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South African transitional justice process“

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Abbreviations

- ANC – African National Congress
- CAQDAS - Computer-Assisted Qualitative Data Analysis Software
- CP rights - Civil and political rights
- CRLR – Commission on Restitution of Land Rights
- ESC rights - Economic, social, and cultural rights
- HRVC – Human Rights Violations Committee
- ICCPR – International Covenant on Civil and Political Rights
- ICESCR – International Covenant on Economic, Social and Cultural Rights
- IFP – Inkatha Freedom Party
- LARP – Land and Agrarian Reform Programme
- LCC – Land Claims Court
- LRAD – Land Redistribution for Agricultural Development
- NGO – Non-Governmental Organization
- PLAS – Proactive Land Acquisition Strategy
- PTO – Permission To Occupy
- RADP – Recapitalization and Development Programme
- RRC – Reparation and Rehabilitation Committee
- SLAG – Settlement Land Acquisition Grant
- SR – Special Rapporteur
- TRC – Truth and Reconciliation Commission
- UN – United Nations

I. INTRODUCTION

In December 2017, following heated discussions and on the final day its 54th National Conference, the African National Congress (ANC), which has headed the South African government since 1994, announced that it intended to amend Section 25 of South African Constitution to enable the expropriation of land without compensation¹. The move was framed as an endeavour to accelerate land reform and thereby foster peace and justice, as illustrated by Presidency Minister Jeff Radebe, who stated that “[w]ithout addressing this historic injustice, we will never have peace in the country”². The initiative has stirred controversy within and outside of South Africa, with actors raising concerns pertaining to property rights, investor confidence and economic development, food security³, an increase in “farmland murders”⁴ or increased litigation⁵. The government has sought to reassure foreign investors by stating that the proposed policy would be conducted “in an orderly manner” and would not equate land grabs⁶ as observed in Zimbabwe in 2000⁷. Lively debates and discussions were still ongoing within Parliament as of July 2021⁸.

¹ L. Omarjee, ‘ANC reaches resolution on land reform’, fin24, 20 December 2017, at <https://www.news24.com/fin24/economy/anc-reaches-resolution-on-land-reform-20171220>, (accessed 5 April 2021).

² Omarjee.

³ P. Pigou, ‘Land Reform in South Africa: Fact and Fiction’, International Crisis Group [website], 2018, <https://www.crisisgroup.org/africa/southern-africa/south-africa/land-reform-south-africa-fact-and-fiction>, (accessed 5 April 2021).

⁴ C. Clark, ‘South Africa Confronts a Legacy of Apartheid – Why land reform is a key issue in the upcoming election’, The Atlantic, 3 May 2019, <https://www.theatlantic.com/international/archive/2019/05/land-reform-south-africa-election/586900/>, (accessed 26 July 2021).

⁵ Mamdani, ‘Why South Africa Can’t Avoid Land Reforms’, New York Times, 17 June 2019, <https://www.nytimes.com/2019/06/17/opinion/south-africa-land-reform.html>, (accessed 26 July 2021).

⁶ Ibid.

⁷ International Crisis Group, ‘Blood and Soil. Land, Politics and Conflict Prevention in Zimbabwe and South Africa’, International Crisis Group [website], 2004, <https://www.crisisgroup.org/africa/southern-africa/zimbabwe/blood-and-soil-land-politics-and-conflict-prevention-zimbabwe-and-south-africa>, pp. 75-94 and 152-156, (accessed 02 February 2021).

⁸ M. Merten, ‘Expropriation without compensation: ANC numbers get its way, but effectively scuppers Section 25 constitutional amendment’, Daily Maverick, 9 July 2021, <https://www.dailymaverick.co.za/article/2021-07-09-expropriation-without-compensation-anc-numbers-get-its-way-but-effectively-scuppers-section-25-constitutional-amendment/>, (accessed on 25 July 2021).

The debates and controversy surrounding the proposed Expropriation Bill highlight the sensitive nature of land in contemporary South Africa. More than that, this shows that, 27 years after the end of the apartheid, questions of socioeconomic justice and inequality are still looming and possibly hamper the prospects for a full reconciliation. As a matter of fact, disparities in access to, use and control of land reflect the continuing economic disenfranchisement of a large part of the black population. In 1994, as the apartheid ended, 87% of the land was owned by the white minority, who represented only 10% of the population⁹. While the newly elected ANC initially vowed to redistribute 30% of commercial farmland within five years, processes of reform, restitution and redistribution have stalled, causing mounting anger within the population, notably the Black community¹⁰.

The contentious nature of debates surrounding the land issue contrasts with the aims of the Truth and Reconciliation Commission (TRC), which was tasked with truth-seeking and recommending measures in order to foster reconciliation following the end of the apartheid. In a way, the current debates about land reform appear to highlight shortcomings of the TRC's work and of mainstream transitional justice at large. Essentially, transitional justice processes have overwhelmingly focused on violations of civil and political rights, while either ignoring or relegating violations of economic, social, and cultural rights as secondary-order, background information¹¹. In South Africa, the mandate of the TRC was largely confined to civil and political rights through its founding legislation's narrow definition for gross violations of human rights. While the Commission held 'Institutional and Special Hearings' pertaining to business, women or the healthcare system, the violations (including of socioeconomic rights) they covered were only mentioned as a contextual info in the TRC's final report, leaving victims unrecognized and out of the scope of reparations¹².

⁹ International Crisis Group, pp. xx.

¹⁰ Pigou.

¹¹ A. Cahill-Ripley, 'Foregrounding Socioeconomic Rights in Transitional Justice. Realising Justice for Violations of Economic and Social Rights', *Netherlands Quarterly of Human Rights*, vol. 32, no. 2, 2017, p. 190, (accessed 03 April 2021).

¹² Ibid., pp. 202-203.

Clearly, the transitional justice process in South Africa appears to be unfinished¹³ on the socioeconomic front. In this regard, the following thesis proposes to map approaches and conceptions of various stakeholders to land rights in transitional justice processes. It is presumed that conflicting interests and visions for transitional justice processes are at play, as victims' rights' groups may for instance want transitional justice processes to address violations of land rights (including through reparations) in a transformative way, while perpetrators may be disinterested in that. The international dimension will be borne in mind as well, as it assumed here that attempts to consider socioeconomic rights in transitional justice processes would not necessarily be favoured by international organizations, which largely promote transitional models relying on neoliberal economic policies. More than that, the assumption is that these approaches convey different, and at times conflicting understandings of 'justice'. This leads us to the following research question: *'How do approaches to land rights by various stakeholders in transitional justice processes in South Africa represent different conceptions of justice?'*

The Master thesis will be structured as follows: a first section (section II) will revolve around the sampling, method of data generation and method of data analysis, and highlight the thesis' limitations. In section III, a state of the art devolved to transitional justice literature will seek to define the concept of transitional justice, as well as outline its achievements and downsides both in theory and practice. In this regard, the insufficient consideration for violations of economic, social, and cultural (ESC) rights in transitional justice processes will be emphasized. Subsequently section IV will spell out the conceptual and theoretical framework of the essay, first by analysing theoretical models of forms of justice and selecting one for the purposes of the essay, and second by defining land rights. This will be followed by section VI on the empirical data gathered which will provide the basis for discussing and interpreting findings in section VII. Lastly,

¹³ P. Maregere, The (un)finished business of transitional justice in South Africa: 'the past is in the present', Doctoral Thesis, Centre for Trust, Peace and Social Relations - Coventry, 2019, <https://pureportal.coventry.ac.uk/en/studentTheses/the-unfinished-business-of-transitional-justice-in-south-africa>, (accessed 5 April 2021).

implications of the findings for the purposes of our analysis will be discussed in a conclusion (section VIII) and avenues for future research will be suggested.

By mapping approaches by various stakeholders to land rights and their understandings of justice, this Master thesis intends to contribute to the academic and praxis-oriented debates surrounding transitional justice processes in South Africa. Through its focus on land rights, it seeks to contribute to filling the gap concerning socioeconomic rights, and more specifically land rights, in transitional justice literature. It aims at contributing to a critical reflection on transitional justice concepts and practices, seeks to contribute to the discussion on the relationship between transitional justice and other concepts such as transformative justice and overall argues for a nuanced, differentiated understanding of justice. More generally, the Master thesis will be used as an opportunity to engage in a practical discussion on the indivisibility of human rights, as well as on the nexus of structural violence and human rights violations.

II. METHODOLOGY

This Master thesis employs a qualitative approach, using a case study, focussing on South Africa. Six semi-structured interviews were conducted with stakeholders relevant to the theme of transitional justice and land rights in South Africa. A qualitative data analysis of these interviews was then conducted, complemented by the use of secondary and primary sources.

A. Research design

a) Choice of qualitative design

The following Master thesis will employ a qualitative research design. Several remarks regarding the conceived relationship between theory and research, the epistemological position, and the ontological position ought to be made at this stage.

The present thesis combines both deductive and inductive elements¹⁴. As a matter of fact, Laplante's theory of the 'justice continuum' and diverse forms of justice will be applied to the case of South Africa and land rights in a deductive, hypothesis-testing manner. At the same time, insights generated from this application will be used to refine and provide practical feedback to Laplante's theory. Epistemologically, the Master thesis leans towards an interpretivist approach¹⁵ and places special emphasis upon how respondents interpret their (social) world¹⁶. Lastly, the ontological position adopted will be constructionist¹⁷ which suggests that the social order is continually constructed and influenced by social actors (rather than external and untouched by them)¹⁸. This ontological position is particularly warranted by the research question itself, which centres around the conceptions and approaches to land rights by diverse stakeholders and how these approaches mirror their visions of justice. As Bryman puts it, it is about "seeing through the eyes of the people being studied"¹⁹. Additionally, a qualitative research design allows for an in-depth inquiry into the specificities of a subject as well as for a higher degree of context-sensitivity²⁰, something that has been particularly called for in transitional justice endeavours.

¹⁴ See A. Bryman, *Social Research Methods* (5th ed.), Oxford, Oxford University Press, 2016, p. 375.

¹⁵ *Ibid.*, p. 26.

¹⁶ *Ibid.*, pp. 26-28.

¹⁷ *Ibid.* p. 375.

¹⁸ *Ibid.* pp. 29-31.

¹⁹ *Ibid.*, p. 392.

²⁰ *Ibid.*, pp. 394-395.

b) Case study design

The following empirical investigation will be based upon a case study. Here, it has been decided to investigate the case of South Africa. Indeed, the South African transitional justice processes has been praised and mechanisms seeking to replicate the TRC have flourished around the world²¹. Within Yin's typology of cases, one could describe South Africa as a 'critical case', meaning that the case plays a critical role in confirming, challenging, or extending theoretical propositions²². Another advantage of a case study for our topic of interest, namely ESC rights in transitional justice processes, is that it allows for an in-depth, intensive investigation to be conducted.

Here, the case study is an embedded single-case study: in such a situation, within a single case (level 1), a part of the analysis is devolved to subunits (level 2)²³. Here, the overall South African context represents the first level of analysis, while the respective stakeholders represent the second level. One could also say that there is a case study within the case study, as the thesis will revolve around land rights among ESC rights. The choice to focus on this category of rights has been made for several substantive and practical reasons. Firstly, focusing on one category of rights allows for a deeper analysis and the revelation of patterns. Additionally, it enhances the consistency and internal coherence of the analysis. Centring the investigation on land rights also makes particular sense in the context of South Africa, as violations of land rights have been ongoing even before the apartheid, for instance with the passing of the 1913 Natives Land Act which strongly restricted possibilities for the black population to own land, leaving them only 7% of the national territory²⁴. The extremely skewed land ownership patterns (wherein, as of 1994, the white minority held 87% of the land while representing only 10% of the population²⁵) have led to mounting calls for redressing historical economic and social inequities, while the topic remains highly sensitive and controversial, as exemplified by

²¹ N. Roht-Arriaza, 'The new landscape of transitional justice', in N. Roht-Arriaza and J. Mariezcurrena (eds.), *Transitional justice in the twenty-first century. Beyond truth versus justice*, Cambridge, Cambridge University Press, 2006, pp. 4-5.

²² R. K. Yin, *Case Study Research and Applications: Design and Methods* (6th ed.), Los Angeles, SAGE, 2018, pp. 49; see also Bryman, pp. 60-64.

²³ Yin, pp. 47-48 and 51-54.

²⁴ International Crisis Group, pp. 135-136.

²⁵ Ibid., p. xx.

the aforementioned debates on the draft Expropriation Bill. Land rights are thus particularly relevant in the context of the South African transitional process, and their intersection with ESC rights makes them worth investigating, particularly since South Africa remains one of the most unequal societies from an economic point of view²⁶. On a practical note, the reason to focus on one category of land rights has also been justified by constraints of time and scope.

B. Data generation method

a) Sampling approach

The following empirical investigation is based on a generic purposive sampling, a form of non-probability sampling that “sample[s] cases/participants in a strategic way, so that those sampled are relevant to the research questions that are posed”²⁷. More specifically, a stratified purposive sampling was conducted, i.e., ‘typical’ cases/respondents were selected within subgroups of interests²⁸. The criteria for sampling the respondents were fixed at the outset of the research and were derived from the literature on South Africa and on relevant actors in transitional justice processes. This sampling strategy was further complemented by a snowball sampling approach, wherein initial respondents were asked to name and provide contacts for other relevant stakeholders²⁹. The size of the sample was primarily determined by the criteria of theoretical saturation³⁰ as well as time constraints.

²⁶ World Bank, ‘The World Bank in South Africa - Overview’, *The World Bank* [website], 18 March 2021, <https://www.worldbank.org/en/country/southafrica/overview>, (accessed 26 July 2021).

²⁷ Bryman, p. 408

²⁸ Ibid., p. 409.

²⁹ Ibid., p. 188.

³⁰ Ibid., pp. 416-419.

b) Interview structure

In addition to the use of primary and secondary literature, the data collection method rested primarily on synchronous, semi-structured interviews. In this context, a series of questions and prompts were used in order to give impulses and focus to the interview. The interviewer took measures to allow for flexibility in the sequencing of these questions to follow up on answers given to deepen certain points if needed. Due to the research question and since the research design is qualitative, the aim of the semi-structured interviews is to investigate in an in-depth manner the framing and conceptions of respondents. All interviews were conducted by one interviewer (the student) with one interviewee, allowing for inter-interviewer consistency. Due to travel restrictions linked to the Covid-19 pandemic, the decision was taken to conduct interviews digitally, namely through videoconferencing tools.

The six interviews lasted between 30 minutes and one hour and twenty minutes. They were based on an interview guide attached in Annex 2.

c) Ethical considerations

This Master thesis relied on ethical considerations laid out by Bryman³¹ as well as Graham, Grewal and Lewis's research³² on participants' needs and views.

Measures were taken to ensure that unpressed and informed consent was secured. All respondents were adults. Participants were informed about the scope, objectives, and purpose of the research as well as about why they had been selected during the contact phase (via email). Participants were further asked to fill out the declaration of consent form for interviews and were informed again at the outset of the interview about the fundamentals of the study.

³¹ Bryman, pp. 125-134.

³² J. Graham, I. Grewal, and J. Lewis, 'Ethics in Social Research: the views of research participants', *GOV.UK* [website], 1 February 2007, <https://www.gov.uk/government/publications/governmental-social-research-ethical-assurance-guidance-for-social-researchers-in-government>, (accessed 29 April 2021).

During the interview, participants were informed of their right to not answer a question or to add information they deemed relevant. The interviewer strived to create an unpressurised, friendly, yet serious atmosphere by giving participants enough time to think their responses and not expressing value judgements about answers given.

With regards to the right to privacy, participants were further informed about the fact that their data would be anonymized. Participants were asked for their consent to the interview being recorded and later stored digitally in a safe space. The participants were informed about their right to interrupt their participation in the study as well as about their right to their data being deleted at a later stage.

A key element to consider was that the study revolves around sensitive and/or controversial topics, such as the apartheid. Special care was given to phrasing questions and reactions in an open, non-confrontational and neutral way, yet always with the aim of responding adequately to research questions. Additionally, the researcher had no personal connection to their respondents and did not receive funding from any State or other organization, so as to foster a sense of neutrality and distance.

Efforts were made to keep the length of the interview under control in order not to be place an undue burden on the participant³³. With regards to the ‘social benefit’ component³⁴, participants were offered the possibility of receiving the final Master thesis via email.

d) Tools and materials used

In the light of restrictions put in place to contain the COVID-19 pandemic, the data collection was entirely conducted digitally. Email services as well as Skype telephone were used in order to establish a first contact with participants to the study. Secondly, the interviews were conducted using the videoconferencing software Zoom (using a premium licence). Interviews were recorded via Zoom, while a recording was made on the phone

³³ S. Webster, J. Lewis and A. Brown, ‘Ethical Considerations in Qualitative Research’, in J. Ritchie, J. Lewis, C. McNaughton Nicholls et al. (eds.), *Qualitative Research Practice : A Guide for Social Science Students and Researchers* (2nd ed.), Los Angeles, SAGE, 2014, p. 87.

³⁴ Graham, Grewal and Lewis, p. 6.

as a backup. Subsequently, interviews were transcribed with the support of an online transcription software (TRINT).

C. Data analysis method

For the purposes of this thesis, it was decided to employ a thematic analysis. More specifically, the data analysis method employed rested upon the ‘Framework’ approach developed by Ritchie and Spencer at the United Kingdom National Centre for Social Research/Social and Community Planning Research³⁵. In the words of Bryman, Framework is a “matrix based method for ordering and synthesising data”³⁶ in a systematic manner³⁷.

The process is constituted of five “distinct though highly interconnected stages”³⁸. During the first step, familiarization³⁹, the researcher thoroughly read the interview transcripts and wrote down notes regarding recurring themes and issues. In a second step, a thematic framework (i.e., “key issues, concepts, themes, according to which the data can be examined and referenced”⁴⁰) was identified⁴¹. Laplante’s theory, which constitutes a theoretical framework, provided a foundation for our thematic framework (a priori issues), yet the researcher also allowed for emergent issues to be integrated into the framework. The third stage, ‘indexing’⁴², involved the application of the thematic framework or index to the entirety of the data in a systematic manner and through the making of judgements about the meaning and significance of data. The fourth step, ‘charting’⁴³, consisted in summarizing passages of text and rearranging the indexed data

³⁵ Bryman, pp. 585-587; J. Ritchie and L. Spencer, ‘Qualitative data analysis for applied policy research’, in A. Bryman and R. G. Burgess (eds.), *Analyzing qualitative data*, London, Routledge, 1994, pp. 173–194.

³⁶ Bryman, p. 585.

³⁷ Ritchie and Spencer, p. 178.

³⁸ Ibid., p. 178.

³⁹ Ibid., pp. 178-179.

⁴⁰ Ibid., pp. 179-180.

⁴¹ Ibid., pp. 179-180.

⁴² Ibid., pp. 180-182.

⁴³ Ibid., pp. 182-185.

under headings and subheadings derived from the thematic framework. In a last step, the researcher mapped and interpreted⁴⁴ the dataset in a systematic manner, with reference to the objectives of qualitative data analysis and the research questions.

In order to facilitate, reduce the time, and make the process of data analysis more understandable and transparent, a computer-assisted qualitative data analysis software (CAQDAS), more specifically the MAXQDA software, was employed using a licence provided by the University of Vienna.

The Framework approach was selected here as it is rooted in the accounts and observations of respondents, is dynamic and flexible yet also systematic and comprehensive. Additionally, the systematic and visual processes of indexing, charting, and mapping can be replicated by other researchers, enhancing the intersubjectivity of the data analysis. Lastly, the Framework approach allows “within-case and between-case analysis” by providing a systematic framework for comparisons and associations⁴⁵. The researcher is also aware of the challenges of such a qualitative data analysis, namely its time-consuming and resource-intensive aspects or the lack of agreement in literature about qualitative analysis terminology⁴⁶.

D. Limitations and quality criteria

Assessing qualitative research based on quality criteria is more complex than in quantitative research, as the relevance of criteria such as reliability and validity and their incorporation into qualitative research remains debated⁴⁷.

⁴⁴ Ritchie and Spencer, pp. 186-193.

⁴⁵ A. Srivastava and S. B. Thomson, ‘Framework Analysis: A Qualitative Methodology for Applied Policy Research’, *Journal of Administration & Governance*, vol. 4, no. 2, 2009, p. 77, (accessed 14 April 2021).

⁴⁶ A. Hackett and K. Strickland, ‘Using the framework approach to analyse qualitative data. A worked example’, *Nurse researcher*, vol. 26, no. 2, 2019, pp. 8–13, (accessed 29 April 2021); D. J. Ward, C. Furber, S. Tierney et al., ‘Using Framework Analysis in nursing research: a worked example’, *Journal of Advanced Nursing*, vol. 69, no. 11, 2013, pp. 2428-2429, (accessed 07 July 2021).

⁴⁷ For a thorough discussion of quality criteria in qualitative research, see Bryman, pp. 383-391.

Yardley's criteria⁴⁸ can be used as a point of reference to guide the conception, implementation, and evaluation of the following research. In order to fulfil Yardley's criteria of sensitivity to the context and "potentially relevant theoretical positions and ethical issues"⁴⁹, a special emphasis was placed on interviewing stakeholders who may hold different normative, theoretical, and ethical positions. The focus on the case of South Africa also allowed us to engage in a substantial way with one context and to investigate it in a deep manner. Yardley's second criterion of commitment and rigour was fulfilled by engaging literature on transitional justice, ESC rights, land rights, and South Africa in a substantial manner and by adopting a wide range of perspectives. Advice and feedback was sought from the supervisor in order to enhance the quality of the process of data collection. As regards the data analysis, I engaged with literature on the Framework approach and sought to train herself in the use of MAXQDA. Research methods were spelled out while premises and assumptions were laid out in a critical manner to foster transparency and coherence. Lastly, the fourth criteria is that of impact and importance "for theory, practitioners and the community on which the research is conducted"⁵⁰. By mapping approaches to land rights and analysing their normative underpinnings, the researcher aimed to help make emerge a better understanding of the diversity of normative conceptions that are at a play in a transitional context, especially in the case of South Africa. The researcher will also transmit research findings to the respondents. Guiding questions as developed by Spencer et al. as well as Tracy⁵¹ have also provided a critical basis for quality criteria.

The following limitations should be borne in mind: due to the sanitary context and travel restrictions, possibilities to travel to South Africa to conduct interviews in person were significantly hampered. On the one hand, this has reduced the possibilities of gathering data surrounding the interview context. The use of teleconferencing tools has

⁴⁸ Bryman, pp. 387-388; L. Yardley, 'Dilemmas in qualitative health research', *Psychology & Health*, vol. 15, no. 2, 2000, pp. 219-224 (accessed 29 April 2021).

⁴⁹ Bryman, p. 387.

⁵⁰ Ibid., p. 387.

⁵¹ Ibid., pp. 388-390.

also narrowed down the range of stakeholders that could potentially be interviewed, as such an interviewing method tends to be biased in favour of stakeholders with an access to a laptop and a stable Internet connection. Further difficulties included the degrading sanitary situation in South Africa, which entailed a move to work-from-home arrangements⁵², thereby making contacts with respondents more difficult. On a personal note, I experienced significant technical issues and a partial loss of data due to a damaged hard drive, but these difficulties could be overcome in a swift manner.

Language restrictions should also be noted. While interviews were conducted in English, which is one of the official languages in South Africa and overall serves as a *lingua franca*, I do not speak other South African languages (such as isiXhosa, Afrikaans, etc.). This language barrier thus possibly restricts the possibilities to engage with non-English speakers and possibly specific types of actors. Nevertheless, measures have been taken to mitigate these limitations as much as possible, notably by approaching several types of stakeholders and organizations with different structures (from loosely organized grassroots networks to more institutionalized entities).

III. STATE OF THE ART: TRANSITIONAL JUSTICE'S DISINTEREST WITH SOCIOECONOMIC RIGHTS

This section will first define the right to remedy and redress, which forms the legal basis for transitional justice, before characterizing transitional justice and elaborating on its developments, achievements, and challenges. Subsequently, the thesis will address transitional justice's long-standing disinterest with socioeconomic rights, and the growing calls to close this gap.

⁵² A. Winning and P. Graff, 'South Africa extends tight COVID-19 restrictions for another 14 days', *Reuters* [website], 11 July 2021, <https://www.reuters.com/world/africa/south-africa-extends-tight-covid-19-restrictions-another-14-days-2021-07-11/> (accessed 26 July 2021).

A. The right to remedy and redress

Transitional justice is grounded in the right to remedy and redress. As a matter of fact, transitional justice processes are initiated often periods of widespread and systematic human rights violations, and in order to address the legacy of such abuses⁵³. The duty of the State to guarantee the right to remedy and redress follows from this.

There are several foundations to the right to remedy and redress. Nowak highlights that if a duty-holder violates a right, “the rights-holder has a legal remedy to hold the duty-bearer accountable and to get reparation for the harm inflicted”⁵⁴, while Stadlmayr states that this entails both an obligation to cease the ongoing violation and to provide guarantees of non-repetition as well as to provide reparation for the harm caused⁵⁵. This is a general principle of international public law, as evidenced by its enshrinement in Article 31 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts⁵⁶. The duty to provide remedies and reparation can also be derived from the general obligations of States to ensure human rights. Several human rights instruments expressly provide for the right to remedy, such as the International Covenant on Civil and Political Rights (ICCPR)’s Article 2(3), the European Convention for the Protection of Human Rights and Fundamental Freedoms’ Article 13, the American Convention on Human Rights’ Article 25 and Article 21 of the African Charter on Human and Peoples’ Rights. Other human rights instruments provide for a right to compensation, for instance the Convention Against Torture (Article 14) and the ICCPR (Art. 9(5) and Art. 14(6)). Lastly, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of

⁵³ L. Stadlmayr, ‘What is Transitional Justice?’, in M. Nowak, K. M. Januszewski and T. Hofstätter (eds.), *All Human Rights for All. Vienna Manual on Human Rights*, Vienna, Neuer Wissenschaftlicher Verlag, 2012(b), p. 521.

⁵⁴ M. Nowak, ‘Human Rights from a Legal Perspective’, in M. Nowak, K. M. Januszewski and T. Hofstätter (eds.), *All Human Rights for All. Vienna Manual on Human Rights*, Vienna, Neuer Wissenschaftlicher Verlag, 2012, p. 21.

⁵⁵ L. Stadlmayr, ‘Remedies and Reparations for Victims of Human Rights Violations’, in M. Nowak, K. M. Januszewski and T. Hofstätter (eds.), *All Human Rights for All. Vienna Manual on Human Rights*, Vienna, Neuer Wissenschaftlicher Verlag, 2012(a), p. 280.

⁵⁶ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (adopted 9 August 2001, not entered into force), Article 31.

International Humanitarian Law set out a framework for providing remedies and reparations to victims⁵⁷.

The right to remedy entails both a procedural component and a substantive component⁵⁸. Procedurally, the right to an effective remedy guarantees that the victim will be able “to allege a violation of a human right before an independent and impartial authority, to have this claim determined, and to obtain adequate redress in case a violation is established”⁵⁹. On a substantive level, the right to reparation covers several measures that a State can take in order to right a human rights violation, such as restitution in kind, monetary compensation, rehabilitation, satisfaction and guarantees of non-repetition. Different measures may be combined in order to provide reparation to a victim⁶⁰. In contexts of gross and/or systematic violations of human rights, the International Center for Transitional Justice identifies four important state obligations: the duty to fully explore the truth, the duty to prosecute, the duty to implement reparations that respect the dignity of each beneficiary, and the duty to reform state laws and institutions⁶¹.

As the State is the primary duty-bearer for human rights obligations, the obligation to provide for remedies and reparation accrues primarily to domestic authorities. Regional and international human rights bodies only have a subsidiary competence in this regard⁶².

B. Characterizing transitional justice

This section will critically discuss definitions of transitional justice, before contextualizing the academic field and practice from a historical point of view. The aims

⁵⁷ Stadlmayr, 2012(a), pp. 279-280.

⁵⁸ M. Nowak, *Introduction to the International Human Rights Regime*, Leiden, Nijhoff, 2003, pp. 63-64.

⁵⁹ Stadlmayr, 2012(a), p. 280.

⁶⁰ Ibid., pp. 280-281.

⁶¹ International Center for Transitional Justice, ‘Effective Remedies to Human Rights Violations’, *International Center for Transitional Justice* [website], 2009(a), <https://www.ictj.org/sites/default/files/ICTJ-Global-Rights-Remedies-2009-English.pdf>, (accessed 3 April 2021).

⁶² Stadlmayr, 2012(a), p. 281.

of transitional justice and its normative foundations will be elaborated upon, before turning to the developments and achievements of transitional justice, as well as criticisms raised at it.

a) Definitional challenges and the ever-growing range of transitional justice mechanisms

As Brigitte Weiffen highlights, the concept of transitional justice is “always in movement”, while the field has been characterized by a wide variety of practices, mechanisms, aims and values⁶³. Consequently, the definition of transitional justice is contested, and various definitions ranging from narrow to very broad have been provided.

From an institutional point of view, the United Nations appears to have increasingly embraced a broader conception, as evidenced by the definition of transitional justice provided in former United Nations (UN) Secretary General Kofi Annan’s 2004 report entitled ‘The rule of law and transitional justice in conflict and post-conflict societies’. In this report, transitional justice is seen as comprising:

“the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof”⁶⁴.

Meanwhile, Ruti Teitel, who attributably coined the term, defines transitional justice as the “conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes”⁶⁵. Her approach to transitional justice mirrors legalistic and so-called narrow conceptions of transitional justice.

⁶³ B. Weiffen, ‘Transitional Justice: Eine konzeptionelle Auseinandersetzung’, in A. Mihr, G. Pickel, and S. Pickel (eds.), *Handbuch Transitional Justice. Aufarbeitung von Unrecht - hin zur Rechtsstaatlichkeit und Demokratie*, Wiesbaden, Springer VS (Sozialwissenschaften), 2018, p. 100

⁶⁴ United Nations Security Council, ‘The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General’, 23 August 2004, UN Doc S/2004/616, para. 8.

⁶⁵ R. G. Teitel, ‘Transitional Justice Genealogy’, *Harvard Human Rights Journal*, vol. 16, 2003, p. 69, (accessed 3 April 2021).

On the other hand, authors such as Naomi Roht-Arriaza adopt a broader conception, stating: “[a]t its broadest, it involves anything that a society devises to deal with a legacy of conflict and/or widespread human rights violations”⁶⁶.

This thesis will adopt the broader definition of transitional justice as laid out by the United Nations and Roht-Arriaza. Indeed, it is argued that such definitions better encapsulate the various facets of transitional justice, notably the extra-legal dimensions. Furthermore, a broader conception allows to encompass violations of ESC rights in transitional justice processes (see section II.C).

A variety of mechanisms have been implemented over the years in order to pursue the various aims of transitional justice. Mechanisms of transitional justice include but are not limited to: the prosecution and punishment of perpetrators by national, international or hybrid tribunals; exercises of truth-seeking and truth-telling such as truth commissions, commissions of inquiry and other fact-finding mechanisms; reparation programs; and legislative and institutional reforms (including vetting)⁶⁷. As Roht-Arriaza notes, different mechanisms exist simultaneously, leading to “synergies and tensions”, but also “duplications and gaps”⁶⁸. She further notes that institutions tend to assume an ever-broader range of functions, which vary depending on the context and exigences of the transition⁶⁹. Hence, Lutz underlines the importance of planning so as to manage these multiple mechanisms⁷⁰.

b) History of transitional justice

Over the past decades, transitional justice has gained increasing traction. While transitional justice finds its roots in the aftermath of World War II, the term has gained

⁶⁶ Roht-Arriaza, p. 2.

⁶⁷ Stadlmayr, 2012(b), pp. 522-523.

⁶⁸ Roht-Arriaza, p. 9.

⁶⁹ Ibid., p. 9.

⁷⁰ E. Lutz, ‘Transitional justice: Lessons learned and the road ahead’, in N. Roht-Arriaza and J. Mariezcurrena (eds.), *Transitional justice in the twenty-first century. Beyond truth versus justice*, Cambridge, Cambridge University Press, 2006, pp. 336-337.

currency during the 1980s and 1990s following the so-called ‘third wave of democratization’ in Southern Europe, Latin America, and Eastern Europe⁷¹. The ever-growing popularity of transitional justice has been attributed to the accrued importance of the humanitarian and human rights discourses, as well as a growing consensus on transitional justice being an adequate means to ensure accountability for human rights violations⁷².

While transitional justice was initially associated with transitions “from an authoritarian to a more democratic political system”⁷³, since the end of the 20th century, the concept has become increasingly applied to post-conflict situations. Bonora argues that transitional justice has become “normalized”, to the extent that transitional justice measures have become an integral, rather than an exceptional component of post-authoritarian and post-conflict policies. Following from this, transitional justice measures, mechanisms and methods have become increasingly ‘standardized’⁷⁴, and include a wide array of stakeholders. This has come along with an increasing professionalization of the transitional justice field⁷⁵.

c) Aims of transitional justice and normative foundations

The aims of transitional justice have been the subject of debate. Most often, authors identify the following aims: responding to the suffering from past abuses, providing recognition to victims, promoting reconciliation, and preventing the future reoccurrence of violations. Several authors have highlighted the interlinkages of transitional justice with peacebuilding and democratization objectives among other societal and political concerns⁷⁶.

⁷¹ Weiffen, pp. 2-8.

⁷² Roht-Arriaza, p. 8.; Lutz, pp. 328-329.

⁷³ C. Bonora, ‘Dealing with the Past Nowadays. A New Paradigm of Transitional Justice?’, *International Journal on Rule of Law, Transitional Justice and Human Rights*, vol. 3, no. 3, 2012, p. 15, (accessed 3 April 2021).

⁷⁴ Lutz, p. 333.

⁷⁵ Bonora, pp. 19.

⁷⁶ Lutz, pp. 327-328; P. De Greiff, ‘Theorizing Transitional Justice’, in M. S. Williams, R. Nagy and J. Elster (eds.), *Transitional Justice. NOMOS LI*, New York, NYU Press, 2012, pp. 39-58.

Leebaw notes a tension in the goals of transitional justice, highlighting that it aims at maintaining a degree of stability and legitimacy, but also is geared towards transformation of values and political relationships over the long term. These inherent tensions will be managed differently depending on the phases of the transition, leading her to plead for a dynamic understanding of transitional processes and transitional justice⁷⁷.

d) Developments and achievements

The practice of transitional justice has evolved in several regards. In his 2017 report to the UN Human Rights Council, the Special Rapporteur (SR) on the promotion of truth, justice, reparation and guarantees of non-recurrence notes several advances in transitional justice, such as the elaboration of a multi-faceted concept of justice, the development of a diversified normative framework or the ‘visibilization’ of victims and acknowledgement of their voice. The SR further highlights progress in the domains of prosecutions (e.g., efforts to nullify/mitigate the consequences of amnesty laws), of truth (e.g., increased usage of truth commissions), reparations (e.g., normative anchoring of victims’ right to reparation, provision of benefits to large numbers of victims “on a time frame, at a cost and in a much more victim-friendly manner than any court procedure”⁷⁸, combination of material and symbolic reparations)⁷⁹.

Two other developments should be noted, such as the evolution of the relationship between the global and the domestic levels: while early experiences of transitional justice mechanisms were either completely national or international⁸⁰, there has been an increasing hybridization⁸¹. Hybrid institutions have been praised for their combination of “the independence, impartiality and resources of an international institution with the

⁷⁷ B. A. Leebaw, ‘The Irreconcilable Goals of Transitional Justice’, *Human Rights Quarterly*, vol. 30, no. 1, 2008, pp. 101 and 118, (accessed 3 April 2021).

⁷⁸ United Nations General Assembly, ‘Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his global study on transitional justice’, 7 August 2017, UN Doc A/HRC/36/50/Add.1, para. 64.

⁷⁹ *Ibid.*, paras. 24-71.

⁸⁰ Roht-Arriaza, p. 10.

⁸¹ Bonora, p. 18-19; See also Roht-Arriaza, pp. 10-13.

grounding in national law, realities and culture, the reduced costs, and the continuity and sustainability of a national effort”⁸². Overall, Roht-Arriaza argues that there is an emerging division of labour between international and domestic courts and mechanisms, as evidenced by the International Criminal Court’s emphasis on its subsidiary competence and the complementarity of the international and domestic levels⁸³. Ultimately, the binary division between national and international no longer holds, as illustrated by the multiplication of local-level initiatives⁸⁴. A second development has been the more frequent involvement of civil society, both local and transnational. Such engagement has also become more institutionalized, notably through the issuance of UN guidelines for the consultation of civil society on transitional justice⁸⁵.

e) Criticisms

However, transitional justice has been criticized both from a theoretical/conceptual and a practical vantage point. This section aims at providing an illustrative (but not exhaustive) list of the criticisms directed at transitional justice theory and praxis.

One of the most challenging aspects of transitional justice is its perceived (in)ability to resonate with different cultures, and its perception as a tool of Western imperialism. The field has strong linkages with Western liberal thought, meaning that mainstream transitional justice processes are often underpinned by the teleological belief of the superiority of a liberal democracy based on the rule of law and the free market, and the assumption that these outcomes constitute universal aims to strive for. Hence, the field has been criticized for marginalizing alternative perspectives and norms, leading several

⁸² Roht-Arriaza, p. 10.

⁸³ Bonora, pp. 17-18; Roht-Arriaza, pp. 10-11.

⁸⁴ Roht-Arriaza, pp. 11-13.

⁸⁵ Bonora, p. 19; Office of the United Nations High Commissioner for Human Rights, ‘Rule-of-Law tools for post-conflict states. National Consultations on Transitional Justice’, *OHCHR.org* [website], 2009, https://www.ohchr.org/Documents/Publications/NationalConsultationsTJ_EN.pdf, (accessed 3 April 2021).

authors to deplore a form of value-imperialism and political instrumentalization⁸⁶. Lundy and McGovern note that transitional justice measures tend to be “donor-driven rather than responsive to the needs of wants of people themselves”⁸⁷, while Nagy criticizes the “saviour” complex incarnated by transitional justice⁸⁸. Mutua and Muvingi further note that the individualistic approach of the mainstream human rights and transitional justice discourses fails to account for central role of the community in a range of societies, thereby undermining transitional justice’s ability to resonate with multiple cultures, notably African cultures⁸⁹. Mutua adds that individualism “remains a source of social alienation” and that it “justifies arguments and actions that reject social responsibility as an obligation for all actors, especially corporate”⁹⁰.

This relativization of the universal reach of transitional justice is echoed by Gready’s opposition of embedded and distanced justice. Distanced justice fails to enable local participation and diverts resources away from national legal systems which it delegitimizes as inadequate. A culturally alien and geographically remote endeavour, it makes “little contribution to democratic development and peace in the country concerned” and can be, at its worst, “alienated and alienating”⁹¹. On the contrary, embedded justice rests on the development of local legal systems and adjudicatory mechanisms and “is at least in part locally defined, claimed and owned, and as a result resonates locally”⁹². Nevertheless, Gready does not espouse a completely uncritical view of embedded justice, highlighting its potential pitfalls such as a lack of capacity, legitimacy or stable environment and the possibility that local power structures and dynamics may contribute to the issues to be addressed. Still, he calls for justice to become wider-encompassing and to include mechanisms going beyond trials, for these

⁸⁶ Weiffen, pp. 98-100; M. Mutua, ‘What Is the Future of Transitional Justice?’, *International Journal of Transitional Justice*, vol. 9, no. 1, 2015, pp. 3-4, (accessed 3 April 2021).

⁸⁷ P. Lundy and M. McGovern, ‘Whose Justice? Rethinking Transitional Justice from the Bottom Up’, *Journal of Law and Society*, vol. 35, no. 2, 2008, p. 275, (accessed 3 April 2021).

⁸⁸ R. Nagy, ‘Transitional Justice as Global Project: critical reflections’, *Third World Quarterly*, vol. 29, no. 2, 2008, p. 275, (accessed 3 April 2021).

⁸⁹ Mutua, p. 4; I. Muvingi, ‘Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies’, *International Journal of Transitional Justice*, vol. 3, no. 2, 2009, p. 178, (accessed 3 April 2021).

⁹⁰ Mutua, p. 4.

⁹¹ P. Gready, ‘Analysis: Reconceptualising transitional justice: embedded and distanced justice’, *Conflict, Security & Development*, vol. 5, no. 1, 2005, p. 9, (accessed 3 April 2021).

⁹² *Ibid.*, p. 9.

mechanisms to be embedded within the localities and communities, and to enable participation⁹³. Hybrid courts may provide a venue for a more embedded form of justice, but it should be noted that such mechanisms have been criticized for “doing justice on the cheap” and for the lack of resources and international support they have received⁹⁴. Additionally, Roht-Arriaza notes that such hybrid institutions run the risk of never being fully appropriated neither by the international nor the domestic stakeholders⁹⁵.

Lastly, the “persistent selectivity in the way in which universal legal obligations are implemented” and the “double standards” of countries that violate human rights yet push transitional justice measures in other countries constitute a sizeable challenge⁹⁶. Several authors have criticized the dominance⁹⁷ and paternalistic attitudes⁹⁸ of external promoters of transitional justice processes, namely the international (Western) community. This also prevents a critical examination the role of and possible abuses by international actors during transitional justice processes⁹⁹. Overall, Nagy notes an ambivalent role of the international community, which is often either absent or indifferent to widespread and systematic violations of human rights, “until it intervenes as the heroic saviour”¹⁰⁰.

A second challenge for transitional justice is participation. The SR on TJ has named the closing of civil spaces a challenge for transitional justice¹⁰¹.

In spite of the increasing rhetorical commitment to participation, in practice, Lundy and McGovern notes that such empowerment-based and participatory approaches “have tended only to be implemented in a vague, weak and ad hoc manner”¹⁰². Furthermore, Bonora notes that only a restricted number of human rights organizations and other civil society organizations dispose of the necessary resources and knowledge to access

⁹³ Gready, p. 18.; see also Maregere, pp. 197-198

⁹⁴ Nagy, p. 283.

⁹⁵ Roht-Arriaza, p. 10.

⁹⁶ United Nations General Assembly, 2017, para. 73.

⁹⁷ Weiffen, pp. 99-100.

⁹⁸ Nagy, p. 282.

⁹⁹ Bonora, p. 20; Roht-Arriaza, p. 11; Nagy, pp. 281-282.

¹⁰⁰ Nagy, p. 284.

¹⁰¹ United Nations General Assembly, 2017, para. 75.

¹⁰² Lundy and McGovern, p. 279.

international and transitional justice mechanisms, leading to a side-lining of smaller local non-government organizations (NGOs) and victim groups¹⁰³. In all cases, a failure to enable genuine participation by civil society and the population at large is likely to lead to significant shortcomings¹⁰⁴. Lundy and McGovern thus argue for transitional justice agendas to include a grassroots, bottom-up approach which would involve communities at every step of the process and aim to foster their agency¹⁰⁵.

A third challenge has been what the SR on transitional justice calls a tendency to “isomorphic mimicry”, i.e., the replication of institutional forms without due consideration for specificities of the context and aims pursued¹⁰⁶. The SR also views as concerning the tendency to conflate post-authoritarian and post-conflict justice¹⁰⁷. As the field of transitional justice has progressed, so have calls for a more systematic consideration of the local context and the appropriateness of transitional justice measures to it¹⁰⁸.

Linked to this argument is Nagy’s criticism of the overly legalistic approach to transitional justice, which is grounded in the ill-guided assumption that law is a “safe, neutral, universal way to engage with other countries”¹⁰⁹, and leads to technocratic, institutional, depoliticised and decontextualised approaches¹¹⁰¹¹¹.

The disconnect between transitional justice’s aims and functions and its practical implementation has been highlighted in several respects. For instance, Mani has noted the

¹⁰³ Bonora, p. 21.

¹⁰⁴ Lutz, pp. 337-338.

¹⁰⁵ Lundy and McGovern, pp. 291-292.

¹⁰⁶ United Nations General Assembly, 2017, para. 84.

¹⁰⁷ Ibid., para. 82.

¹⁰⁸ Lutz, pp. 333-336; Maregere, pp. 42-47.

¹⁰⁹ Nagy, p. 279.

¹¹⁰ United Nations General Assembly, 2017, para. 85.

¹¹¹ Weiffen, pp. 98-100; Nagy, p. 279; R. Urueña and M. A. Prada-Urbe, ‘Transitional Justice and Economic Policy’, *Annual Review of Law and Social Science*, vol. 14, no. 1, 2018, pp. 401, (accessed 3 April 2021).

contrast between the elevated cost of transitional justice measures and the usually scarce resources for transitional countries¹¹².

The lack of theoretical and conceptual clarity has been widely denounced by scholars. Nagy criticizes mainstream conceptions that see transitional justice as a specific period, and thereby fail to acknowledge the continuities of violence and exclusion¹¹³.

The SR has deplored the lack of consideration given to the nexus between transitional justice and other fields (such as development and security policies), arguing that transitional justice cannot “[exhaust] the agenda of transformations” required by countries¹¹⁴. The lack of conceptual clarity has led to an expansion of transitional justice mandates without due regard for the suitability of transitional mechanisms for these purposes¹¹⁵. Additionally, the SR has noted a tendency to securitization which tends to marginalize human rights at the benefit of security goals¹¹⁶.

One final strand of criticism has been that transitional justice has so far overwhelmingly used a discourse centred around exceptional crimes such as crimes against humanity, while failing to address issues of structural violence and social injustices¹¹⁷. In this regard, several scholars and practitioners have deplored mainstream transitional justice theory and praxis’ failure to consider violations of economic, social, and cultural rights¹¹⁸. This line of argument will be elaborated upon in the section below.

¹¹² R. Mani, ‘Editorial: Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development’, *International Journal of Transitional Justice*, vol. 2, no. 3, 2008, pp. 256–257, (accessed 3 April 2021).

¹¹³ Nagy, p. 280; Mani, 2008, pp. 259-261.

¹¹⁴ United Nations General Assembly, 2017, para. 86.

¹¹⁵ Ibid., paras. 78-80.

¹¹⁶ Ibid., para. 74.

¹¹⁷ Bonora, p. 20; Weiffen, p. 98.

¹¹⁸ Mutua, p. 4.

C. Transitional justice and economic, social, and cultural (ESC) rights: two estranged fields?

Economic, social, and cultural (ESC) rights have long been neglected by mainstream transitional justice for a range of reasons. Calls for a more holistic approach encompassing ESC rights in transitional justice have mounted over the years, but have not been unchallenged nor uncontroversial.

a) Reasons for the neglect of economic, social, and cultural rights in transitional justice processes

Economic, social, and cultural (ESC) rights have long been neglected by mainstream transitional justice for several reasons. Firstly, transitional justice is largely based on mainstream justice and criminal law, which insufficiently consider ESC rights in comparison to civil and political (CP) rights¹¹⁹, and largely focus on bodily integrity rights¹²⁰, as well as on ending violence and securing a peaceful transfer of power¹²¹.

Secondly, the marginalized position of ESC rights in transitional justice reflects the Cold-War divisions between CP and ESC rights, wherein mainstream, westernized human rights conceptions have taken on a bias in favour of CP rights at the expense of ESC rights, sometimes based on the assumption that the realization of ESC rights would automatically flow from the fulfilment of CP rights. This bias has continued after the end of the Cold War in spite of the repeated emphasis on the interdependence and indivisibility of human rights¹²².

Additionally, there is a widespread opinion that ESC rights are not justiciable, or at least not as easily justiciable as CP rights, and that they represent more aspirational goals

¹¹⁹ L. Arbour, 'Economic and Social Justice for Societies in Transition', *International Law and Politics*, vol. 40, no. 1, 2007, p. 5, (accessed 3 April 2021); Urueña and Prada-Urbe, pp. 399-400; Cahill-Ripley, pp. 188-189.

¹²⁰ L. García Martín, *Transitional justice, corporate accountability, and socio-economic rights. Lessons from Argentina*, Abingdon Oxon, New York NY, Routledge, 2019, p. 52.

¹²¹ Muvingi, p. 167.

¹²² Cahill-Ripley, pp. 187-188, (accessed 3 April 2021); Arbour, pp. 5-6.

rather than fundamental rights. Hence, the duty of progressive realization of ESC rights is often conflated with the idea that ESC rights are less legally binding than CP rights¹²³.

Last but not least, mainstream transitional justice's individualistic approach has diminished its ability to adequately capture dynamics of (in)justice on a group level, including socioeconomic dynamics of exclusion, marginalization, and discrimination¹²⁴.

While there have been some attempts by transitional justice mechanisms to address violations of ESC rights, for instance in Timor-Leste or in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia¹²⁵, these efforts have remained unsystematic and rather superficial¹²⁶. Violations of ESC rights as factors of conflict or during the conflict have rather been treated as of secondary order or as background information for violations of bodily rights, rather than as an integral part of systematic and widespread human rights violations¹²⁷.

b) The interlinkages between transitional justice and neoliberalism

The philosophical foundations of transitional justice, namely liberalism and neoliberalism, have contributed to the side-lining of ESC rights. Bowsher notes that transitional justice has emerged and entrenched itself parallel to the establishment of neoliberalism on a global scale, thereby becoming closely linked to it¹²⁸.

Narrowly defined, neoliberalism is characterized by an ideology which places individual (rather than collective) freedom and dignity (free from any interference, notably from the State) at the center¹²⁹. In this conception, markets are perceived as most conducive to realizing individual freedom due to their (cost-)efficiency, competitiveness,

¹²³ Arbour, pp. 9-14; Cahill-Ripley, pp. 187-188.

¹²⁴ Nagy, p. 284; Mani, 2008, pp. 254-256; Arbour, pp. 4-5.

¹²⁵ Cahill-Ripley, pp. 197 and 205-207.

¹²⁶ García Martín, pp. 56-64; Cahill-Ripley, pp. 196-207.

¹²⁷ García Martín, p. 57; Cahill-Ripley, pp. 190-191.

¹²⁸ J. Bowsher, '“Omnus et Singulatum”: Establishing the Relationship Between Transitional Justice and Neoliberalism', *Law and critique*, vol. 29, no. 1, 2018, pp. 92-195, (accessed 30 July 2021).

¹²⁹ G. McNaughton and D. F. Frey, 'Introduction', in G. McNaughton and D. F. Frey (eds.), *Economic and Social Rights in a Neoliberal World*, New York, Cambridge University Press, 2018b, pp. 4-6.

and the range of choices they provide. In opposition to the *laissez-faire* of classical liberalism¹³⁰, neoliberalism foresees an intervention by the state to “[unleash] market efficiency”¹³¹. Yet, neoliberalism goes beyond the mere realm of economics and permeates “every part of society”¹³². It envisages a society in which human beings are market actors (similar to Foucault’s *homo oeconomicus*) who ‘invest’ in every dimension of their life¹³³. In this sense, neoliberalism “denotes a modality of governing designed to remake subjectivity and, more generally, social relations in the form of enterprises competing in a market”¹³⁴. In a turn away from collective forms of social solidarity¹³⁵, neoliberalism erases the political struggles inherent to democracies and turns them into decisions “about how to run the state as a corporation”¹³⁶. According to Poku and Whitman, “[t]he extensive privatization and monetization of public goods and the shrinking of the compass of state authority [...] fracture important forms of public access, accountability, deliberation and an inclusive balancing of interests and costs”¹³⁷.

McNaughton and Frey claim that human rights and neoliberalism are fundamentally “incompatible”, for instance due to their different values (neoliberalism is disinterested in values of equality and solidarity, which are however anchored in human rights instruments). The individual-centric perspective of neoliberalism further contrasts with human rights conceptions encompassing not only individual, but also, collective, societal and global rights. Additionally, neoliberalism pleads for a State restraining itself to promoting the market, while human rights conceive a proactive State as the primary duty-bearer for the protection and promotion of human rights, which ought to “take steps, [...] to the maximum of its available resources, with a view to achieving progressively the full

¹³⁰ Bowsher, 2018, pp. 82-83.

¹³¹ McNaughton and Frey, 2018b, p. 6.

¹³² D. F. Frey and G. McNaughton, ‘Conclusion’, in G. McNaughton and D. F. Frey (eds.), *Economic and Social Rights in a Neoliberal World*, New York, Cambridge University Press, 2018, p. 338.

¹³³ Bowsher, 2018, p. 87.

¹³⁴ Ibid., p. 92.

¹³⁵ J. Bowsher, ‘The South African TRC as Neoliberal Reconciliation: Victim Subjectivities and the Synchronization of Affects’, *Social & Legal Studies*, vol. 29, no. 1, 2020, p. 47, (accessed 30 July 2021).

¹³⁶ Bowsher, 2018, p. 92.

¹³⁷ N. Poku and J. Whitman, ‘Africa under neoliberalism’, in N. Poku and J. Whitman (eds.), *Africa under Neoliberalism*, London, Routledge, 2017b, p. 5.

realization of the rights¹³⁸. Lastly, McNaughton and Frey argue that “[w]hereas the neoliberal policy framework is centered on the market, the human rights policy framework is centered on people”¹³⁹. Research has demonstrated the “incompatibility of economic and social rights with neoliberalism and market fundamentalism”¹⁴⁰, noting the conflicts between both paradigms, but also warning about the emergence of “market-friendly” norms that attempt to opt ESC rights into the neoliberal paradigm, thereby undermining them¹⁴¹.

In spite of the aforementioned incompatibility between neoliberalism and human rights, dominant (or even hegemonic¹⁴²) neoliberal conceptions permeate mainstream transitional justice¹⁴³. This has been enabled by transitional justice’s focus on political liberalism and democratic institutions, which has allowed it to turn a blind eye to questions of socioeconomic inequalities¹⁴⁴. McNaughton and Frey acknowledge that the promotion of a partial human rights and transitional justice framework centered around CP rights has “aligned closely with a neoliberal policy agenda”, making human rights appear “compatible with neoliberalism”¹⁴⁵. In mainstream transitional justice approaches, neoliberal free market economy is often perceived as “the only viable path to development and human well-being”¹⁴⁶. As the neoliberal orthodoxy only foresees a very limited intervention by the State in economic and social matters¹⁴⁷, it substantively constrains the range of options available to promote ESC rights in transitional contexts. In this regard, the power and influence of international financial institutions such as the World Trade Organization, International Monetary Fund and World Bank should be noted: indeed, many transitional nations often face vast needs for economic reconstruction and

¹³⁸ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), UNTS No. 993, Article 2(1).

¹³⁹ McNaughton and Frey, 2018b, p. 9.

¹⁴⁰ McNaughton and Frey, 2018b, p. 14.

¹⁴¹ *Ibid.*, pp. 14-16.

¹⁴² *Ibid.*, p. 3.

¹⁴³ Frey and McNaughton, p. 344.

¹⁴⁴ Bowsher, 2020, p. 45.

¹⁴⁵ McNaughton and Frey, 2018b, p. 11.

¹⁴⁶ Muvingi, p. 167.

¹⁴⁷ N. Smith, ‘Neoliberalism’, *Encyclopedia Britannica* [website], 2019, <https://www.britannica.com/topic/neoliberalism>, (accessed 3 April 2021).

development and are faced with conditionalities for development aid or participation in global trade which are grounded in principles of neoliberalism¹⁴⁸.

Lastly, Bowsher's arguments about transitional justice and neoliberalism should be underlined. According to Bowsher, in addition to the focus on CP rights which leads to ignoring violations of ESC rights and demands for socioeconomic justice, the focus on individual victims in transitional justice processes contributes to "processes of individualisation". As a result, transitional justice promotes a "thin" conception of community gathered around the recognition of individual victims "through the 'technocratic' legalism of human rights"¹⁴⁹. The focus on individual suffering leads to the ignoring of systemic and structural violence. By decollectivizing claims for justice, transitional justice "inaugurates a new society, one that is properly governed, and that is amenable to neoliberal economy as a purely technical necessity"¹⁵⁰.

c) Calls for a more holistic approach

Over the last years, scholars and practitioners have increasingly called for a more systematic consideration and inclusion of ESC rights in transitional justice theory and practice.

Former UN High Commissioner for Human Rights Louise Arbour thus called for transitional justice to "make the significant leap that would allow justice, in its full sense, to contribute as it should to societies in transition"¹⁵¹, and echoed Boraine's calls for a "holistic interpretation" of justice¹⁵². She and other scholars have thus urged transitional justice measures to not only address abuses committed during the period of conflict/authoritarianism that led to the transition, but also to tackle the crimes and abuses which pre-dated this period and acted as causes/triggers¹⁵³. Arbour argues that violations

¹⁴⁸ Muvingi, p. 169; Bowsher, 2018, pp. 93-94.

¹⁴⁹ Bowsher, 2018, p. 104.

¹⁵⁰ Ibid., p. 104.

¹⁵¹ Arbour, p. 2.

¹⁵² A. Boraine, 'Transitional Justice: A Holistic Interpretation', *Journal of International Affairs*, vol. 60, no. 1, 2006, pp. 17–27, (accessed 3 April 2021); Arbour, p. 2.

¹⁵³ Arbour, p. 8; Cahill-Ripley, pp. 211-212.

of ESC rights should not be left unaddressed, as this otherwise reinforces the false assumption that these rights are “not entitlements but aspirational expectations to be fulfilled by market-driven or political processes alone”¹⁵⁴. The lack of attention given to ESC rights also undermines the notion of indivisibility and interdependence of human rights. Lastly, Muvingi asserts that unaddressed socioeconomic inequities and grievances can act as “powder kegs” of resentment and undermine transitional processes on the longer term¹⁵⁵.

Arbour has called for transitional justice measures to pay attention to ESC rights through the action of judicial and quasi-judicial bodies¹⁵⁶, noting for instance the importance of individual and collective reparation programs in redressing violations of ESC rights, while reminding that such programs cannot replace longer-term socioeconomic policies aimed at rectifying and preventing widespread inequalities and discrimination¹⁵⁷. She further emphasizes the importance of transitional processes giving a momentum to ground ESC rights in constitutions and/or peace agreements and providing opportunities for legal reform geared towards the protection and promotion of ESC rights¹⁵⁸. Cahill-Ripley issued other recommendations, such as including members with an expertise in the area of socioeconomic rights in transitional justice mechanisms or including a definition of human rights violations within the mandates of truth commissions and courts/tribunals that covers violations of ESC rights¹⁵⁹. Muvingi underlines the transformative potential of transition phases, where the mere reform and adjustment of unjust social orders and economic structures and institutions cannot suffice¹⁶⁰. The heightened awareness for the place of ESC rights in transitional justice processes is evidenced by the publication in 2014 of a manual by the Office of the United

¹⁵⁴ Arbour, p. 4.

¹⁵⁵ Muvingi, pp. 163–182; see also Urueña and Prada-Urbe, p. 401.

¹⁵⁶ Arbour, pp. 14-20.

¹⁵⁷ Arbour, pp. 17-20; Mani, 2008, pp. 254-256; Muvingi; Urueña and Prada-Urbe, pp. 404-405; Garcia, pp. 61-63 ; K. Boyle, ‘Reconceptualising socio-economic rights in the transitional justice discipline’, *Law, Social Justice and Global Development Journal*, vol. 20, no. 2, 2016, (accessed 3 April 2021).

¹⁵⁸ Arbour, pp. 21-26.

¹⁵⁹ Cahill-Ripley, pp. 212-213.

¹⁶⁰ Muvingi, pp. 178-179.

Nations High Commissioner for Human Rights entitled ‘Transitional Justice and Economic, Social and Cultural Rights’¹⁶¹.

The debate about the place of ESC rights in transitional justice discourse and praxis has also been nurtured by a more sustained reflection on the interlinkages between transitional justice and development¹⁶²¹⁶³. While emphasizing the complementarity of both fields, de Greiff has underlined that development policies cannot replace transitional justice measures and that conversely transitional justice measures “do not exhaust the development agenda of the countries where they are implemented”¹⁶⁴.

d) Controversies and challenges

Calls for expanding the scope of transitional justice to encompass violations of ESC rights have not remained unchallenged, both on a theoretical and practical level.

On a theoretical level, Urueña and Prada-Urbe have highlighted the difficulty of delineating the separation between transitional justice and development/social policy¹⁶⁵. Garcia notes that confusion remains prevalent in academia surrounding ESC rights, highlighting that these represent only one portion of the socioeconomic dimension of justice. She further argues that, while transitional justice mechanisms ought to address violations of socioeconomic rights (selected and prioritized with the help of criteria “grounded in solid theoretical analysis and empirical research”), they cannot address the whole range of socioeconomic challenges¹⁶⁶. Cahill-Ripley further argues that notions of structural violence impinge on questions on historical injustice, making the task of

¹⁶¹ Office of the United Nations High Commissioner for Human Rights, ‘Transitional justice and economic, social and cultural rights’, *OHCHR.org* [website], 2014, <https://www.ohchr.org/Documents/Publications/hr-pub-13-05.pdf>, (accessed 3 April 2021).

¹⁶² See Mani, 2008, pp. 254-256; Urueña and Prada-Urbe, pp. 402-403.

¹⁶³ United Nations General Assembly, ‘Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence’, 25 July 2018, UN Doc A/HRC/39/53, para. 69; see also United Nations General Assembly, ‘Promotion of truth, justice, reparation and guarantees of non-recurrence’, 23 August 2013, UN Doc A/68/345.

¹⁶⁴ United Nations General Assembly, 2013, para. 60.

¹⁶⁵ Urueña and Prada-Urbe, p. 405.

¹⁶⁶ García Martín, p. 66.

outlining the scope of transitional justice harder¹⁶⁷. Waldorf has rejected “thicker”¹⁶⁸ conceptions of transitional justice, arguing that transitional justice is “inherently short-term, legalistic and corrective” and “should focus on accountability for gross violations of civil and political rights”, while socioeconomic injustices should be addressed by “democratic politics and distributive justice”¹⁶⁹. Waldorf has further criticized alternative concepts such as transformative justice (see section III.A.a) and is sceptical towards linking development and transitional justice, arguing that such a move could reinforce the state-centric nature of transitional justice¹⁷⁰.

On a practical note, Mani highlights the challenge of comprehensive measures of transitional justice being implemented in environments where resources are scarce and where reconstruction needs are immense. She adds that the stretching of transitional justice to encompass socioeconomic issues could pose a challenge to transitional justice mechanisms which are already “overstretched, [with] their responsibilities too heavy, public expectations too unrealistic and finance already too lean”¹⁷¹. Yet, she argues that “justice on the cheap” can hardly be done without diminishing the quality of the justice delivered. She nevertheless asserts that “[p]opulations and governments should not be forced to make a trade-off between development and justice”¹⁷².

Waldorf argues that adding violations of ESC rights to transitional justice mandates risks raising already inflated expectations which will likely be left unfulfilled. He additionally argues that this extended scope would create timing problems, as transitional justice mechanisms are usually short-lived while the redress of socioeconomic injustice is a longer-term issue¹⁷³. Lastly, he claims that transitional justice scholars and

¹⁶⁷ Cahill-Ripley, pp. 191-192.

¹⁶⁸ Urueña and Prada-Urbe, p. 405.

¹⁶⁹ L. Waldorf, ‘Anticipating the Past: Transitional Justice and Socio-Economic Wrongs’, *Social & Legal Studies*, vol. 21, no. 2, 2012, p. 179, (accessed 3 April 2021).

¹⁷⁰ *Ibid.*, p. 180.

¹⁷¹ Mani, 2008, p. 255.

¹⁷² *Ibid.*, p. 256.

¹⁷³ Waldorf, p. 179.

practitioners often lack the expertise necessary to design and implement programmes aimed at reducing socioeconomic inequalities¹⁷⁴.

On their side, Urueña and Prada-Urbe stress the risk of depoliticizing the issue of wealth distribution by shifting the focus from justice to development and peacebuilding¹⁷⁵. On top of that, external factors could hinder the substantive redress of violations of ESC rights: as a matter of fact, investment protection clauses contained in international investment agreements and investment arbitration may prevent far-reaching redistribution, as countries may face contradicting imperatives from transitional justice and socioeconomic justice on the one hand and obligations towards foreign investors on the other¹⁷⁶.

IV. THEORETICAL AND CONCEPTUAL FRAMEWORK

Before turning to our case study, it is essential to define what ‘justice’ is meant under transitional justice. In a first step, this section will introduce and discuss various theoretical models of justice. It will then provide a framework for conceptualizing land rights.

A. The ‘justice’ in transitional justice processes: the need for a nuanced understanding

As previously highlighted, there has been criticism towards the transitional justice field, notably the dominance of legal perspectives hints at insufficient interdisciplinarity,

¹⁷⁴ Waldorf, p. 179.

¹⁷⁵ Urueña and Prada-Urbe, p. 406.

¹⁷⁶ Urueña and Prada-Urbe, pp. 406-407.

the risk of hyper-specialisation and failure to consider insights from other disciplines, as well as blurred boundaries between research and praxis¹⁷⁷.

On a fundamental level, several authors have deplored the lack of systematic theoretical underpinnings in the transitional justice literature. On a direct and concrete level, this can lead and has led to poorly conceived practical interventions¹⁷⁸. To explain transitional justice's lack of theoretical foundations, Zistel et al. note transitional justice's strong heterogeneity (gathering multiple disciplines and practices) which may have the emergence of a "common theoretical language"¹⁷⁹, the field's relative youth, as well as the dominance of practice at the expense of a substantial engagement between theorists and practitioners. Furthermore, the concept of transitional justice is not static but always being expanded, rendering the formulation of theories more challenging. Lastly, there has been a tendency to emphasize the need for the including local knowledge and viewpoints, while calls for building holistic theories have been much rarer¹⁸⁰.

Rather than under-theorization, one could speak of a lack of holistic theories. As Zistel et al. argue, there is ultimately not *one* but *many* theoretical approaches to transitional justice, which sometimes stand in contradiction¹⁸¹.

One of the aims of this essay is to engage in a reflection about the forms of justice in transitional justice processes. As a result, the theoretical and conceptual framework will rest on the different types of justice outlined by several authors, in order to articulate a more nuanced and differentiated conception of justice in transitional contexts.

a) From forms of justice in transition...

As highlighted by Muvingi, conceptions of justice as a mere formal equality which fail to acknowledge *de facto* inequalities and historical context fail to provide substance

¹⁷⁷ Weiffen, p. 97.

¹⁷⁸ United Nations General Assembly, 2017, para. 77.

¹⁷⁹ S. Buckley-Zistel, T. Koloma Beck, C. Braun et al., 'Transitional justice theories: An introduction', in S. Buckley-Zistel, T. Koloma Beck, C. Braun et al., *Transitional justice theories*, Oxon, Routledge, 2014(b), p. 2.

¹⁸⁰ Ibid., pp. 2-3.

¹⁸¹ Ibid., pp. 4-8 on various theories and schools of thoughts.

to human rights¹⁸². Hence, a more substantive understanding of justice is required. In this section, conceptions of forms of justice as articulated by Webber, Mani and Laplante will be covered.

Jeremy Webber identifies three forms of justice, which are distinct but interlinked, yet sometimes stand in tension¹⁸³. The first form of justice is *retrospective* justice, which echoes Aristotle's 'corrective'/'rectificatory' justice. Retrospective justice is oriented towards "repair[ing] the consequences of a past instance of wrongful conduct"¹⁸⁴, and is thus backward-looking. Retrospective justice aims at restoring a balance that has previously been disturbed by wrongdoing. Webber notes that this type of justice adopts a narrow focus, as it revolves around the wrongful action between two parties and how to remedy it, but does not consider the general circumstances of the event nor the future relationship between the wrongdoer and the victim. Retrospective justice is for instance incarnated in civil remedy processes¹⁸⁵.

The second form of justice is *prospective*, forward-looking justice¹⁸⁶. This notion corresponds to Aristotle's notion of distributive justice, which focuses on the proportionate repartition of honours and benefits to citizens. While retrospective justice is limited to correcting a single event situated in the past, prospective/distributive justice is broader, more open-ended and requires "the specification of the relevant goods and the articulation of an appropriate theory of distribution"¹⁸⁷. As a result, it is more likely to be the subject of controversy, but also represents an opportunity for genuine engagement on how to shape relations between citizens. Webber defines prospective justice as akin to restorative justice, as both "tend to be premised on the need to maintain community into

¹⁸² Muvingi, p. 166.

¹⁸³ J. Webber, 'Forms of Transitional Justice', in M. S. Williams, R. Nagy and J. Elster (eds.), *Transitional Justice. NOMOS LI*, New York, NYU Press, 2012, pp. 98-99.

¹⁸⁴ Ibid., p. 102.

¹⁸⁵ Ibid., pp. 102-103.

¹⁸⁶ Ibid., pp. 103-108.

¹⁸⁷ Ibid., p. 103.

the future”¹⁸⁸, but favours the term prospective justice for its focus on future collaboration¹⁸⁹.

Finally, Webber identifies the third form of justice as the “*adjustment of contending legal and political orders*”¹⁹⁰. By that, Webber means that, following the collapse of old authoritarian regimes, the normative boundaries of a society are contested: some may push for retaining these normative boundaries, while others may argue for a redefinition and change of normative foundations. The previous political and legal order’s legitimacy may be apprehended differently among various segments of the population. Hence, in transitional contexts, varying normative understandings may emerge (e.g.: Westernized conceptions of the law vs. ‘traditional’/‘indigenous’/‘customary’ understandings), and Webber argues that “the challenges of normative diversity” ought to be anticipated and addressed¹⁹¹.

Different understandings of justice (retrospective, prospective or adjustment of contending political and legal orders) will inspire different types of measures in transitional contexts. There may be synergies between these measures based on different understandings of justice, but also tensions¹⁹². To sum up, Webber argues that conceptual clarity about the forms of justice pursued would enhance transitional justice’s efficacy, as it would enable it to “better match institutions to their role”¹⁹³.

Mani identifies three dimensions of justice in post-conflict peacebuilding¹⁹⁴. It is however argued in this essay that this framework can be applied to transitional contexts at large, especially in situations of widespread and systematic human rights violations. The first dimension is *legal justice or the rule of law*. Mani argues that this dimension is

¹⁸⁸ Webber, p. 104.

¹⁸⁹ Ibid., p. 104.

¹⁹⁰ Ibid., pp. 108-113.

¹⁹¹ Ibid., p. 111.

¹⁹² Ibid., pp. 106-108.

¹⁹³ Ibid., p. 122

¹⁹⁴ R. Mani, *Beyond retribution: seeking justice in the shadows of war*, Oxford, Polity Press, 2007, pp. 3-22.

“usually delegitimized, debilitated or destroyed during or prior to the conflict”¹⁹⁵. As a result, a far-reaching reform or transformation is required. This dimension is concerned with legal systems and is particularly preoccupied with providing legal redress to victims of human rights violations¹⁹⁶.

The second form, *rectificatory justice*, addresses “injustices in terms of direct physical violence suffered by people during conflict”¹⁹⁷, such as gross violations of human rights, crimes against humanity and war crimes¹⁹⁸. In this sense, Mani’s conception of rectificatory justice echoes Webber’s notion of retrospective justice. The rectificatory understanding of justice is the one that has primarily informed transitional justice efforts since the second half of the twentieth century.

Lastly, *distributive justice*¹⁹⁹ tackles “the underlying causes of conflict, which often lie in real or perceived socioeconomic, political or cultural injustice”²⁰⁰ and inequalities. This conception can be compared to Aristotle’s distributive justice concept and Webber’s prospective justice understanding.

Mani argues that, while all three forms of justice should be addressed after a conflict and during a transitional process, there has been a tendency to prioritize rectificatory justice at the expense of the other dimensions. This leads to unbalanced results, due to the forms’ interdependence²⁰¹.

Laplante also offers a pluralistic theory of justice, casting various forms of justice employed in the case of reparations, from broader to narrower conceptions, along a ‘justice continuum’. By that, she aims at providing a dynamic, flexible understanding of justice, and emphasizes that the continuum is not linear, as different understandings of

¹⁹⁵ Mani, 2007, p. 6.

¹⁹⁶ Ibid., pp. 5-6.

¹⁹⁷ Ibid., p. 7.

¹⁹⁸ Ibid., pp. 5 and 7-8.

¹⁹⁹ Ibid., pp. 5 and 8-9.

²⁰⁰ Ibid., p. 8.

²⁰¹ Ibid., pp. 9-11.

justice may operate simultaneously etc²⁰². On the narrowest side of the justice continuum, *reparative* justice echoes Aristotle's conception of corrective justice. In this sense, it is akin to righting a wrong so as to restore the balance in a relation. This is exemplified by the use of civil remedies in ordinary contract and tort law. In the case of transitional justice, a prime example of reparative justice is that of restitution²⁰³.

A second narrow vision of justice is that of *restorative* justice, which like reparative justice aims at repairing a harm, but envisions the wrong to be righted in a broader way. Further, while restorative justice largely rests on legalistic means, reparative justice embraces extra-legal approaches. Restorative justice characteristically emphasises mediating between the offender and the victim and revolves around the victim defining 'what' must be restored and 'how', thereby adopting a participatory approach. Through restorative justice, "microreconciliation with communities"²⁰⁴ is strived for²⁰⁵.

Further along the justice continuum is the notion of *civic justice*²⁰⁶, which is geared towards realizing "macroreconciliation which mends the relationship between the government and the governed"²⁰⁷. It also emphasizes participation by citizens, and echoes notions of deliberative democracy. With this, victims' status as citizens ought to be reaffirmed and transitional governments are able to affirm their authority and legitimacy by re-anchoring the society in human rights and democratic values.

Lastly, the broadest conception of justice on Laplante's continuum is that of *socioeconomic justice*²⁰⁸, which aims at correcting "historical social and economic inequalities"²⁰⁹. This type of justice thus looks at factors for violence and oppression and is forward-looking as it also seeks to prevent the recurrence of violence.

²⁰² L. J. Laplante, 'The plural justice aims of reparations', in S. Buckley-Zistel, T. Koloma Beck, C. Braun et al. (eds.), *Transitional justice theories*, Oxon, Routledge, 2014, pp. 66–84.

²⁰³ Ibid., pp. 70–71.

²⁰⁴ Ibid., p. 74.

²⁰⁵ Ibid., pp. 71–74.

²⁰⁶ Ibid., pp. 74–77.

²⁰⁷ Ibid., p. 74.

²⁰⁸ Ibid., pp. 77–79.

²⁰⁹ Ibid., p. 77.

b) ...to transformative justice

Mainstream transitional justice has been criticized for focusing on interpersonal violence and failing to tackle structural violence, which is defined “a condition in which violence occurs without being precipitated by the direct actions of specific individuals against other specific individuals”²¹⁰. Hence, authors such as Evans remains sceptical of moves to expand transitional justice to cover violations of ESC rights, asserting that transformative justice looks beyond transitional mechanisms and their transitional lens, and thus requires an independent definition.

Hence, according to Evans, while transitional justice is mostly short-term, elite-led and focused on CP rights, the economic component is central in transformative justice, which revolves around socioeconomic rights and inequality, aims at tackling structural violence and overall at stimulating longer term, radical change throughout society. He argues that “[t]he intention of transformative justice is to address the structural, social, and economic issues that are merely overlapping with and peripheral to the existing transitional justice toolkit”²¹¹. He thus lists a series of preconditions for transformative justice, such as the inclusion and genuine participation of affected communities, “a focus on addressing economic conditions; emphasis on long-term societal changes; and attention to the historical and structural roots of contemporary injustices”²¹².

Lambourne similarly suggests going beyond traditional notions of transitional justice by proposing a theory of transformative justice²¹³. Her model rests on four pillars, namely: *accountability/legal justice* (which brings together retributive and restorative justice); *truth* (including knowledge – which corresponds to a rather factual dimension of truth - and acknowledgement – which entails recognition by perpetrators of the harm done and its impact on victims); *socioeconomic justice* (drawing on Mani’s distributive justice

²¹⁰ M. Evans, ‘Structural Violence, Socioeconomic Rights, and Transformative Justice’, *Journal of Human Rights*, vol. 15, no. 1, 2016, pp. 2-3, (accessed 3 April 2021).

²¹¹ Evans, p. 7.

²¹² Ibid., p. 9.

²¹³ W. Lambourne, ‘Transformative justice, reconciliation and peacebuilding’, in S. Buckley-Zistel, T. Koloma Beck, C. Braun et al. (eds.), *Transitional justice theories*, Oxon, Routledge, 2014, pp. 19-39.

concept); and *political justice* (which aims at the transformation of institutions and relationships among citizens to foster representation and participation).

She further adds that transformative justice should be grounded in six principles: firstly, the usage of both symbolic and ritual elements; secondly the adoption of a complex temporality which is prospective, present-oriented and retrospective (dealing with historical injustice). Local ownership and capacity-building represent a third guiding principle. Her conception invites to go beyond the mere rectification of wrongs by highlighting “structural transformation and institutional reform”²¹⁴ as a fourth guiding principle, and emphasizes the relationship between transformation and reconciliation. Lastly, Lambourne’s conception of transformative justice aims at being “holistic, integrated and comprehensive”²¹⁵.

c) Conceptual framework

There is a certain amount of overlap between the forms of justice identified in the respective theoretical frameworks. It is argued here that, to a certain extent, ‘thicker conceptions’ of transitional justice as articulated by Webber, Mani, and Laplante, possess a transformative component, notably through their emphasis on correcting historical socioeconomic inequalities. Conversely, and as noted by Waldorf, Lambourne’s theory intersects to a large extent with Mani’s conception²¹⁶.

Overall, it is argued here that Laplante’s model is the most convincing, as it succeeds in encompassing the various forms of justice in a holistic framework.

- Laplante’s *reparative* form of justice encompasses Webber’s *retrospective* and Mani’s rectificatory forms of justice, as well as Lambourne’s notion of accountability and legal justice.

²¹⁴ Lambourne, p. 33

²¹⁵ Ibid., p. 33.

²¹⁶ Waldorf, p. 180.

- The notion of *restorative, prospective* form of justice that is centred around relations between citizens, re-establishing trust, including through the telling of truth and the acknowledgement of violations.
- Laplante's *civic justice* notion echoes her and the authors' emphasis of on participation. Here, the approach will be to enlarge this notion to encompass Webber's element of adjusting contending legal and political orders: indeed, addressing the challenges of normative diversity in a deliberative, democratic manner in order to let shared norms emerge can reinforce the foundations of the collective, in a fashion similar to that of a social contract. In this way, one could even name this form of justice a *political, participatory*, or even *democratic* form of justice.
- Lastly, the *socioeconomic* understanding of justice articulated by Laplante (as well as Lambourne), which is aimed at correcting socioeconomic inequities; mirrors Aristotle and Mani's distributive understanding of justice as well as Webber's prospective justice form.

Laplante's model is thus flexible yet allows for a more systematic and theory-driven approach while acknowledging the fact that different understandings of justice may be operating at the same time. More than that, it is argued here that her model can not only be applied to analyse reparations during transitional justice processes but can also be used at a larger scale for overall transitional justice processes. Of course, these categories are not clear-cut and mutually exclusive. For instance, elements like Mani's rule of law/legal justice can be attributed to several categories, as restoring the rule of law can both contribute to the realization of reparative justice and accountability, but also to restorative and political justice.

Hence, the following sections will build upon Laplante's model and her notions of reparative, restorative, civic/political and socioeconomic justice.

B. Conceptualizing land rights

As previously stated, this master thesis revolves around ESC rights in transitional justice processes, with a focus on land rights. This section will thus strive to provide a conceptual and definitional framework for land rights.

Firstly, it should be highlighted that a ‘human right to land’ does not exist per se in international human rights law. Nevertheless, land is referred to in Article 11(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (which covers the right to food) and Article 14(2)(g) of the International Convention on the Elimination of All Forms of Discrimination against Women. Several international monitoring mechanisms such as treaty bodies and special procedures mandate holders have further addressed land issues in their recommendations²¹⁷. The UN Committee on Economic, Social and Cultural Rights for instance touched indirectly upon land rights by issuing General Comment No. 7 on the right to adequate housing and forced evictions, in which it emphasized the importance of land tenure²¹⁸. The Committee has also touched upon issues of land ownership in its General Comment No. 20 on non-discrimination, noting that property status can be used as a ground of discrimination (for instance when a person’s land tenure status grounds an unjustified differential treatment)²¹⁹. At the regional level, mechanisms such as the African Commission on Human and Peoples’ Rights or the Inter-American Court of Human Rights have developed a jurisprudence and/or doctrine regarding land rights²²⁰. As States remain the primary duty-bearers regarding the respect, protection and fulfilment of human rights, national authorities and

²¹⁷ United Nations Economic and Social Council, ‘Report of the United Nations High Commissioner for Human Rights’, 11 July 2014, UN Doc. E/2014/86, paras. 12-14.

²¹⁸ United Nations Committee on Economic, Social and Cultural Rights, ‘General comment No. 7. The right to adequate housing (art. 11 (1) of the Covenant): Forced evictions’, 16 May 1997, para. 9

²¹⁹ United Nations Committee on Economic, Social and Cultural Rights, ‘General Comment No. 20. Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)’, 2 July 2009, UN Doc E/C.12/GC/20, para. 25

²²⁰ United Nations Economic and Social Council, para. 13.

laws are primarily tasked with creating a framework regarding the access to, usage, control and transfer of land and property²²¹.

While there is no independent standing ‘right to land’, land rights touch upon and are related to a wide array of CP, ESC, and collective rights. These rights notably include the right to self-determination (Articles 1 of the ICCPR and ICESCR), the right to non-discrimination and equality, the right to life, the right to an adequate standard of living, the right to food, the right to an effective remedy, the right to freedom of expression and to freedom of assembly and association, as well as the right to take part in public affairs. Land rights are also the subject of specific obligations with regards to certain groups of rights holders such as women or indigenous peoples²²². Consequently, while land rights might appear ‘harder’ to access due to their indirect anchoring in human rights treaties, they are nevertheless grounded in a large number of international and regional human rights treaties, as well as in soft law documents such as the Guiding Principles on Business and Human Rights²²³.

Land rights are not only formulated in international and regional human rights treaties; they are also referred to in international humanitarian law, international criminal law, and international refugee law. International humanitarian law also addresses land rights through Article 54 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts and Article 12 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, as both forbid the attack, destruction, removal or rendering useless “objects indispensable to the survival of the civilian population”²²⁴. Obligations related to land rights also apply in situations of occupation, emergencies, and natural disasters²²⁵. In the domain of

²²¹ United Nations Economic and Social Council, paras. 15-20.

²²² Ibid., paras. 21-53

²²³ Ibid., paras. 54-57.

²²⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978), UNTS 17512, Article 54; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted 8 June 1977, entered into force 7 December 1978), UNTS 17513, Article 12.

²²⁵ United Nations Economic and Social Council, paras. 58-61.

international criminal law, the Rome Statute addresses land rights in its provisions on war crimes, crimes against humanity and crimes of genocide. For instance, “when committed as part of a widespread or systematic attack directed against any civilian population”, the “deportation or forcible transfer of population” may qualify as crimes against humanity (Article 7(1))²²⁶. Lastly, the 1951 Convention relating to the Status of Refugees refers to land rights by providing for rights of refugees to residence, property, housing, and freedom of movement²²⁷.

Other international law instruments such as the Food and Agricultural Organization’s Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security also establish obligations for States, such as the need to secure land tenure in a human rights compliant way²²⁸.

On 26 April 2021, the UN Committee on Economic, Social and Cultural Rights published a draft General Comment No. 26 on Land and Economic, Social and Cultural Rights, hinting at the growing willingness to anchor land rights. The draft General Comment emphasizes the importance of access to land “for the realization of several Covenant rights”, including the rights to an adequate standard of living, to health or the protection against non-discrimination²²⁹. The Draft General Comment highlights that, “where necessary, States should “carry out land reforms and other policy reforms [...] to secure efficient and equitable access to land and to strengthen sustainable pro-poor growth”²³⁰. The Draft further states that “[i]n principle, deprivation of land rights, all processes of land restitution and land reform must be accompanied by fair and prompt compensation”, which “fairly balances the rights of the individual and the wider interests

²²⁶ Office of the United Nations High Commissioner for Human Rights, ‘Land and Human Rights. Standards and Applications’, *OHCHR.org* [website], 2015, <https://www.ohchr.org/EN/Issues/LandAndHR/Pages/LandandHumanRightsIndex.aspx>, pp. 87-89, (accessed 3 April 2021); Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), UNTS 38544, Article 7(1).

²²⁷ Office of the United Nations High Commissioner for Human Rights, 2015, p. 4.

²²⁸ Office of the United Nations High Commissioner for Human Rights, 2015, pp. 85-87.

²²⁹ R. Uprimny and M. Windfuhr, ‘Committee on Economic, Social and Cultural Rights: General comment No. 26 (2021) on land and economic, social and cultural rights - Draft prepared by the Rapporteurs, Rodrigo Uprimny and Michael Windfuhr’, *United Nations Human Rights – Office of the High Commissioner* [website], 3 May 2021, <https://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCR-draft-GC-land.aspx>, para. 1 (accessed 26 July 2021).

²³⁰ *Ibid.*, para. 34.

of society”. It adds that, while “[i]n general, the compensation should be reasonably related to the market value of the acquired property”, there are “certain circumstances” in which “public interest may require that less than market value compensation or, exceptionally, none at all”²³¹. Lastly, it is worth mentioning that the General Comment’s Rapporteurs highlight the fact that land conflicts may act as root causes or triggers for conflicts and note the central importance of resolving land disputes and conflicts in order to foster peace²³².

Before turning to the empirical inquiry, last terminological clarifications pertaining to land are required. When defining land, it should be kept in mind that land can be differentiated along its uses. There are three categories of land use, namely the use of land for collective purposes (residential, traditional/religious/cultural, institutional, service-provision, recreational or environmental land use), the use of land for productive purposes (commercial, industrial, or agricultural land) and lastly the use of land for individual/private purposes (for property and residence purposes or for financial use)²³³.

Land tenure is defined as “the relationship, whether legally or customarily defined, among individuals, groups of individuals or peoples with respect to land. In broad terms, land tenure systems determine who can use what resources for how long and under what conditions”, noting that land tenure can encompass not only formal/ownership under statutory law, but also rental, occupation, collective tenure, indigenous tenure, seasonal use or use of land for gathering resources²³⁴.

Lastly, “[a]ccess to and use of land represent the opportunities for temporary or permanent use and/or occupation of land for housing, productive activities, use of land-based resources, or use of land for the enjoyment of cultural, religious and other activities.

²³¹ Uprimny and Windfuhr, para. 34.

²³² Ibid., paras. 45-48.

²³³ Office of the United Nations High Commissioner for Human Rights, 2015, p. 6.

²³⁴ Ibid., pp. 6-7.

Control over land refers to the ability to effectively decide how the land should be used, by whom, and how the benefits generated should be allocated”²³⁵.

V. CASE STUDY: SOUTH AFRICA

As previously stated, the following thesis is based on a case study revolving around land rights in South Africa. The long story of dispossession of land rights from the majority, as well as the transitional justice process make South Africa a critical case for our inquiry.

The transitional justice process and the question of land rights in South Africa are set against the backdrop of human rights violations unfolding firstly in the context of colonization and subsequently under the oppressive, authoritarian regime of the apartheid. While the apartheid regime was anchored in law in 1948, the history of oppression, structural violence and human rights violations predates its formal establishment. In a sense, this complicates efforts to disentangle violations and socioeconomic inequities inherited from the apartheid from those inherited from the colonial time²³⁶.

A. Human rights violations: from the colonization to the apartheid

The first European settlers established themselves in South Africa in 1652²³⁷, and what was then called the Cape colony soon evolved to be an economic hub. The discovery of diamonds in 1867 and later on gold reinforced European competition for the riches of South Africa, as well as the enslavement and exploitation of local African communities.

²³⁵ Office of the United Nations High Commissioner for Human Rights, 2015, p. 7.

²³⁶ M. Hall, J. R. D. Cobbing, D. F. Gordon, et al., ‘South Africa’, *Encyclopedia Britannica* [website], 2021, <https://www.britannica.com/place/South-Africa>, (accessed 26 July 2021).

²³⁷ H. van der Merwe and G. Lamb, ‘Transitional Justice and DDR: The Case of South Africa’, *International Center for Transitional Justice* [website], 2009, <https://www.ictj.org/sites/default/files/ICTJ-DDR-South-Africa-CaseStudy-2009-English.pdf>, p. 5, (accessed 26 July 2021).

While relations between European settlers and the respective African states alternated between conflict and cooperation, centuries of conflicts and colonial aggression by European settlers as well as conflicts between local African states gradually led to the dispossession of most of the African states' land and the decline of African states between the 1860s and 1900. The Union of South Africa was founded in 1910 and consecrated the further disenfranchisement of the Black population through racial segregation policies²³⁸.

The 1948 elections marked a turning point with the victory of the National Party, which then entrenched the apartheid regime into law. While non-whites were progressively deprived of political representation and their citizenship, several pieces of legislation targeted CP rights²³⁹. The South African society became politically, economically, socially, and spatially segregated. As underlined by Maregere, violence was pervasive in the apartheid regime²⁴⁰, and violations perpetrated by the State included torture and ill-treatment, extra-judicial killings, sexual and gender-based violence, abduction, and the disproportionate use of force²⁴¹. The commission of human rights violations by non-State actors such as the IFP and to a lesser extent the ANC should further be noted²⁴². Other noteworthy aspects include the growing interlinkages between criminal networks on the one hand and the state and liberation forces on the other hand²⁴³, as well as the regional consequences of the apartheid and resistance thereto²⁴⁴, which led the TRC to conclude that the number of people victims of violations outside of South Africa had been much higher than within the country itself²⁴⁵.

²³⁸ Hall, Cobbing, Gordon et al.; H. M. Feinberg, 'Dispossession, Black South African Land Ownership and Restitution in Historical Perspective, 1913–1948 and Beyond', in A. Pallotti and U. Engel (eds.), *South Africa after apartheid. Policies and challenges of the democratic transition*, Leiden, Boston, Brill, 2016, p. 87.

²³⁹ Maregere, pp. 77-80; Hall, Cobbing, Gordon et al.

²⁴⁰ Maregere, p. 79.

²⁴¹ van der Merwe and Lamb, pp. 6; Hall, Cobbing, Gordon et al.

²⁴² van der Merwe and Lamb, p. 6.

²⁴³ Ibid., pp. 6-7.

²⁴⁴ Hall, Cobbing, Gordon et al.; Maregere, p. 79.

²⁴⁵ van der Merwe and Lamb, p. 5; Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report. Volume 2*. Pretoria, 1998b, <https://www.justice.gov.za/trc/report/finalreport/Volume%202.pdf>, p. 43 (accessed 26 July 2021); Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report. Volume 5*, Pretoria, 1998e, <https://www.justice.gov.za/trc/report/finalreport/Volume5.pdf>, p. 257 (accessed 26 July 2021).

In the context of these violations, land constituted a central issue in the struggle for power. As colonizers took over the power, land policies increasingly marginalized the Black population. The Natives Land Act of 1913 infamously restricted access to land for the Black population to ‘reserves’ covering a mere 7.3% (subsequently 13%) of the territory. Further legal provisions such as the Group Areas Act (1950) infringed upon the Black population’s freedom of movement through “influx control” and pass laws. They also reinforced spatial segregation, leading to the forced removal of the non-white population from areas designated for the white population²⁴⁶. Hence, between the 1960s and early 1980s, more than 3.5 million Blacks were forcibly removed from towns and white rural areas (so-called “black spots”²⁴⁷) and pushed to reserves²⁴⁸. While most arable land and a large part of mineral deposits belonged to the white population, the black majority was confined to overpopulated territories (known as homelands/Bantustans and administered by traditional leaders co-opted by the apartheid government) with poor quality land where economic conditions steadily deteriorated. Tenants living on white-owned farms and workers migrating to find (low-paid) jobs in cities fared no better²⁴⁹.

B. The “elite-driven”²⁵⁰ transitional justice process in South Africa

Faced with economic recession, international isolation, and the inability to suppress dissent, the ruling National Party gradually changed its stance, conducting negotiations with the ANC from 1990 onwards²⁵¹. In spite of positions initially at odd²⁵² and a volatile security background, an agreement was reached in 1993 on an interim constitution enfranchising all citizens and consecrating a long list of rights. In the country’s first free election in 1994, the ANC won by a large majority at the national and provincial level.

²⁴⁶ Hall, Cobbing, Gordon et al.; Maregere, pp. 78-79; Feinberg, pp. 87-90.

²⁴⁷ Feinberg, pp. 87-88.

²⁴⁸ Hall, Cobbing, Gordon et al.

²⁴⁹ Hall, Cobbing, Gordon et al.

²⁵⁰ Maregere, p. 81.

²⁵¹ Hall, Cobbing, Gordon et al.; Maregere, pp. 81-83.

²⁵² D. Powell, ‘The Role of Constitution Making and Institution Building in Furthering Peace, Justice and Development: South Africa's Democratic Transition’, *International Journal of Transitional Justice*, vol. 4, no. 2, 2010, pp. 239–240.

Under President Nelson Mandela, the government faced the daunting task of improving the socioeconomic condition of the non-white (and especially the Black) population, while also addressing conflicts between Zulu factions and reforming the state apparatus²⁵³. The new Constitution, signed in 1996, entails one of the most substantial Bill of Rights worldwide with a comprehensive human rights architecture. Importantly, Section 38 affirms the justiciability of all rights in the Bill, including ESC rights²⁵⁴.

As this thesis revolves around normative conceptions of justice in South Africa, it is crucial to highlight the notion of *ubuntu* which emphasizes the “interconnectedness of an individual to the wider community”²⁵⁵. In this conception, violent conflict and oppression endanger not only the well-being of the concerned individuals, but also of the community as a whole, meaning that conflict-resolution is essential and often predicated on consensus-building, multiparty processes and a communitarian approach. Justice in the sense of *ubuntu* has the central role of “restoring wholeness between individual and community [...], keeping social order and indeed harmony”²⁵⁶.

With regards to transitional justice, the most notable measure taken was the establishment of the Truth and Reconciliation Commission in 1995²⁵⁷, chaired by Archbishop Desmond Tutu²⁵⁸. The TRC was mandated with examining

“politically-motivated human rights abuses committed between 21 March 1960 (the day of the Sharpeville Massacre) and the 10 May 1994 (the day Nelson Mandela took oath of office as the first democratically elected President of the Republic of South Africa”²⁵⁹

as well as fostering national truth and reconciliation. Within the TRC, the Human Rights Violations Committee (HRVC) was tasked with investigating human rights violations; the Reparation and Rehabilitation Committee (RRC) elaborated proposals to provide for reparations and the rehabilitation of victims who applied for it; while the Amnesty Committee was responsible for the conditional, ‘amnesty-for-truth’ process,

²⁵³ Hall, Cobbing, Gordon et al.

²⁵⁴ Office of the United Nations High Commissioner for Human Rights, 2014, p. 48

²⁵⁵ Maregere, p. 62.

²⁵⁶ Maregere, p. 64.

²⁵⁷ P. van Zyl, ‘Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission’, *Journal of International Affairs*, vol. 52, no. 2, 1999, pp. 653-654, (accessed 26 July 2021).

²⁵⁸ Hall, Cobbing, Gordon et al.

²⁵⁹ Maregere, p. 85.

wherein perpetrators who agreed to fully confess to violations of human rights (that qualified as an act associated with a political objective) could apply for amnesty²⁶⁰. The Commission was supported by an investigative unit and a witness protection program²⁶¹.

The Commission released a first report in October 1998 and a final report in 2003. It “conducted 140 hearings across 61 towns and some 22,000 victim statements taken covering 37,000 violations”²⁶². Over 7,000 applications for amnesty were received²⁶³, of which 1,500 were granted while the rest were pending further legal proceedings²⁶⁴. In its final report, the TRC affirmed that “[n]o major role-player emerge[d] unscathed although, [...], a distinction must be made between those who fought for and those who fought against apartheid”²⁶⁵. The Commission also held institutional hearings to investigate the role of institutions such as the business and labour sector. With regards to land issues, the TRC recommended an audit of “all unused and under-utilised land, with a view to making this available to landless people, included land expropriated”²⁶⁶. Interestingly, and probably because of its limited mandate, the Commission reiterated that it had been tasked with addressing “the moral, political and legal consequences of the apartheid years”, while other institutions had the responsibility to address its socioeconomic implications²⁶⁷.

The TRC was not uncriticized, be it on a political level (e.g., sentiments that the Commission was too “conciliatory”²⁶⁸ or targeted certain actors²⁶⁹) or an operational level (e.g., ad hoc, and formalistic engagement with civil society²⁷⁰, “fairly superficial”

²⁶⁰ A. Pradier, M. Rubin, and H. van der Merwe, ‘Between transitional justice and politics: Reparations in South Africa’, *South African Journal of International Affairs*, vol. 25, no. 3, 2018, pp. 306–307; van Zyl, pp. 653–656, (accessed 26 July 2021); International Center for Transitional Justice, ‘South Africa’, *International Center for Transitional Justice* [website], n.d., <https://www.ictj.org/our-work/regions-and-countries/south-africa>, (accessed 26 July 2021).

²⁶¹ van Zyl, p. 656.

²⁶² Maregere, p. 86.

²⁶³ Ibid., p. 86.

²⁶⁴ Hall, Cobbing, Gordon et al.; see also other numbers from van Zyl, pp. 657–658.

²⁶⁵ Truth and Reconciliation Commission, 1998e, p. 257.

²⁶⁶ Ibid., p. 319.

²⁶⁷ Ibid., p. 258.

²⁶⁸ Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report. Volume 1*, Pretoria, 1998a, <https://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf>, p. 9 (accessed 26 July 2021).

²⁶⁹ Maregere, p. 87.

²⁷⁰ van der Merwe and Lamb, pp. 19–20; Maregere, pp. 89–90.

investigations²⁷¹). On a legal level, some authors have criticized the TRC's mandate for being overly "ambitious"²⁷² while others have denounced the TRC's mandate as too narrow. Nagy notes that dimensions of poverty and racism were relegated to the background in a largely "depoliticised chronicle"²⁷³ that failed to account for the systemic nature of apartheid as a crime against humanity²⁷⁴. According to Roberts, transitional justice 'colonized' South Africa's TRC by pushing the ANC's radical anti-colonial agenda of social transformation to the margins and replacing it by a depoliticized, liberal-globalist approach²⁷⁵. This is further echoed by Bowsher's argument that the TRC, through its depoliticized narrative centring around physical violence against individuals, contributed to a "de-collectivisation" process, wherein subjects "abandon[ed] collective understandings of injury, justice, and political organization and to identify with the passive and individualized suffering". This process was "necessary to the broader imposition of neoliberalism in South Africa"²⁷⁶.

The TRC was deemed the reflection of "elitist, top-down political machinations" and criticized for not being responsive to victims' and survivors' needs and expectations²⁷⁷. Criticism was directed at the narrow definition of victims under the TRC Act, the short length of the TRC's proceedings as well as the lack of awareness by some victims/survivors that led only a fraction of them to submit statements²⁷⁸. While the TRC's RRC recommended a comprehensive programme of reparations, the recommendations were implemented with delay and in a partial manner, leading Pradier Rubin and van der Merwe to state that the reparations programme in South Africa was instrumentalised for political gain and deprioritised²⁷⁹. Most criticism revolved around the slow-paced amnesty and prosecutions process²⁸⁰. The fact that people who had not

²⁷¹ van der Merwe and Lamb, p. 19; see also Truth and Reconciliation Commission, 1998a, p. 201-243 on the destruction of evidence.

²⁷² Maregere, p. 90.

²⁷³ Nagy, p. 284.

²⁷⁴ See also Powell, pp. 237-238; Maregere, p. 92.

²⁷⁵ R. S. Roberts, 'How 'Transitional Justice' Colonized South Africa's TRC', *Modern Languages Open*, vol. 1, no. 34, 2020, pp. 1-15.

²⁷⁶ Bowsher, 2020, p. 43.

²⁷⁷ Maregere, p. 84.

²⁷⁸ Pradier, Rubin, van der Merwe, p. 308; Maregere.

²⁷⁹ Pradier, Rubin, van der Merwe, p. 316.

²⁸⁰ Maregere, p. 93; van der Merwe and Lamb, pp. 20-21.

applied for amnesty were not prosecuted despite promises to do so was interpreted as breaches of moral and political contracts²⁸¹. The pardons process under President Mbeki²⁸² as well as planned “[a]mendments to the National Prosecuting Authority’s Prosecution Policy” were heavily criticized by victims and survivors’ groups and later on declared unconstitutional²⁸³. Additionally, the Commission’s view that reconciliation could take place after decades of brutal oppression was deemed “optimistic and excessive”²⁸⁴.

The legacy of the TRC is still widely discussed, notably on a socioeconomic level. Up until now, South Africa is characterized by large socioeconomic discrepancies (with a consumption expenditure Gini coefficient of 0.63²⁸⁵), in addition to tense racial relations and continued high levels of violence²⁸⁶. In interviews with survivors and victims of the apartheid, Maregere noted the high expectations and subsequent disillusionment of respondents²⁸⁷. These pitfalls and shortcomings have fragilized²⁸⁸ the transitional justice process and led several authors to describe it as “unfinished”²⁸⁹.

Nevertheless, the Commission has also been praised for unearthing information about a range of violations committed by both the apartheid regime and members of liberation movements²⁹⁰. Its public proceedings²⁹¹, the involvement of civil society organizations, the TRC’s acknowledgement of apartheid as a crime against humanity and its commitment to offer victims/survivors the possibility to directly participate in “the construction of a unifying national narrative” was lauded²⁹². Paul van Zyl argues that the

²⁸¹ Gready, p. 4.

²⁸² International Center for Transitional Justice, n.d.

²⁸³ van der Merwe and Lamb, p. 21.

²⁸⁴ Maregere, p. 93.

²⁸⁵ World Bank.

²⁸⁶ Maregere, pp. 95-97.

²⁸⁷ Ibid., pp. 203-206.

²⁸⁸ van der Merwe and Lamb, p. 24.

²⁸⁹ Maregere; A. Pallotti, and U. Engel, ‘Introduction’, in A. Pallotti and U. Engel (eds.), *South Africa after apartheid. Policies and challenges of the democratic transition*, Leiden, Boston, Brill, 2016(b), p. 1.

²⁹⁰ Hall, Cobbing, Gordon et al.

²⁹¹ A. K. Krüger and S. Scheuzger, ‘Globale Verbreitung von Wahrheitskommissionen als Instrument der Transitional Justice’, in A. Mihr, G. Pickel, and S. Pickel (eds.), *Handbuch Transitional Justice. Aufarbeitung von Unrecht - hin zur Rechtsstaatlichkeit und Demokratie*, Wiesbaden, Springer VS (Sozialwissenschaften), 2018, pp. 140-141.

²⁹² Maregere, p. 88.

TRC represented a “middle path between an uncompromising insistence on prosecution on the one hand, and a defeatist acceptance of amnesty and impunity on the other”²⁹³.

C. Land rights: the bone of contention

As previously stated, estimates suggest that, as of 1994, around 87% of land in South Africa was owned by the white minority²⁹⁴, more specifically 60,000 white landowners representing themselves less than 1% of the country’s population²⁹⁵. In the light of the long history of dispossession of the non-white (especially the Black) population, the government has described land reform as a “moral, social and economic imperative”²⁹⁶.

a) Constitutional framework

The legal framework pertaining to land rights in South Africa should be underlined. Within the Bill of Rights of 1996 Constitution, Section 25 is devoted to the right to property. On the one hand, it protects existing property rights by prohibiting arbitrary deprivation of property²⁹⁷. On the other hand, it allows expropriation of property “for a public purpose or in the public interest”²⁹⁸ (which includes land reform²⁹⁹) subject to due process as well as just and equitable compensation³⁰⁰. The Section further lays out the ground principles of land reform and land redistribution, notably by referring to

²⁹³ van Zyl, p. 648.

²⁹⁴ Evans, p. 10; Mamdani; International Crisis Group, p. xx.

²⁹⁵ M. M. Stickler, ‘Land redistribution in South Africa’, *Gates Open Research* [website], 2012, <https://gatesopenresearch.org/documents/3-841>, p. 1 (accessed 26 July 2021).

²⁹⁶ South African Government, ‘Land reform’, *South African Government* [website], n.d., <https://www.gov.za/issues/land-reform>, (accessed 26 July 2021).

²⁹⁷ Constitution of the Republic of South Africa 1996, s25(1).

²⁹⁸ Ibid., s25(2)(a).

²⁹⁹ Ibid., s25(4)(a).

³⁰⁰ Ibid., s25(2)(b) and s25(3).

restitution for people “dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices”³⁰¹ or to security of tenure³⁰².

b) Measures taken and policies pursued

As the ANC came into power in 1994, one its main goals was to correct the skewed land distribution; Measures taken with regards to land issues can be classified under three broad themes: land restitution, land redistribution and land tenure reform³⁰³.

The first pillar, restitution, was primarily based on the Restitution of Land Rights Act of 1994 and recognizes the right of the restitution or compensation of people who had been dispossessed of their land as a result of racial discrimination between 19 June 1913 and the cut-off date for receiving claims³⁰⁴. A Commission on Restitution of Land Rights (CRLR) was tasked with receiving and investigating claims and advising the Land Claims Court (LCC) which adjudicated the claims and issued orders of restitution or compensation. Applicants for land restitution initially were able to lodge claims from the establishment of the CRLR in 1995 until the end of December 1998³⁰⁵.

The second pillar is redistribution. A first objective aimed at transferring 30% of white-owned agricultural land to black owners by 1999. This objective was however pushed to 2014³⁰⁶ and 2025³⁰⁷ later on. While no comprehensive legislation was passed on the subject, the 1997 White Paper on South African Land Policy laid the foundations of the land redistribution program. One of them was the market-based principle of willing buyer, willing seller³⁰⁸ which used “economic incentives to encourage existing owners to sell their land and assist potential beneficiaries in acquiring it”³⁰⁹. A series of programmes

³⁰¹ Constitution of the Republic of South Africa 1996, s25(7).

³⁰² Ibid., s25(6).

³⁰³ South African Government; M. Zamponi, ‘The South African Land Reform since 1994: Policies, Debates, Achievements’, in A. Pallotti and U. Engel (eds.), *South Africa after apartheid. Policies and challenges of the democratic transition*, Leiden, Boston, Brill, 2016, p. 107.

³⁰⁴ South African Government; Zamponi, pp. 107-109.

³⁰⁵ South African Government; Zamponi, p. 108.

³⁰⁶ Stickler, p. 1.

³⁰⁷ Zamponi, p. 111-112.

³⁰⁸ Stickler, p. 2; Zamponi, p. 110.

³⁰⁹ Stickler, p. 2.

was implemented³¹⁰, firstly the Settlement Land Acquisition Grant (SLAG) (1995 to 1999) which enabled poor black people to apply for a grant of 16,000 rand in order to buy land for agriculture or housing. The SLAG program was replaced in 2001 by the Land Redistribution for Agricultural Development (LRAD) program, which redirected its focus from poor households in rural areas to the promotion “of a class of full-time, black commercial farmers”³¹¹. Changes in LRAD notably included the removal of the income ceiling placed on SLAG grants, a sliding scale allowing beneficiaries to receive larger grants, and easier access to loans through the Land Bank. The Proactive Land Acquisition Strategy (PLAS) succeeded the LRAD in 2005-2006. It replaced the direct transaction between the seller and beneficiary by allowing the State to directly acquire land and then making it available “on a leasehold basis to selected beneficiaries”³¹². Other programmes included the Recapitalization and Development Programme (RADP)³¹³ and the Land and Agrarian Reform Programme (LARP)³¹⁴.

Land tenure reform has been the most complex and “the least developed of the three pillars”³¹⁵. While pieces of legislation such as the Land Reform (Labour Tenants) Act of 1996 and the 1997 Extension of Security of Tenure Act³¹⁶ were passed, a draft Communal Land Rights Act failed³¹⁷. Tenure reform pursues objectives of securing land tenure for people living in former homelands and for farm dwellers living on commercial farms³¹⁸.

c) Outcomes and pitfalls³¹⁹

Up until today, authors deplored “skewed ownership and distribution of land”³²⁰. According to a 2017 audit, 43% of rural land in South Africa was owned by companies

³¹⁰ Stickler, pp. 2-6.

³¹¹ Ibid., p. 4.

³¹² Ibid., p. 6.

³¹³ South African Government.

³¹⁴ Zamponi, p. 116.

³¹⁵ Ibid., p. 113.

³¹⁶ South African Government.

³¹⁷ Zamponi, pp. 113-116.

³¹⁸ Ibid., p. 113.

³¹⁹ Specific achievements and shortcomings of the land reform in South Africa will be elaborated further upon in section VI, which revolves around respondents’ discussion of the land reform.

³²⁰ Maregere, p. 95.

of trusts, while 39% of the land was owned by individuals, an overwhelming part of which (72%) were white³²¹. Figures vary, but overall hint at the disproportionately low land ownership by the black majority³²².

Land reform has failed to structurally change agrarian economy which remains based on capital- and skills-intensive commercial business farming³²³. Only 2.33 million South African households were engaged in agriculture as of 2016, a figure that has been declining³²⁴. Low subsidies for farmers and deregulation have reinforced the concentration of land in the hands of multinational agribusinesses and large-scale commercial farmers³²⁵. Critics have pointed out that primary beneficiaries of land reform efforts turned out to be a small group of black people with a certain capital, rather than the poorest/most marginalized groups. As a result, land reform programmes have fallen short from remedying structural inequalities³²⁶. Thefts of stocks and rural violence³²⁷ highlight the challenges of land reform. It should also be noted that, while the debate is often framed with regards to land issues in rural areas, land reform is also relevant with regards to urban areas, where rapid levels of urbanization reinforce the land pressure³²⁸.

Overall, the question of land rights and land reform ought to be contextualised in the broader debate on neoliberalism in South Africa. The ANC's traditional anchoring in the left side of the political spectrum has contrasted with the government's implementation of neoliberal approaches since coming to power, such as the 1996 Growth, Employment and Redistribution (GEAR) macroeconomic strategy, which revolved around "fiscal discipline, privatizations and market deregulation"³²⁹. This evolution has been appraised very critically, for instance by Mwipikeni who notes the

³²¹ South African Government.

³²² M. Cohen, 'Why Land Seizure is Back in the News in South Africa', Bloomberg, 21 December 2017, <https://www.bloomberg.com/news/articles/2017-12-21/why-land-seizure-is-back-in-news-in-south-africa-quicktake-q-a>, (accessed 26 July 2021).

³²³ Zamponi, p. 118.

³²⁴ South African Government; International Crisis Group, pp. 15-16.

³²⁵ International Crisis Group, p. 16.

³²⁶ Evans, pp. 10-13; Powell, pp. 245-247.

³²⁷ International Crisis Group, p. 16.

³²⁸ Ibid., p. 17.

³²⁹ Bowsher, 2020, p. 48.

contrast between the recognition of ESC rights by “[t]he juridical constitutional order of the state” and the fact that “the neoliberal socio-economic structure annuls such rights”³³⁰.

d) Latest developments

More and more calls have asked for abandoning the market-based approach³³¹. As noted in the introduction, the 2017 ANC resolution on passing legislation to allow expropriation without compensation as a means to speed land reform³³² has been widely controversial. Under the 1996 Constitution, Section 25 on the right to property prohibits arbitrary deprivation of property, except if permitted by law, “for a public purpose or in the public interest” and “subject to compensation”³³³ which should be “just and equitable”³³⁴. The section explicitly states that “the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources”³³⁵.

According to Enoch Godongwana, chair of the ANC’s economic transformation committee, changing the constitution in order to allow for expropriation without compensation should nevertheless be made with due consideration to sustainability, so as to prevent a negative impact on agricultural production, food security and other economic sectors. The move was framed as an endeavour to accelerate land reform and thereby foster peace and justice, as illustrated by Presidency Minister Jeff Radebe, who stated that “Without addressing this historic injustice, we will never have peace in the country”³³⁶. Such policy discussions are not new, as an Expropriation Bill had already been tabled in 2008, but not passed³³⁷.

³³⁰ P. Mwipikeni, ‘Ubuntu, Rights, and Neoliberalism in South Africa’, *International Journal of African Renaissance Studies - Multi-, Inter- and Transdisciplinarity*, vol. 14, no. 2, 2019, p. 82.

³³¹ Stickler, p. 7.

³³² Cohen.

³³³ Constitution of the Republic of South Africa 1996, s25(2).

³³⁴ Ibid., s25(3).

³³⁵ Ibid., s25(4).

³³⁶ Omarjee.

³³⁷ L-A. Daniels and S. Mkhwanazi, ‘Explained: What you need to know about SA’s Expropriation Bill’, IOL, 2 March 2021, <https://www.iol.co.za/news/politics/explained-what-you-need-to-know-about-sas-expropriation-bill-568f535c-1130-4d08-b122-ec4d31b49c12>, (accessed 5 April 2021).

The initiative has stirred controversy within and outside of South Africa. Local commentators, as well as opposition parties like the United Democratic Movement have accused the ANC of trying to undercut electoral challenges posed the Economic Freedom Fighters party³³⁸. Business interest group Agri SA has criticized the suggested policy, arguing that this would “threaten economic growth, investor confidence” and “heighten uncertainty”. Similar, Business Unity South Africa has described the resolution as sending “a wrong message to investors and rating agencies”³³⁹. Overall, the business community has heavily criticized the suggested legislation, arguing that it presented “risks to investments in lands and property” for foreign investors³⁴⁰. Business actors have stated that passing such a bill would risk triggering a banking crisis, threaten food security, fail to resolve land reform’s shortcomings, and violate property rights³⁴¹. Additionally, risks of “political favouritism, cronyism, complex cumbersome democracy and the whims of current and future political leaders”, triggered by “extreme state control” would allegedly hamper economic activities and thereby reduce the living standard of all citizens³⁴². Lastly, fears of far-reaching, “chaotic and violent seizure of white farmers’ land” as seen in Zimbabwe³⁴³ and other African countries³⁴⁴ have been expressed. This concern has also been echoed by opposition party Democratic Alliance, which has criticized the suggest policy as not “economically viable”³⁴⁵. In the context of

³³⁸ G. Davis, ‘ANC to amend constitution to allow for land expropriation without compensation’, *Eyewitness News* [website], 21 December 2017, <https://ewn.co.za/2017/12/21/anc-to-amend-constitution-to-allow-for-land-expropriation-without-compensation>, (accessed 5 April 2021); L. Isaacs, ‘ANC’s decision on land expropriation without compensation a radical move’, *Eyewitness News* [website], 21 December 2021, <https://ewn.co.za/2017/12/21/anc-s-decision-on-land-expropriation-without-compensation-a-radical-move>, (accessed 5 April 2021).

³³⁹ Isaacs.

³⁴⁰ R. G. Volterra, P. Flint and G. Sharma, ‘South Africa: South Africa’s Expropriation Bill, 2020’, *Mondaq* [website], 18 November 2020, <https://www.mondaq.com/southafrica/constitutional-administrative-law/1006880/south-africa39s-expropriation-bill-2020>, (accessed 5 April 2021).

³⁴¹ J. Neves, ‘Changing Constitution to allow land expropriation is ‘dangerous’ in face of Covid-19 – Anthea Jeffery’, *biznews.com* [website], 01 April 2021, <https://www.biznews.com/thought-leaders/2021/04/01/land-expropriation-amendment-bill>, (accessed 5 April 2021).

³⁴² J. Felix, ‘Parliament hears the pros and cons of land expropriation without compensation’, *news24*, 24 March 2021, <https://www.news24.com/news24/southafrica/news/parliament-hears-the-pros-and-cons-of-land-expropriation-without-compensation-20210324>, (accessed 5 April 2021).

³⁴³ Pigou.

³⁴⁴ J. Cameron, ‘Every SA should be VERY worried about land expropriation: Insights from land grabs elsewhere in Africa – Dawn Ridler’, *biznews.com* [website], 9 February 2021, <https://www.biznews.com/thought-leaders/2021/02/09/land-expropriation>, (accessed 5 April 2021).

³⁴⁵ Isaacs.

the COVID-19 pandemic, concerns about a reduction in foreign investment have been prominent, as it has been argued this could “stall any prospect of economic recover”³⁴⁶. The controversy even took an international dimension³⁴⁷ in August 2018, as Fox News anchor Tucker Carlson (wrongly) claimed that South Africa had already amended the constitution to enable land expropriation without compensation and was singling out white farmers. This led then President Trump to tweet that he had instructed his Secretary of State “to closely study the South Africa land and farm seizures and expropriations and the large scale killing of farmers”³⁴⁸.

Nevertheless, the initiative has moved forward and in 2018, the Parliament adopted a resolution, initiated by the EFF and supported by the ANC, Inkatha Freedom Party (IFP) and National Freedom Party, establishing an ad hoc Constitutional Review Committee tasked with reviewing and amending Section 25 of the Constitution in order to allow for expropriation without compensation³⁴⁹. In July 2019, the Advisory Panel on Land Reform and Agriculture issued a report regarding the suggested constitutional modification as well as several recommendations on land reform. The panel backed the idea of amending the Constitution in order to enable and clarify expropriation without compensation, yet under specific circumstances (for instance, such an expropriation could be conducted in the case of abandoned land). The Panel further stated that the 1975 Expropriation Act was unconstitutional, thereby advising the Parliament to repeal the Act and to draft a new expropriation legislation³⁵⁰. On 9 October 2020, discussions surrounding the draft Land

³⁴⁶ Neves.

³⁴⁷ Pigou.

³⁴⁸ D. J. Trump, ‘I have asked Secretary of State @SecPompeo to closely study the South Africa land and farm seizures and expropriations and the large scale killing of farmers. “South African Government is now seizing land from white farmers.” @TuckerCarlson @FoxNews’, 22 August 2018 - 10:28:45 PM EST, Tweet, <https://www.thetrumparchive.com/?searchbox=%22white+farmers%22>, (accessed 5 April 2021).

³⁴⁹ M. Mothapo, ‘NATIONAL ASSEMBLY GIVES THE CONSTITUTION REVIEW COMMITTEE MANDATE TO REVIEW SECTION 25 OF THE CONSTITUTION’, *Parliament of the Republic of South Africa* [website], 27 February 2018, <https://www.parliament.gov.za/press-releases/national-assembly-gives-constitution-review-committee-mandate-review-section-25-constitution>, (accessed 5 April 2021); R. Pather, ‘First step to land expropriation without compensation’, *Mail & Guardian*, 27 February 2018, <https://mg.co.za/article/2018-02-27-historic-vote-land-expropriation-without-compensation-passed/>, (accessed 5 April 2021).

³⁵⁰ Reuters Staff, ‘South African land reform panel recommends seizures without pay in certain circumstances’, Reuters, 28 July 2019, <https://www.reuters.com/article/us-safrica-land/south-african-land-reform-panel-recommends-seizures-without-pay-in-certain-circumstances-idUSKCN1UN0F9>, (accessed 5 April 2021); South African Government News Agency, ‘Panel releases land reform report’, *SAnews.gov.za*

Expropriation Bill (B3-2020³⁵¹), which ought to replace the 1975 Expropriation Act, commenced. In his 2021 address to the nation, President Ramaphosa stated that the Expropriation Bill ought to be passed that same year³⁵². Discussions of the Expropriation Bill were still ongoing within the Parliament's Public Works and Infrastructure Committee in late March 2021³⁵³. Parallel to this process, the Ad Hoc Constitutional Review Committee has also been proceeding with its work³⁵⁴. Debates have been lively³⁵⁵, and concerns have been expressed about the fact that the Expropriation Bill may be finalized before the Constitution is amended³⁵⁶, which would render it unconstitutional. Additionally, both parliamentary committees have been criticized for their alleged failure to facilitate public participation, notably by only addressing a small amount of the tens of thousands of submissions made by citizens and organizations during the public consultation³⁵⁷. As of early July 2021, the Ad Hoc Committee had reached a stalemate, as the EFF predicated its vote in favour of the amendment on the condition that the state be made custodian of all land and that the 1913 Natives Land be removed as a cut-off date for land claims. However, this demand was not acceded to by the ANC, which

[website], 28 July 2019, <https://www.sanews.gov.za/south-africa/panel-releases-land-reform-report>, (accessed 5 April 2021); Expert Advisory Panel on Land Reform and Agriculture, *FINAL REPORT OF THE PRESIDENTIAL ADVISORY PANEL ON LAND REFORM AND AGRICULTURE*, Pretoria, Republic of South Africa, 4 May 2019, https://www.gov.za/sites/default/files/gcis_document/201907/panelreportlandreform_0.pdf, (accessed 5 April 2021).

³⁵¹ B. Mabasa and T. Karberg, 'What you might like to know about the Expropriation Bill', *Moneyweb* [website], 29 March 2021, <https://www.moneyweb.co.za/news/south-africa/what-you-might-like-to-know-about-the-expropriation-bill/>, (accessed 5 April 2021).

³⁵² P. Vecchiatto, 'South Africa's ANC Sees Land-Expropriation Clause This Year', *Bloomberg*, 8 January 2021, <https://www.bloomberg.com/news/articles/2021-01-08/south-africa-s-anc-sees-land-expropriation-amendment-this-year-kjompv2>, (accessed 5 April 2021).

³⁵³ Felix.

³⁵⁴ J. Gerber, 'Ad hoc committee on Section 25 amendment concerned about parallel Expropriation Bill process', *news24*, 25 March 2021, <https://www.news24.com/news24/southafrica/news/ad-hoc-committee-on-section-25-amendment-concerned-about-parallel-expropriation-bill-process-20210325>, (accessed 5 April 2021).

³⁵⁵ M. Maqhina, 'Rocky start to land reform hearings', *IOL*, 27 March 2021, <https://www.iol.co.za/news/politics/rocky-start-to-land-reform-hearings-79cbe452-6ff6-4325-acae-b362dc00fa7e>, (accessed 5 April 2021).

³⁵⁶ Gerber.

³⁵⁷ M. Nathan, 'Land Expropriation: Public opinion ignored – committees breach constitutional obligations', *biznews.com* [website], 18 March 2021, <https://www.biznews.com/thought-leaders/2021/03/18/land-expropriation-constitutional-obligations>, (accessed 5 April 2021).

does not have a sufficient number of parliamentary seats in order to pass the Constitutional amendment on its own (a two-thirds majority is required)³⁵⁸.

VI. EMPIRICAL EXAMINATION

The following Master thesis generated data by conducting six semi-structured, in-depth qualitative interviews with different stakeholders in South Africa. Following their conduction and transcription, interviews were analysed using the Framework analysis, with the help of the MAXQDA software. A list of codes was generated, which can be seen in Annex 3.

A. Respondent information

The respondent sample was constituted of two women³⁵⁹ and four men³⁶⁰, aged between 25 and 70 years old. Among the respondents³⁶¹, the majority of whom had legal training and/or a legal background, three were part of civil society organizations (one from a prominent economic interest group³⁶², one from a civil rights organization³⁶³ and one from a victims/survivors' support group³⁶⁴), two were members of political parties (one from the ruling party in the executive branch³⁶⁵, one from an opposition party in the

³⁵⁸ Merten.

³⁵⁹ Representative of an economic interests' group, interview, Zoom, 17 May 2021 (Respondent 1); Representative of a victims and survivors' support group, interview, Zoom, 25 May 2021 (Respondent 2).

³⁶⁰ Representative of a civil rights organization, interview, Zoom, 25 May 2021 (Respondent 3); Member of the Parliament and of an opposition party, interview, Zoom, 08 June 2021 (Respondent 4); High-ranking member of the executive and of the ruling party, interview, Zoom, 25 June 2021 (Respondent 5); Former member of the Land Claims Court, active in the judicial sector, interview, Zoom, 06 July 2021 (Respondent 6).

³⁶¹ From this point onwards, when referring to one respondent, the pronoun 'they' will be used in its gender-neutral sense, as it enhances the anonymity of respondents.

³⁶² Respondent 1.

³⁶³ Respondent 3.

³⁶⁴ Respondent 2.

³⁶⁵ Respondent 5.

legislative branch³⁶⁶) and one worked in a legal profession³⁶⁷. Respondents had varying but generally strong levels of involvement with land issues, ranging from litigation on behalf of individuals and communities who had been subjected to forced removals and land dispossession during the apartheid³⁶⁸, to the representation of farmers' and the agricultural sector's interest³⁶⁹, to being politically involved in matters of transitional justice and in the process to amend Section 25 of the South African Constitution³⁷⁰.

B. Human rights violations

Respondents discussed violations of human rights and notably land rights in South Africa. One respondent highlighted the long history of “disempowerment of communities” and “theft of land”³⁷¹, while another one highlighted the key role of the 1913 Natives Land Act in codifying the dispossession of the black majority from land³⁷². The various dimensions of land rights violations were discussed, notably the policy of ‘forced removal of black spots’, influx control, forced removals and the banishment of the black population into overcrowded homelands³⁷³. One respondent emphasized the scale of violations, stating that these forced removals represented the largest forced displacement in a country not at war³⁷⁴. The particularly detrimental impact on women’s and indigenous peoples’ rights to land was evoked, with one respondent noting the insufficient consideration of a balance between the black majority’s and the indigenous peoples’ claims to land³⁷⁵. Talking about the impact of land rights violations, one respondent noted the transgenerational effects of forced removals and the “very, very, very deep wounds” they left³⁷⁶. As a matter of fact, people dispossessed of their land were

³⁶⁶ Respondent 4.

³⁶⁷ Respondent 6.

³⁶⁸ Respondent 2; Respondent 6.

³⁶⁹ Respondent 1.

³⁷⁰ Respondent 4; Respondent 5.

³⁷¹ Respondent 2.

³⁷² Respondent 5.

³⁷³ Respondent 2; Respondent 5; Respondent 6.

³⁷⁴ Respondent 2.

³⁷⁵ Ibid.

³⁷⁶ Ibid.

uprooted from their land and lost their capital and investment in land, their homes, community structures, livelihood opportunities, as well as the graves of their ancestors. The enduring impact of forced removals was reinforced by the poor quality of the soils in the homelands, making it hard or almost impossible to cultivate land in a productive way. This was further compounded by the passage of time, which prevented people from returning to their places of origin as they had started to rebuild community connexions³⁷⁷.

C. General discussion of the transitional justice process

Discussing the transitional justice process, respondents noted many improvements overall³⁷⁸, notably with regards to CP (freedom of speech, right to privacy³⁷⁹) and the development of a robust judiciary. However, and in spite of improvements in the population's access to basic necessities, they noted several shortcomings in the areas of ESC rights, such as the high unemployment rate, issues with the education system and chronic poverty³⁸⁰. One respondent deplored the failure to develop mother tongue education in languages other than English and a "villainization" of certain cultures, races, and languages³⁸¹. The aforementioned shortcomings, in addition to the failure to prosecute all atrocities after the amnesty-for-truth process ended³⁸², corruption, state capture and maladministration³⁸³, led one respondent to state that "the general population [could not] draw a distinction between the outcomes of those processes and the so-called unfinished business"³⁸⁴.

Respondents noted that land issues were not dealt with in the context of the TRC. One respondent affirmed that the fact that transitional justice did not cover explicitly land

³⁷⁷ Respondent 2.

³⁷⁸ Respondent 3; Respondent 4; Respondent 6.

³⁷⁹ Respondent 3.

³⁸⁰ Respondent 2; Respondent 3; Respondent 4; Respondent 6.

³⁸¹ Respondent 3.

³⁸² Respondent 4.

³⁸³ Respondent 3.

³⁸⁴ Respondent 4.

issues was “the cause for huge problems now”, claiming that the failure to deal with land issues in the context of TRC was a deliberate move due to the matter’s complexity³⁸⁵.

D. Land reform

a) Expectations

The respondents noted that, in the light of violations of land rights under the colonization and the apartheid, high expectations had surrounded the land reform. The expectation was notably that the prohibition on black people owning (farming) land³⁸⁶ and their dispossession would be rectified through land restitutions³⁸⁷ and the transferral of agricultural land to black farmers³⁸⁸. Several respondents highlighted the centrality of remedying these violations and clearing up land struggles for “the future peace and stability”³⁸⁹, stating that land redistribution was “in the interests of everyone”³⁹⁰. One respondent affirmed that a properly and successfully handled land reform could have led to an improvement of the socioeconomic situation, noting that the failure or success of land reform projects impacted hundreds of people³⁹¹. The inability to fulfil these expectations was also discussed, with one respondent stating that the initial expectation that the restitution process would take five years was “a hopeless underestimate”³⁹², while another one reminded that the target of 30% of land redistributed had been pushed and pushed again³⁹³. Respondents expressed diverging opinions the importance of land reform in the eyes of public opinion. One voiced strong scepticism about it, citing a poll wherein only 1% of polled South Africans had stated that land reform would improve their lives, and highlighting that safety, employment and education were primary

³⁸⁵ Respondent 2.

³⁸⁶ Respondent 4.

³⁸⁷ Respondent 1; Respondent 2.

³⁸⁸ Respondent 4.

³⁸⁹ Respondent 2.

³⁹⁰ Respondent 5.

³⁹¹ Respondent 4.

³⁹² Respondent 6.

³⁹³ Respondent 5.

concerns³⁹⁴. However, others noted that land (and economic conditions overall) remained a prominent issue for the black majority especially³⁹⁵, with one arguing that there was “land hunger” in South Africa³⁹⁶ while another stated that many communities still expected solutions for unresolved land issues³⁹⁷.

b) Appraisal of actual impact

In contrast with these big expectations, the assessment of land reform efforts overall remained very sobering and pessimistic: the words “failure” and “failures” were reiterated respectively 30 times during the interviews, adjacent to other terms such as “frustration” and “unsuccessful”. As noted by one respondent, most fixed targets were not met³⁹⁸. However, some respondents offered more nuanced response, noting successes such as the restitution process (notably with regards to urban claims) and the legal regime put in place³⁹⁹, but overall stating that “the government ha[d] had some achievements, but they could have done a lot better”⁴⁰⁰.

1. Successes of land reform

Respondents noted some successes of land reform. On a legal level, one respondent described the legal regime governing the land reform as “well intentioned, optimistic, good enough in many ways”⁴⁰¹. Two had a fairly positive appraisal of the restitution process, noting that most urban land claims had been settled⁴⁰². One noted that the LRAD programme was an improvement upon the SLAG programme, as the larger size of grants combined with loans allowed some beneficiaries to establish themselves as successful farmers⁴⁰³.

³⁹⁴ Respondent 3.

³⁹⁵ Respondent 1; Respondent 2; Respondent 4; Respondent 5; Respondent 6.

³⁹⁶ Respondent 5.

³⁹⁷ Respondent 2.

³⁹⁸ Respondent 5.

³⁹⁹ Respondent 4; Respondent 6.

⁴⁰⁰ Respondent 6.

⁴⁰¹ Ibid.

⁴⁰² Respondent 4; Respondent 6.

⁴⁰³ Respondent 1.

2. Challenges and pitfalls of the land reform

Challenges were discussed at length by respondents and can be divided into six categories: legal challenges, policy-related challenges, political challenges, implementation issues, and the ambivalent role of traditional leadership structures.

On the legal level, the land reform process was first marked by the temporary nature of institutions tasked with handling land issues, notably the CRLR and of the LCC. One respondent noted that the LCC was initially set up for a five-year mandate⁴⁰⁴, while another one noted that, following bottlenecks and slow progress, a draft bill was in front of the parliamentary Portfolio Committee of Justice in order to grant the LCC a more permanent status⁴⁰⁵. A second issue was that of competing law systems, which notably came into play with regards to tenure reform. Respondents highlighted the competing and contradicting rights of various persons (labour tenants, current owners, people living on communal land) over the same piece of land due to different forms of land ownership under Western-style law and customary law⁴⁰⁶. This is to an extent related to the next challenge, which is insecure tenure: in addition to the matter of competing rights and the weakness of statutory rights in former homelands, one respondent mentioned the lack of written leases given to beneficiaries of land reform programmes such as PLAS⁴⁰⁷. Lastly, another respondent stated that the restitution process had been over-judicialized⁴⁰⁸.

On the policy level, one respondent mentioned design flaws in the legislation although the primary criticism remained aimed at the laws' implementation⁴⁰⁹. Another issue was the lack of coherence, as exemplified by the reopening of the restitution process in 2014, which was however interrupted soon after due to its unconstitutionality, however leaving enough time for around 100,000 claims to be lodged and await their processing⁴¹⁰. A third challenge was linked to the nature of restitution, where restitution claims in rural

⁴⁰⁴ Respondent 6.

⁴⁰⁵ Respondent 4.

⁴⁰⁶ Respondent 1; Respondent 2.

⁴⁰⁷ Respondent 1.

⁴⁰⁸ Respondent 5.

⁴⁰⁹ Respondent 6.

⁴¹⁰ Respondent 1.

areas often involve large communities (sometimes hundreds of people) and a large number of farmers⁴¹¹. The passage of time since the dispossession⁴¹² and possible splits and disputes within claimant communities further complicate the issue of restitution⁴¹³. Finally, restitution claims also require a substantive level of evidence to prove the dispossession of land (such as the presence of ancestors' graves, outlines of huts, various historical and administrative records), resources which many of the dispossessed individuals no longer or never had, or evidence which had been destroyed in the process of land dispossession⁴¹⁴. The restitution process further had the specificity that in 90% of land claims, successful claimants opted for monetary compensation instead of physical land restitution. As a result, the restitution process failed to significantly change the skewed land ownership patterns⁴¹⁵, meaning that a large part of the land remained in the hands of white farmers. Another policy challenge concerned the ideological orientation of the land reform. On the one hand, two respondents stated that individual property rights and title deeds had been insufficiently explored⁴¹⁶, with one observing that the government had so far only transferred six percent of the land it had acquired to private ownership⁴¹⁷. As a result of programmes such as PLAS, wherein the government was the ultimate owner of the land⁴¹⁸, the government had accumulated a substantive amount of land⁴¹⁹. One respondent qualified this as an accumulation of land mirroring a disregard of property rights⁴²⁰. On the other hand, another respondent stated that the market-based approach pursued by the post-apartheid government (resting on the willing buyer, willing seller principle) and the acquisition of land by the state at market-related prices had complicated the land reform and redistribution of land, as "billions of rands [...] were paid" which however did not justify the value of the land acquired⁴²¹. This respondent deplored the fact that, due to the 1975 Expropriation Act, courts had interpreted the 'just

⁴¹¹ Respondent 1.

⁴¹² Respondent 1; Respondent 2; Respondent 4.

⁴¹³ Respondent 1; Respondent 6.

⁴¹⁴ Respondent 2; Respondent 5.

⁴¹⁵ Respondent 4.

⁴¹⁶ Respondent 3; Respondent 4.

⁴¹⁷ Respondent 3.

⁴¹⁸ Respondent 1.

⁴¹⁹ Respondent 4.

⁴²⁰ Respondent 3.

⁴²¹ Respondent 5.

and equitable compensation' requirement in the Constitution as equivalent to market-related compensation, therefore creating a divergence between the Constitution and the Act⁴²². The respondent further added that further laws could have been enacted, such as a law on redistribution and a law or policy on price determination⁴²³. Lastly, one respondent pointed to the international dimension, stating that "greater use could perhaps have been made of international experience"⁴²⁴.

Political challenges featured prominently in the challenges evoked by respondents. Some respondents deplored a lack of political will on the side of the government to fix land issues⁴²⁵, for instance with regards to tenure reform, with one respondent stating that tenure reform had not been "given the credit it should have received in terms of the overall land reform project"⁴²⁶. Another respondent noted a tendency on the side of some parties to "overemphasize" the failures on the part of the government⁴²⁷. Many alluded to the politicization of the land question, noting that frustration generated from the shortcomings of the land reform had provided a fertile ground for politicians from both the opposition and the ruling party to obtain political gains on a short-term basis⁴²⁸. Respondents discussed the ongoing debate about expropriation without compensation and the proposed amendment to Section 25 of the Constitution, with several noting populist language⁴²⁹ and one calling expropriation without compensation "purely a very foolish political ploy and not a socio-economic measure"⁴³⁰. One respondent criticized the "manipulation of attitudes and perceptions", affirming that political messaging had led some people, who had initially been satisfied with the outcomes of the restitution process (in large part monetary compensation) to change their minds and reclaim their land back⁴³¹. Lastly, two

⁴²² Respondent 5.

⁴²³ Ibid.

⁴²⁴ Respondent 6.

⁴²⁵ Respondent 2; Respondent 3; Respondent 4.

⁴²⁶ Respondent 4.

⁴²⁷ Respondent 6.

⁴²⁸ Respondent 1; Respondent 2; Respondent 3; Respondent 4; Respondent 6.

⁴²⁹ Respondent 1; Respondent 2; Respondent 3; Respondent 4.

⁴³⁰ Respondent 4.

⁴³¹ Ibid.

pointed out to the overlaps between land issues and racial questions, noting scapegoating rhetoric⁴³².

Implementation issues constituted a fourth type of challenge discussed, with many emphasizing that, while legal fundamentals properly enabled land reform, failure was at an operational and administrative level⁴³³. One affirmed that the government had pursued a top-down approach which had “failed horrifically”⁴³⁴. Budgetary issues constituted another challenge, as several respondents noted that the budget devoted to land reform had been “inadequate” and not always spent⁴³⁵; as a matter of fact, one respondent stated that, since 1994, never more than 1% of the national budget had been allocated to land reform, in spite of a more positive economic situation under the presidencies of Nelson Mandela and Thabo Mbeki⁴³⁶. Maladministration featured prominently among implementation issues, and notably included flawed processes. The CRLR was widely criticized for its slow processes and failure to appreciate the complexity of the task⁴³⁷; one respondent explained that the Commission’s recruits did not receive adequate linguistic and technical training in order to process claims, meaning that, when claims were challenged in court, decisions giving back land to claimants were invalidated⁴³⁸. In the case of labour tenants, one respondent stressed the fact that land claims had been lost and that no proper system had been established to process them⁴³⁹. An example of such delays and maladministration that was mentioned by several respondents was the so-called Mwelase case, wherein the government failed to implement legislation recognizing labour tenants’ claims to land ownership, leading several claimants to lodge a class action, which resulted in the LCC appointing a Special Master tasked with overseeing the government’s implementation of the labour tenant programme⁴⁴⁰. Overall, the notion of “bureaucratic incompetence” was reiterated by respondents⁴⁴¹. Maladministration was

⁴³² Respondent 2; Respondent 3.

⁴³³ Respondent 1; Respondent 4.

⁴³⁴ Respondent 3.

⁴³⁵ Respondent 1; Respondent 4.

⁴³⁶ Respondent 1.

⁴³⁷ Respondent 6.

⁴³⁸ Respondent 1; Respondent 2.

⁴³⁹ Respondent 6.

⁴⁴⁰ Respondent 1; Respondent 6.

⁴⁴¹ Respondent 4.

also linked with delays and bottlenecks in processing claims, with respondents noting that some claimants had died before seeing their claims processed, while 5 to 6,000 (mostly complex, rural) claims remained to be processed⁴⁴². Lastly, several implementation issues pertained to the interaction with beneficiaries. First, although legislation on land restitution and redistribution programs foresaw the provision of support to beneficiaries, several respondents noted that beneficiaries, notably aspiring farmers, did not receive adequate training, machines, manure, seeds etc. in order to productively exploit the land afforded to them⁴⁴³. One respondent argued that land reform also suffered from a lack of proper communication and education surrounding it⁴⁴⁴. The small size of grants (notably SLAG grants) did not allow beneficiaries to buy land portions alone and forced them to pool their resources in so-called community property associations⁴⁴⁵. However, these entities faced several challenges, notably disagreements about the purposes for which the land should be employed, leading to conflicts and power politics⁴⁴⁶. Interaction with beneficiaries was lastly marked by the difficulties linked with the occupation of farmer in South Africa, notably the frequent droughts, climate change, infertile soils⁴⁴⁷, the need for long-term vision⁴⁴⁸ and the difficulty in accessing financing and loans for black farmers⁴⁴⁹.

Last but not least, the role of traditional leaders and structures in land issues was largely discussed by respondents⁴⁵⁰. As a matter of fact, a substantial amount of people living in rural areas reside on former homelands/former Bantustans, governed by traditional leaders. During the colonial and apartheid eras, regimes implemented a policy of co-optation of traditional leadership in order to gain access to and control over land. As a result, traditional leaders were given the ownership of the land and the power to allocate land to people under their jurisdiction, in exchange for the payment of rent or a portion of their production. One respondent mentioned so-called permissions to occupy

⁴⁴² Respondent 1; Respondent 4; Respondent 6.

⁴⁴³ Respondent 2; Respondent 3; Respondent 4.

⁴⁴⁴ Respondent 4.

⁴⁴⁵ Respondent 1.

⁴⁴⁶ Respondent 1; Respondent 2; Respondent 5.

⁴⁴⁷ Respondent 2; Respondent 4.

⁴⁴⁸ Respondent 4.

⁴⁴⁹ Respondent 2.

⁴⁵⁰ Respondent 1; Respondent 2; Respondent 4; Respondent 5; Respondent 6.

(PTOs) granted to people living in communal land, which have remained in place even after the end of the apartheid⁴⁵¹. However, this system was heavily criticized by respondents. Indeed, one respondent emphasized that the idea that traditional leaders were the ultimate owners of the land did not correspond to pre-colonial customary law, and affirmed that traditional leaders were rather intended to be administrators of communally owned land. While stressing the fact that traditional leaders were essential in administering land and could play a positive role in representing and defending the rights of people living in rural areas⁴⁵², most respondents highlighted the potential and actual abuses of power deriving from this system, noting that the system of co-optation of traditional leaders was coupled with weak local government, attempts by politicians to woo traditional leaders in order to get support, an accumulation of wealth and power by leaders as well as the persistence of authoritarian and patriarchal conception of traditional leaders' roles. Because of the lack of access to and ownership of land as well as systems of rent and taxes imposed by traditional leaders, one respondent further noted that most people living on former homelands were not enabled to make more than a subsistence type of farming⁴⁵³. As put by respondent 2, access to land was not democratized for people living on former homelands⁴⁵⁴. At this stage, it is worth mentioning the case of the KwaZulu-Natal province. The participation of the Zulu people and the Zulu king in the transition 1994 election was conditioned upon the transferral of trust land (in the then Zululand province) in a royal trust, the Ingonyama Trust⁴⁵⁵. The Ingonyama Trust now represents 40% of the land in KwaZulu-Natal⁴⁵⁶, and has contributed to the accumulation of considerable wealth due to the levying of rent and taxes. Although the payment of rent to the Ingonyama Trust was declared invalid in a court decision, the king and royal household retain a substantial amount of power⁴⁵⁷, highlighting the shortcomings of democratization in the case of land issues.

⁴⁵¹ Respondent 2.

⁴⁵² Respondent 5; Respondent 6.

⁴⁵³ Respondent 1; Respondent 2; Respondent 4; Respondent 5; Respondent 6.

⁴⁵⁴ Respondent 2.

⁴⁵⁵ Ibid.

⁴⁵⁶ Respondent 4.

⁴⁵⁷ Respondent 2; Respondent 4; Respondent 6.

E. Appraisal of transitional justice measures

During interviews, respondents were asked to assess various categories of measure, derived from Laplante's continuum of justice, based on their adequacy to promote and protect land rights in transitional justice processes.

a) Reparative justice

Firstly, respondents were invited to assess measures taken at the individual level such as court proceedings, restitution, compensation, satisfaction, guarantees of non-repetition. Interestingly, although this dimension usually features prominently in transitional justice processes, this was not the most heavily discussed category of measures.

All respondents acknowledged the importance of individual measures of reparative justice, notably with regards to the restitution process. Three respondents were particularly keen on a liberal approach, emphasizing the need for improving access to title deeds and private property⁴⁵⁸. Interestingly, one respondent highlighted challenges of reconciling communal and individual interests, noting that in many restitution cases where the land had previously been owned communally, restored land ought to go to communities, but that this created the potential for intra-community conflicts due to differing interests of individuals. As a result, they stated the need to shift the process of land reform (and notably land restitution) to be more responsive towards the needs of individuals and to reconcile individuals and collectives⁴⁵⁹.

Lastly, one respondent described reparative justice measures as a crucial, but not complete component of transitional society. They stated that such "demand-driven models" were necessary in order to provide people wronged with a meaningful

⁴⁵⁸ Respondent 1; Respondent 3; Respondent 4.

⁴⁵⁹ Respondent 5.

opportunity to lodge a complaint, which would need to be acknowledged and processed fairly, but that this was insufficient in rectifying inequalities and skewed land ownership patterns⁴⁶⁰.

b) Restorative justice

The second category revolved around measures at the inter-personal, communal level such as measures of truth-telling, dialogue, and reconciliation. In this regard, respondents adopted a fairly large approach to measures of restorative justice.

One respondent reiterated that measures geared towards collectives were relevant but asserted the need to establish mechanisms to help deal with individual interests within communal/community issues, in an attempt to bridge the gap⁴⁶¹. Another one seconded this view, referring to possible difficulties arising from collective claims to land and pointing to the Kranspoort judgement⁴⁶².

Respondents adopted a wider approach to community-based measures. One respondent for instance stated that measures towards establishing partnerships and building trust through social facilitation were the most optimal in promoting and protecting land rights in the context of transitional justice processes⁴⁶³. Another respondent emphasized the importance of plural and inter-community dialogues, denouncing what they described as populist rhetoric about race and intercultural relations and racially discriminatory policies, and advocating for plural narratives⁴⁶⁴.

Lastly, a bottom-up approach of self-reliance was evoked by several respondents. Two noted grassroots, community-level initiatives entailing partnerships between white and black farmers (e.g., with regards to training and skills sharing⁴⁶⁵). One referred to informal projects of land reform by some white farmers, who developed profit-sharing

⁴⁶⁰ Respondent 6.

⁴⁶¹ Respondent 5.

⁴⁶² Respondent 6.

⁴⁶³ Respondent 1.

⁴⁶⁴ Respondent 3.

⁴⁶⁵ Respondent 2.

schemes and systems of co-ownership with their workers. However, they stated that, due to the fact that many farming enterprises were only able to make very small profit margins (especially during dry seasons), this option was mostly feasible for “mega-farming enterprises” and could not economically viable for all types of farmers⁴⁶⁶. One respondent was especially keen on grassroots, bottom-up solutions and on developing self-sufficient, “state-proof” communities able to “take things into their own hands”, as they remained very critical towards the “state-centralised top-down party politics approach”⁴⁶⁷.

c) Civic/political justice

The third category corresponded to measures on the collective level in the political and institutional sense, and included measures fostering participation at the political level, constitutional amendments, and legal reforms.

Firstly, it should be emphasized that respondents displayed a strong sense of trust in the institutions that emerged from the transitional justice process in South Africa. Institutions were described as properly functioning⁴⁶⁸, notably the judiciary, which was assessed as fair and competent⁴⁶⁹. The fact that respondents referred multiple times to the 1996 Constitution as well as constitutional institutions and processes (111 occurrences of “constitution” and “constitutional” throughout the six interviews) can be interpreted as an evidence of this trust. Respondents extensively discussed the wide array of rights granted by the Constitution⁴⁷⁰ and also referred to it while discussing expropriation without compensation (see section VI.E.d).

On a political level, one respondent noted that the transition had been very successful, as the ANC had been able to assert control over the legislature and government in a stable way. At a more abstract level, they noted that the majority had been enabled to command the legislative process and to appoint the government, stating “it's within the

⁴⁶⁶ Respondent 4.

⁴⁶⁷ Respondent 3.

⁴⁶⁸ Ibid.

⁴⁶⁹ Respondent 3; Respondent 6.

⁴⁷⁰ Respondent 6.

control of the victim communities now to create a society which serves people who are previously disadvantaged”⁴⁷¹.

One respondent expressed concerns about threats to institutions, for instance maladministration and corruption, and adopted a rather pessimistic stance towards the future evolution of institutions, which they saw as weakening⁴⁷². Nevertheless, they expressed optimism with regards to the “very healthy civil society environment” providing a “layer of defence” to citizens⁴⁷³. This sentiment was shared by other respondents who emphasized the strength of the civil society sector and its effectivity with regards to advocacy, protest, and litigation on behalf of communities⁴⁷⁴ (most notably in the Mwelase case⁴⁷⁵).

d) Socioeconomic justice

The last category of measures was measures of socioeconomic justice, such as measures geared towards remedying historic injustices and measures aiming at correcting socioeconomic inequities on a longer term.

This category of measures proved to be the most difficult to discuss for respondents. Most appeared to agree with incorporating elements of socioeconomic justice in transitional justice measures, but strongly differed with regards to approaches to pursue and the intensity at which these measures should be implemented. Two respondents explicitly defined socioeconomic measures as central to transitional justice⁴⁷⁶. Noting that the economic gains for South Africans had not matched their political gains, one respondent argued that a substantial measure of state intervention was needed in order to address historic inequalities. They however noted that such a process would be “long” and “painful”, and that there was no “quick fix”⁴⁷⁷.

⁴⁷¹ Respondent 6.

⁴⁷² Respondent 3.

⁴⁷³ Ibid.

⁴⁷⁴ Respondent 2; Respondent 3; Respondent 6.

⁴⁷⁵ Respondent 1; Respondent 6.

⁴⁷⁶ Respondent 5; Respondent 6.

⁴⁷⁷ Respondent 6.

In terms of implementing socioeconomic measures, several respondents pointed out that a prominent question to answer was the type of economic system one wanted to implement in a transitional context. While two opted for a more liberal stance, emphasizing equality of opportunity⁴⁷⁸, a reduction of land ownership by the state, private ownership, and title deeds⁴⁷⁹, another respondent noted that the Constitution of South Africa leaned more towards a social democratic (rather than a socialist or capitalist) system⁴⁸⁰. The latter respondent noted that substantive equality was needed and ought to be implemented through affirmative action (as anchored in the equality clause in Section 9 of the 1996 Constitution), but also pointed out the challenge of accommodating a system of affirmative action in a capitalist society “where the state doesn't have immediately immediate and direct responsibility for the distribution of social goods”⁴⁸¹.

The measures to be taken also invite to reflect on the role of the courts and the judiciary. As a matter of fact, one respondent stated that a delicate balance had to be found between anchoring socioeconomic rights and remedying economic inequities on the one hand and ensuring separation of powers on the other hand. In this regard, they pointed out to a solution designed by the South African Constitutional Court in its *Grootboom* case, where it argued that courts should guide their judgements by assessing whether the government acted in a rational and reasonable way in order to protect ESC rights⁴⁸².

In a sense, the question of choosing an economic system was crystallized in debates on expropriation without compensation. Respondents had particularly strong feelings on the subject, with some stating that such an attempt would have negative effects on the economy, agricultural sector, and food security. Several referred to the case of Zimbabwe, citing risks for food security and economic stability⁴⁸³. Two visions were opposed: one of a liberal, market-based reform (that could be complemented with the government having the possibility to make snap choices and pre-emptively acquire land)⁴⁸⁴. Another

⁴⁷⁸ Respondent 3.

⁴⁷⁹ Respondent 3; Respondent 4.

⁴⁸⁰ Respondent 6.

⁴⁸¹ Ibid.

⁴⁸² Ibid.

⁴⁸³ Respondent 2; Respondent 3; Respondent 4.

⁴⁸⁴ Respondent 4.

one was opposed to market-related compensation, stating that it was expensive and unsustainable, and arguing in favour of just and equitable compensation (which could vary and thus could also be nil), in line with the Constitution⁴⁸⁵. The debate surrounding expropriation without compensation was intrinsically linked with legal and political controversies, as several respondents stated that the attempted Constitutional amendment was not required since Section 25 already provided for expropriation without compensation in the public interest, and that parties (including the ANC) were attempting to score political points⁴⁸⁶. One respondent noted that consensus had been attained last-minute on Section 25 but emphasized the balance it had attained between property rights and land reform⁴⁸⁷. However, one respondent from the ruling party argued that the amendment was needed in order to make what was implicit in the Constitution explicit, as expropriation without compensation has not yet been tested in courts⁴⁸⁸.

e) Other types of measures

Respondents also suggested other types of measures⁴⁸⁹. Suggested measures included a proper budget for land reform⁴⁹⁰, support for farmers including financing (for instance through blended financing programmes⁴⁹¹), increased post-settlement support for beneficiaries of land reform programmes and an increased investment in education and training in the agriculture sector⁴⁹².

⁴⁸⁵ Respondent 5.

⁴⁸⁶ Respondent 1; Respondent 2; Respondent 4.

⁴⁸⁷ Respondent 1.

⁴⁸⁸ Respondent 5.

⁴⁸⁹ Respondent 2

⁴⁹⁰ Respondent 4.

⁴⁹¹ Respondent 1.

⁴⁹² Respondent 1; Respondent 3; Respondent 4.

F. Lessons learned

When concluding interviews, respondents were asked about lessons learned from the transitional justice process in South Africa, including with regards to land rights.

When discussing policy areas to prioritize in transitional societies, one respondent stated that education and corruption ought to be addressed from the outset of transitions. Indeed, they noted that transitional societies were particularly vulnerable to corrupt people having an exaggerated influence and getting into positions of power. With regards to education, they noted the transgenerational impacts of “broken education system[s]”. As a result, they identified corruption as education as two policy areas to “aggressively address” at the beginning of any transition⁴⁹³.

Another category of lessons learned pertained to the interaction between the local and international context. On the one hand, several respondents mentioned the fact that “one-size-fits-all” could not function in transitional contexts, emphasizing the centrality of holistic and needs-based approaches and highlighting country specificities⁴⁹⁴. However, another respondent deplored the fact that international examples had been insufficiently considered in South Africa and urged to draw expertise from transitional experiences in other countries⁴⁹⁵.

The role of politics featured prominently among respondents’ replies. Emphasising the need to manage expectations, several of them noted the potential for frustration when promises could not be delivered upon⁴⁹⁶. One respondent stated “you can have the best theoretical plans, if you fail at the implementation phase, it will have a knock-on effect of ultimately contaminating the successes you've also achieved”⁴⁹⁷. Lastly, one added that the complexities of “bringing about change where social and economic relations have been entrenched on a discriminatory basis for a long period of time” ought to be

⁴⁹³ Respondent 6.

⁴⁹⁴ Respondent 1; Respondent 5.

⁴⁹⁵ Respondent 6.

⁴⁹⁶ Respondent 1; Respondent 4.

⁴⁹⁷ Respondent 4.

recognized, and that one thus needed to be realistic in one's expectations, as quick fixes would not work⁴⁹⁸. Respondents expressed scepticism as to political fixes, with one criticizing the "short-term" orientation of politics and politicians⁴⁹⁹.

Lastly, the role of the state in transitional justice was discussed at length by respondents. One respondent pleaded for accountability in transitional justice processes, notably with regards to corruption. They further advocated for civil service positions to be seen as positions where one serves the community, and for standards of excellence to be associated with such positions. This respondent further argued in favour of using the already existing skills of civil servants in former regimes and redirecting them towards serving the broader community, in particular its impoverished components⁵⁰⁰. One respondent was particularly vocal about solutions emanating from outside the state, such as grassroots, community-based solutions designed in a bottom-up approach, while another stated that transitional justice could not be privatised but that the government alone could not do this task, thus advocating for partnerships between a wide array of stakeholders⁵⁰¹.

Lastly, respondents were asked whether the transitional justice framework was the most appropriate for dealing with land issues and violations of land rights. While several respondents did not seem to outright exclude transitional justice, one respondent was highly critical of the transitional justice model based off the South African TRC, as they stated that it "consistently failed victims and survivors". Regarding land, they argued that they did not know of any example where a truth commission had solved "the fundamental problem around recognizing rights to land". They thus argued for a transformation of the model of transitional justice⁵⁰². Another one stated that a review, debate, and discussion of measures implemented thus far was needed⁵⁰³.

⁴⁹⁸ Respondent 6.

⁴⁹⁹ Respondent 1.

⁵⁰⁰ Respondent 6.

⁵⁰¹ Respondent 1.

⁵⁰² Respondent 2.

⁵⁰³ Respondent 5.

VII. DISCUSSION AND INTERPRETATION OF FINDINGS

A. Insights on land rights and land issues

a) The centrality of the land question

Interviews with respondents were instrumental in revealing the centrality of land questions in the context of South Africa, and, it is argued here, in many post-colonial contexts. As a matter of fact, conflicts surrounding access to, ownership and usage of land have been central during eras of domination and economic exploitation by colonial structures. As previously stated, the dispossession of land from the black majority in South Africa did not unfold overnight with the establishment of the apartheid but was implemented from the beginnings of colonial conquest and culminated with apartheid segregation laws. In a system based on the oppression and exploitation of one part of the population, violations of human rights, notably ESC rights, are linked with conflicts surrounding land. Land not only has a central relevance with regards to economic matters and livelihood opportunities but is also linked with matters of political power and self-determination, cultural rights (e.g., burial of ancestors on one's land), as well as the human rights of specific groups, notably women and indigenous peoples.

Respondents' statements during interviews seemed to indicate the belief that violations of land rights and by extension violations of ESC rights are of central importance and ought to be addressed in transitional contexts. While the TRC was not mandated with addressing land issues, the statements of several respondents seemed to very much indicate the fact that land issues indeed fall under the scope of transitional justice, as they are intrinsically linked with a history of oppression. Many respondents highlighted the high expectations that surrounded land issues as the country transitioned from the apartheid into a democracy, and they further noted the deep frustration resulting from not meeting all set targets and expectations for land reform. If left unaddressed or under-addressed, violations of land rights bear the potential for tensions and conflicts in the future. This is evidenced by the deeply politicized and controversial debates

surrounding expropriation without compensation. The potential for frustration leading to conflicts is further reinforced by the gap between the high expectations surrounding land issues in transitional contexts and the complexity of resolving such issues in the context of decades-long discrimination and oppression.

b) The need for strong laws and institutions

One thing that stood out while analysing respondents' declarations during the interviews was their emphasis on the Constitutional and legal framework developed during the transition. Transpiring from the data collected was an emphasis on a coherent and holistic set of laws, covering the many aspects of land rights and land reform, such as land restitution, land redistribution, tenure reform, etc. In this regard, one dimension that is particularly relevant to the case of South Africa and to many post-colonial societies is the coexistence of various law systems. Several respondents highlighted the insecurities resulting from differing and at times competing rights to land under different systems of law, in this case Western-style law and customary law. The management of different law systems echoes Gready's reflections about reconciling the local and global level, and the notion of embedded as opposed to distanced justice⁵⁰⁴.

The need for robust institutions was highlighted by respondents. Indeed, one key issue observed in land reform processes was the fact that many institutions were underfunded and ill-equipped to manage the daunting task of land reform, as exemplified by the case of CRLR. In order to protect and promote land rights, institutions need a clear, realistic mandate (with regards to its time frame and scope of activities), as well as adequate training for their workers to deal with the specificities and complexities of land issues and land rights (for instance training on how to investigate a claim for land restitution). Last but not least, respondents' emphasis on the insufficient budget as a factor for failure of the land reform alludes to the importance of properly budgeting for human rights-based laws and policies.

⁵⁰⁴ Gready.

Lastly, the data collected pointed out the need to address is the coexistence of a variety institutions possessing different types of legitimacy. In the case of South Africa, the question of the role of traditional leaders and traditional leadership structures highlights the fact that, while traditional structures can possess a great sense of legitimacy and cultural relevance, they can play a role that either fosters or undermines human rights, sometimes simultaneously. Stakeholders implementing transitional justice measures thus face the delicate task of preserving structures that possess a high relevance in certain contexts (here especially rural areas), while also having to ensure that these institutions do not run counter the human rights of people living under them, notably women.

c) Policy questions

From a human rights-based point of view, several insights can be derived from the interviews conducted with the respondents with regards to policy questions.

Firstly, while several measures and programmes were implemented since the transition in 1994, their approaches and more specifically their targeted population seem to have regularly shifted. As a matter of fact, while the SLAG programme seemed to initially target the landless and poor segments of the population in rural areas, the LRAD shifted towards facilitating the emergence of black commercial farmers. As stated by a respondent, it is crucial to adopt a needs-based and holistic strategy with regards to land issues, including land rights. Measures taken to promote and protect land rights ought to have clear objectives and target populations and strive towards coherence among themselves.

In terms of policy approaches, land issues present a particular challenge for human rights due to the political, economic, and cultural significance of land. Specific issues arise in relation to land, for instance the passage of time between the dispossession of land from victims of human rights violations and the time by which these victims lodge these claims. In these cases, respondents often noted that the passage of time was associated with the loss or destruction of evidence, the rebuilding of community connexions by victims and survivors and the entrenchment of the new owners, thereby

complicating claims with regards to restitution and redistribution. These findings hint at the relevance of temporality in transitional contexts. In addition to the question of temporality, another specificity pertaining to land issues is the diversity of interests surrounding it. At this stage, it is interesting to mention one statement by a respondent who alluded to colliding land claims by the black majority and indigenous peoples of the Hoengeyqua tribe in the Eastern Cape province, noting that no solution had been found by the CRLR in order to legitimate both types of claims and “work out a solution”⁵⁰⁵. This highlights the fact that, in transitional contexts and more specifically with regards to land issues, claims with different sources of legitimacy often arise and sometimes stand in competition, thereby compelling authorities to trade-offs and political decisions.

Lastly, discussions surrounding the interaction with beneficiaries of land reform programmes raises the question of how to deal with victims of land rights violations, especially in transitional contexts, and further than that, how to implement a reform aiming at improving access to human rights in a dignified and empowering way. As a matter of fact, the example of the land reform in South Africa highlights challenges linked with incorporating the needs and expectations of beneficiaries of land reform programmes, the need to provide support following the beneficiaries’ settlement, as well as questions pertaining to (re)valorising the sector of agriculture. Discussions by some participants of needs-based reforms and community-based solutions highlight the need to seriously explore more participatory and capabilities-based systems of land reform in order to promote and protect land rights in transitional contexts.

⁵⁰⁵ Respondent 2.

B. Critical reflections on transitional justice

a) The special temporality of transitional justice

While selecting the case study for this Master thesis, it may have appeared odd to select a country that officially effectuated its transition more than 27 years ago; one may ask whether the society remains ‘transitional’.

It may be easier to pinpoint the ‘beginning’ of a transition: In the case of South Africa, one may consider the transition to have started at the inception of negotiations between the apartheid regime and the ANC, or at the latest following the 1994 elections. Regarding the end of a transition however, and as Bonora highlights, justice-seeking has become “continuous” and “more diffused”, unfolding over long periods of time. In the words of Bonora, “transitional justice interventions are not anymore relegated to a period marked by discrete boundaries and generally understood as “transition””⁵⁰⁶. This is visible in our case study. Indeed, several of our respondents highlighted in their responses the unresolved land issues, often criticizing the fact that these issues had not been dealt with (sufficiently) in the context of transitional justice. This enduring need is further reinforced by the transgenerational impacts of human rights violations, as well as the lag between the commission of the violation and the lodging of a claim, especially in the case of land issues. Up until today, debates surrounding land reform, including for instance the Draft Expropriation Bill, are also revealing of this continuing transitional justice process. As a matter of fact, the land reform has been framed as a way to “correct apartheid spatial planning” and “overturn inherited patterns of racial privilege, deep rural poverty spatial inequality”⁵⁰⁷.

The present Master thesis thus argues that, in the light of the open-endedness of transitional justice processes, a constant endeavour of assessment, feedback and refining of transitional justice measures is required, in order to adapt to the new realities following the transition. Yet, this raises the question of when a society ceases to be transitional, and

⁵⁰⁶ Bonora, p. 16.

⁵⁰⁷ R. Lamola, ‘The land shall be shared’, *Umrabulo*, vol. 43, 2018, pp. 9 and 10 (accessed 27 July 2021).

when measures geared towards remedying the impacts of violations (notably on a socioeconomic level) no longer fall under the scope of transitional justice, but of general economic and development policies.

b) Top-down or bottom-up? Local, national, or global?

Respondents discussed attempts at land reform at local, community-based level. The interaction between national authorities such as the government and local authorities (for instance traditional leaders) was further addressed. Stemming from these discussions, a range of positions seemed to emerge, with some arguing that a top-down, centralized transitional justice approach to land issues had been associated with failure, and that communities thus ought to “take things into their own hands”⁵⁰⁸. However, the risk of having varying degrees of rights protection was also highlighted by respondents’ critical appraisal of the role of traditional leaders. As a matter of fact, traditional leaders were appraised as a factor of both protection and undermining of land rights. This highlights the need for an actor to guarantee a certain harmony in protecting and promoting land rights. While one respondent was particularly keen on ‘state-proof’ solutions, most seemed to still insist on the fact that the State ought to play a central role in this regard (see also section VII.B.e).

Surprisingly, respondents did not address the role of international actors in the transitional justice process and in land rights issues in South Africa. Only one respondent, who themselves had worked with international organizations, deplored the fact that international experience had been insufficiently drawn upon in order to remedy land rights violations in South Africa and invited to consider international examples⁵⁰⁹.

⁵⁰⁸ Respondent 3.

⁵⁰⁹ Respondent 6.

c) What policy areas should transitional justice touch upon?

A review of the literature as well as discussions with respondents revealed criticism at the fact that transitional justice mechanisms in South Africa such as the TRC had adopted a narrow view of human rights violations to be remedied. Statements by several respondents about the centrality of remedying land issues, be it for the future stability and peace of the country or for the socioeconomic situation, seem to hint at wider conception of transitional justice, which does not solely revolve around civil and political rights. This seems to hint at a scepticism or even rejection of the mainstream liberal conception of transitional justice, and a shift towards a more systematic inclusion of ESC rights as well as land rights in transitional justice.

Some respondents further touched upon policy fields to address during transitional processes, two of which were education and corruption. Respondents across organizational and ideological lines emphasized the need to invest in education and training, with one describing educational measures as necessary to break generational cycles of poverty⁵¹⁰. Hence, data collected during the Master thesis seems to hint at the fact that education, while rather unaddressed in mainstream literature, appears to be a prominent preoccupation of stakeholders in transitional justice contexts. The second policy area prominently mentioned was that of corruption. This echoes Urueña and Prada-Urbe's calls to expand transitional justice to encompass corruption and economic crimes in the scope of transitional justice⁵¹¹. It is also argued here that the plea to include the fight against corruption into transitional justice efforts highlights the interlinkages between transitional justice and state-building endeavours.

d) The role of politics in transitional justice

Discussions with respondents highlighted the potential for politicization and political conflicts in transitional justice. Far from mainstream legalistic approaches to transitional justice that revolve around technical fixes to institutions⁵¹², transitional

⁵¹⁰ Respondent 6.

⁵¹¹ Urueña and Prada-Urbe, pp. 403-404.

⁵¹² Waldorf, p. 179; Nagy, p. 275.

processes are associated with heavy contestation and lively debates. Different political projects often contend and collide, as highlighted in the case of land rights and ESC rights by the debates around expropriation without compensation.

The dissatisfaction and fatigue expressed by several respondents surrounding the politicization of land issues convey the opinion that an over-politicization of land rights and transitional justice to the disfavour of a rights-based approach. Nevertheless, the present Master thesis remains sceptical toward an approach that would aim at ‘keeping politics out’ of transitional justice and land issues. Indeed, reference is made here to Webber’s notion of “adjustment of contending legal and political orders”⁵¹³. It is argued that transitional contexts are associated with windows of opportunity to question and (re-)negotiate the normative boundaries in a given society, a process that is inherently associated with contestation, debate, and, ultimately, politics.

e) The role of the state

Last but not least, one dimension that should be analysed in the light of the data collected is the role of the state in transitional justice processes. In this regard, respondents adopted a wide range of positions.

Some respondents continued to emphasize the role of the state in promoting and protecting land rights in the context of transitional processes in South Africa, pointing out to the need to allocate a more substantial budget to land reform or the need to reinforce existing institutions. One respondent’s emphasis on the creation of ‘state-proof’ communities in the light of what they deemed as ‘government failure’ reveals the increasing search for solutions beyond the state in transitional contexts. Another respondent’s suggestion to focus on partnerships and social facilitation, wherein transitional justice and land issues are not privatized but the state is not the only stakeholder in charge, further hints at the relativization of the centrality of the state in matters of transitional justice. In other words, in the 21st century, transitional justice is no longer ‘only’ a state matter but is influenced and conducted by a wide array of

⁵¹³ Webber, pp. 108-113.

stakeholders, in an increasingly decentralized fashion. How the state will negotiate and assume its place in this constellation of stakeholders remains to be seen.

f) In transitional justice, economy matters

The following thesis acknowledges the neutrality of human rights with regards to various economic systems⁵¹⁴. Nevertheless, it also argued here that the design of the economy in a given context bears a significant impact on the enjoyment of human rights, including land rights. This was evidenced by several respondents' emphasis on picking an economic system to implement socioeconomic measures in transitional contexts. Additionally, one respondent noted that socioeconomic measures taken in transitional contexts faced the challenge of being implemented in a capitalist society. Indeed, and increasingly as a consequence of globalization and neoliberal policies, the State is not the only actor able to determine the wider economic context to implement measures aimed at promoting and protecting human rights. Efforts to promote human rights, including land rights, are thus met with the framework conditions of the economy at the national level, but also at the regional and international level. This will be elaborated upon further in the section below.

C. The 'justice' in transitional justice

The Master thesis aimed at mapping respondents' understandings of 'justice' by interrogating their approaches to land rights in the transitional justice contexts. An analysis of the data collected during interviews revealed the following insights.

⁵¹⁴ United Nations Committee on Economic, Social and Cultural Rights, 'General Comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant)', 14 December 1990, UN Doc E/1991/23, para. 8.

a) The multifaceted understandings of justice

Not one, but multiple and coexisting normative conceptions of justice were advocated for and represented by respondents.

As a matter of fact, while all respondents noted the importance of individual measures associated with the ‘reparative’ form of justice, their answers highlighted the fact that only pursuing such a form of justice was insufficient in order to remedy violations of land rights resulting from decades of colonization and apartheid. The reparative, individual, ‘demand-driven’ model of justice has been implemented to the largest extent in South Africa, notably through restitution proceedings, yet demands for remedies and a correction of socioeconomic inequities with regards to access to land have not waned.

The second form of justice, restorative justice, was particularly relevant in the case of South Africa, notably due to the central place of the notion of *ubuntu* in South African culture. It is further worth mentioning that the work of the TRC was grounded in both of these notions⁵¹⁵. Respondents’ answers highlighted the importance of measures geared towards the collective, notably due to the fact that land was and still remains held communally in a large number of rural areas. However, divergences may sometimes appear between reparative and restorative justice, as evidenced by difficulties linked with restitution and community property associations. With regard to restorative justice, it is interesting to note that respondents adopted a broad view of restorative, community-based form of justice, for instance by referencing multi-stakeholder partnerships, or by advocating for bottom-up, community-level initiatives.

The third of form of justice, namely civic and political justice, was probably the most referred to by respondents. Respondents’ emphasis on the constitutional framework, on the existence of a vibrant civil society in South Africa, as well as on the successful transition at the executive and legislative levels indicates that this form of justice is considered the most central and may be among the most consensual forms of justice together with reparative justice. In a sense, this form of justice interplays with notions of

⁵¹⁵ Truth and Reconciliation Commission, 1998a, pp. 8, 103 and 125-131.

state-building. The 1996 Constitution seems to represent a central point of reference and a cornerstone of the institutional and political system in South Africa, including in the land reform. This echoes Powell's observations about the centrality of constitution-making and state-building processes in "foregrounding the interests of social justice in powerful ways, and cementing them in basic institutions for a new and more just political order"⁵¹⁶. Hence, it is argued here that constitutional frameworks do not only pertain to the technical and institutional functioning of transitional societies but can act as powerful factors for the promotion of an agenda of social transformation and the protection and promotion of human rights. One respondent's discussion of the role of courts in advancing ESC rights as well as land rights however brings into question the role of different parts of the state in transitional justice processes. As a matter of fact, a balance must be found in what institutions should promote a proactive agenda of transitional justice, and how they should keep each other in check. Lastly, respondents' emphasis on the need for a vibrant civil society is furthermore interesting as it indicates a broad view of participation at the political level, thus indicating that civic and political justice is understood in the wider sense that goes beyond the State.

Lastly, socioeconomic justice was considered by most respondents to be a part of transitional justice, albeit with differing appreciations of how such a form of justice ought to be implemented. The interconnection of this form of justice with the other forms of justice is worth highlighting, as evoked by one respondent who underlined the discrepancies between political and economic gains of the South African population. Especially with regards to this form of justice, it is hard to implement a 'neutral' form of transitional justice, as fundamental questions are asked about the type of economic system that will be put in place. Hence, if one considers socioeconomic justice as a part of transitional justice, the mainstream liberal conception of transitional justice should be considered as only one of many options, and not an ideology-free, neutral approach to be implemented in all contexts.

To sum up, respondents across ideological, organizational, racial and gender lines held a variety of normative conceptions of justice. In opposition to a unidimensional

⁵¹⁶ Powell, p. 248.

conception of justice, interviewees were often proponents of multifaceted understandings, combining various forms of justice. This invites us to reconsider and diversify our understanding of transitional justice.

b) The passage of time and the move away from mainstream liberal thought

Understandings of ‘justice’ in transitional contexts do not only vary among respondents; it is argued here that these shifts also unfold over time. As a matter of fact, one could argue that disillusionments with mainstream models of liberal transitional justice and their outcomes have contributed to making other conceptions of justice more prominent.

For instance, it is interesting to note that the government, which initially pursued a liberal approach with regards to land reform and focused extensively on reparative justice, has shifted at least rhetorically towards a more radical approach with regards to socioeconomic justice. Another respondent’s mention of the change of minds among the population also echoes this argument. Lastly, one of the respondents’ criticism of the mainstream, South African transitional justice model and their advocacy for a new, victim-centred approach also reflects shifting conceptions of justice in the light of transitional processes’ successes and shortcomings.

D. Scope, limitations, and avenues for future research

Several dimensions could not be explored in the context of this thesis and would deserve further investigation. At the immediate level of the study, it was not possible due to time and technical constraints to interview certain types of stakeholders that would have brought in interesting insights, namely members of academia, traditional leaders, as well as international stakeholders (such as members of embassies and diplomatic corps or representatives of international organizations).

The present Master thesis followed a qualitative approach, and thus its findings are of more limited transferability than those of a quantitative study. Nevertheless, issues present in South Africa have also been observed in other transitional contexts, where a similar inquiry could be conducted. Particularly in post-colonial contexts, questions relating to competing legal systems or the interaction between traditional leadership structures and Western-style structures would be worth investigating.

This inquiry has further revealed that Laplante's continuum of justice possesses sufficient flexibility to be applied beyond the scope of reparations. Hence, this differentiated and multifaceted model of justice provides a solid framework of analysis which could be used and replicated in the context of other inquiries.

Lastly, the interplay between socioeconomic justice measures in transitional contexts and the international economic system would be worth studying in deeper detail. As a matter of fact, Urueña and Prada-Urbe note that international investment agreements may act as limits to a thicker conception of transitional justice⁵¹⁷. While the Washington consensus has been the subject of increasing criticism, global financial institutions remain oriented towards a liberal approach to economics⁵¹⁸, which thus constrains the scope of socioeconomic measures taken in a transitional society. Hence, the interplay between socioeconomic measures in transitional justice and the wider international economic context warrant further research.

VIII. CONCLUSION

In 1994, South Africa effectuated its transition from decades of an oppressive and authoritarian system based on the segregation and oppression of the majority. More than 27 years later however, socioeconomic disparities, as well as the controversial debates surrounding access to, usage and ownership of land point out to the “unfinished

⁵¹⁷ Urueña and Prada-Urbe, pp. 406-407.

⁵¹⁸ S. R. Hurt, ‘Washington Consensus’, *Encyclopedia Britannica* [website], 2020, <https://www.britannica.com/topic/Washington-consensus>, (accessed 27 July 2021).

business”⁵¹⁹ of the South African transitional justice process. Noting the wide variety of stakeholders involved in land issues, the present Master thesis was written with the aim of answering the following research question: “*How do approaches to land rights by various stakeholders in transitional justice processes in South Africa represent different conceptions of justice?*”.

Transitional justice is grounded in the right to remedy and redress, which founds State obligations under multiple international and regional human rights instruments. The right to remedy and redress entails both a procedural component and a substantive component. The present Master thesis noted the contestation surrounding definitions of transitional justice, which range from narrow and legalistic approaches to broad definitions. I opted for a wider definition, as it was deemed more appropriate to reflect the multiple dimensions of transitional justice and to encapsulate violations of ESC rights. Transitional justice has become widely popular and has undergone a process of standardization, while a multitude of mechanisms has been developed. It is characterized by contradicting aims, notably those stability and legitimacy on the one hand, and transformation on the other hand., Transitional justice has gone through a range of positive developments such as the ‘visibilization’ of victims or the increased usage of truth commissions. Other developments to be noted include the increasing hybridization of transitional justice and emerging division of labour between international and domestic mechanisms, as well as the trend towards a stronger involvement of civil society in transitional justice processes. The thesis noted several strands of criticisms raised at transitional justice theory and practice, such as its Eurocentrism; the dominance of liberal thought and of the international community; obstacles to substantial and broad-based participation; the pursuing of decontextualized, depoliticized, technocratic, and legalistic approaches; operational shortcomings such as insufficient resources; and the lack of theoretical and conceptual clarity. A significant line of criticism has revolved around the marginalization of ESC rights in mainstream transitional justice thought and practice. The insufficient consideration of socioeconomic dimensions unfolded in part due to the close

⁵¹⁹ Maregere.

interlinkages between transitional justice and neoliberalism. In recent years, authors such as Arbour and Mani have called for a more holistic approach encompassing socioeconomic dimensions, but have also been faced with theoretical and practical challenges to incorporating violations of ESC rights in transitional justice (such as blurred lines between transitional justice and development policy, stretching already low resources, and raising expectations unlikely to be fulfilled).

After noting the absence of holistic theories on transitional justice and the existence of many theoretical approaches, the thesis highlighted conceptions of justice as articulated by Webber, Mani and Laplante. Models of transformative justice as proposed by Evans and Lambourne, which seek to go beyond transitional justice, were further elaborated upon. Ultimately, Laplante's model of continuum of justice (ranging from reparative justice to restorative, civic/political and socioeconomic justice) was chosen as it was deemed the most convincing, flexible, and systematic. Lastly, the section laid out the specificities of land rights, noting that, while there is no 'right to land' per se, land rights touch upon a range of CP, ESC, and collective rights, and are thus anchored in a wide array of international and regional instruments. The elaboration of a Draft General Comment on land rights by the UN Committee on Economic, Social and Cultural Rights further suggests the increasing willingness to anchor land rights.

South Africa was selected as a case study. As a matter of fact, the TRC has given rise to a 'South African model', which has been praised and replicated, making it a critical case in transitional justice studies. Furthermore, land rights are of particular interest in the South African context. The thesis introduced the context of the case study, noting continuities between violations of human rights from the colonial period to the apartheid regime, and highlighting the centrality of land issues in this regard. The section described the transitional justice process in South Africa, which was driven by compromises at the political level and marked by the work of the TRC. The work and legacy of the TRC was appraised in a critical manner, before turning to the question of land reform. In spite of a

progressive constitutional and legal framework, the skewed land ownership patterns have persisted while frustration has progressed.

The thesis presented the results of the data collected in the framework of six synchronous, semi-structured interviews conducted with diverse stakeholders. The data was divided into various categories derived from the index/thematic framework.

Respondents' discussions of human rights, and notably land rights, violations in South Africa provided an insight into the detrimental transgenerational impacts of land dispossession and forced removals on the affected populations, with groups such as women and indigenous peoples disproportionately affected.

With regards to the transitional justice process, respondents' answers highlighted the discrepancies between the improvements in the case of CP rights and institutions and the lack of progress with regards to ESC rights and collective rights, notably land rights. Land rights assumed a particular place in the transitional justice process, as they were not dealt with extensively by the TRC, something that was deemed deliberate by a respondent, who highlighted the problems resulting from unresolved land issues.

Discussing the land reform in South Africa so far, respondents stressed the high expectations surrounding it and its centrality for peace, stability, and wider economic situation. This contrasted with the frustration expressed at the outcomes of the land reform, although respondents noted some successes such as the restitution process with regards to urban land claims. Respondents highlighted legal challenges (temporary nature of institutions tasked with handling land issues, competing law systems, insecurity of tenure, over-judicialization of the restitution process) and policy-related pitfalls (lack of coherence, nature of restitution, ideological challenges). They further noted political issues (politicization and lack of political will, changing of minds, use of scapegoating rhetoric) and implementation-related challenges (top-down approach, budgetary issues, maladministration, delays and corruption, and issues in the interaction with beneficiaries such as insufficient support). Lastly, challenges linked with traditional leadership structures were discussed, including the insufficient democratization in access to and

ownership of land, with the example of the Ingonyama Trust in the KwaZulu-Natal province.

Respondents were then asked to assess measures based on Laplante's continuum of justice. While reparative justice was acknowledged as important, with some respondents emphasizing property rights and a liberal approach, this form of justice was deemed essential but insufficient to address all land issues. Restorative justice was further conceived as important, but respondents also highlighted possible difficulties in balancing such measures with individual interests. They adopted a wide approach to community-based measures, emphasizing partnerships and plural, inter-community dialogues or even advocating for a bottom-up, self-reliant approach by communities. Civic/political justice was intensively discussed by respondents, who overall demonstrated a strong sense of trust in the institutions created following the transition, as well as in civil society. Lastly, socioeconomic justice was more controversial, although several respondents seemingly indicated that socioeconomic measures ought to be part of transitional justice. They proposed varying solutions with regards to the type of economic system under which socioeconomic measures should be taken (with some pleading for liberal approaches revolving around property rights while others emphasized social democratic systems and affirmative action). The question of expropriation without compensation revealed these opposing visions as well as legal and political controversies.

While discussing lessons learned, respondents highlighted education, corruption in addition to socioeconomic issues as priority policy areas for transitional societies. They further reflected on the interaction between the local and the international context, on the one hand emphasizing the needs for context-sensitivity, while also urging to draw expertise from international experiences. Respondents noted the importance of managing expectations in transitions and the risks associated with unfulfilled promises, with some expressing criticism at the role of politics in transitional justice. Respondents further adopted a range of attitudes with regards to the role of the state, ranging from an emphasis on the state's role to serve the community to pleas for grassroots, bottom-up solutions by 'state-proof' communities. Last but not least, it should be mentioned that, while several

respondents did not seem to outright exclude transitional justice, one respondent was highly critical of the transitional justice model based off the South African TRC.

Several insights can be drawn from these findings. With regards to land rights and land issues, one of the main insights drawn from this study is the centrality of remedying violations of land rights, especially in transitional contexts. Land is not central from an economic point of view, but is also of central relevance in a political and cultural sense. As a result, when left unaddressed or under-addressed, violations of land rights and their legacy may breed a fertile ground for politicization and conflicts. Secondly, the need for a strong constitutional framework as well as a comprehensive set of mutually reinforcing laws ought to be highlighted, notably with regards to the existence of different legal systems that may stand in contradiction to one another. The coexistence of legal systems is echoed by the simultaneous presence of institutions possessing different types of legitimacy, such as national authorities and traditional leadership structures. This invite us to adopt an approach that benefits from these traditional structures but stays off from being too idealistic and remains cautious about the persistence of structures which may contribute to the problems that need to be remedied. The need for strong institutions with clear, realistic mandates and adequate budgets is further emphasized in this thesis. With regards to policy-related dimensions, the present thesis notes the importance of needs-based, holistic strategies with clear objectives and target populations. These strategies need to take into account the specific challenges linked with land issues, such as the impact of the passage of time on restitution claims or the competition of claims with different sources of legitimacy. Discussions surrounding the interaction with beneficiaries of land reform programmes invite us to explore more participatory and capabilities-based systems of land reform in order to promote and protect land rights in transitional contexts.

The thesis further allowed to elaborate on critical reflections on transitional justice, such as the specific temporality of transitional justice. As a matter of fact, while the beginning of a transition may be more readily identifiable, transitional justice appears to be more diffuse and ongoing, as evidenced by the fact that land reform in South Africa continues to be framed in reference to transitional justice and redressing past human rights

violations. The present Master thesis thus argues that, in the light of the open-endedness of transitional justice processes, a constant endeavour of assessment, feedback and refining of transitional justice measures is required, in order to adapt to the new realities following the transition. A second category of findings pertains to the interaction between the local, national, and global levels. The data collected hints at a higher receptivity to bottom-up measures due to the pitfalls of centralized top-down approaches. Yet, the role of the State is not fully discarded either, specifically with regards to traditional leaders. A surprising finding was the limited manner in which the role of international actors in the transitional justice process and in land rights issues was discussed. Thirdly, criticism at the TRC's narrow mandate and statements about the centrality of remedying land issues point out to a wider conception of transitional justice which would also include ESC rights. This wider conception also encompasses the domains of education and anti-corruption measures, highlighting the interlinkages between transitional justice and state-building endeavours. Regarding the role of politics of transitional justice, while over-politicization and demagogic rhetoric risks undermining a rights-based approach, the present Master thesis emphasizes the fact that transitional processes provide windows of opportunity for (re-)negotiating the normative boundaries of a society, a process that is inherently associated with contestation, debate, and, ultimately, politics. In this regard, a depoliticized, technical approach would be unfitting. Another finding pertains to the nuanced and complex vision of the role of the state in transitional justice processes. While it remains considered a central stakeholder on the one hand, proposals for bottom-up initiatives by state-proof communities or for partnerships and social facilitation hint at the fact that transitional justice is evolving to become or has become less state-centric. Lastly, this thesis argues that the design of the economy (be it at the national or international level) bears a significant impact on the enjoyment of human rights, including land rights, in a transitional context. This thesis has noted the strong interlinkages between neoliberalism and mainstream transitional justice approaches centred on CP rights at the expense of ESC rights. Yet, academic literature as well as the data collected in this study highlight the detrimental impact of neoliberalism on democratic processes, accountability, and the remedying of socioeconomic inequalities. Although the neoliberal setup of the international economy constrains the range of measures that can be

implemented at a socioeconomic level in a transitional context, the present thesis pleads for transitional justice conceptions that place human rights ahead of economic dogmas such as neoliberalism.

The last sub-section of findings allows us to answer the question of how stakeholders' approaches to land rights in South Africa correspond to various normative conceptions of justice. In short, the interviewed stakeholders represent multifaceted understandings which coexist, compete, and sometimes contradict one another. As a matter of fact, while the reparative form of justice was deemed an essential part of an agenda to promote and protect land rights in transitional contexts, it was considered insufficient alone to correct socioeconomic inequities resulting from past violations. A tension was felt between reparative and restorative justice (itself conceived in a broad manner), between the individual and the collective dimensions. The notion of civic and political justice was particularly prominent, reflecting the continued importance of constitution-making and state-building processes. This form of justice was however conceived in a creative way, as institutions and the Constitution were not conceived as technical and neutral elements of the State, but as factors for social change and transformation. Respondents' emphasis on the role of civil society further highlighted the fact that the State is not the only one promoting the civic/political form of justice. Lastly, several respondents embraced the idea that socioeconomic justice should be included in transitional justice endeavours. Their responses highlight the fact that, if one were to adopt such a broad perception of transitional justice, it should be able to accommodate different types of economic systems, and not only the mainstream, liberal, market-based conception. Lastly, one should note that these understandings of justice did not only vary from one actor to another, but have also shifted over time, probably at least in part due to disillusionments with mainstream, liberal transitional justice models.

While the present Master thesis' findings can only be transferred to other contexts in a limited manner due to the qualitative nature of the inquiry, they point out to issues (specifically competing legal systems and competing claims to land, or the interaction between traditional leadership structures and Western-style structure) that can also be found in other transitional contexts, particularly post-colonial ones. Furthermore, it was

not possible to interview certain types of stakeholders such as members of academia, traditional leaders, or international stakeholders. Hence, further research could strive to gather the points of view of these actors. Further avenues for research could be the application of Laplante's theory to other transitional justice cases. Additional areas to investigate were suggested, notably the interplay between socioeconomic justice measures in transitional contexts and the international economic system. The thesis provided an opportunity to reflect on a normative theory of transitional justice, namely Laplante's continuum of justice, and to apply it to a concrete case study. Overall, it is an invitation to diversify our understandings of justice and transitional justice.

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ANNEXES

1. List of interviews

1 – Interview with a representative of an economic interests' group (via Zoom, 17 May 2021).

2 – Interview with a representative of a victims and survivors' support group (via Zoom, 25 May 2021).

3 – Interview with a representative of a civil rights organization (via Zoom, 25 May 2021).

4 – Interview with a member of the Parliament and of an opposition party (via Zoom, 08 June 2021).

5 – Interview with a high-ranking member of the executive and of the ruling party (via Zoom, 25 June 2021).

6 – Interview with a former member of the Land Claims Court, active in the judicial sector (via Zoom, 06 July 2021).

2. Interview guide

Introducing questions

- Can you please shortly introduce yourself and your organization (name, mandate, position within the organization, geographic focus is applicable)?

Intermediate questions – Transitional Justice in general

- How would you assess the transitional justice process in South Africa so far?
- Are there any pitfalls? Was anything lacking or not?
- How would you describe your position and role so far in the transitional justice process?

Intermediate questions – TJ and land rights

- How adequate would you rate these transitional justice measures for promotion and protection of land rights?
 - Measures focusing on the individual level such as court proceedings, restitution, compensation, satisfaction, guarantees of non-repetition.
 - Measures focusing on the interpersonal, communal level such as truth-telling and measures of dialogue and reconciliation.
 - Measures focusing on the collective level in the political/institutional sense. These can include measures fostering participation at the political level, constitutional amendments, legal reforms.
 - Measures focusing on the collective level in the socioeconomic sense, such as measures to remedy historic injustices and measures aiming at correcting socioeconomic inequities on a longer-term. For instance, the draft Expropriation Bill.
- What other measures or mechanisms (if any) do you deem essential to protect and promote land rights in South Africa?

Ending questions

- Do you believe transitional justice is an adequate framework to protect and promote land rights in South Africa? Why / why not?
- If not: what framework is most appropriate?
- What can be learned from the South African case for transitional justice in general?
- Which other stakeholders do you believe are crucial (with regards to land rights) in South Africa?
- Is there anything else you wish to add? Something important we did not discuss?

3. *List of codes*

Respondent information	• Personal background • Organization
Human rights violations	• Colonial era • Apartheid ◦ Land rights violations under apartheid • Specific groups • Role of business actors • Impact of violations
Transitional justice process – general	• Civil and political rights • Economic, social, and cultural rights • Collective/group rights • General assessment ◦ Upsides ◦ Pitfalls
Land reform	• Expectations ◦ Objectives of land reform ◦ Public opinion • Appraisal of actual impact ◦ Successes of land reform ◦ Challenges/pitfalls of land reform ▪ Legal challenges ❖ Competing law systems ❖ Overjudicialization ❖ Insecure tenure ❖ Temporary institutions ▪ Policy challenges ❖ Flaws in legislation ❖ Lack of coherence ❖ Nature of restitution ❖ Ideological challenges ❖ International dimension ▪ Political challenges ❖ Politicization of the land question ◦ Political will/lack thereof ❖ Changing of minds ❖ Politicization of race ▪ Implementation issues ❖ Top-down approach ❖ Budgetary issues ❖ Maladministration ◦ Flawed processes ◦ Unprocessed claims, delays ◦ Corruption/nepotism ◦ Mwelase case ▪ Interaction with beneficiaries ◦ Size of grants ❖ Lack of post-settlement support

	❖ Community property associations ❖ Difficulties of being a farmer ❖ Inadequate communication/awareness/education ▪ Ambivalent role of traditional leaders ❖ No true democratization ❖ Case of KwaZulu-Natal and Ingonyama Trust
Appraisal of measures	• Reparative Justice ○ Liberal approach, ownership, title deeds • Restorative Justice ○ Trust-building, social facilitation ▪ Plural, inter-community dialogue ○ Self-reliance, bottom-up approach • Civic/political justice ○ Trust in institutions ▪ Control of political process, participation ❖ Constitution & judiciary ○ Threats ○ Role of civil society ▪ Litigation • Socioeconomic justice ○ Question of choosing a system ▪ Affirmative action ○ Role of courts ○ Expropriation without compensation ▪ Arguments in favour ▪ Criticism ❖ Example of Zimbabwe ▪ Proposed alternatives • Other types of measures ○ Adequate budget ○ Support for farmers ▪ Education
Lessons learned	• Priority policy areas • Interaction between local and global • Role of politics • Role of the state ○ Need for accountability ○ Role of civil servants ○ Solutions outside the state ○ Partnerships • Is the TJ framework most appropriate?
Miscellaneous	• Persons to contact • Vocabulary clarification

Abstract

More than 27 years after the end of the apartheid in South Africa, land issues and overall questions of socioeconomic justice remain disputed and debated, as evidenced by the passionate and controversial debates around the Draft Expropriation Bill and planned amendment of Section 25 of the 1996 Constitution. The persistence of socioeconomic inequalities long after the work of the Truth and Reconciliation Commission ended has led several authors to describe the South African transitional justice process as ‘unfinished’. The present Master thesis aims at investigating how approaches to land rights by various stakeholders mirror different normative conceptions of justice in the South African transitional justice process. The thesis first starts by critically introducing the field of transitional justice and notes how mainstream transitional justice theory and practice has marginalised economic, social and cultural rights. It then discusses various theoretical models which outline the different normative conceptions of justice represented in transitional justice processes. Using six semi-structured qualitative interviews conducted from May to July 2021, the thesis generates insights pertaining to land issues, transitional justice, and the notion of justice in general. These findings lead to affirm that stakeholders hold multifaceted normative conceptions of justice which coexist, compete and sometimes contradict one another. These understandings vary not only among stakeholders, but also over time. Overall, the Master thesis is an invitation to diversify and broaden academic and praxis-oriented understandings of ‘justice’, so that transitional justice can remain relevant across time and cultures.

Keywords: Transitional Justice / Land Rights / South Africa / Human Rights / Justice.

Zusammenfassung

Mehr als 27 Jahre nach dem Ende der Apartheid in Südafrika sind Landfragen und allgemeine Fragen der sozioökonomischen Gerechtigkeit nach wie vor umstritten und werden kontrovers diskutiert, wie die kontroversen Debatten um den Entwurf des Enteignungsgesetzes und die geplante Änderung von Abschnitt 25 der Verfassung von 1996 zeigen. Das Fortbestehen sozioökonomischer Ungleichheiten lange nach Abschluss der Arbeit der Wahrheits- und Versöhnungskommission hat mehrere Autor*innen dazu veranlasst, den südafrikanischen Prozess der Übergangsgerechtigkeit als "unvollendet" zu bezeichnen. In der vorliegenden Masterarbeit wird untersucht, inwieweit die Ansätze zu Landrechten von verschiedenen Akteur*innen unterschiedliche normative Vorstellungen von Gerechtigkeit im südafrikanischen Übergangsgerechtigkeitsprozess widerspiegeln. Die Arbeit beginnt mit einer kritischen Einführung in das Feld der Übergangsgerechtigkeit und stellt fest, wie die Theorie und Praxis der Übergangsgerechtigkeit wirtschaftliche, soziale und kulturelle Rechte marginalisiert hat. Anschließend werden verschiedene theoretische Modelle erörtert, die die unterschiedlichen normativen Gerechtigkeitsvorstellungen, die in Prozessen der Übergangsgerechtigkeit vertreten werden, umreißen. Anhand von sechs halbstrukturierten qualitativen Interviews, die von Mai bis Juli 2021 durchgeführt wurden, liefert die Arbeit Erkenntnisse zu Landfragen, Übergangsgerechtigkeit und dem Begriff der Gerechtigkeit im Allgemeinen. Dies führt zu der Feststellung, dass die Akteur*innen vielfältige normative Vorstellungen von Gerechtigkeit haben, die nebeneinander bestehen, miteinander konkurrieren und sich manchmal widersprechen. Diese Auffassungen variieren nicht nur zwischen den Akteur*innen, sondern auch im Laufe der Zeit. Insgesamt ist diese Masterarbeit eine Aufforderung, akademische und praxisorientierte Verständnisse von "Gerechtigkeit" zu diversifizieren und zu erweitern, sodass Übergangsgerechtigkeit über Zeit und Kulturen hinweg relevant bleiben kann.

Schlüsselwörter: Übergangsgerechtigkeit / Landrechte / Südafrika / Menschenrechte / Gerechtigkeit.