final product and inspired a culture of democratic engagement that had not existed before. Third, the central position of legal institutions, such as binding constitutional principles and the certification process, within the rules of procedure that governed the conduct of negotiations, helped to instate the rule of law as the final word on the resolution of conflicts in society.

But whose victories were these? Powerful political voices argue that whites in general and the rising black middle class were the main beneficiaries of the democratic transition.[34] There is evidence to support this argument. Levels of poverty, inequality and unemployment are amongst the highest in the world and still follow the familiar divisions of race and class. The unequal distribution of income, wealth, ownership and land that existed before the transition has survived and deepened, the only change being the addition of a new black middle class to the equation, and with it rising levels of inequality amongst

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[34] The SACP is a vociferous proponent of this view. SACP, 'Together, Let's Defeat Capitalist Greed and Corruption! Together, Let's Build Socialism Now,' *Political Report of the Central Committee to the 12th Special National Conference* (10 December 2009).

blacks.[35] Admittedly, the state has gone a long way towards providing for the basic needs of its citizens, but this progress falls far short of what is needed to achieve real social justice. Why did the transformation leg of the transition fail?

The Left wing of the ruling alliance, in particular the powerful labour unions, attributes the failure to the adoption of a neoliberal macroeconomic framework (GEAR). It argues that fiscal austerity has benefited the capitalist class but not created jobs for the poor, instead deepening preexisting inequalities. This shift in focus away from the RDP to fiscal discipline effectively killed 'the debate about the necessary developmental approach to transform the economy.'[36] As Zinaida Miller points out, this is not an uncommon experience in countries undergoing transition, where fiscal orthodoxy, seen as a precondition for growth and global competitiveness, ends up entrenching existing inequalities, further impoverishing those worst affected by conflict and obstructing redistributive redress.[37] This criticism has gained political traction in recent years, as job losses have risen as a result of the global economic meltdown and the economic recession at home.[38]

Another reason for the failure of any real transformation is that the process of state building did not produce a capable developmental state, as was intended, but a soft state whose integrity and effectiveness is being dangerously undermined by corruption, patronage and incompetence at every level. This

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[35] The Gini coefficient, which measures income inequality with 0 representing perfect equality and 1 perfect inequality, increased from 0.64 in 1995 to 0.69 in 2005, with significant shifts within population subgroups. Iraj Abedian, 'Achievements, Failures and Lessons of the South African Macroeconomic Experience, 1994–2008,' in *Transformation Audit: Risk and Opportunity*, ed. Jan Hofmeyr (Cape Town: Institute for Justice and Reconciliation, 2008). For a general assessment of poverty, growth and development, see, United Nations Development Programme, *South Africa: Human Development Report 2003* (Oxford: Oxford University Press, 2003); Presidency of the Republic of South Africa, *Development Indicators* (2008).

[36] Turok, supra n 19 at 117.

[37] Miller, supra n 9.

[38] See, SACP, supra n 34.

view is widely held, even within the ruling ANC.[39] Many believe that what caused this decay is the blurring of the line between the ruling party and the state due to the deployment of inexperienced, often incompetent and sometimes unscrupulous party loyalists into the public sector, which in turn fuelled an exodus of experience and skills.[40] Others view the decay in government as merely a symptom of a more general decay in society caused by wanton greed and moral degeneration.[41]

The signs are there that the levels of inequality, poverty and unemployment in the country have reached crisis proportions, which has led to political instability. Contestation over the correct macroeconomic policy for the country has led to deep divisions within the ANC-led alliance, notably between the new middle class elements and the Left. Public opinion about the problems confronting the country is also divided, and, worryingly, often along race and class lines. These divisions have opened the way for a radical, populist political ideology to emerge within the country. Worse, it has led to new forms of violent conflict and abuse of human rights. Public protests over poor service delivery and corruption are common, widespread and often violent.[42] In 2008, and more recently, a wave of attacks against foreign nationals in which many lives were lost swept through the country.

These attacks were a manifestation of growing tensions between locals and foreign nationals coexisting in poverty but competing with each other for scarce jobs and public services. As a country, South Africa today is one of the most criminally violent societies in the world. These new forms of social and criminal violence are rooted in, and are a consequence of, the legacy of the political past, and they challenge directly the goal

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[39] Ibid.; Gerald Shaw, 'Troubled ANC Has Lost Its Moral Compass,' Cape Times, 25 January 2010.

[40] Ramphele, supra n 19.

[41] Ibid.

[42] According to the South African government, there were 52 cases of municipal protest between January and August 2009. Ministry of Cooperative Governance and Traditional Affairs, *The State of Local Government Report* (2009). For an international perspective on these protests, see, Barry Bearak, 'South Africa's Poor Renew a Tradition of Protest,' *New York Times,* 6 September 2009.

of non-repetition of past conflict.[43] These are the effects of transition without real transformation.

Reflections on Why the TJ Debate Matters, and Why South Africa's Transition Matters to the Debate

The debate about the scope of TJ's remit matters for ethical, conceptual and practical reasons. The field of transitional justice is influentially present and actively seeking particular outcomes in the name of justice precisely at transition time, when things are the most precarious, dangerous and fraught. That fact raises important ethical questions both for those who hold the narrow and the wide view of the field. How does TJ justify ignoring structural injustices that in fact exist? How does it justify accepting the risk that its version of events might displace valid claims for social justice or, in validating a liberal view of transition, replicate structural injustices? On the other hand, how would TJ justify intervening on behalf of redistributive justice when the questions involved in that enquiry are validly and directly the concern of a legitimate political process? To whom does TJ account for its influence and actions in either case? These questions are for a larger canvas than this article and, though relevant, run some way beyond the particular question I want to add to the debate: How does TJ justify constructing, and continuing to reproduce, a narrow account of South Africa's transition when human rights abuses were comparatively few, structural injustice was a documented fact and securing social justice was both a precondition for any political settlement and a stated aim of the new democratic order? If, indeed, South Africa provided 'the golden model' that gave shape and impetus to TJ, it seems remarkable that its pioneering experiments with redistributive justice have had so little impact on the doctrines and tools of the field.[44]

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[43] See, for example, the research reports of the Violence in Transition Project of the Centre for the Study of Violence and Reconciliation, which demonstrate the continuities in patterns, forms, actors and root causes of violence in South Africa from the past to the present.

[44] Hugo van der Merwe, Victoria Baxter and Audrey R. Chapman, eds., *Assessing the Impact of Transitional Justice: Challenges for Empirical*

The conceptual stakes are equally high. Presently, TJ is ill-equipped to respond to particular practical dilemmas, notably socioeconomic injustices that cause political conflict and facilitate its return. The field emerged in response to the practical dilemmas of its formative period – finding a way to hold perpetrators of human rights abuses accountable and to compensate their victims – and the emergence of new dilemmas warrants a reappraisal of its normative assumptions. The argument for extending TJ's remit to include structural injustices supports the view that TJ should do more for justice in the face of actual injustices that are remediable. The countervailing argument that TJ should confine its focus to matters connected with criminal accountability reflects a belief that TJ is well-suited to addressing injustices that arise from conflict crimes but ill-suited to addressing the demands of social justice more broadly.

Two connected assumptions lie behind this limitation: that TJ is not a theory of development (in the sense of redistributive justice), and that questions about social justice involve political questions about development and properly belong to political processes, and therefore to fields concerned with post-conflict recovery. The first assumption rejects the normative basis for extending TJ, and the second its necessity. Both assumptions are flawed. Regarding the first, the dominant conception of justice during transition emerged as a response to particular conditions of injustice that activists were worried about at the time. As Arthur shows, alternative conceptions of justice were available during the formulation of the field's normative concepts, but the prevailing one was chosen.[45] Nothing is inevitable about the current conception of TJ, and there is no intrinsic worth to limiting the field's scope to the specific legal and institutional remedies currently employed. Further, redistributive justice is a core dilemma in contemporary debates about conceptions of justice appropriate for the modern

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Research (Washington, DC: US Institute of Peace Press, 2009).

[45] Arthur, supra n 5.

era.[46] In the sense of redistributive justice, in other words, justice is precisely a theory of development: justice as development.

Regarding the second assumption, structural injustices do not somehow get dealt with during the course of transition. If redressing structural inequalities is a concern at all, it is subordinated to the imperative of economic growth and efficiency that overwhelmingly drives the highly organized international industry concerned with building state institutions designed to support long-term recovery. Here, South Africa is a salient lesson: the prevailing global economic paradigm tends to facilitate the survival of socioeconomic injustices in the interests of long-term growth and 'trickle-down' redistribution, sowing the seeds for structural injustice to foment future conflict.

Wide-view proponents are right to focus on structural injustice, but wrong in thinking that the remedy lies with extending the reach of existing legal instruments. Truth commissions may have a part to play in revealing the truth behind socioeconomic injustices but they lack the power and the means to displace long-vested, unfairly secured advantages. For that, other, more formidable institutions are required. This is South Africa's second lesson: constitution-making and state-building processes present strategic opportunities for foregrounding the interests of social justice in powerful ways, and cementing them in basic institutions for a new and more just political order. The direction for normative change within the field lies not with squeezing more use out of the tools we have, but with fashioning new sets of measures that are better suited to meeting the actual demands of justice in transition. In the same way that the post recovery industry does not prevaricate about pushing for economic efficiency as a driving imperative for long-term growth and development under the new order, TJ should not prevaricate about fighting on behalf of social justice as a basis for lasting peace, using all appropriate

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[46] See, Amartya Sen, *The Idea of Justice* (London: Allen Lane, 2009); Michael J. Sandel, *Justice: What's the Right Thing to Do?* (London: Allen Lane, 2009).

means.

Finally, the debate is important for practical reasons. Transitions offer opportunities to redress actual injustices that could facilitate a return to conflict if they are not addressed. One of TJ's prime objectives is preventing the recurrence of conflict. And, if peace, development and justice are indeed all facets of human freedom, and are all at stake in political transitions, then there is strong incentive for TJ to take a wider, longer and more nuanced view of what actually goes on during a political transition.[47] Here, too, South Africa's experience suggests the sort of spaces in which advocacy can influence political choices in the interests of greater social justice.

The process of constitution making concentrated South Africa's attention and energies around the common goal of building a national consensus on the nature and form of a just democratic order. Even within the confines of elite pact making, opportunities emerged for a broader range of social forces to exert their influence on the constitutional outcome. Human rights and development activists, in particular, were instrumental in securing the inclusion of socioeconomic rights and other measures for achieving social justice. This experience suggests that it is important for TJ practitioners to have a deep understanding of the political context in which transitions play out, and to appreciate the full range of opportunities to secure peace and justice, as well as the trade-offs that are inevitable in processes of political compromise.

South Africa's history and political context meant that a leading role for the state in the pursuit of redress and social justice for historically oppressed groups was inevitable. The inclusion of socioeconomic rights, for example, drew a direct link between social injustices of the past and the state's role in redistribution

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[47] For the close conceptual and practical linkages amongst peace, justice and development, see, Kai Ambros, Judith Large and Marieke Wierda, eds., *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development: The Nuremberg Declaration on Peace and Justice* (New York: Springer, 2009); Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999).

through its control of the public purse. Transformation, and the long-term stability of the country, was predicated on addressing the social and economic inequalities that had sustained apartheid and fuelled the conflict. Failure on this front would have amounted to reconciliation without justice and left racial divisions intact, with perilous consequences for the country. With the state leading the pursuit of social justice, state effectiveness and the impact of service delivery on poverty and inequality became the litmus tests for transformation. Investment in state building and meeting the basic needs of the population, whatever dilemmas they pose, are crucial to preventing conflict. With the TJ community focused on the TRC process, however, practitioners were slow to make that shift. It was only after a country-wide outbreak of service delivery-related protests in 2005 that TJ organizations began to adopt an explicit focus on the relationships between service delivery, poverty, inequality, social justice and civil conflict.[48] In the South African transition, and perhaps in all transitions, the passage of time and the timing of interventions were strategic factors. It was somewhat inevitable therefore that over time South Africans would simply move on from the narrow definition of TJ, reduced largely to a focus on the TRC, as they began to grapple with the larger issue of how to build a democratic state and tackle the massive poverty and inequality left behind by apartheid. Massive social and economic inequality in the country was both the fuel for racial conflict and its product, and remains the single biggest threat to peace and stability in the country today.[49]

This suggests a further lesson for TJ, namely that techniques of statecraft and social policy quickly become the primary vehicles for tackling the social and economic causes of conflict. For development agencies, building state institutions in the aftermath of conflict is a key priority, both for long-term

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[48] The Institute for Justice and Reconciliation, South Africa, has released an annual 'Transformation Audit' since 2006, which assesses the state of service delivery and development in the country (http://www.ijr.org.za/politicalanalysis/ta).

[49] See, Centre for Development and Enterprise, *Voices of Anger: Protest and Conflict in Two Municipalities* (April 2007); Michael Humphrey and Estela Valverde, 'Human Rights Politics and Injustice: Transitional Justice in Argentina and South Africa,' *International Journal of Transitional Justice* 2(1) (2008): 83–105.

recovery and for conflict prevention.[50] TJ is concerned with institutional reform, but in the justice and security sectors, which is too narrow a focus if one of TJ's overall goals is preventing the recurrence of conflict. Given the high rates of transition violence and failure, peace dividends must translate into improved human security and well-being to hold off further conflict. In this sense, institutional reform is a form of both redress and reparation for previously marginalized and oppressed groups, and hence a safeguard against a return to violence that will only deepen their plight. Consequently, TJ should turn its attention to matters of institutional reform, or at least to making the linkages that would support institutional reform more broadly, if its goals are to be embedded in the moment of transition.

This suggests a third area for closer enquiry by TJ practitioners, namely the state's operational capability to discharge its mandate to increase human welfare. One of the central pillars of TJ is securing peace, and peace, development and justice are all facets of human freedom.[51] International practice suggests that none of these goals can be achieved without an effective state. In conjunction with other fields, TJ must therefore pay the closest possible attention to the political context, spaces and opportunities for institution building, at the moment of transition and beyond. Only when public institutions hold under pressure does the risk of conflict recurring in fragile societies recede. When those institutions weaken or fail altogether, as seen in Kenya and Zimbabwe, conflict is often close at hand.

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[50] Organisation for Economic Co-operation and Development, 'Service Delivery in Fragile Situations: Key Concepts, Findings and Lessons,' *Journal on Development* 9(3) (2008): 9–63.

[51] Sen, supra n 47.