

Transitional Justice?:  
The South African Truth and Reconciliation Commission and Socio-economic Rights

“Reconciliation means that those who have been on the underside of history must see that there is a qualitative difference between repression and freedom. And for them, freedom translates into having a supply of clean water, having electricity on tap; being able to live in a decent home and have a good job; to be able to send your children to school and to have accessible health care. I mean, what’s the point of having made this transition if the quality of life of these people is not enhanced and improved? If not, the vote is useless.”<sup>1</sup> –Desmond Tutu, Chair of the Truth and Reconciliation Commission

The transition from the apartheid government to a fully functioning democracy in South Africa is often lauded as a prime example for other countries to follow. And for many reasons it should be. The actual transition of power was practically bloodless, the implementation of the new constitution went smoothly and civil and political rights continue to be observed throughout the country. According to the Human Rights Watch 2008 Country Summary, the government generally respects the rights of individuals to vote and upholds numerous civil freedoms including freedom of speech and the press.<sup>2</sup> The government also created the Truth and Reconciliation Commission to deal with past gross violations of human rights and foster forgiveness throughout the shattered country, instead of choosing to ignore the human rights violations of the apartheid regime completely. On the surface, South Africa appears to embody a governmental transition done right.

### *Institutionalized Inequalities*

However, the South African transition did not come close to accomplishing everything promised to the people, especially in regard to social and economic rights. While these rights are enshrined in the 1996 Bill of Rights alongside civil and political rights, the Human Rights Watch Country Summary displays the extent to which social and economic rights are consistently

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<sup>1</sup> “South Africa; Tutu says Poverty, Aids Could Destabilise Nation,” AllAfrica.com, November 2001.

<sup>2</sup> Human Rights Watch World Report, <http://hrw.org/english2k8/docs/2008/01/31/safric17797.htm>, 2008.

violated. The Bill of Rights promises universal education, however at least 50% of students attend schools that lack basic necessities such as electricity or proper sanitation facilities, not to mention are taught by under qualified teachers with few materials. Health care, especially considering the high percentage of individuals living with HIV/AIDS, is severely lacking. Many South Africans live in shacks or have no home at all while others are continually evicted from their “homes” as corporations buy up open land. This endemic poverty is overwhelmingly located in rural areas, a fact that can be traced back to the apartheid regime’s policies to keep blacks from owning property inside certain city boundaries. Human Rights Watch notes a priority concern “in South Africa is to ensure that the government continues to address the progressive realization of socioeconomic rights and to hold the government accountable to fulfill these rights as binding obligations rather than programmatic aspirations.”<sup>3</sup> In the report, HRW also suggests that South Africa ratify the United Nations Covenant on Economic, Social and Cultural rights as a sign of their commitment to the implementation of these rights.

Even more noteworthy, and perhaps revealing, is the severe inequality that plagues the country. According to the UN Human Development Index, which uses life expectancy, education, literacy, standard of living and GDP to measure the general well being of a country, South Africa is classified as an upper-middle income nation.<sup>4</sup> This ranking seems to indicate that in South Africa the resources exist to eradicate the violation of many economic and social rights, however there is a basic implementation problem. The root of this problem could be traced to the transition from the apartheid regime to the democratic government and the party receiving power, the African National Congress’s (ANC), failure to create the economic reform necessary to ensure basic human rights. The continual violation of social and economic rights in South

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<sup>3</sup> Human Rights Watch World Report.

<sup>4</sup> United Nations Human Development Index, <http://hdr.undp.org/en>, 2005.

Africa displays the failure of the transitional government to address the economic oppression institutionalized by the apartheid regime. The focus on civil and political rights during the transition, while at times necessary, obscured the real problem in South Africa: institutionalized economic oppression. This can be seen clearly in one of the institutions created to aid the transition: the Truth and Reconciliation Commission. In this paper, I will argue the flaws of the Truth and Reconciliation Commission are indicative of the larger problems that the transitional government failed, or did not want to, address- namely ensuring the implementation of economic and social rights in South Africa. The legacies of allowing political factors to largely influence the way in which the TRC functioned are seen in the inequities in South African society in 2008.

*The Truth and Reconciliation Commission: Mixed Legacies?*

The Truth and Reconciliation Commission (TRC), constitutionally mandated by the 1995 Promotion of National Unity and Reconciliation act, attempted to use the revelation of truth about the injustices that occurred during the apartheid regime in order to promote national healing.<sup>5</sup> Beginning in 1996, it functioned under the belief that the best way to heal past wounds from apartheid was uncovering truth about wrongs inflicted against other citizens. The committee consisted of three bodies: the Human Rights Violations Committee, which investigated apartheid-era human rights violations, the Reparation and Rehabilitation Committee, which worked to restore victim's dignity and the Amnesty Committee, which had the power to grant amnesty to perpetrators (black or white) based upon full disclosure of actions and proof of political purposes. The effectiveness of the TRC is highly debated by both citizens and scholars. While it did reveal the truth about many of the disappearances and murders which had plagued individual families, few high-ranking apartheid era officials applied for amnesty and the court of

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<sup>5</sup> *Promotion of National Unity and Reconciliation Act, 1995*,  
[http://www.fas.org/irp/world/rsa/act95\\_034.htm](http://www.fas.org/irp/world/rsa/act95_034.htm).

South Africa has failed to prosecute those that did not apply, effectively delegitimizing the work of the court. However, more importantly, most agree that the commission failed to address the violations of social and economic rights perpetrated by the apartheid regime, opting to focus mainly on more visual violations of civil and political rights. But what are the actual reasons for this failure and how has it affected the future of socio-economic rights in South Africa?

### Who is to be blamed?

Kadar Asmal, Minister of Education in South Africa, argues the TRC had the legislative scope to deal with violations of social and economic rights committed during the regime and, at times, attempted to exercise it. However, the commission proved hesitant to venture beyond traditional civil and political rights offenses and media coverage, “focused disproportionately on the dramatic evil deeds done by those who sought amnesty from criminal prosecution.”<sup>6</sup> Asmal believes the transitional justice instituted by the TRC focused too much on the individual instead of societal healing and group culpability. Nicoli Natrass highlights the fact the TRC had a set of institutional hearings that investigated business, the health sector, gender issues and churches and their role in upholding the apartheid regime. These special investigations and hearings were created to, “explore broader issues of involvement and moral responsibility.”<sup>7</sup> Similarly to Asmal, Natrass argues the TRC failed to sufficiently explore the role of whole sectors of the economy, instead opting to focus on the more sensational individualized amnesty hearings. Both authors, essentially, focus on the individuality of the proceedings in the TRC, claiming they would have been more effective in addressing social and economic rights had there been more discussion of broader societal ramifications. They blame the TRC as an institution for its

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<sup>6</sup> Asmal, Kader, “Truth, Reconciliation and Justice: The South African Experience in Perspective”, *Modern Law Review*, Volume 63, No. 1, January 2000, pp 17.

<sup>7</sup> Natrass, Nicoli, “The TRC on Business and Apartheid: A Critical Evaluation”, *African Affairs*, Volume 98, No. 392, July 1999, pp 374.

inability to expose social and economic violations, not the legislation which created it or the political scene that bore it.

Asmal and Natrass make valid criticisms of the TRC. It did focus too much on the experience of the individual, instead of the shock of an entire society, and the media played a large role in deciding which of the hearings received attention. Asmal acknowledges that, “in a system that killed far more infants through malnutrition and unavailability of water than it killed adults with bullets and bombs, the drama to be had from placing militarists on trial might easily overshadow the equally real atrocity of the system itself.”<sup>8</sup> Asmal and Natrass believe the commission could have delved beyond the realm of civil and political rights, but simply chose not to. However, the interest the outgoing apartheid regime had in blocking a full investigation into the violations of socio-economic rights seems to point to a deeper issue than simply the TRC’s choice to only thoroughly investigate civil and political rights. As displayed by the research of Elizabeth Stanley and Naomi Klein, the failures of the TRC were attributable, instead, to the political forces that surrounded the creation of the new government, not lack of will or action on the part of the commission.

#### The Politics of Truth Commissions

First and foremost, the TRC, as constructed by the transitional government, lacked a real forum in which to openly discuss the violations of socio-economic rights committed daily by the apartheid regime. Both the Amnesty Committee and the Reparations and Rehabilitation Committee dealt mainly with truth telling about “gross violations of human rights” such as torture, kidnapping and mass murder.<sup>9</sup> Victims or families of victims were given a cathartic

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<sup>8</sup> Asmal, Kader, pp 16.

<sup>9</sup> *Promotion of National Unity and Reconciliation Act, 1995*,  
[http://www.fas.org/irp/world/rsa/act95\\_034.htm](http://www.fas.org/irp/world/rsa/act95_034.htm).

forum to discuss emotions and try to understand the actions of the apartheid regime. This forum allowed for the acknowledgement of their pain as well as the violation of their human dignity. Both Committees focused on acts taken by individuals, not policies representative of the entire regime. However, the lasting legacies of apartheid are seen much more clearly in the rampant poverty and economic oppression that plagues the country, not the horrific and sensational individual rights violations that occurred. In the TRC, no committee is dedicated solely to exploring, acknowledging the injustices of everyday life under apartheid or allowing the economically oppressed to speak out. The outgoing National Party helped to construct a commission that focused on the evils of the individuals who applied for amnesty instead of the entire regime. These individuals could be made into radicals or deviants from party line. Or those who stood before the amnesty committee could claim they were simply acting upon orders from those higher up, reminiscent of the excuses of Nazi's used during the Nuremberg trials. The National Party ensured the construction of a truth commission that only revealed partial truths about the regime in order to maintain the legitimacy necessary to continue to hold some political power. The lack of a forum for the discussion of socio-economic rights violations reflects this need to reveal only partial truths.

The TRC's inability to address violations of social and economic rights also stems from the economic interests of the National Party. As discussed by Naomi Klein in The Shock Doctrine, during the transition the National Party attempted to maintain influence in any way possible. When it became clear they would be put out of the majority in the South African Parliament, the National Party turned to economic negotiations in order to maintain the wealth its white members had amassed throughout the regime.<sup>10</sup> They successfully implemented their own

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<sup>10</sup> Klein, Naomi, pp 199.

economic plan, “under the noses of African National Congress leaders, who were naturally preoccupied with winning the battle to control Parliament. In the process, the ANC failed to protect itself against a far more insidious strategy- in essence, an elaborate insurance plan against the economic clauses in the Freedom Charter ever becoming law in South Africa.”<sup>11</sup> The National Party’s economic plan established a free and independent central bank, protected private property against land reform and redistribution, and limited actions the government could take in order to lower unemployment or socialize health care.

The National Party had an interest in creating a commission that would not delve too deeply into their own socio-economic violations of human rights because this commission would then have the power to make recommendations in order to create a more equitable society. In essence, the TRC would have the mandate to recognize, and perhaps correct, the rights violations the new economic negotiations would perpetuate from the old regime. As Beetham points out, “there is a general agreement among commentators on economic and social rights that for them to be effectively realized would require a redistribution of power and resources, both within countries and between them. It is hardly surprising that many governments should be less than enthusiastic about such an agenda.”<sup>12</sup> The last thing the National Party wanted was a redistribution of economic power. So instead, the transitional government created a commission that dealt with the, “outward manifestations of apartheid such as torture... [leaving] the economic system served by those abuses completely untouched.”<sup>13</sup> Maintaining the oppressive economic institutions of the apartheid regime proved particularly easy in South Africa because the old beneficiaries of the apartheid regime maintained some measure of control and influence

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<sup>11</sup> Klein, Naomi, pp 200.

<sup>12</sup> Beetham, David, pp 117.

<sup>13</sup> Klein, Naomi, pp 211.



in the government.<sup>14</sup> The economic interests of the National Party are implicit in the TRC's failure to address socio-economic human rights violations.

However, the National Party could not, on its own, have dictated the entire mandate for the TRC. During the consolidation of economic power by the National Party, the incoming African National Congress, led by Nelson Mandela, focused on maintaining political power and upholding the delicate agreement that allowed for the government transition. During the creation and implementation of the TRC, the ANC wanted to keep the peaceful nature of politics and maintain the status quo instead of rocking the boat by investigating the National Party's attempt to avoid dealing with the institutionalized economic violations of rights found during apartheid. Instead of challenging the former apartheid regime, the ANC settled for individualized trails in order to avoid further social fragmentation.<sup>15</sup> By choosing to uphold the status quo, "neither the TRC nor the government... sufficiently challenge[d] the structural inequalities which contextualized apartheid inequalities."<sup>16</sup> Without being able to challenge these inequalities, the TRC proved only able to hold the economic regime of apartheid minimally responsible. The TRC suggested a wealth tax of 1% for all businesses, regardless of their relations with the regime. However, the limited acknowledgement of structural and institutional problems by the TRC contributed directly to its inability to make the necessary suggestions in order to address these issues.<sup>17</sup> Overall, the ANC's insistence on maintaining the status quo and acceptance of the interests of the National Party in the TRC lead to a commission that failed to truly acknowledge the abuses of social and economic rights during the apartheid regime.

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<sup>14</sup> Stanley, Elizabeth, "Evaluating the Truth and Reconciliation Commission", *Journal of Modern African Studies*, Cambridge: Cambridge University Press, 2001, pp 536.

<sup>15</sup> Stanley, Elizabeth, pp 526.

<sup>16</sup> Stanley, Elizabeth, pp 527.

<sup>17</sup> Stanley, Elizabeth, pp 530.

*Conclusions: How can Socio-economic rights be ensured in South Africa?*

The TRC failed to acknowledge that the revelation of truth about gross human rights abuses and small reparations do not provide justice for the socio-economically unequal past in South Africa and the ramifications of this omission still resonate in society today. Sadly, for those who bore the brunt of the brutality of the apartheid regime, life has not changed significantly. Today, “the country stands as a living testament to what happens when economic reform is severed from political transformation. Politically, its people have the right to vote, civil liberties and majority rule. Yet economically, South Africa has surpassed Brazil as the most unequal society in the world.”<sup>18</sup> Obviously, democracy and the existence civil liberties have not been a sufficient condition for securing economic and social rights. The transitional government allowed political and economic pressures from the National Party to play too large of a role in the commission established to investigate their own human rights abuses.

So what can South Africa do now? As HRW mentioned in its country report, signing the UN Covenant on Social, Economic and Cultural rights would be a step in the right direction. Most, of the socio-economic rights mentioned in the Covenant are also already in the constitution, so it is up to the ANC to enforce them. A redistribution of resources and economic reform will be necessary to ensure socio-economic rights for all. This movement will only come from massive grassroots pressure and social unrest, as the transition from apartheid to democracy came. South Africa has the constitutional framework to ensure socio-economic rights for all- but does it have the political will to enforce it?

Word Count: 2,540

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<sup>18</sup> Klein, Naomi, pp 198.