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# A Tale of Two Rights? The Manifest Functions of Truth and Reconciliation Commissions and the Ambivalence Towards Economic, Social, and Cultural Rights

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Cosmas Emeziem \*

Transitional justice programs usually implicate economic, social, and cultural rights because of the interlinked nature of these facets of life in societies undergoing rapid transitions. For mature democracies, the changes may not be as rapid as they are for post-conflict or post-authoritarian societies, but the entanglements of the questions of justice in the social, economic, and cultural spheres are no less significant. Sometimes, the struggle for resources and economic opportunities is at the core of conflicts and human rights violations.<sup>1</sup> In the aftermath of these conflicts, many

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<sup>1</sup> Ruti Teitel, in a recent work, has reflected on the liability of corporations for economic rights violations and the failure by the current regime of international law to effectively hold them accountable. See Ruti Teitel, *On Corporate Responsibility, Human Rights, and Transitional Justice: Quo Vadis?* 112 AM. SOC. INT'L L. 324–26 (2018); see generally *Transitional Justice and Economic, Social and Cultural Rights*, OFF. UNITED NATIONS HIGH COMM'R FOR HUM. RTS. [UN OHCHR] (2014), <https://www.ohchr.org/Documents/Publications/HR-PUB-13-05.pdf> [<https://perma.cc/G2G5-WHKZ>]; see also E. Cusato, *Back to the Future? Confronting the Role(s) of Natural Resources in Armed Conflict Through the Lenses of Truth and Reconciliation Commissions*, 19 INT'L CMTY. L. REV., 4–5, 373–400 (2017).

countries rely on transitional justice mechanisms, such as Truth and Reconciliation Commissions (TRCs) and Criminal Tribunals, to redress these violations and restore peace and democratic harmony,<sup>2</sup> hence the significant utilization of TRCs in recent decades.<sup>3</sup> Despite these professed motivations to redress human rights violations, the default functionality of these measures is the redress of civil and political rights violations as a pathway to peace and reconciliation. The focus on civil and political rights by TRCs has somewhat made economic, social, and cultural rights the often-overlooked bundle of rights in transitional justice programs. Consequently, TRCs have become the means of presumed reconciliation and peace while leaving the structural economic, social, and cultural issues untouched. This ambivalent glance that TRCs make to Economic, Social, and Cultural Rights (ESCR) has neither produced sustainable peace nor guaranteed a transformative transitional justice. Thus, questions of violent expropriations of lands, minerals, water, and other resources are left unanswered. In some cases, market approaches like “willing buyer” and “willing seller”<sup>4</sup> are adopted, and this does not allow for any meaningful economic, social, and cultural justice. It is time to rethink

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<sup>2</sup> William A. Schabas, *Truth Commissions and Courts Working in Parallel: The Sierra Leone Experience*, 98 AM. SOC. INT’L L. 189–92 (2004).

<sup>3</sup> Truth Commissions and related bodies of inquiries have been used more than forty times in recent decades to search for the redress of human rights violations, reconciliation, and restoration of stability in post-conflict and post-authoritarian situations. See PRISCILLA HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* 6 (2d ed. 2002).

<sup>4</sup> The post-apartheid reform efforts in South Africa gave constitutional recognition to economic, social, and cultural rights. However, it did not resolve the land issues; the country adopted the policy of willing buyer, willing seller. Twenty-four years after, the land issue in South Africa is arguably the most significant law reform issue in the country today. Sam Rugege, *Land Reform in South Africa: An Overview*, 32 INT’L J. LEGAL INFO. 283, 292 (2004); Edward Lahiff, *‘Willing Buyer, Willing Seller’: South Africa’s Failed Experiment in Market led agrarian reform*, 28 Third World Quarterly, 8, 1577–97(2007); Ben Cousins, *Land reform and agriculture uncoupled: the political economy of rural reform in post-apartheid South Africa*, in IN THE SHADOW OF POLICY: EVERYDAY PRACTICES IN SOUTH AFRICA’S LAND AND AGRARIAN REFORM 48 (2013).

this framework of TRCs because it creates an ambiance of insincere transitional justice.

This Essay argues for developing a TRC paradigm that makes economic, social, and cultural rights manifest functions of TRCs. At a time of strident national and international calls and movements for equality, equity, sustainable development, and redress of racial and historical injustice, TRCs can be more beneficial if economic justice questions are made manifest functions. Such a paradigm will also help to consolidate the flailing canons of TRCs as frameworks of transitional justice.

## I. INTRODUCTION

Food,<sup>5</sup> shelter, and healthcare<sup>6</sup> are some of the earliest concerns of humankind. In our epoch, they are identified as part of economic, social, and cultural rights.<sup>7</sup> These rights are central to human wellbeing and dignity. Their importance is further recognized and amplified by the International Covenant on Economic, Social, and Cultural Rights (ICESCR).<sup>8</sup> Some of the

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<sup>5</sup> See generally Rhonda E. Howard-Hassmann, *Implications for the International Human Right to Food*, in *State Food Crimes* 133 (2016); Olivier De Schutter, *The role of global governance in supporting human rights: the global food price crisis and the right to food*, in *ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS* 90 (2014); Michael A. Meyer, *The right to food*, 27 *INT'L REV. RED CROSS* 443 (1987).

<sup>6</sup> See, e.g., *International Covenant on Economic, Social and Cultural Rights*, in *INTERNATIONAL LAW DOCUMENTS* 189 (Jan Klabbers ed., 2016); UN OHCHR, *General Comment No. 12 on the right to adequate food*, <https://www.refworld.org/pdfid/4538838c11.pdf> [<https://perma.cc/6MLF-G9M9>].

<sup>7</sup> See generally UN OHCHR, *International Covenant on Economic, Social and Cultural Rights*, <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> [<https://perma.cc/93AH-25XM>]; Jeremy Waldron has explored the linkages and relationships between socioeconomic rights and the classic theories of justice. See generally Jeremy Waldron, *Socioeconomic Rights and Theories of Justice*, 48 *S.D. L. REV.* 773 (2011).

<sup>8</sup> In this paper, the words “socioeconomic rights” and “economic and social rights” are used interchangeably because the literature in the field makes no significant delineation between these usages. Also, it is worth noting that economic, social, and cultural rights/justice flow from each other and are treated here as such. See Waldron, *supra* note 7, at 784; see also Francesca Bignami & Carla Spivack, *Social and Economic Rights as Fundamental Rights*, 62 *AM. J. COMP. L. SUPP.* 561 (2014).

rights as articulated by the ICESCR are the right to just and favorable conditions of work;<sup>9</sup> the right to social security including social insurance;<sup>10</sup> the right to accord the widest possible protection to the family as the natural and fundamental group unit of society;<sup>11</sup> and the right to an adequate standard of living including food, clothing, housing, and the continuous improvement of housing conditions.<sup>12</sup> Another is the right to mental health, which includes the improvement of environmental and industrial hygiene.<sup>13</sup> Article 13 of the ICESCR recognizes the right to education because it is essential to the full development of the human personality and a sense of dignity. Article 15 of the ICESCR recognizes the right to take part in cultural life. Together, these economic, social, and cultural rights form the frameworks for economic, social, and cultural justice.

However, these rights were often victims of racism, colonization, segregation, forced and uncompensated expropriation, separation of children from families of Indigenous peoples, and other such policies of exclusion that are significant to our current dilemmas about providing healing, reconciliation, reparations, forgiveness, and memory and enacting lasting community harmony. For instance, in Apartheid South Africa, Black people were excluded from the cities and forced into areas designated as Black homelands. The impact of this forceful and uncompensated eviction still reverberates in South Africa.<sup>14</sup> In the same manner, a special form of

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<sup>9</sup>See generally UN OHCHR, *supra* note 7.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See generally Michael Robertson, *Dividing the Land: An Introduction to Apartheid Land Law*, in NO PLACE TO REST: FORCED REMOVALS AND THE LAW IN SOUTH AFRICA 122–36 (Christina Murray & Catherine O’Regan eds., 1990); Colin Bundy, *Land, Law and Power: Forced Removals in Historical Context*, in NO PLACE TO REST: FORCED REMOVALS AND THE LAW IN SOUTH AFRICA 3–12 (Christina Murray & Catherine O’Regan eds., 1990). More importantly, the direct effect of two pieces of legislations in apartheid South Africa—the *Black Land Act (No 27) of 1913* and *Development Trust and Land Act (No 18) of 1936*—was to effectively reserve only about 13 percent of the land in

segregated education, “the Bantu Education,”<sup>15</sup> was instituted for Black South Africans. This form of education was essentially poor-quality education, which could not guarantee the receivers the needed level of human development to be effective competitors with their peers around the world. This exclusion from education by segregation was also a matter of state policy in America before the case of *Brown v. Board of Education*.<sup>16</sup>

Yet, economic, social, and cultural rights (ESCR)<sup>17</sup> have enjoyed limited support, especially in the legal canons of many liberal democracies—unlike civil and political rights, such as the rights to life, freedom of expression, political participation, privacy, and human dignity.<sup>18</sup> Hence, the perception within some parts of the academy, and in policy spaces, is that ESCR are

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South Africa for Black South Africans, who are the majority in the country. Over 70% of the population are Blacks according to the South African census figures of 2011. Catherine M. Coles, *Land Reform from Post-Apartheid South Africa*, 20 B.C. ENV'T. AFF. L. REV. 699, 669–759 (1993).

<sup>15</sup> Just as with the Jim Crow segregation of schools in America, South African “Bantu Schools” were specifically for Black people and were highly under-resourced—in funding, teachers, teaching materials, and general educational infrastructure. Melia Thompson-Dudiak, *Comparison: Improving How the Legacies of State-Sponsored Segregation in The United States and South Africa Affect Equity and Inclusion in American and South African Higher Education Systems*, 49 CAL. W. INT’L L. J. 8 (2018).

<sup>16</sup> See generally *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>17</sup> The rights articulated by the ICESCR are known as Economic, Social, and Cultural Rights (ESCR).

<sup>18</sup> See generally Rosalind Dixon & Julie Suk, *Liberal Constitutionalism and Economic Inequality*, 85 U. CHI. L. REV. 369 (2018); JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: WHAT CAN BE DONE* (2012); Richard A. Epstein, *The Wrong Rights, or: The Inescapable Weaknesses of Modern Liberal Constitutionalism*, 85 U. CHI. L. REV. 403 (2018); Ray Kiely, *Poverty reduction through liberalisation? Neoliberalism and the myth of global convergence*, 33 REV. OF INT. STUD. 415 (2007); Claudio A. Holzner, *The Poverty of Democracy: Neoliberal Reforms and Political Participation of the Poor in Mexico*, 49 LATIN AM. POL. & SOC. 87 (2007); Stephan Haggard, *Markets, Poverty Alleviation, and Income Distribution: An Assessment of Neoliberal Claims*, 5 ETHICS & INT’L AFFS. 175 (1991); Frank I. Michelman, *Socioeconomic Rights in Constitutional Law: Explaining America Away*, 6 INT’L J. CONST. L. 663, 664 (2008); Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT’L J. CONST. L. 13 (2003); Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 864–68 (2001).

merely “desirable social issues” that are non-justiciable.<sup>19</sup> Some others have also suggested an approach to ESCR that focuses on the arbitrariness of acts.<sup>20</sup> Civil and political rights, such as the rights to privacy and ownership of property, are ordinarily deemed enforceable. The limited exceptions to the enforceability of civil and political rights are often clearly provided in law or expressly articulated in judicial opinions. Equally, while these civil and political rights can only be attenuated in exceptional circumstances<sup>21</sup> and for public good, such as the execution of a lawfully issued search warrant, ESCR are deemed non-justiciable unless they can find expression through civil and political rights.<sup>22</sup> For instance, the right to shelter can derive its justiciability through the right to human dignity.<sup>23</sup> Therefore, it is only through some creative jurisprudential crafting and interpretation, “rather than a matter of purely distributive justice,”<sup>24</sup> that these ESCR are given effect.<sup>25</sup> In other

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<sup>19</sup> Shylashri Shankar & Pratap Bhanu Mehta, *Courts and Socioeconomic Rights in India*, in *COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD* 146–82 (2008); see generally David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT’L L. J. 189 (2012); ROBERTO GARGARELLA, THEUNIS ROUX, & PILAR DOMINGO, *COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR?* (1st ed. 2006); MALCOLM LANGFORD, *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW* (2008).

<sup>20</sup> *Id.*

<sup>21</sup> Even then, the question of what is an exceptional circumstance remains a matter for judicial review. In other words, judicial review is critical so that private rights are not easily taken away at a whim. See Lindsay F. Wiley, & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against “Suspending” Judicial Review*, 133 HARV. L. REV. 9, 179–98(2020); *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>22</sup> Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law*, 22 AM. U. INT’L L. REV. 1, 35–64 (2006).

<sup>23</sup> Christopher McCrudden, *Human Dignity and Judicial Interpretations Human Rights*, 19 EUR. J. INT’L L., 655–724 (2008); Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L. J. 1–64 (1999); E.P. Mendes, *Taking Equality into the 21<sup>st</sup> Century: Establishing the Concept of Equal Human Dignity*, 12(1) NAT’L J. CONST. L. 3 (2000).

<sup>24</sup> Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 HUM. RTS. Q., 63, 63 (2004).

<sup>25</sup> Sandra Liebenberg, *The Value of Human Dignity in Interpreting Socio-Economic Rights*, 21 S. AFR. J. ON HUM. RTS. 1, 1–31 (2005).

words, unless these ESCR can effectively be attached to civil and political rights, they are unenforceable.

The bifurcation in human rights theory between positive and negative rights<sup>26</sup> makes it difficult for policy makers to argue for an equal policy commitment to economic, social, and cultural rights. But transitional justice emphasizes an uncommon approach to justice that includes restorative justice, hence the need to deeply interrogate the apparent reticence of transitional justice efforts toward socioeconomic rights. This inadequate commitment to ESCR has created some distress, which is of great concern to policy and legal scholars because of what it portends for the future—the increasing fragility of even the “established democracies.”<sup>27</sup> There is a concern that stable democracies can only be constructed on just foundations, in societies where all human rights are recognized, respected, protected, and remedied when they are violated.<sup>28</sup> This human rights framework cannot be limited to civil and political rights. It must necessarily embrace economic, social, and cultural rights because without them social harmony may not be easily guaranteed.

The concern is mostly hinged on the reality that some of the most prominent human rights challenges of the 21<sup>st</sup> century are the distress of want, inequality, and misery.<sup>29</sup> The emergence of the COVID-19<sup>30</sup> pandemic

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<sup>26</sup> For a general view of the idea of negative and positive rights, see David P. Currie, *Positive and Negative Constitutional Rights*, 53 UNIV. CHI. L. REV. 864 (1986); Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY*, 118–172 (1969).

<sup>27</sup> Christopher N. J. Roberts, *The United States' Unequivocal Ambivalence toward Socioeconomic Rights*, in *THE CONTENTIOUS HISTORY OF THE INTERNATIONAL BILL OF HUMAN RIGHTS* (2014); see generally Jo Beall, Stephen Gelb, & Shireen Hassim, *Fragile Stability: State and Society in Democratic South Africa*, 31 J. S. AFR. STUD., 681 (2005).

<sup>28</sup> Sharath Srinivasan, *No Democracy with Justice: Political Freedom in Amartya Sen's Capability Approach*, 8 J. HUM. DEV. 3, 457–80 (2007).

<sup>29</sup> See generally THOMAS PIKETTY, *CAPITAL IN THE 21<sup>ST</sup> CENTURY* (2014); THOMAS PIKETTY, *CAPITAL AND IDEOLOGY* (2019); JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002); *POVERTY, PARTICIPATION, AND DEMOCRACY: A GLOBAL PERSPECTIVE* (Anirudh Krishna ed., 2008).

<sup>30</sup> The world economic outlook in the face of the COVID-19 pandemic has become more dire as many have been pushed further into poverty. See *The Global Economic Outlook*

has further exacerbated the problem of poverty,<sup>31</sup> inequality,<sup>32</sup> and misery.<sup>33</sup> The gap between the rich and poor continues to widen despite the abundance of technical knowledge and the uncommon innovations that humanity continues to make.<sup>34</sup> The inequality within nation-states remains significant despite state and international policy and<sup>35</sup> concerted efforts<sup>36</sup> to lift many

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*During the COVID-19 Pandemic: A Changed World*, THE WORLD BANK (June 8, 2020), <https://www.worldbank.org/en/news/feature/2020/06/08/the-global-economic-outlook-during-the-covid-19-pandemic-a-changed-world> [<https://perma.cc/J9V8-ZHSB>]; see generally *Human Development Report 2020: The Next Frontier*, UNDP (2020), <http://hdr.undp.org/en/2020-report> [<https://perma.cc/F99E-6ZB7>]; Jason DeParle, 8 Million Have Slipped Into Poverty Since May as Federal Aid Has Dried Up, N.Y. TIMES (Oct. 15, 2020) <https://www.nytimes.com/2020/10/15/us/politics/federal-aid-poverty-levels.html> [<https://perma.cc/5NPW-4HKF>].

<sup>31</sup> See generally Giovanni Valensisi, *COVID-19 and Global Poverty: Are LDCs Being Left Behind?*, 32 EUR. J. DEV. RSCH. 1535, 1535–57 (2020).

<sup>32</sup> Yasmin Dawood, *The New Inequality: Constitutional Democracy and the Problem of Wealth*, 67 MD. L. REV. 123, 123 (2007).

<sup>33</sup> In addition, environmental degradation and climate change will continue to force humanity into reckoning, hence the need to reignite global commitment to economic, social, and cultural rights. Yanzhong Huang, *Health Effects of Environmental Degradation*, in TOXIC POLITICS: CHINA'S ENVIRONMENTAL HEALTH CRISIS AND ITS CHALLENGE TO THE CHINESE STATE, 25–53 (2020).

<sup>34</sup> See Samuel Scheffler, *Is Economic Inequality Really a Problem?*, N.Y. TIMES (July 1, 2020), <https://www.nytimes.com/2020/07/01/opinion/economic-inequality-moral-philosophy.html> [<https://perma.cc/6E7T-EDNE>]; see generally Robert H. Frank, *How Rising Inequality Has Widened the Justice Gap*, N.Y. TIMES (Aug. 31, 2018), <https://www.nytimes.com/2018/08/31/business/rising-inequality-widened-justice-gap.html> [<https://perma.cc/RMU3-MLD6>].

<sup>35</sup> Global and regional international/transnational policy institutions such as the United Nations, the World Bank, International Monetary Fund (IMF), the European Union (EU), the Association of Southeast Asian Nations (ASEAN), and the Economic Community of West African States (ECOWAS) are all involved in the efforts to eradicate poverty and enhance ESCR. Sacha Garben, *The European Pillar of Social Rights: An Assessment of its Meaning and Significance*, 21 CAMBRIDGE Y.B. EUR. LEGAL STUD. 101–27 (2019).

<sup>36</sup> Alberto D. Cimadamore, *Global justice, international relations, and the Sustainable Development Goals' quest for poverty eradication*, 32 J. INT'L & COMPAR. SOC. POL'Y 131, 142 (2016); See generally Shadrack C. Agbakwa, *A Path Least Taken: Economic and Social Rights and The Prospects of Conflict Prevention and Peacebuilding in Africa*, 47 J. AFR. L. 38–64 (2003).

out of poverty. For many of these societies, the foundations of inequality and the consequent fracturing of these societies are linked to ESCR problems.<sup>37</sup>

These problems range from immediate concerns about systemic exclusion,<sup>38</sup> based on racial, cultural, or other identities and backgrounds,<sup>39</sup> historical immiseration,<sup>40</sup> dispossession,<sup>41</sup> domination, and exclusive utilization of natural resources.<sup>42</sup> The lack of sustainable utilization of the natural environment and its consequent aggravation of climate-induced disasters has also heightened the difficulties. Globally, many communities are finding themselves forced out of their homesteads by increasingly violent

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<sup>37</sup> See generally ANDREAS DAFINGER, *THE ECONOMICS OF ETHNIC CONFLICT: THE CASE OF BURKINA FASO* (2013); CHARLES H. ANDERTON & JOHN R. CARTER, *PRINCIPLES OF CONFLICT ECONOMICS: THE POLITICAL ECONOMY OF WAR, TERRORISM, GENOCIDE, AND PEACE* (2d ed. 2019).

<sup>38</sup> See generally ADOLFO FIGUEROA ET AL., *SOCIAL EXCLUSION AND INEQUALITY IN PERU* (1996); MOUNA H. HASHEM, *GOALS FOR SOCIAL INTEGRATION AND REALITIES OF SOCIAL EXCLUSION IN THE REPUBLIC OF YEMEN* (1996); PAUL P. APPASAMAY ET AL., *SOCIAL EXCLUSION FROM A WELFARE RIGHTS PERSPECTIVE IN INDIA* (1996); PASUK PHONGPAICHIT ET AL., *CHALLENGING SOCIAL EXCLUSION: RIGHTS AND LIVELIHOOD IN THAILAND* (1996); NATALIA TCHERNINA, *ECONOMIC TRANSITION AND SOCIAL EXCLUSION IN RUSSIA* (1996); FREDERICK KAIJAGE & ANNA TIBAIJUKA, *POVERTY AND SOCIAL EXCLUSION IN TANZANIA* (1996).

<sup>39</sup> *Identity and historical injustice*, in *IDENTITIES, AFFILIATIONS, AND ALLEGIANCES* 283, 283–84 (Seyla Benhabib et al. eds., 2007).

<sup>40</sup> Eric Wiebelhaus-Brahm, *Truth Commissions in Non-Transitional Contexts: Implications for Their Impact and Legacy*, in *THE GLOBAL IMPACT AND LEGACY OF TRUTH COMMISSIONS* 247, 247–68 (Jeremy Sarkin ed., 2019).

<sup>41</sup> See generally James L. Gibson, *Overcoming Historical Injustices: Land Reconciliation in South Africa* (2009); Ambreena Manji, *Rethinking Historical Land Injustices*, in *THE STRUGGLE FOR LAND AND JUSTICE IN KENYA* 139–59 (2020).

<sup>42</sup> Some scholars have alluded to these as economic genocides. See Charles H. Anderton & John R. Carter, *Economic Aspects of War, Terrorism, and Genocide*, in *PRINCIPLES OF CONFLICT ECONOMICS: THE POLITICAL ECONOMY OF WAR, TERRORISM, GENOCIDE, AND PEACE* 157–320 (2d ed. 2019).

climatic conditions,<sup>43</sup> such as flooding, drought, and desertification.<sup>44</sup> Globalization has not helped to resolve the issues relating to poverty; inequality; and the evident lack of strong commitment to ESCR, though it has created a global elite that can move seamlessly across sovereign borders.<sup>45</sup> The easy flow of capital<sup>46</sup> across borders has been complemented by a heightened securitization of migration.<sup>47</sup> Hence, many are caught in a marginal subsistence where want and misery pervade every moment of their lives. So, we have food insecurity,<sup>48</sup> limited access to clean water, limited availability of grazing fields, and other means of sustenance. These are ready sources of conflicts and contestations.

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<sup>43</sup> Jessica Owley, *Climate-Induced Human Displacement and Conservation Lands*, 58 HOUS. L. REV. (2021) (arguing for a proactive step to mitigate the impact of climate change induced displacements and mass migration. This is especially so in the light of the fact that it is estimated that about 150 million people will be displaced by climate factors by the year 2050); *see also* World Bank Group, *GROUNDWELL: PREPARING FOR INTERNAL CLIMATE MIGRATION*, at xxi (2018).

<sup>44</sup> MATTHEW SCOTT, *CLIMATE CHANGE, DISASTERS, AND THE REFUGEE CONVENTION (2020)*; Somini Sengupta, *Even Amid a Pandemic, more Than 40 million People Fled their Homes*, N.Y. TIMES (May 20, 2021), <https://www.nytimes.com/2021/05/20/climate/storms-floods-wildfires-displacement.html> [<https://perma.cc/2TDB-5YYP>].

<sup>45</sup> Ingo Venzke, *The law of the global economy and the spectre of inequality*, 9 LONDON REV. INT'L L. 1:111–134, (2021) (Ingo Venzke argues that the current structure of international law is a contributing factor to what he refers to as a “specter of inequality” that haunts international law).

<sup>46</sup> *See generally* CAPITAL WITHOUT BORDERS: CHALLENGES TO DEVELOPMENT (Ashwini Deshpande ed., 2010) (exploring themes on the global movement of capital and what it means for development, especially for middle to low-income countries).

<sup>47</sup> Meng-Hsuan Chou et al., *Is Securitizing Migration a Mandatory Choice? Lessons from the EU and China*, in SECURITY RELATIONS BETWEEN CHINA AND THE EUROPEAN UNION: FROM CONVERGENCE TO COOPERATION? 209–28 (Emil J. Kirchner et al. eds., 2016); Mathilde Duhaà et al., *The EU Migration Crisis, and the Human Rights Implications of the Externalisation of Border Control*, in EUROPEAN YEARBOOK ON HUMAN RIGHTS 2018 135–66 (Wolfgang Benedek et al. ed., 2018).

<sup>48</sup> *See* Anne Saab, *An International Law Approach to Food Regime Theory*, 31 LEIDEN J. INT'L L. 251–65 (2018) (exploring the theme of food insecurity and why international lawyers should develop a framework that fits international law and its special fields into the broader schema of the political economy of food).

Equally, these same sets of people who are left in want are often subjected to bearing the most challenging burdens of climate change,<sup>49</sup> poor governance, corruption, and ill-executed strategic and development policies.<sup>50</sup> For example, small island states are heavily impacted by the issues of climate change, although they contribute less to factors responsible for the rapid change in climate conditions, such as greenhouse gas emissions.<sup>51</sup> Moreover, poor communities often lack the effective, resilient tools and resources for climate induced disasters.<sup>52</sup> The lack of capacity to cope with increasingly violent climate situations is sometimes traceable to zoning laws

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<sup>49</sup> Eleanor Krause & Richard V. Reeves, *Hurricanes hit the poor hardest*, BROOKINGS (Sept. 18, 2017), <https://www.brookings.edu/blog/social-mobility-memos/2017/09/18/hurricanes-hit-the-poor-the-hardest/> [<https://perma.cc/29SF-RNMW>].

<sup>50</sup> Saliwe M. Kawewe & Robert Dible, *The Impact of Economic Structural Adjustment Programs [ESAPs] on Women and Children: Implications for Social Welfare in Zimbabwe*, 27 J. SOCIOLOGY & SOC. WELFARE, 4 (6), 79–107 (2000) (arguing that the implementation of structural adjustment policy in Zimbabwe had a harsh impact on the poor).

<sup>51</sup> Maxine Burkett, *A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy*, 35 UNIV. HAW. L. REV. 2 (2013).

<sup>52</sup> It has been seen with climate-related disasters, like Hurricane Katrina, that poor neighborhoods often lack the infrastructure to cope with their accompanying problems. Equally, years of underinvestment in poor communities and such factors as the siting of waste disposal infrastructure in these communities often contribute to their inability to cope effectively with climate change disasters. Often, this does not change after the crisis as government interest is short-lived. To this effect, many of these poor communities are left to bear the multi-generational impact of these disasters. Hence there is a need for a social justice-focused approach to these problems. This social justice approach will entail the utilization of the instrumentalities of transitional justice so that communities can have a careful review of the social, economic, and cultural factors that affect the quality of lives of these communities. This is the responsible thing to do to enhance good faith and community harmony and to prevent social rupture and consequent further violation of human rights. See generally Darryl Fears & Dino Grandoni, *EPA just detailed all the ways climate change will hit U.S. racial minorities the hardest. It's a long list*, WASH. POST (Sept. 2, 202), <https://www.washingtonpost.com/climate-environment/2021/09/02/ida-climate-change/> [<https://perma.cc/2EHG-M57S>]; Susan L. Waysdorf, *Returning To New Orleans: Reflections On The Post-Katrina Recovery, Disaster Relief, And The Struggle For Social Justice*, 12 U.D.C. L. REV. 3 (2009); Jonathan P. Hooks & Trisha B. Miller, *The Continuing Storm: How Disaster Recovery Excludes Those Most in Need*, 43 CAL. W. L. REV. 4 (2006); Juliana Maantay, *Zoning Law, Health, and Environmental Justice: What's the Connection?* 30 J. L., MED. & ETHICS 572–93 (2002).

and segregation even in mature democracies such as the United States.<sup>53</sup> In the same vein, when governance fails or when regulations are poorly implemented, especially in authoritarian states, that misgovernance most often disparately impacts poor communities.<sup>54</sup> These communities are sometimes burdened for generations by odious debts<sup>55</sup> accumulated under previous violent and authoritarian regimes. These odious debts often negatively affect the amount of resources available for public investment in education, infrastructure, health care and housing. Even for mature democracies, failures of governance and regulation can lead to devastating

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<sup>53</sup> There is a broad literature on whether environmental racism is in apartheid South Africa, Canada, Australia, or the United States. This manifests not just in the situation of heavily polluting industries in the neighborhoods of these communities but also includes policies excluding them from real estate in safe neighborhoods. These legal otherings and exclusions are often at the bedrock of lack of capacity for disaster management resilience in these communities. See generally William C. C. Kemp-Neal, *Environmental Racism: Using Environmental Planning to Lift People out of Poverty and Reshape the Effects of Climate Change and Pollution in Communities of Color*, 32 FORDHAM ENV. L. REV. 295–321 (2021); Richard J. Lazarus, “Environmental Racism! That’s What it is”, 2000 U. ILL. L. REV. 255–74 (2000); Edward P. Boyle, *It’s Not Easy Bein’ Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 VAND. L. REV. 937 (1993).

<sup>54</sup> See generally Sudarno Sumarto et al., *Governance and Poverty Reduction: Evidence from Newly Decentralized Indonesia* (SMERU Research Center, Working Paper, Mar. 2004).

<sup>55</sup> See David C. Gray, *Devilry, Complicity, and Greed: Transitional Justice and Odious Debt*, 70 L. AND CONTEMP. PROBS. 137–64 (2007) (arguing that any treatment of odious debts must be consistent with the broader programs of transitional justice in which they are situated). David believes that there is a paucity of literature linking debts accumulated by discredited regimes to the transitional justice efforts because these are often left to market fundamentals and business negotiations. For general literature on odious debts, see PATRICIA ADAMS, *ODIOUS DEBTS* (1991); Michael Kremer & Seema Jayachandra, *Odious Debt: When Dictators Borrow, who Repays the Loan?* BROOKINGS (March 1, 2003); Anna Gelpern, *Odius Debt, Not Debt*, 70 L. & CONTEMPORARY PROBLEMS 81 (2007); Lee C. Buchheit, G. Mitu Gulati, & Robert B. Thompson, *The Dilemma of Odious Debts*, 56 DUKE L. J. 1201 (2007); Soren Ambrose, *Social Movements of the Politics of Debt Cancellation*, 6 CHICAGO J. OF INT’L LAW 1, 267–85 (2005); Robert Howse, *The Concept of Odious Debt in Public International Law*, UNCTAD, 185, 1–27(2007).

consequences for the communities. We have seen these consequences in the failure of water regulatory policies<sup>56</sup> in places such as Flint, Michigan.<sup>57</sup>

When these conditions of poverty, inequality, and climate induced disasters are mixed with poorly digested ideas and ideologies, the potential for violence is primed.<sup>58</sup> This has led to vast violations of human rights in many places around the world. For example, in the case of Boko Haram,<sup>59</sup> the complex brew of poverty,<sup>60</sup> poor governance, economic exclusion, illicit exploitation of natural resources, and ill-digested and religiously-tainted

<sup>56</sup> Mitch Smith & Julie Bosman, *Michigan Attorney General Sues 2 Companies Over Flint Water Crisis*, N.Y. TIMES (June 22, 2016) <https://www.nytimes.com/2016/06/23/us/flint-water-crisis-michigan.html> [<https://perma.cc/FF7E-R96E>]. Though the Attorney General of Michigan is bringing an action to hold responsible companies accountable, this is also an indication of policy and regulatory failure. Litigations are often after the fact because the harm has already been done. This may include lasting health and economic harm to the lives of those impacted by the failure. Litigation also may not necessarily produce optimal results because of legal technicalities that shape the trajectory of trials in these types of situations—evidence, death or retirement of essential personnel, limited research, and information asymmetry between corporations and their host communities.

<sup>57</sup> Andrew Lawton, *The Flint Water Crisis: A National Warning of Failing Infrastructure*, 19 MARQ. BENEFITS & SOC. WELFARE L. REV. 85 (2017); Abby Goodnough, *Michigan Governor Tells Congress He Was Misled on Flint Water*, N.Y. TIMES (Mar. 17, 2016), <https://www.nytimes.com/2016/03/18/us/michigan-governor-tells-congress-he-was-misled-on-flint-water.html> [<https://perma.cc/DUT9-CP6W>].

<sup>58</sup> Ideologies influence conflicts. These intangible beliefs and persuasions inspire conflicts. See Maynard J. Leader, *Ideology and Armed Conflict*, 56 J. PEACE RSCH. 635 (2019).

<sup>59</sup> See generally Gertrude Fester-Wicomb, *Interrogator Versus Political Prisoner: Silences, Secrets and the Unsaid – A Question of Power*, 10 INT'L J. TRANSITIONAL JUST. 189–98 (2016); Robert Pirro, *Václav Havel and the Political Uses of Tragedy*, 30 POL. THEORY 228 (2002); VACLAV HAVEL & JOHN KEANE, *THE POWER OF THE POWERLESS: CITIZENS AGAINST THE STATE IN CENTRAL EASTERN EUROPE* (Taylor & Francis 2016); ALEXANDER THURSTON, *BOKO HARAM: THE HISTORY OF AN AFRICAN JIHADIST MOVEMENT* (Princeton 2019); Michael H. Hunt, *Ideology*, in *EXPLAINING THE HISTORY OF AMERICAN FOREIGN RELATIONS* (Michael J. Hogan & Thomas G. Paterson eds., 2d ed. 2004).

<sup>60</sup> See generally Ambassador David Shinn, *Poverty and Terrorism in Africa: The Debate Continues*, 17 GEO. J. INT'L AFFS. 16 (2016).

ideologies<sup>61</sup> has produced mass misery, displacements, and violence in Northeastern Nigeria.<sup>62</sup> Many other examples can also be cited from other parts of the world.

Beyond situations of conflict, such as those described above, even stable and mature democracies, including the United States, Britain, Australia, and Canada, have not been insulated from the tensions arising from years of racial and colonial prejudice that are deeply entangled with the public architecture of these states.<sup>63</sup> While many are quick to argue that these countries are democratic states and their institutions are not manifestly unjust or racist,<sup>64</sup> historical injustice<sup>65</sup> in these countries continues to significantly shape the evolution of their polity and public policy even in this era.<sup>66</sup> The recent,

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<sup>61</sup> See generally Jeff Victoroff, *The Mind of the Terrorist: A Review and Critique of Psychological Approaches*, 49 J. CONFLICT RESOL. 3 (2005); Martha Crenshaw, *The Psychology of Terrorism: An Agenda for the 21st Century*, 21 POL. PSYCH. 405 (2000).

<sup>62</sup> Rick Gladstone, *U.N.: Boko Haram Mayhem Has Displaced 1.4 Million Children*, N.Y. TIMES (Sept. 17, 2015) <https://www.nytimes.com/2015/09/18/world/africa/un-boko-haram-mayhem-has-displaced-1-4-million-children.html> [<https://perma.cc/27PW-2A9C>].

<sup>63</sup> The experience of Indigenous and First Nations peoples in Canada, Australia, and New Zealand are ready examples here. See LOUISE CHAPPELLET ET AL., *THE POLITICS OF HUMAN RIGHTS IN AUSTRALIA* 149 (2009); see generally Tyrone A. Forman & Amanda E. Lewis, *Racial Apathy and Hurricane Katrina: The Social Anatomy of Prejudice in the Post-Civil Rights Era*, 3 DU BOIS REV. 175 (2006).

<sup>64</sup> David Siders, 'America is not racist' becomes a GOP 2024 mantra, POLITICO (Jul. 28, 2021) [politico.com/news/2021/07/28/gop-primary-america-racist-2024-500680](https://www.politico.com/news/2021/07/28/gop-primary-america-racist-2024-500680),

[<https://perma.cc/CES3-XBNY>]; Rashawn Ray, *Is the United States a racist Country?*, BROOKINGS (May 4, 2021), <https://www.brookings.edu/blog/how-we-rise/2021/05/04/is-the-united-states-a-racist-country/> [<https://perma.cc/GWF7-QBJH>]; Muna Chalabi, *Tim Scott says America is not a racist Country—the data says otherwise*, THE GUARDIAN (May 6, 2021), <https://www.theguardian.com/news/datablog/2021/may/06/tim-scott-america-racist-data-racial-disparities> [<https://perma.cc/YJ5U-BRW9>].

<sup>65</sup> Michael D. Biddiss, *Racial Ideas and the Politics of Prejudice 1850–1914*, 15 HIST. J. 570 (1972); John Kane, *Racialism and Democracy: The Legacy of White Australia*, in *THE POLITICS OF IDENTITY IN AUSTRALIA* 117–31 (Geoffrey Stokes ed., 1997).

<sup>66</sup> See generally Kimberly Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

gruesome murder of George Floyd,<sup>67</sup> its accompanying massive demonstrations against police brutality,<sup>68</sup> and the legacy of slavery<sup>69</sup> illustrate the deep divide within these communities.<sup>70</sup> The status of the correctional institutions, criminal justice, and disparate impacts on minority communities continually draw attention to the materiality of inequity and inequality in these communities.<sup>71</sup>

Truth Commissions can play a critical role in these ongoing debates and conversations about the best way(s) to reimagine society and respond to questions of social (in)justice, inequality, and inhuman treatment in society. However, that conversation must not fall into the folly of focusing only on

<sup>67</sup> Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html?partner=IFTTT> [<https://perma.cc/6CUU-6NBN>].

<sup>68</sup> Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Sept. 7, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.htm> [<https://perma.cc/4KAS-37JR>].

<sup>69</sup> See generally Paul Finkelman, & Seymour Drescher, *The Eternal Problem of Slavery in International Law: Killing the Vampire of Human Culture*, 2017 MICH. ST. L. REV. 755 (2017); Seymour Drescher & Paul Finkelman, *Slavery*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 890–916 (Bardo Fassbender & Anne Peters eds., 2012); Joseph C. Miller, *Introduction: Atlantic Ambiguities of British and American Abolition*, 66 WM. & M. Q. 680 (2009); see also Rebecca J. Scott, *International Law and Contemporary Slavery: The Long View*, 38 MICH. J. INT'L. L. 349 (2017); JENNY MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW (2011).

<sup>70</sup> Neil Irwin et al., *America's Racial Divide, Charted*, N.Y. TIMES (Aug. 19, 2014), <https://www.nytimes.com/2014/08/20/upshot/americas-racial-divide-charted.html> [<https://perma.cc/9T7R-VJTK>]; see generally Monte Mills et al., *Race, Racism, and American Law: A Seminar From The Indigenous, Black, And Immigrant Legal Perspectives*, 21 ST. MARY'S L. REV. RACE SOC. JUST. 1 (2019); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1148 (1997) (Professor Siegel looks at the problem of entrenched inequality and how efforts at abolition often become quickly attenuated by approaches that only change the rhetoric while failing to transform the systems).

<sup>71</sup> Mass incarceration in America illustrates the disparate impact of criminal justice and correctional policy on Black people and other minorities in America. See generally Dorothy E Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004); ANGELA DAVIS, POLICING THE BLACK MAN (2017); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

civil and political rights. It must embrace and proffer sustainable answers to economic, social, and cultural rights to establish lasting peace and harmony in society. I argue so because, in recent decades, Truth and Reconciliation Commissions (TRCs) have become the most utilized transitional justice mechanism.<sup>72</sup> The popularity of TRCs is indicative of their wide acceptance in different global communities as better tools for managing potentially difficult conversations and proffering solutions for human rights violations. Significantly, their prominence has been noted in transitional justice measures around the world.<sup>73</sup> However, one noted difficulty with TRCs is that, like international criminal tribunals, TRCs have often focused on redressing violations of civil and political rights.<sup>74</sup> Beyond short political negotiations about such issues as sovereign debts through market approaches, no sustainable effort at economic justice is pursued in many of these cases.<sup>75</sup>

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<sup>72</sup> HAYNER, *supra* note 3.

<sup>73</sup> *Id.*; see also *Truth Commissions Digital Collection*, U.S. INST. FOR PEACE (Mar. 16, 2011), <https://www.usip.org/publications/2011/03/truth-commission-digital-collection> [<https://perma.cc/9TGL-96LT>].

<sup>74</sup> See generally Jovana Davidovic, *International Criminal Court, the Trust Fund for Victims, and Victim Participation*, in *JUS POST BELLUM AND TRANSITIONAL JUSTICE* (Larry May & Elizabeth Edenberg eds. 2013). The ICC Trust Fund for Victims is an attempt to overcome this lacuna in normative and functional framework of Transitional Justice Mechanisms like Truth Commissions and International Criminal Tribunals. See also Conor McCarthy, *The provision of reparations and victim support through the Trust Fund*, in *REPARATIONS AND VICTIM SUPPORT IN THE INTERNATIONAL CRIMINAL COURT* (2012); Anne-Marie De Brouwer, *Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families*, 20 LEIDEN J. INT. L. 207, 208 (2007).

<sup>75</sup> See generally Rama Mani, *Editorial: The Dilemmas of Expanding Transitional Justice or Forging the Nexus between Transitional Justice and Development*, 2 INT'L J. TRANSITIONAL JUST. 253 (2008); Dustin N. Sharp, *Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice*, 26 HARV. HUM. RTS. J., 149–78 (2013); Ruben Carranza, *Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?* 2 INT'L J. TRANSITIONAL JUST. 310–30 (2008); Juan Carlos Ochoa-Sanchez, *Economic and Social Rights and Truth Commissions*, 29 INT'L J. HUM. RTS., 9, 1470–93 (2019). The author explores the question of suitability of TRCs for investigating economic, social, and cultural rights violations; Louise Arbour, *Essay: Economic and Social Justice for Societies in Transition*, 40 N.Y.U. J. INT'L L. AND POL. 1–27 (2007); Zinaida Miller, *Effects of Invisibility: In search of the Economic in*

This privileging of civil and political rights in the framework of TRCs, evidenced by laws, policies, terms of references, and proceedings, needs to be adjusted so that communities can tap into the robust capacity of TRCs in seeking sustainable solutions to larger questions of social justice that often tug at the seam of community harmony. Therefore, it is time to reexamine this framework of TRCs because it creates a less inspiring transitional justice. The framework's current preferential focus on civil and political rights underestimates the potential of TRCs for public good.

The above argument is further reinforced by the existence of communities with significant economic exclusion and repression, whose embedded structural inequities are often a source of tension, community fracture, and failure of democracy.<sup>76</sup> In these communities, the mere restoration of the freedom of expression will not erase the fact that they still face exclusion in such things as access to education, clean water, sanitation, and safe housing.<sup>77</sup> When these things are neglected, social rupture is merely postponed instead of being sustainably resolved. Hence, these problems in the social spheres often quickly exacerbate the tensions underpinned by economic, social, and cultural (in)justice. For some of these communities, struggles over limited resources have led to serious violence and sometimes violent repression. In the aftermath of these problems, TRCs have been used as a mechanism of transitional justice to reclaim the community's soul, bring healing, and

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*Transitional Justice*, 2 INT'L J. TRANSITIONAL JUST. 3, 277 (2008); Evelyne Schmid, *Liberia's Truth Commission Report: Economic Social, and Cultural Rights in Transitional Justice*, 24 PRAXIS: FLETCHER J. HUM. SEC. 5–28 (2009); James L. Cavallaro & Sebastian Albuja, *The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond*, in TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND STRUGGLE FOR CHANGE 121–42 (Kiera McEvoy & Lorna McGregor eds., 2008).

<sup>76</sup> Christian Houle, *Inequality and Democracy: Why Inequality Harms Consolidation but Does Not Affect Democratization*, 61 WORLD POL. 589, 597 (2009).

<sup>77</sup> Ismael Muvungi, *Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies*, 3 INT'L J. TRANSITIONAL JUST. 2, 163–82 (2009); THE GLOBAL IMPACT AND LEGACY OF TRUTH COMMISSIONS 24 (J. Sarkin ed., 2019).

reconcile all parts of the community.<sup>78</sup> Interestingly, many of these truth and reconciliation efforts have focused more on the civil and political rights of citizens. Hence, cases of disappearances, torture, rape, murder, and other forms of civil and political rights violations form the centerpiece of the transitional justice mandate and proceedings.<sup>79</sup> While these are indisputably important contributions to society via TRCs, the marginal look at ESCR is an epistemic and policy inconsistency that should be corrected.

What a marginal glance at ESCR—or their total avoidance—sometimes does is to leave unattended or keep suspended such issues as the forced removal of citizens—especially Indigenous communities<sup>80</sup>—from their lands; expropriation of resources; continued pollution; environmental degradation; and other forms of economically fraught structures and experiences.<sup>81</sup> The limited reflection of these troubling economic realities in the TRC mechanism is a critical oversight.<sup>82</sup> This framework has to be

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<sup>78</sup> See generally ONUR BAKINER, TRUTH COMMISSIONS, MEMORY, POWER, AND LEGITIMACY (2016).

<sup>79</sup> *Truth Commissions and Social Justice: 'Wishful Thinking or Not Very Thoughtful Wishing'?*, 24 in THE GLOBAL IMPACT AND LEGACY OF TRUTH COMMISSIONS, 169–88 (Brianna McGonigle Leyh).

<sup>80</sup> Nisha Bhakta, *A Clash Between Culture and Law: A Comparative Look at the Conflict Between Quiet Title Actions in Hawaii, the Kuleana Act of 1850, and the Displacement of Indigenous People*, 49 CAL. WESTERN INT'L L. J. 7 (2018) (highlighting the tension that is always underneath society between Indigenous rights and law. Despite the passage of time, these Indigenous communities still long for a just deliberation about their economic and cultural rights that were supplanted by colonial and settler legal regimes. While it may be impossible to reverse what has happened, TRCs can create an opportunity for dialogue, acknowledgment, restitution or reparations, healing, and harmony).

<sup>81</sup> Louise Arbour, *Economic and Social Justice for Societies in Transition*, 40 N.Y.U. J. INT'L L. & POL. 1, 8–10 (2007).

<sup>82</sup> This panders to the epistemic choice long made by liberal democracy—at least since the end of World War II—to focus on periodic elections, civil and political rights guaranteed by the constitution, and judicial review as the principal foundation of democracy. In other words, social and economic rights were deemed to be marginal to liberal democracy. It deemed economic and social rights as desirable ideals but not binding obligations. This delineation has since permeated the conceptual, functional, and institutional frameworks about social, economic, and cultural rights. See Monique Deveaux, *Normative liberal theory, and the bifurcation of human rights*, 2 ETHICS & GLOBAL POL. 171, 186 (2009).

readjusted as we progress in our current efforts to facilitate inclusive prosperity and democracy worldwide. The adjustment of the current TRC framework is also imperative because it contradicts the existing jurisprudence on human rights—especially in international law.<sup>83</sup> The existence of historical injustices in many of our societies makes this paradigm shift in the use of TRCs currently more imperative. Advocating for democracy, peace, and reconciliation without due attention to economic, social, and cultural rights is problematic. The reticence towards social and cultural rights does not guarantee lasting peace and community harmony. It sustains inequality and systemic injustice in ways that easily precipitates community rupture and violence and vast violations of civil and political rights.

From the foregoing, this essay is approached from five structural parts. Part I, which was the introduction, sets the stage by providing a general background. It also highlights the problem of the marginality of economic, social, and cultural rights in the TRC cannon of transitional justice—when compared to the strong focus of TRCs on civil and political rights. Part II takes the debate further by distilling the noted functions of TRCs, such as providing an articulation of the truth of what happened, reconciliation, healing, and recommendations for future policy interventions. It will also show the need to integrate ESCRs as manifest functions of TRCs. Part III will then pivot to stating some of the notable impediments challenging the mainstreaming of ESCRs as manifest functions of TRCs. It makes a case that the strong focus on civil and political rights, without a commensurate

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<sup>83</sup> MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT 33 (2000); AMARTYA SEN, DEVELOPMENT AS FREEDOM (2000); Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315, 317 (2004); see also James Nickel, *A Defense of Welfare Rights as Human Rights*, in CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY (Thomas Christiano & John Philip Christman eds., 2009); James Nickel, *Rethinking Indivisibility: Towards a Theory of Supporting Relations Between Human Rights*, 30 HUM. RTS. Q. 984, 1000 (2008); Rhonda Copelon, *The Indivisible Framework of International Human Rights: A Source of Social Justice in the U.S.*, 3 N.Y.C. L. REV. 59, 63 (1998); see generally DANIEL J. WHELAN, INDIVISIBLE HUMAN RIGHTS: A HISTORY (2011).

commitment to economic, social, and cultural rights, does not guarantee inclusive societies. In other words, the current approach merely defers the dream of lasting peace and community harmony. Part III recognizes and argues further that TRCs have strong capacities because of their flexibility to provide a congenial environment for community dialogues—especially considering that sometimes these subjects can be fraught with political contentions and acrimony. It contends that this inherent flexible capacity of TRCs can be further explored to overcome the impediments to the mainstreaming of economic, social, and cultural rights as manifest functions of TRCs.

Part IV argues that social movements are needed to further redefine the paradigm of TRCs in ways that are responsive to the economic, social, and cultural rights of the community. The social movement angle to the retooling of TRCs is essential because it helps to amplify the gaps that society needs to close. Otherwise, these gaps will persist, and society may remain fractured by such subsisting problems as inequality and environmental injustice. More so, social movements elevate voices and faces which had been muffled or ignored by exclusionary laws and problematic interpretations of law enforcement. Social movements have capacities to engender national dialogue, which I argue in Part IV as a responsible approach to the problems because other approaches, such as citizens' repression through high-handed law enforcement, are neither productive nor sustainable. TRCs provide a middle ground of encounter. Because many jurisdictions do not consider economic, social, and cultural rights as judicially enforceable or justiciable unless such rights can also find expressions in civil and political rights, TRCs can help communities bridge this gap. Were economic, social, and cultural rights to be generally enforceable, litigation would still have its inherent difficulties. These litigation difficulties may arise from court processes and rules such as standing and time limitations, which can be dispositive. Equally, the time and cost of legal representation in such cases are usually ill-affordable for minority and poor communities. Part V concludes by

surmising that TRCs are great instrumentalities for community reconciliation. This reconciliation through TRCs can be deepened if economic, social, and cultural rights are embraced by practitioners and policy makers when enacting TRC programs. Else, the TRC mechanism will increasingly appear to be a weak tool of transitional justice.

## II. FUNCTIONS OF TRUTH AND RECONCILIATION COMMISSIONS

As argued above, the Truth Commission mechanism is one of the most widely adopted and adapted forms of transitional justice instruments in recent years.<sup>84</sup> This continued adoption and adaptation of TRCs<sup>85</sup> for transitional justice inspires a careful comparative law determination. Having seen the consistent adoption of this mechanism, it is crucial to prime its functionality in such a way that it provides meaningful transition, reconciliation, and restoration of peace by making economic justice one of its manifest functions. It is argued that it is dysfunctional to avoid socioeconomic questions, which are sometimes the foundational problems that create fragility in societies and focus only on civil and political rights. It is also not enough to leave these socioeconomic questions to the general recommendation of TRCs. They should be manifest functions of TRCs on equal footing with civil and political rights.

Hence, the idea of *functionalism*<sup>86</sup> is another means of understanding the operation or goal of laws, institutions, and frameworks. Functionalism is a

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<sup>84</sup> See HAYNER, *supra* note 3; Martha Minow looks at TRCs as part of the entire mechanisms for alternative justice. She offers some critique of the TRC's mechanism, especially in those circumstances where its use has been ambiguous both in intent and outcome due to political interference. See Martha Minow, *Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court*, 60 HARV. INT'L L. J. 1 (2019).

<sup>85</sup> See MARK FREEMAN, TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS 3 (2006); see generally COLLEEN MURPHY, A MORAL THEORY OF POLITICAL RECONCILIATION (2010).

<sup>86</sup> Michele Graziadei, *The Functionalist Heritage*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 100, 100–27 (Pierre Legrand & Roderick Munday, eds., Cambridge Univ. Press, 2003); JOHN HENRY MERRYMAN, THE LONELINESS OF THE

term that reoccurs frequently in many fields of learning.<sup>87</sup> Therefore, different understandings of it exist.<sup>88</sup> The field of comparative law relies on functionalism as a major aspect of its overarching methods<sup>89</sup> and theory of research that deals with law in society—law in action as opposed to law in the books.<sup>90</sup> Functionalism also has a more diverse meaning in jurisprudence, which principally emphasizes the effectiveness of law in society as opposed to formalism or certainty of principles and standards as may be found in the statutes. However, the use of functionalism in this work is as to its concise stipulations in comparative law.

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COMPARATIVE LAWYER AND OTHER ESSAYS IN FOREIGN AND COMPARATIVE LAW (Kluwer Law Int'l, 1999); BASIL MARKESINIS, FOREIGN LAW AND COMPARATIVE METHODOLOGY: A SUBJECT AND A THESIS (Hart Publ'g, 1997); OTTO KAHN-FREUND, COMPARATIVE LAW AS AN ACADEMIC SUBJECT (Clarendon Press 1965); *See generally* Geoffrey Samuel, *Epistemology and Methodology of Comparative Law: Contributions from the Sciences and Social Sciences*, in EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW, 35, 41–73 (Mark Van Hoecke ed., Hart Publ'g, 2004).

<sup>87</sup> Robert Merton explored the idea of functionalism in the field of sociology. However, the idea has since spread into comparative law. *See generally*, ROBERT K. MERTON, SOCIOLOGY OF SCIENCE AND SOCIOLOGY AS SCIENCE (2010).

<sup>88</sup> Ralf Michaels, *The Functional Method of Comparative Law*, *The Oxford Handbook of Comparative Law* 339–82 (2006).

<sup>89</sup> KONRAD ZWEIGERT & HEIN KOETZ, AN INTRODUCTION TO COMPARATIVE LAW (Tony Weir trans., 1998).

<sup>90</sup> Mermin notes that “Functionalists are concerned with law’s operative role in society.” *See* Samuel Mermin, *Legal Functionalism*, Communication at the IV World Congress on Philosophy of Law and Social Philosophy, 81–83 (Madrid 7–12 September 1973), <https://repository.law.wisc.edu/s/uwlaw/item/27314>; Samuel Mermin, *Functionalism, Definition, and the Problem of Contextual Ambiguity*, 14 *Logique et Analyse*, (53/54), 319–27 (1971). Felix Cohen argues:

Functionalism as a philosophy may be defined as the view that a thing does not have a ‘nature’ or ‘essence’ or ‘reality’ underlying its manifestations and the effects apart from its relations with other things . . . Functionalism may be summed up in the directive: if you want to understand something, observe it in action.

*See* Felix Cohen, *The Legal Conscience* 79–80 (1960); *see generally* Lon Fuller, *Positivism and Fidelity to Law*, 71 HARV. L. REV. 4, 630–72 (1958); Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931); Roscoe Pound, *Limits of Effective Legal Action*, 3 ABA J. 55 (1917); Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12(1910); Wendel Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

The functional approach helps us to understand and explain the values accruable from legal instruments and mechanisms. In simple parlance, functionalism explains laws and institutions according to the roles they perform in society.<sup>91</sup> In other words, functionalism as a theory of law deals with and concentrates on the operative part of law in society. It looks at how different societies use a set of laws, institutions, and instruments to provide solutions to similar problems.<sup>92</sup> TRCs have specific roles that are normatively assigned to them.<sup>93</sup> These roles are often deducible from establishing laws and the terms of reference of TRCs, including finding the truth, reconciling, reconstituting public morals and ethos, healing, and setting an agenda for policy intervention to restore community and avoid future repetition.<sup>94</sup> This partly explains the reasons for their borrowing, adaptations, and usage in many transitional justice situations. Thus, functionalism offers a medium for examining the goals and sometimes the normative legitimacy of the TRC mechanism.

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<sup>91</sup> Richard Hyland, *Comparative Law*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 184, 188 (Dennis Patterson ed., 1996).

<sup>92</sup> Christopher A. Whytock, *Legal Origins, Functionalism, and the Future of Comparative Law*, 2009 BYU L. REV. 1879 (2009).

<sup>93</sup> On the general role of Truth Commissions, see Christopher K. Connolly, *Living on the Past: The Role of Truth Commissions in Post-Conflict Societies and the Case Study of Northern Ireland*, 39 CORNELL INT'L L. J. 6 (2006); see generally ANTJIE KROG, COUNTRY OF MY SKULL: GUILT, SORROW, AND THE LIMITS OF FORGIVENESS IN THE NEW SOUTH AFRICA (1998); MARTIN MEREDITH, COMING TO TERMS: SOUTH AFRICA'S SEARCH FOR TRUTH (1999). A common function of TRCs is that they are expected to establish the "truth" through their investigation and hearing. See generally Rodolfo Mattarollo, *Truth Commissions*, in POST-CONFLICT JUSTICE 295, 298–99 (M. Cherif Bassiouni ed., 2002); Mark Vasallo, *Truth and Reconciliation Commissions: General Considerations and a Critical Comparison of the Commissions of Chile and El Salvador*, 33 U. MIAMI INTER-AM. L. REV. 153 (2002).

<sup>94</sup> Non-recurrence/non-repetition is a central norm of transitional justice mechanisms. It is applicable to TRCs and such other mechanisms as criminal tribunals. See generally Maja Davidovic, *The Law of 'Never Again': Transitional Justice and the Transformation of the Norm of Non-Recurrence*, 15 INT'L J. TRANSITIONAL JUST., 2, 386–406(2021).

Put in another way, TRCs represent clear evidence of borrowing.<sup>95</sup> One meaningful way of harnessing the dynamic capacities of TRCs is to centralize economic, social, and cultural rights as *manifest and latent functions of TRCs*. The manifest functions include research about the ‘*remote and immediate circumstances or causes*’<sup>96</sup> of human rights violations in the transitional

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<sup>95</sup> The idea of legal borrowing has been explored in comparative law as legal transplant. See generally Mathias Siems, *COMPARATIVE LAW: LEGAL TRANSPLANTS*, (Cambridge Univ. Press, 2018); Alan Watson, *Comparative Law and Legal Change*, 37 *CAMBRIDGE L.J.* 313, 317–18 (1978); ANDREAS RAHMATIAN, *LORD KAMES: LEGAL AND SOCIAL THEORIST* 191–219 (Edinburgh Univ. Press, 2015).

<sup>96</sup> I have reviewed the Truth Commissions Mandate of Liberia, Nigeria, South Africa, Sierra Leone, and Canada, and all of them contained some version of that phrase “remote and immediate causes,” “remote and immediate circumstances,” or “causes, nature, and extent of violations” of the noted crisis. Such general provisions often indicate the object or function of these commissions. See generally §§ 3 and 4 of *South Africa’s Promotion of National Unity and Reconciliation Act No. 34 of 1995* (As severally amended by Act No 87 of 1995; Act No. 18 of 1997; Act No. 47 of 1997; Act No. 84 of 1997; Act No 33 of 1998; Act No 34 of 1998; and Act No 23 of 2003):

§ 3(1). The objectives of the Commission shall be to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past by; (a) establishing as complete a picture as possible of *the causes, nature and extent of the gross violations of human rights* which were committed during the period from 1 March 1960 to the cut-off date, including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations, by conducting investigations and *holding hearings*; (b) facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirements of this Act; (c) establishing and making known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending *reparation measures* in respect of them; (d) compiling a report providing as comprehensive an account as possible of the activities and findings of the Commission contemplated in paragraphs (a), (b) and (c), and which contains recommendations of measures to prevent the future violations of human rights; and, § 3(2). The provisions of subsection (1) shall not be interpreted as limiting the power of the Commission to investigate or make recommendations concerning any matter with a view to

society. This research is aimed at knowing the truth of the circumstances of these human rights violations. Also, the investigation and documentation about these human rights violations have prominence in the list of manifest functions of TRCs. Another manifest function is the *organization of public hearings*<sup>97</sup> to hear and record witnesses, thus documenting for society the details of what happened during the period of violence and repression. Precisely, TRCs constitute themselves through public hearings and witnesses' testimonies into a forum for remaking and reclaiming the public space previously expropriated by law enforcement, authoritarian regimes, or non-state actors through terror and violence.<sup>98</sup> I argue that TRCs are platforms for reclaiming the public sphere because it is often the case that in times of repression, those who express adverse opinions against authoritarian

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promoting or achieving national unity and reconciliation within the context of this Act.

<sup>97</sup> Public Hearings are significant aspects of Truth and Reconciliation Commissions. This does not exclude private hearings where the TRC considers it expedient according to the circumstance of the case. See U.N. Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Truth Commissions*, 17, 21 (2006), <https://www.ohchr.org/Documents/Publications/RuleofLawTruthCommissionsen.pdf> [<https://perma.cc/BE82-LHAD>]. See also *Section 6 of the Truth and Reconciliation Act 2000 of Sierra Leone*, which sets out the 'object' of the Commission as:

§6. (1) The object for which the Commission is established is to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to *prevent a repetition* of the violations and abuses suffered.

§6. (2) Without prejudice to the generality of subsection (1), it shall be the function of the Commission - (a) to investigate and report on the causes, nature and extent of the violations and abuses referred to in subsection (1) to the fullest degree possible, including their antecedents, the context in which the violations and abuses occurred, the question of, whether those violations and abuses were the result of deliberate planning, policy or authorization by any government, group or individual, and the role of both internal and external factors in the conflict; (b) ...; and, (c) to do all such things as may contribute to the fulfilment of the object of the Commission.

<sup>98</sup> BAKINER, *supra* note 78.

regimes suffer harsh consequences ranging from arrests, public executions, torture, and disappearances. Thus, TRCs present a different environment whereby citizens can give their voices a free rein without molestation. Freedom of expression is indispensable in this reclamation of the public sphere, and TRCs often help in restoring free expression in transitional justice situations.

In these recordings, witness testimonies, and research, the truth is also sought after and achieved. This is because the right to know<sup>99</sup> what happened is deemed fundamental in the field of international human rights as a way of ensuring healing, closure, and non-repetition.<sup>100</sup> Therefore, this truth-finding helps the community know and solve problems of disappearances, tortured death in custody, and other unknown events that could have remained unknowable if not for the peculiar flexibilities, such as amnesty, made possible through the instrument of a truth commission.<sup>101</sup>

It follows that TRCs also serve as reservoirs of this carefully researched and documented truth. States can draw from these reservoirs in seeking redresses and setting up preventive measures against future human rights violations. TRCs thus fulfill the need for truth and satisfy the obligation of the state to investigate disappearances and other human rights violations previously considered “secret,” “classified,” or “irretrievably lost.”<sup>102</sup>

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<sup>99</sup> See Eduardo Ferrer Mac-Gregor, *The Right to the Truth as An Autonomous Right Under the Inter-American Human Rights*, 9 MEXICAN L. REV. 1, 121–39 (2016).

<sup>100</sup> See generally Patricia Naftali, *The ‘Right to Truth’ in International Law: The ‘Last Utopia’?*, in LAW AND MEMORY: TOWARDS LEGAL GOVERNANCE OF HISTORY 70–88 (2017); Yasmin Naqvi, *The Right to the Truth in International Law: Fact or Fiction?*, 88 INT’L REV. RED CROSS 245, 245–73 (2006); Alice M. Panepinto, *The Right to the Truth in International Law: The Significance of Strasbourg’s Contributions*, 37 LEGAL STUD. 739, 739–64 (2017).

<sup>101</sup> For example, the hearing in the Biko Case from South Africa revealed for the first time the actual circumstances of some of those that died in police custody in apartheid times. The ANC leader, Steve Biko, was killed in police custody in 1977. See Gay J. McDougall, *Twenty Years of South African Constitutionalism*, 60 N.Y.L. SCH. L. REV. 25 (2016) for an overview of post-apartheid transition in South Africa.

<sup>102</sup> See Geoff Dancy et al., *The Turn to Truth: Trends in Truth Commission Experimentation*, 9 J. HUM. RTS., 1, 45–64, (2010).

Therefore, some of the manifest functions include *articulating remedial measures*<sup>103</sup> for violations and making far-reaching recommendations for preserving human rights, rebuilding social equilibrium, encouraging racial harmony, and paying reparations in the post-conflict society.<sup>104</sup> Accordingly, it is not unusual to consider TRCs as the nursery beds of ideas for the new society.

*Reconciliation*<sup>105</sup> is also a bold, manifest function of truth commissions. The pivot of TRCs towards the reconciliatory framework in transitional justice became prominent following the South African experience and the Good Friday Agreement.<sup>106</sup> The Good Friday Agreement not only proposed power-sharing and other questions of executive-legislative relations but also set out a section of its declarations to questions of reconciliation and victims' violence.<sup>107</sup> Acknowledging the sufferings of victims is therefore now

<sup>103</sup> TRCs are always enjoined to make recommendations for the way forward. See Joanna R. Quinn & Mark Freeman, *Lessons Learned: Practical Lessons Gleaned from inside the Truth Commissions of Guatemala and South Africa*, 25 HUM. RTS. Q. 1117, 1118 (2003).

<sup>104</sup> Penelope E. Andrews, *Reparations for Apartheid's Victims: The Path to Reconciliation?* 53 DEPAUL L. REV., 3, 1155–80 (2004).

<sup>105</sup> Since the Good Friday Agreement and the South African Truth and Reconciliation Commission, "reconciliation" has gained currency in the jurisprudence of transitional justice. See generally Duncan Morrow, *The Rise (and Fall?) of Reconciliation in Northern Ireland*, 44 PEACE RSCH. 5 (2012); Timothy White, *Generational Change and Redefining Identities: Post-Conflict Peacebuilding in Northern Ireland*, 45 PEACE RSCH. 95 (2013); Christopher K. Connolly, *Living on the Past: The Role of Truth Commissions in Post-Conflict Societies and the Case Study of Northern Ireland*, 39 CORNELL INT'L L. J. 401 (2006).

<sup>106</sup> For an overview of the Good Friday Agreement, see generally Warren Hoge, *An Irish Accord: the overview; Irish talks produce an accord to stop decades of bloodshed with sharing of Ulster Power*, N.Y. TIMES (Apr. 11, 1998) <https://www.nytimes.com/1998/04/11/world/irish-accord-overview-irish-talks-produce-accord-stop-decades-bloodshed-with.html> [<https://perma.cc/8D7V-SHZY>].

<sup>107</sup> The Good Friday Agreement noted:

The tragedies of the past have left a deep and profoundly regrettable legacy of suffering. We must never forget those who have died or been injured, and their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all.

considered essential by scholars in the field.<sup>108</sup> This acknowledgment is necessary for reconciliation and fulfillment of the right of the victims<sup>109</sup> to remember and have society reckon with their suffering.<sup>110</sup>

In the South African experience, the mantra “no future without forgiveness”<sup>111</sup> seemed to have also heightened this manifest turn of truth commissions towards reconciliation and forgiveness.<sup>112</sup> The exemplary acts of forgiveness<sup>113</sup> and the tone of leadership displayed by Nelson Mandela and other leaders in South Africa have embedded this idea of reconciliation as a manifest function of Truth Commissions.<sup>114</sup> Hence, a tradition of truth and

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*See The Northern Ireland Peace Agreement: The Agreement reached in the multi-party negotiations* (Apr. 10, 1998), [https://peacemaker.un.org/sites/peacemaker.un.org/files/1E%20GB\\_980410\\_Northern%20Ireland%20Agreement.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/1E%20GB_980410_Northern%20Ireland%20Agreement.pdf) [<https://perma.cc/W6ZV-9SGG>]; Bertie Ahern, *The Good Friday Agreement: An Overview*, 22 *FORDHAM INT'L L. J.* 1196 (1998). The Good Friday Agreement has also received some critical comments from scholars on issues of amnesty and early release from custody of paramilitaries. *See* Daniel F. Mulvihill, *The Legality of the Pardoning of Paramilitaries under the Early Release Provisions of Northern Ireland's Good Friday Agreement*, 34 *CORNELL INT'L L. J.* 6 (2001).

<sup>108</sup> *To Rebuild Lives, Suffering Must Be Acknowledged, 'Justice Done', Human Rights High Commissioner Says, as Security Council Takes Up Transitional Justice*, U.N. Security Council Report, S/PV.8723 (Feb. 13, 2020), [https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S\\_PV.8723.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S_PV.8723.pdf) [<https://perma.cc/UW3Z-688B>] (the report notes that victims are the primary reason for establishing transitional justice programs).

<sup>109</sup> Raquel Aldana, *A Victim-Centered Reflection on Truth Commissions and Prosecutions as a Response to Mass Atrocities*, 5 *J. HUM. RTS.* 1, 107–26 (2006).

<sup>110</sup> *See* Good Friday Agreement, *supra* note 107; Maggie Beirne & Colin Knox, *Reconciliation and Human Rights in Northern Ireland: A False Dichotomy?* 6 *J. HUM. RTS. PRAC.* 1, 26–50 (2014).

<sup>111</sup> *See* DESMOND TUTU, *NO FUTURE WITHOUT FORGIVENESS* 279 (2012).

<sup>112</sup> The forgiveness mantra has been criticized as also potentially traumatizing, especially for the victims of the previous violence. *See* John D. Inazu, *No Future Without (Personal) Forgiveness: Re-examining the Role of Forgiveness in Transitional Justice*, 10 *HUM. RTS. REV.* 309, 326 (2009); Pierre Hazan, *Measuring the Impact of Punishment and Forgiveness: A Framework for Evaluating Transitional Justice*, 88 *INT'L REV. RED CROSS* 19, 40–41 (2006).

<sup>113</sup> *See* Rebecca Saunders, *Questionable Associations: The Role of Forgiveness in Transitional Justice*, 5 *INT'L J. TRANSITIONAL JUST.* 119, 141 (2011).

<sup>114</sup> *Truth Commission: South Africa*, U.S. INST. OF PEACE (1995–2002). President Nelson Mandela was courageous in setting up the South African TRC. He also gave the TRC

reconciliation emerged as the core functionality of TRCs. Today, it is not unusual to view reconciliation as an inexorable limb of Truth Commissions. This creativity could be extended to larger economic and developmental questions.

On the other hand, several perceptible latent functions<sup>115</sup> of truth commissions include memory, healing, or stopping the trajectory of trauma by unlocking the hidden and repressed pains—both at the individual and community levels.<sup>116</sup> They also serve as a grand symbol for a new beginning.<sup>117</sup> Equally, collective memory and human rights education/orientation<sup>118</sup> is another perceptible latent function. In the long term, these latent functions manifest in the form of museums,<sup>119</sup> public

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autonomy and made every effort to ensure that commission members were neutral by appointing a committee to oversee a public nomination, selection, and interviewing of the TRC commissioners. In the end, he apologized to all victims on behalf of the South African state. *See generally* Emily B. Mawhinney, *Restoring Justice: Lessons from Truth and Reconciliation in South Africa and Rwanda*, 36 *HAMLIN L. J. PUB. L. & POL.* 2 (2015).

<sup>115</sup> Latent functions of law and legal institutions are those functions which, though not expressed on the face of the law, legal instrumentality or institutions also manifest from these laws and legal instrumentalities. *See* David A. Funk, *Major Functions of Law in Modern Society Featured*, 23 *CASE W. RESV. L. REV.* 257 (1972); Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 *HARV. INT'L L. J.* 411, 428–29 (1985); Michele Graziadei, *The Functionalist Heritage*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 100–28 (2003). The functionalism idea is more explored in the social sciences—sociology and anthropology. *See* Kingsley Davis, *The Myth of Functional Analysis as a Special Method in Sociology and Anthropology*, 24 *AM. SOCIO. REV.* 757, 763, 765, (1959).

<sup>116</sup> Regine U. King, *Healing Psychosocial Trauma in the Midst of Truth Commissions: The Case of Gacaca in Post-Genocide Rwanda*, 6 *GENOCIDE STUD. AND PREVENTION: AN INT'L J.* 2, 5, 134–51 (2011); Pumla Gobodo-Madikizela *Transitional justice and truth commissions: exploring narratives of repair and healing in the post-Holocaust era*, 18 *PSYCH., CRIME & L.* 3, 275–97 (2012).

<sup>117</sup> *See generally*, *TRANSITIONS AND JUSTICE: NEGOTIATING THE TERMS OF NEW BEGINNINGS IN AFRICA* (Gerhard Anders & Olaf Zenker ed. 2015).

<sup>118</sup> TRCs also have the latent capacity to provide clinical education to the public on human rights.

<sup>119</sup> *See* *THE PERFORMANCE OF MEMORY AS TRANSITIONAL JUSTICE* 45 (S. Elizabeth Bird, Fraser M. Ottanelli eds., 2014).

squares,<sup>120</sup> sculptural representations, plaques, and ad-hoc exhibitions.<sup>121</sup> These functions are, however, not readily predictable because the power asymmetries in a society may assist their flourishing or frustrate them.

It is of note that these functions are often not so clearly demarcated. I have also based the analysis on the significant provisions seen in the mandate of truth commissions. Hence, depending on the nature of the society and the framing of the mandate of TRCs, manifest and latent functions can become one of the other. There can indeed be swaps and diffusions across what seems like a permissible space between latent and manifest functions of TRCs.<sup>122</sup> In all these, TRCs do not usually focus on ESCR as manifest functions. Therefore, it takes either a creative or activist interpretation of the mandates of TRCs to make ESCR their functional fundamentals. The individualized cases of victims' compensation are often tailored to those who have a direct claim of civil and political rights violation. Why is this so? Might there be a new paradigm that centralizes economic, social, and cultural rights as manifest functions of TRCs? This shall be the focus of the next segment.

### III. IMPEDIMENTS TO ECONOMIC, SOCIAL, AND CULTURAL JUSTICE AS MANIFEST FUNCTIONS OF TRCS

Now, the question that arises from the foregoing is: Why has it not been readily possible to make economic justice and reform of political economy

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<sup>120</sup> See generally TRANSITIONAL JUSTICE AND MEMORY IN EUROPE 1–24 (1945–2013) (Nico Wouters ed., 2017).

<sup>121</sup> See Duncan Light & Craig Young, POST-COMMUNIST TRANSITIONAL JUSTICE: LESSONS FROM TWENTY-FIVE YEARS OF EXPERIENCE: *Public Memory, Commemoration, and Transitional Justice: Reconfiguring the Past in Public Space* 203, 233, 242 (2015); Stephanie Schwandner-Sievers & Melanie Klinkner, *Longing for Lost Normalcy: Social Memory, Transitional Justice, and the 'House Museum' to Missing Persons in Kosovo*, 47 NAT'YS PAPERS 232, 234–39 (2019).

<sup>122</sup> One of the canons of transitional justice efforts is that they are context driven. There are a lot of advantages to this, which includes responding to the felt needs of the community, legitimacy, and a sense of ownership. Dustin N. Sharp, *Addressing Dilemmas of the Global and the Local in Transitional Justice*, 29 EMORY INT'L L. REV. 1, 71–117 (2014).

manifest or self-evident functions of Truth Commissions? The existing literature does not speak directly to the subject as it should. The circuitous scholarship around the subject of economic justice is equally traceable to the mandates of TRCs.<sup>123</sup> The mandates of TRCs are often general and about remote and immediate causes of collapse of rule of law and consequent violation of human rights.<sup>124</sup> These mandates sometimes tangentially touch on political economy, economic rights, and systemic transformations that could enhance general and equal access to economic opportunities.<sup>125</sup> Happily, there are precedents of Truth Commissions focusing on economic justice, especially arising from questions of economic genocide that happened before and during World War II.<sup>126</sup> This state of the literature raises

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<sup>123</sup> However, Christine Chinkin has identified some of the impediments against mainstreaming economic, social, and cultural rights in transitional justice. See generally Christine Chinkin, *Gender and Economic, Social, and Cultural Rights*, in ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW: CONTEMPORARY ISSUES AND CHALLENGES (2014); Christine Chinkin, *The Protection of Economic, Social and Cultural Rights Post-Conflict*, PEACE WOMEN (2017).

<sup>124</sup> See generally Eduardo Gonzalez, *Drafting a Truth Commission Mandate: A Practical Tool*, INT'L CTR FOR TRANSITIONAL JUST. 1–28 (2013).

<sup>125</sup> See Brianne McGonigle Leyh, *Truth Commissions and Social Justice: 'Wishful Thinking or Not Very Thoughtful Wishing'?*, in THE GLOBAL IMPACT AND LEGACY OF TRUTH COMMISSIONS 169–88 (2019).

<sup>126</sup> See CHARLES ANDERTON & JURGEN BRAUER, ECONOMIC ASPECTS OF GENOCIDES, OTHER MASS ATROCITIES, AND THEIR PREVENTION 3–27 (2016). *Genocide* is defined as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) *deliberately inflicting on members of the group conditions of life calculated to bring about its physical destruction in whole or in part*; (d) imposing measures intended to destroy; (e) forcibly transferring children of the group to another group.” See *Article II of the Convention on the Prevention and Punishment of the Crime of Genocide*, 78 U.N.T.S. 277 (GA Res. A/RES/3/260 effective January 12, 1951). Raphael Lemkin while espousing that the techniques of genocide often permeate all aspects of nationhood—political, social, cultural, religious, moral, *economic*, and biological aspects—noted that economic genocide involves “[t]he genocidal purpose of destroying or degrading the economic foundations of national groups was to lower the standards of living and to sharpen the struggle for existence that no energies might remain for cultural or national life.” Thus, members of the targeted group are subjected to deprivations of their basic means of sustenance. This may include the right to work, expropriation of property, liquidation of businesses, and other exclusionary

curiosity concerning the factors that are responsible for the perennial marginalization of economic, social, and cultural rights.

Several factors are influencing this current, distant gesturing at economic, social, and cultural rights when framing and implementing TRCs. The first factor is the political economy.<sup>127</sup> A focus on economic inequities by TRCs will challenge the dominant economic models and interests, locally and internationally. Powerful states, such as the United States, do not concede to the paradigm of ESCR as enforceable human rights.<sup>128</sup> Cass Sunstein has

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policies aimed at sharpening the struggle for existence amongst members the targeted group. See Raphael Lemkin, *Genocide—A Modern Crime*, 4 FREE WORLD 39, 39 (1945); for further readings on genocide, see Claus Kreß, *The Crime of Genocide Under International Law*, 6 INT'L CRIM. L. REV. 461–502 (2006); WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* (2002). Sometimes the literature on genocide defines cultural genocide to include aspects of the economic life in the community. Thus, the totality of the lives of these groups including political, social, and economic are targeted with a view to destroying the group. For instance, the Canadian TRC Report considered *cultural genocide* as;

[t]he destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred, and their movement is restricted. Languages are banned. Spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed. And most significantly [...] families are disrupted to prevent the transmission of cultural values from one generation to the next.

see Truth and Reconciliation Commission of Canada, *Honouring the truth, reconciling for the future: summary of the final report of the Truth and Reconciliation Commission of Canada* 1 (2015). Recent debates about genocide and the economic aspects of it have also touched on starvation or famine when deliberately engineered to cause death or make survival impossible for a targeted national, ethnic, racial, or religious group. See Bridge Conley & Alex de Waal, *The Purposes of Starvation: Historical and Contemporary Uses*, 17 J. OF INT'L CRIM. JUST. 699–722 (2019).

<sup>127</sup> See generally HANNAH FRANZKI & MARIA CAROLINA OLARTE, *UNDERSTANDING THE POLITICAL ECONOMY OF TRANSITIONAL JUSTICE: A CRITICAL THEORY PERSPECTIVE* (2013), on the debates about political economy in transitional justice.

<sup>128</sup> For some of the overarching reasons for the reluctance of many states to enforce economic social and cultural rights, see Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law*, 22 AM. UNIV. L. REV. 1, 35–64 (2006); Frank I. Michelman, *Socioeconomic rights in constitutional law: Explaining America away*, 6 INT'L J. CON. L. 3-4, 663–86 (2008). Michelman's view of socioeconomic rights as norms is indicative of the narrow

identified some factors that can explain the general American disposition towards ESCR. They are: the age of the Constitution of the United States; the institutional nature of the American system that considers economic rights unable to easily coexist with judicial review; “American exceptionalism”; and American legal realism, which stresses the developments within the US Supreme Court in the 1960–1970s.<sup>129</sup>

Another factor is that the expansion of trade laws, bilateral investment treaties,<sup>130</sup> arbitration, and self-contained systems of dispute settlements will be implicated if any such turn of TRC functionality happens today.<sup>131</sup> The liberal economic order these treaties and dispute settlement mechanisms have come to represent favors strong investments and private property protection. This is further complicated by the status of property rights in many of the societies in transitions.<sup>132</sup> For instance, communities that once had communal ownership of lands may have lost such lands to forceful expropriation. These forcefully expropriated lands may have also become vested in private hands.<sup>133</sup> These private rights, vested either in individual citizens or

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construction of economic, social, and cultural rights in the United States legal system. Generally, the reticence of the United States Supreme Court towards considering foreign judicial precedents is a significant factor in the evolution of rights jurisprudence in America. For a general discussion of the practice of the U.S. Supreme Court regarding foreign sources of law, see Ryan C. Black et al., *We Are the World: The U.S. Supreme Court’s Use of Foreign Sources of Law*, 46 BRIT. J. POL. SCI. 891–913 (2016).

<sup>129</sup> See Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees*, 56 SYRACUSE L. REV. 1 (2005).

<sup>130</sup> Megan Wells Sheffer, *Bilateral Investment Treaties: A Friend or Foe to Human Rights*, 39 DENV. J. INT’L L. & POL’Y 483 (2011). The author discusses generally the difficulties inherent in holding corporations accountable for human rights violations. This is even more difficult in post conflict situations because of weak institutions and corruption.

<sup>131</sup> Yannick Radi, *Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox*, 37 N.C. J. INT’L L. 1107, 1108–12 (2011).

<sup>132</sup> Tara Van Ho, *Is it Already Too Late for Colombia’s Land Restitution Process? The Impact of International Investment Law on Transitional Justice Initiatives* 5 INT’L HUM. RTS. L. REV. 1, 60–85 (2016).

<sup>133</sup> Bernadette Atuahene, *Property and Transitional Justice*, 58 UCLA L. REV. DISCOURSE 65 (2010). The author explores possible ways by which transitional communities may be able to overcome the huddles that impede property reform.

corporations, must be considered in making recommendations for inclusive economic, social, and cultural change.<sup>134</sup> More so, the complicated linkages between global/transnational corporations and regulatory arbitrage may well become a centerpiece of TRCs if ESCR are to be centralized.<sup>135</sup> In cases where states have acted without a carefully thought through policy of reform, sanctions have been used to frustrate the efforts of such states.<sup>136</sup>

Furthermore, the issues around sovereign debts accumulated by authoritarian regimes may pose serious political difficulties because they may be implicated in the search for the truth regarding the utilization of the borrowed resources. So, the linkages and leverages between the global and the local political economy are apparent dilemmas that limit the ambition of states. This limitation persists even when an ESCR-centered approach would have produced more sustainable answers to the questions that tug at the fabric of their communities. The difficulty with this avoidance of the socioeconomic and cultural rights concerns is that it will not make the problems go away. Rather, it sets the next generation up for a future reckoning. Therefore, the TRC mechanism must embrace the need to bring up the questions and open a conversation regarding the place of corporations

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<sup>134</sup> Rhodri C. Williams, *The Contemporary Right to Property Restitution in the Context of Transitional Justice*, BROOKINGS (May 31, 2007) <https://www.brookings.edu/articles/the-contemporary-right-to-property-restitution-in-the-context-of-transitional-justice/> [<https://perma.cc/RDY2-L6AT>].

<sup>135</sup> KATE MILES, *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT, AND THE SAFEGUARDING OF CAPITAL* (2013) (Discussing generally the entangled nature of global political economy and its protection of corporations).

<sup>136</sup> Hasani Claxton, *Land and Liberation: Lessons for the Creation of Effective Land Reform Policy in South Africa*, 8 MICH. J. RACE & L. 529, 544 (2003); Blair Rutherford, *The Rough Contours of Land Reform in Zimbabwe*, 29 FLETCHER F. WORLD AFF. 103, 103–05 (2005); Norimitsu Onishi, *Resolving Who Owns What Land Lies at Heart of Zimbabwe's Future*, N.Y. TIMES (Jan. 20, 2020), <https://www.nytimes.com/2018/01/20/world/africa/zimbabwe-land-disputes-mugabe-mnangagwa.html> [<https://perma.cc/UAY3-73GU>]; Murithi Mutiga, *Why Zimbabwe Sanctions Boomerang*, N.Y. TIMES (Nov. 7, 2013), <https://www.nytimes.com/2013/11/08/opinion/mutiga-why-zimbabwe-sanctions-boomerang.html> [<https://perma.cc/53VY-ECXT>].

in the overall spiraling of violence and increasing human rights violations in societies.<sup>137</sup> Dictatorships often depend on the support of major economic players, such as corporations, within the country.<sup>138</sup>

Considering the issues that abound in changing societies, including sovereign debts, misused public resources by authoritarian regimes through corruption, forced and uncompensated expropriation of Indigenous property, abduction of Indigenous children, and violent environmental injustice, TRCs should centralize economic, social, and cultural rights. When these rights are centralized in TRCs mechanisms, it will help the society to decide on less acrimonious ways of solving these problems. For instance, if TRCs are properly empowered to consider direct questions of economic, social, and cultural rights, they can make recommendations on the establishment of endowments as part of the overarching effort to heal the community and make amends for past violations. How do we sustainably finance such an endowment? This is a pertinent question since TRCs are neither sovereigns, citizens, nor corporations with capacity to generate resources that can sustain a legacy. However, I identify three potentially viable financing models that could be adopted to finance such endowments. First, endowments can be funded through reparations made by corporations, organizations, and institutions found to have violated economic, social, and cultural rights. This can also come in the form of vesting of lands hitherto expropriated and vested in the state in the established endowment/trust to perpetually generate resources that will sustain the reparative funds. A measure of public lands could be vested in such endowments. This is especially so in those situations where it is impossible to trace individual persons for compensation. Public funds looted and stashed away in offshore accounts by dictators can also be

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<sup>137</sup> *The Enron Corporation: Corporate Complicity in Human Rights Violations*, HUM. RTS. WATCH (1999) <https://www.hrw.org/reports/1999/enron/>.

<sup>138</sup> *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities*, HUM. RTS. WATCH (1999) <https://www.hrw.org/reports/1999/nigeria/nigeria0199.pdf>.

reinvested in these endowments when they are recovered. TRCs may also help to articulate grounds for negotiated sovereign debt forgiveness and return of public funds embezzled by authoritarian regimes and stashed offshore in tax havens. Indeed, the details of the administration and utilization of such funds can be carefully worked out by communities, governments, corporations, and civil society organizations bearing in mind the dynamics and needs of the respective transitional justice situation.

Second, corporations can be incentivized to elevate their corporate responsibility goals by devoting these corporate social responsibility resources towards these endowments. Government can use policy leverages such as tax holidays and pioneering status exemptions to incentivize corporate buy-in to the endowment policy. Such an approach will balance the need to protect private rights and ensure public good. Indeed, a healthy business environment is created when there is a visible commitment of all parts of the society to peace, justice, and rule of law. Furthermore, recovered art and cultural treasures may also be vested in these endowments. These can continually provide resources through loaning programs and exhibitions. Equally, public facing artists and creators can be encouraged to create and donate works that will further enrich the art/cultural resources of such endowments. These approaches, when prudentially deployed by a board of trustees, could produce a lot of public good and would mitigate what could easily appear as government interference with private property rights.

Another challenge to the inclusion of economic, social, and cultural justice as manifest functions of TRCs is the endurance of powerful individuals, groups, and organizations allied to the previous regime. In transitional societies, the members of the previous regime do not disappear quickly, especially in post-conflict states.<sup>139</sup> Thus, the staying power of these groups is a significant factor in deciding what reforms and matters can be deliberated

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<sup>139</sup> Matiangai V. S. Sirleaf, *The Truth about Truth Commissions: Why they do not function Optimally in Post Conflict Societies*, 35 CARDOZO L. REV. 2263–348 (2014).

and determined through TRCs. The fear of potential fall back to crisis instigated by these powerful individuals and organizations usually results in the lack of political will to centralize economic, social, and cultural justice in TRC processes.<sup>140</sup> In mature democracies, the dynamics are different in that there may not be previous authoritarian regimes.<sup>141</sup> Instead, mature democracies have systems founded on exclusion from the colonial domination of Indigenous peoples to slavery and segregation.<sup>142</sup> Generations after the *de jure* abolishment of these exclusionary policies, the *de facto* impact of these social, economic, and cultural experiences are enduring.<sup>143</sup>

Many stakeholders, such as citizens and corporate interests, are committed to maintaining this status quo even if it means using violence, hence the need to find a lasting solution by centralizing socioeconomic and cultural rights is readily relegated. For example, in the case of Timor-Leste, land grievances are foundational to the crisis in the country.<sup>144</sup> Yet the grievances are so

<sup>140</sup> *Id.* (the author highlights some of the difficulties that Truth Commissions could face if implemented in the immediate aftermath of conflicts).

<sup>141</sup> It is important to note that democratic backsliding is possible even in mature democracies. Thus, perpetual vigilance is the only way society can guide against the emergence of authoritarian regimes even in established democracy. For more literature on this, see STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018); Tom Ginsburg, *Democratic Backsliding, and the Rule of Law*, 44 OHIO N. U. L. REV. 3, 351–70 (2018). Democratic back sliding can also take the form of judicial capture and undermining of institutions of state. Michael J. Klarman, *The Degradation of American Democracy—And the Court*, 134 HARV. L. REV. 1, 1–264 (2020).

<sup>142</sup> Calla Wahlquist, *Victoria launches truth commission into ongoing effect of violent colonization on Aboriginal people*, THE GUARDIAN (Mar. 9, 2021), <https://www.theguardian.com/australia-news/2021/mar/09/victoria-launches-truth-commission-into-ongoing-effect-of-violent-colonisation-on-aboriginal-people> [<https://perma.cc/4MEJ-W2DC>].

<sup>143</sup> Richard Rothstein, *Brown v. Board at 60: Why Have we Been so Disappointed? What Have we Learned?* ECON. POL'Y INST. (Apr. 17, 2014), <https://www.epi.org/publication/brown-at-60-why-have-we-been-so-disappointed-what-have-we-learned/> [<https://perma.cc/47TQ-SXCA>]; Jim Hilbert, *School Desegregation 2.0: What is Required to Finally Integrate America's Public Schools*, 16 NW. J. HUM. RTS. 92 (2018).

<sup>144</sup> See generally Charlotte C. Williams, *Comment, Reaching Back to Move Forward: Using Adverse Possession to Resolve Land Conflicts in Timor-Leste*, 18 PAC. RIM L & POL'Y J. 575, 578–81 (2009).

complex and entangled by competing interests that it is difficult to find an optimal solution.<sup>145</sup> However, TRCs can offer a platform to negotiate for acceptable outcomes even when it may cause discomfort to existing private and corporate interests. TRCs could also be helpful in unearthing violations of civil and political rights. For instance, a farmer who knows that his farm will be confiscated if it is found that he did not give testimony regarding a “secret” mass grave in his farm may well have a higher incentive—such as amnesty and just compensation for his land—to volunteer evidence. The same can be said of a banker who knows that giving evidence of bank transfers, which aided the financing of weapons of violence, may guarantee operational licenses and limited sentences: that banker is likely to respond positively to a summons. Increasingly, there is a shift towards criminal accountability against corporations for financing conflicts or using their corporate veil in ways that support crimes against humanity. One example is the recent case involving Lafarge Cement Company<sup>146</sup> and its alleged contribution to crimes against humanity in the Syrian crisis by purchasing oil from ISIS.<sup>147</sup>

Another significant impediment is the *prevailing political dispositions* and ideologies towards economic, social, and cultural rights. There is a notable

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<sup>145</sup> Bernardo Almeida, *The Law, and Its Limits: Land Grievances, Wicked Problems, and Transitional Justice in Timor-Leste*, 15 INT’L J. TRANSITIONAL JUST. 128, 147 (2021). Bernardo recognizes issues of land grievances as wicked problems and uses the case of Timor-Leste to highlight how colonialism, forced expropriation, and conflict can complicate transitional justice efforts. Thus, a ‘wicked problem’ requires a search for acceptable rather than optimal solutions.

<sup>146</sup> Madeline Young, *LaFarge’s Case Cemented: Holding Corporations Liable for Crimes Against Humanity*, 36 EMORY INT’L L. REV. 1 (2021).

<sup>147</sup> The crisis in Syria and the mass atrocities of ISIS are well known. Lafarge is accused of purchasing commodities such as oil from ISIS. The company equally paid taxes to ISIS for the movement of its employees and cement in the country. Through these ways, Lafarge provided funding to a terrorist organization, making the company complicit in the crimes against humanity committed by ISIS. See Liz Alderman, *Terrorism financing charge upheld against French company Lafarge*, N.Y. TIMES (Nov. 7, 2019), <https://www.nytimes.com/2019/11/07/business/lafarge-terrorism-syria.html> [<https://perma.cc/7QYC-EPGW>].

tension in the field regarding the best approaches to realizing ESCR. This creates dilemmas that seep into transitional justice projects because centralizing economic rights in such projects may encourage redistribution of wealth. The redistribution may come in the form of reparations, restitution, just compensations, or other forms of state policy interventions to mitigate the lasting legacies of exclusion. There is also a constitutional philosophy which refuses to expressly recognize ESCR as rights on equal standing with civil and political rights.<sup>148</sup> The libertarian approach to political economy and inequity is very influential. It is a palpable hurdle to convince different political blocks that mainstreaming ESCR in TRCs is not an attempt to create socialist societies.<sup>149</sup> For others, reforms geared towards economic and social equity challenge their belief in cultural superiority.<sup>150</sup>

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<sup>148</sup> See Sunstein, *supra* note 129.

<sup>149</sup> Rosalind Dixon and Julie Suk have put the problem succinctly thus:

First, the enforcement of equality and nondiscrimination rights raises difficulties regarding the definition of the classes or categories worthy of constitutional protection. Second, the enforcement of social and economic rights tends to focus on alleviating poverty or helping the poor, and therefore insufficiently addresses the destabilizing dynamics resulting from wealth that is perceived to be excessive. Third, the structural and procedural interventions, intended to loosen specific barriers to social or economic reform at one particular historical moment, may work at a different historical moment to facilitate altogether different reform agendas by leaders with authoritarian or antidemocratic tendencies. Finally, all three of these limits point to the fact that significant reductions in economic inequality require the disruption of incumbent power and wealth. Institutional path dependence is difficult to overcome, and the fear of incumbents' resistance and backlash may deter the efforts of those desirous of change.

See Rosalind Dixon & Julie Suk, *Liberal Constitutionalism and Economic Inequality*, 85 UNIV. CHI. L. REV. 2(8) 369–401 (2018).

<sup>150</sup> See Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 453–504 (2010); MEIZHU LUI ET AL., *THE COLOR OF WEALTH: THE STORY BEHIND THE U.S. RACIAL WEALTH DIVIDE* 2–6 (2006); Melvin L. Oliver et al., *"Them That's Got Shall Get": Inheritance and Achievement in Wealth Accumulation*, in 5 RESEARCH IN POLITICS AND SOCIETY: THE POLITICS OF WEALTH AND INEQUALITY 69, 73 (1995).

These foregoing apprehensions about wealth redistribution and structural transformation are not justified. First, TRCs offer a platform for deciding what is to be done about inequity arising from economic, social, and cultural injustice. This is especially important in places with contemporary records of forced removal of people, such as in South Africa.<sup>151</sup> More so, the fact of segregated access means there is a collective duty on members of the society—whether as individuals or corporate persons—to find amicable solutions, and TRCs make this highly possible.<sup>152</sup> The alternative is to sustain the flawed socioeconomic and cultural foundations, and this can lead to political fragility and outright civil conflict in extreme circumstances. To overcome this hurdle, it will be critical to understand and communicate the need to rethink the unshifting ideologies about capital and wealth in democratic societies. This rethink is important—especially to reduce extreme inequality in society. Indeed, one of the strongest safeguards to private rights is equity and equal opportunity in law. When there is equity and equal opportunity, everybody has a chance and that reduces fragility.

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<sup>151</sup> Bernadette Atuahene, *South Africa's Land Reform Crisis: Eliminating the Legacy of Apartheid*, FOREIGN AFFS. (2011); Sasha F. Belinkie, *South Africa's Land Restitution Challenge: Mining Alternatives from Evolving Mineral Taxation Policies*, 48 CORNELL INT'L L. J. 5 (2015).

<sup>152</sup> Two recent examples of using a TRC-like project in the aftermath of economic crisis can be seen in Greece and Iceland. See generally I Kovras, S McDaid, & R. Hjalmarsson, *Truth Commissions after Economic Crises: Political Learning or Blame Game?* 66 POL. STUD. 173, 191 (2018); see also *Report of the Iceland Banking Collapse*, SPECIAL INVESTIGATION COMMISSION, <https://www.rna.is/eldri-nefndir/addragandi-og-orsakir-falls-islensku-bankanna-2008/skyrsla-nefndarinnar/english/> [https://perma.cc/S HQ3-53BA]. The Special Investigation Commission (SIC) delivered on April 12, 2010. The Commission was established by Parliamentary Act No. 142/2008 of the Icelandic Parliament in December 2008 “to investigate and analyze the processes leading to the collapse of the three main banks in Iceland.” Though this is a very liberal understanding of the use of the term Truth Commission, it is indicative of the possibilities inherent in the TRC mechanism for communities that wish to use it to meet questions of economic, social, and cultural rights.

While there may be fears about nationalization of foreign assets, it seems that the fears are ill-founded.<sup>153</sup> First, most states today are linked to the global economy and would incur sanctions if they violate their obligations. Equally by expropriating private property without due process or negotiated compensation, such states will undermine their ability to attract foreign direct investment.<sup>154</sup> Second, investors are better protected today,<sup>155</sup> unlike in decades before the 1960s, when investment treaty law and relevant jurisprudence was not as mature as it is currently. Third, the ideological contestations of the Cold War era have also diminished.<sup>156</sup> Thus, there is currently no specter of communism facing humanity. In light of the foregoing

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<sup>153</sup> States especially took over the assets of foreign investors in the first decades of political independence of countries of the global south.

<sup>154</sup> When Zimbabwe attempted a land reform without due commitment to negotiations, it incurred global sanctions including from the World Bank and the International Monetary Fund. See Caitlin Shay, *Fast Track to Collapse: How Zimbabwe's Fast-Track Land Reform Program Violates International Human Rights Protections to Property, Due Process, and Compensation*, 27 AM. UNIV. L. REV. 133, 171 (2012). Equally, investment dispute settlement tribunals, such as the International Center for the Settlement of Investment Disputes, also gave arbitral awards against Zimbabwe for the land reform policies that went awry. See *Bernhard von Pezold and others v. Zimbabwe, ICSID Case No. ARB/10/15*. Often these tribunals have the full faith and credit of international institutions (IOs) such as the World Bank Group. See L. Yves Fortier, *Arbitrating in the Age of Investment Disputes*, 31 UNIV. NEW S. WALES L.J. 282, 283 (2008); Ibrahim F.I. Shihata, *The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, with Particular Reference to ICSID and MIGA*, 1 AM. U. J. INT'L L. & POL'Y 97, 98–99 (1986).

<sup>155</sup> The literature in the field of International Investment Law (IIL) shows a recognition of the strong protections that international investment currently enjoys. See generally Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67 (2005). Some other scholarship also views the international investment law regime as weighted more in favor of investors, thus diminishing the regulatory capacity of states for transformative economic policies. See Olivia Chung, *The Lopsided International Investment Law Regime, and Its Effect on the Future of Investor-State Arbitration*, 47 VA. J. INT'L L. 953, 963 (2007); Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT'L ECON. L. 1037, 1071 (2010).

<sup>156</sup> Peter Charles Choharis, *The Cold War and How We Think About Private Property*, THE ATLANTIC (Dec. 24, 2011), <https://www.theatlantic.com/international/archive/2011/12/the-cold-war-and-how-we-think-about-private-property/250464/> [<https://perma.cc/CV87-75ZL>].

diminished concerns and capacities of states to violate established protections of international investments and private property, I argue that the more serious challenges facing humanity are the many spaces of misery that dot the global landscape.<sup>157</sup> Even in the Organization for Economic Cooperation and Development (OECD)<sup>158</sup> countries, questions about equity and inequality, such as access to education, healthcare, mass incarceration, state violence, harsh sentencing policies on drugs, lack of infrastructure like broadband, and other challenges to opportunity are pushing very hard on the seam of society. These are questions that need answers; else, the present fault lines of identity and cultural diversity may be heightened.

There is also the argument about overstressing TRCs in that TRCs' core mandate does not include economic questions since these can be dealt with through humanitarian assistance.<sup>159</sup> This argument is limited in its appreciation of the nature and operation of TRCs because TRCs are often organized around committees and units with different expertise and experience.<sup>160</sup> These committees are also insulated from the need to win elections and maintain party relevance.<sup>161</sup> Thus, they are better positioned to study and reflect on the problems and make recommendations about them after objectively evaluating available evidence. Often, national legislatures are taxed by too many interests that prevent them from examining these

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<sup>157</sup> See Venzke, *supra* note 45.

<sup>158</sup> See Kate Andrias, *The Fortification of Inequality: Constitutional Doctrine and the Political Economy*, 93 IND. L. J. 5, 28 (2018); Michele Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, 3 UTAH L. REV. 391, 463 (2014).

<sup>159</sup> For a general view of the debates about the desirability or otherwise of incorporating economic rights into the cannon of transitional justice mechanism, see Evelynne Schmid, & Aoife Nolan, *'Do No Harm'? Exploring the Scope of Economic and Social Rights in Transitional Justice*, 8 INT'L J. TRANSITIONAL JUST. 362, 382 (2014).

<sup>160</sup> ICTJ: TRUTH SEEKING: ELEMENTS OF CREATING AN EFFECTIVE TRUTH COMMISSION (Eduardo González and Howard Varney ed. 2013), <https://www.ictj.org/sites/default/files/ICTJ-Book-Truth-Seeking-2013-English.pdf> [<https://perma.cc/BLR4-7BX2>].

<sup>161</sup> See South African Truth and Reconciliation Commission, *supra* note 105.

underlying socioeconomic and cultural inequities. Therefore, it is well within the capability of well-organized TRC mechanisms to interrogate economic, social, and cultural issues and provide viable recommendations on economic, social, and cultural justice issues in any community.

Besides the articulated expertise and use of committees to respond to different subjects that may come before TRCs, there is also a possibility of using the mandate of TRCs to set their functional boundaries. For example, in contrast to making all the economic, social, and cultural issues manifest functions, communities can—depending on their circumstances and contexts—set some of the issues as manifest functions while dealing with others as latent. For instance, a TRC may seek to make an environmental justice issue a manifest function while treating education as benign depending on the prevailing problems within the community. Thus, economic justice and fundamental structural questions that fuel inequality and exclusion from the “pursuit of happiness”<sup>162</sup> in the community can also be made latent functions of TRCs. That way, the commission will have the capacity to interpret its mandate robustly to accommodate the questions of economic (in)justice without being reckless or unrestrained. This is argued with the hope that the other elements for a viable truth commission, like commissioners with integrity, proper financing, enabling law, and required expertise, are also put in place—all things being equal.

Indeed, these potential dynamics must be properly contextualized, bearing in mind the mood of the community and the time. TRCs must be calibrated to resonate with the needs and commitments of the community. It must be noted that the quest here is not to create a standard or model TRC mechanism. It is rather to reinforce the fact that since societies have decided to rely more on TRCs, the TRC mechanism should be dynamic by centralizing economic,

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<sup>162</sup> The right to a pursuit of happiness is a central promise of the American constitutional democracy. See Carlton F. Larson, *The Declaration of Independence: A 225th Anniversary Re-Interpretation*, 76 WASH. L. REV. 701, 708 (2001).

social, and cultural justice questions in the society. Therefore, it remains the individual decision of a country or community to adopt the mechanism of TRC in its transitional justice effort. In the same regard, it is also the absolute right of communities to determine what mandate(s) such a TRC mechanism will be charged with.

Equally, TRCs are only a strand in the overall web of any comprehensive transitional justice project. TRCs are only one aspect of the larger transitional justice strategy. There should be thoughtful consideration of the place of TRCs in this strategy. Another important factor is the existence of necessary political will to seek transitional justice through the mechanism of a truth commission. Existing political will is necessary because the success or failure of the commission will depend on the independence and capacity of the body to do its work. A successful strategy requires that the political establishment is ready to provide information, release documents, and, where necessary, provide the needed support as requested by the commission. This not only helps the work of the commission but also enhances its legitimacy before the public. Only a ground swell of commitment from the community or country in question can overcome the hurdles of political perceptions, constitutional avoidance, ideology, powerful political interests, lack of political will, or simply inertia which impedes the integration of ESCR as a central piece of TRCs. Be that as it may, the next section discusses social movements and the role they can play in setting the agenda and organizing communities to shift unequal paradigms and commence the hard work of building more inclusive communities using the TRC mechanism. In essence, the next section will argue that there is a need for a collaborative contribution from all facets of the society to make freedom ring and hasten the day of equal justice for all as professed in our constitutions, declarations of independence, and national ethos.

#### IV. THE ROLE OF SOCIAL MOVEMENTS IN ADVANCING THE ARC OF ECONOMIC, SOCIAL, & CULTURAL JUSTICE THROUGH TRCS

Truth Commissions are critical instruments of reform and reconciliation. Their transplant and utilization in many countries around the world is a self-evident testimony of their utility. However, the frequency and number of TRCs around the world has not led to socioeconomic and cultural justice. Hence, the case made here for TRCs to embrace economic, social, and cultural justice as manifest functions instead of the current tangential treatment of the subject. In support of the case made above, it is further argued that to move the arc of justice towards the ends of economic, social, and cultural justice, social movements are needed to help society overcome many of the impediments and reticence currently challenging the realization of these aspects of justice.

This integration of ESCR into the cannon of TRCs is important because of the interdependence of all human rights. Civil and political rights and economic, social, and cultural rights are interwoven. Thus, ignoring either branch of the rights paradigm does not make for sustainable peace and justice. Social movements—participatory citizens engagements<sup>163</sup>—are critical in ensuring that the radical bifurcation between the two bundles of rights does not continue to deepen. This is because citizenship connotes a bundle of rights and participatory freedoms.<sup>164</sup> My argument about the value of citizenship participation<sup>165</sup> in organizing and calling for shifts in the prevailing paradigms in society hinges on the fact that democracy is about the citizens themselves. Leaders or representatives, as custodians of the public trust, owe their service to the beneficial interests of citizens.<sup>166</sup> When citizens call attention to their heartfelt concerns, leaders should ordinarily

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<sup>163</sup> PERFORMING CITIZENSHIP (Inbal Ofer, & Tamar Groves eds.) (2016).

<sup>164</sup> T. H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS 10–14 (1950).

<sup>165</sup> Steven Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 272 (2002).

<sup>166</sup> See generally Tom Ginsburg, Justin Blount & Zachary Elkins, *The Citizen as Founder: Public Participation in Constitutional Approval*, 81 TEMPLE L. REV. 361 (2008).

respond. Hence, the sustainability of any democracy is dependent on the participatory role of citizens.<sup>167</sup> This participation can be through voting<sup>168</sup> during elections, public interest litigation, organizing, and other forms of citizen public engagement. Else, the dividends of citizenship may diminish, and in some cases become vestigial because of non-utilization.

In contrast to citizenship, subjecthood indicates domination—servitude, indentureship, subordination, limited freedoms and rights—which depends largely on the discretionary whims of the rulers. In such indentured situations, the “consent of the governed”<sup>169</sup> is not necessary. Little wonder then why authoritarian regimes abhor the free exercise of the rights of the citizens to participate in the life of the community through free associations, assembly, campaigning, voting, and sometimes public interest litigation for the judicial review of the acts of governments.<sup>170</sup> The easiest way to take away the rights of citizens is to exclude them from participating in the life of the community.<sup>171</sup>

One means of citizens’ participation in democratic societies is through social movements.<sup>172</sup> For this purpose, social movements are described as the

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<sup>167</sup> See generally Joshua S Sellers, *Political Participation, Expressive Association, and Judicial Review*, 69 AM. UNIV. L. REV. 6 (2020).

<sup>168</sup> *Id.*

<sup>169</sup> See Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987–1037 (1997).

<sup>170</sup> In a sense, authoritarian regimes stifle democracy. See generally Michael Zürn, *How Non-Majoritarian Institutions Make Silent Majorities Vocal: A Political Explanation of Authoritarian Populism*, in PERSPECTIVES ON POLITICS 1–20 (2021).

<sup>171</sup> Tom Ginsburg, *How Authoritarians Use International Law*, 31 J. OF DEMOCRACY 44, 58 (2020).

<sup>172</sup> There is a broad literature on social movements in the social and political sciences. It also resonates in comparative law. In many respects, social movements are critical in producing cycles of reflection and reform of the society. See generally DONATELLA DELLA PORTA, *MOBILIZING FOR DEMOCRACY: COMPARING 1989 AND 2011* (2014); DONATELLA DELLA PORTA, *CAN DEMOCRACY BE SAVED?: PARTICIPATION, DELIBERATION AND SOCIAL MOVEMENTS* (2013); Sidney Tarrow, *Cycles of Collective Action: Between Moments of Madness and the Repertoire of Contention*, 17 SOC. SCI. HIST. 281 (1993); DONATELLA DELLA PORTA, *SOCIAL MOVEMENTS, POLITICAL VIOLENCE, AND THE STATE: A COMPARATIVE ANALYSIS OF ITALY AND GERMANY* (1995); DONATELLA

coming together of people, organizations, associations, and groups in society to pursue some public goal(s).<sup>173</sup> Social movements and organizing can play a role in ensuring that TRCs champion the underpinning socioeconomic and cultural violations that frustrate peace and harmony in society. Usually, social movements are a combination of subgroups within society to campaign, organize, and achieve a given outcome within the framework of society.<sup>174</sup> They are often associated with social change since they are usually motivated by the need to contest a given social, economic, or political situation and thus bring about change to the existing nature of things.<sup>175</sup>

Significantly, there is often an element of spontaneity that unlocks social movement activities in society. Police brutality,<sup>176</sup> prison riots,<sup>177</sup> and perceived government inaction and inequity<sup>178</sup> sometimes provide the

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DELLA PORTA, THE LOGIC OF UNDERGROUND ORGANIZATIONS IN SOCIAL MOVEMENTS, POLITICAL VIOLENCE, AND THE STATE: A COMPARATIVE ANALYSIS OF ITALY AND GERMANY 112–35 (1995); David S. Meyer & Nancy Whittier, *Social Movement Spillover*, 41 SOC. PROBS. 277 (1994).

<sup>173</sup> Mario Diani, *The Concept of Social Movement*, 40 SOC. REV. 1, 3–7 (1992).

<sup>174</sup> *Id.*; see generally Joel F. Handler, *Social Movements and The Legal System: A Theory of Law Reform and Social Change* (1978).

<sup>175</sup> See generally G. Edward White, *The Origins of Civil Rights in America*, 64 CASE W. RESRV. L. REV. 755 (2014).

<sup>176</sup> See Oliver Laughland et al., ‘We Can’t Breathe’: Eric Garner’s Last Words Become Protesters’ Rallying Cry, THE GUARDIAN (Dec. 4, 2014), <https://www.theguardian.com/us-news/2014/dec/04/we-cant-breathe-eric-garner-protesters-chant-last-words> [<https://perma.cc/GX2G-SPV4>]; Tina Susman & Vera Haller, *Demonstrators Echo Eric Garner’s ‘I Can’t Breathe’ Cry Again, a Year After His Death*, L.A. TIMES (Jul. 18, 2015), <https://www.latimes.com/nation/la-na-garner-justice-20150719-story.html>, [<https://perma.cc/Q8Z7-EA88>]; Ryan D. King et al., *Contemporary Hate Crimes, Law Enforcement, and the Legacy of Racial Violence*, 74 AM. SOC. REV. 291, 294–95 (2009).

<sup>177</sup> See Sarah Spiegel, *Prison “Race Riots:” An Easy Case for Segregation?* 95 CAL. L. REV. 2261, 2270–74 (2007).

<sup>178</sup> *Lynching in America: Confronting the Legacy of Racial Terror*, EQUAL JUST. INITIATIVE (2015), <https://lynchinginamerica.eji.org/report/> [<https://perma.cc/EQ8D-XRMB>]; Tabatha Abu El-Haj, *Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Speech*, 80 MO. L. REV. 1, 1–3 (2015).

catalyst for social movements.<sup>179</sup> Other examples include the death by self-immolation by a street vendor,<sup>180</sup> use of military forces such as in Vietnam,<sup>181</sup> and the Chernobyl nuclear accident.<sup>182</sup> Such varied events unleash public resentment by the governed, which then leads to social movements.<sup>183</sup> Citizens' engagement often resonates in different ways with the law and legal institutions, such as courts and the criminal justice system.<sup>184</sup> For example, some courts may see the social movement as an opportunity to bring a new disposition to rights jurisprudence through judicial review.<sup>185</sup> On the other hand, law enforcement institutions may view social movements with contempt since they often appear to challenge the 'accepted' ways of doing

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<sup>179</sup> See generally H. Timothy Lovelace, Jr., *Of Protest and Property: An Essay in Pursuit of Justice for Breonna Taylor*, 116 N.W. UNIV. L. REV. 23 (2021). The author draws parallels between the civil rights movements use of sit-ins of the 1960s and the deliberate use of trespass to property as a strategy for the pursuit of social justice. See also A. O. Scott, *A long Summer in Mississippi That Still Burns*, N.Y. TIMES (Aug. 12, 2010), <https://www.nytimes.com/2010/08/13/movies/13neshoba.html> [https://perma.cc/56D2-86S4].

<sup>180</sup> See Eric Gobe & Lena Salaymeh, *Tunisia's "Revolutionary" Lawyers: From Professional Autonomy to Political Mobilization*, 41 L. & SOC. INQUIRY 311, 325–29 (2016).

<sup>181</sup> See generally DANIEL S. LUCKS, *SELMA TO SAIGON: THE CIVIL RIGHTS MOVEMENT AND THE VIETNAM WAR* (2014).

<sup>182</sup> Olena Nikolayenko, *Marching Against the Dictator: Chernobyl Path in Belarus*, *Social Movement Studies*, 14 SOC. MOVEMENT STUD. 230, 236 (2015).

<sup>183</sup> Campbell Robertson, *Mississippi Ends Inquiry Into 1964 Killing of 3 Civil Rights Workers*, N.Y. TIMES (June 30, 2016), <https://www.nytimes.com/2016/06/21/us/mississippi-ends-inquiry-into-1964-killing-of-3-civil-rights-workers.html> [https://perma.cc/S4ZK-3NF4].

<sup>184</sup> See generally Christopher W. Schmidt, *Conceptions of Law in the Civil Rights Movement*, 1 U.C. IRVINE L. REV. 641 (2011).

<sup>185</sup> See generally MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

things.<sup>186</sup> The resistance to the Vietnam draft scheme<sup>187</sup> received mixed interpretation by different institutions of government.<sup>188</sup> Indeed, because

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<sup>186</sup> Many people were detained for allegations of causing the breach of public peace and other forms of crimes because of their participation in sit-ins and other forms of public organizing for justice and equality under the law. *See* the following cases: *Bell v. Maryland*, 378 U.S. 226 (1964) (“Petitioners, [Black] ‘sit-in’ demonstrators, were asked to leave a Baltimore restaurant solely because of their race, refused to do so, and were convicted of violating Maryland’s criminal trespass law. The convictions were affirmed by the highest state court. Subsequent to that affirmance, and prior to disposition of the case on writ of certiorari in this Court, the City of Baltimore and the State of Maryland enacted ‘public accommodations’ laws, applicable to Baltimore, making it unlawful for restaurants to deny their services to any person because of his race.”); *Gober v. City of Birmingham*, 373 U.S. 374 (1963); *Peterson v. City of Greenville*, 370 U.S. 935 (1962) (“Petitioners, ten [Black men], entered a store in Greenville, S. C., and seated themselves at the lunch counter. The manager of the store did not request their arrest; but he sent for police, in whose presence he stated that the lunch counter was closed and requested everyone to leave the area. When petitioners failed to do so, they were arrested and later they were tried and convicted of violating a state trespass statute. The store manager testified that he had asked them to leave because to have served them would have been ‘contrary to local customs’ of segregated service at lunch counters and would have violated a city ordinance requiring separation of the races in restaurants. Held: Petitioners’ convictions for failure to leave the lunch counter violated the Equal Protection Clause of the Fourteenth Amendment, even if the manager would have acted as he did independently of the existence of the ordinance.”); *Wright v. Georgia*, 370 U.S. 935 (1962) (“Petitioners, six young [Black men], were convicted of breach of the peace for peacefully playing basketball in a public park in Savannah, Ga., customarily used only by white people and not dispersing when ordered to do so by the police. There was no evidence of disorderly conduct or of any activity which might be thought to violate a breach of the peace statute. One of the arresting officers testified that petitioners were arrested because they were [Black]. At their trial, both in a demurrer to the accusation and in motions for a new trial, petitioners contended, *inter alia*, that the breach of the peace statute violated the Due Process Clause of the Fourteenth Amendment because it did not give adequate warning that their conduct violated it. The Georgia Supreme Court held that error in denial of the motions for a new trial could not be considered because it was not properly briefed on the appeal, and it affirmed the convictions.”); and *Edwards v. South Carolina*, 372 U.S. 229 (1963) (“Feeling aggrieved by laws of South Carolina which allegedly ‘prohibited Negro privileges,’ petitioners, 187 [Black] high school and college students, peacefully assembled at the site of the State Government and there peacefully expressed their grievances ‘to the citizens of South Carolina, along with the Legislative Bodies of South Carolina.’ When told by police officials that they must disperse within 15 minutes on pain of arrest, they failed to do so and sang patriotic and religious songs after one of their leaders had delivered a ‘religious harangue.’ There was no violence or threat of violence on their part or on the part of any member of the crowd watching them; but petitioners were arrested and convicted of the common-law crime of breach of the peace, which the State Supreme

social movements adopt different strategies, courts<sup>189</sup> are also sometimes arenas of protests and contestations about democracy and human rights.<sup>190</sup> These protestations can also be done before TRCs. Indeed, TRCs are more conducive platforms for social movement engagement because of their flexible procedures—unlike courts, which have a rigid process for the gathering of evidence, *locus standi*, and conduct of proceedings.<sup>191</sup> Social movements can engender progress and thus move forward the arc of justice.

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Court said, ‘is not susceptible of exact definition.’ Held: In arresting, convicting, and punishing petitioners under the circumstances disclosed by this record, South Carolina infringed their rights of free speech, free assembly, and freedom to petition for a redress of grievances—rights guaranteed by the First Amendment and protected by the Fourteenth Amendment from invasion by the States.”).

<sup>187</sup> Bill Zimmermann, *The Four Stages of the Antiwar Movement*, N.Y. TIMES (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/opinion/vietnam-antiwar-movement.html> [<https://perma.cc/M38M-LVHM>].

<sup>188</sup> Michael Stewart Foley, *The moral case for draft avoidance*, N.Y. TIMES (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/opinion/vietnam-draft-resistance.html> [<https://perma.cc/ARP2-AWZK>].

<sup>189</sup> See generally Alexi Freeman, and Jim Freeman, *It’s About Power, Not Policy: Movement Lawyering for Largescale Social Change*, 23 CLINICAL L. REV. 147 (2016).

<sup>190</sup> See Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 879 (2013); Lani Guinier, *Beyond Legislatures: Social Movements, Social Change, and the Possibilities of Demosprudence: Courting the People Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 539 (2009); David M. Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at United States v. Classic*, 90 YALE L. J. 741, 745–61 (1981); Gerald Torres, *Social Movements and the Ethical Construction of Law*, 37 CAP. UNIV. L. REV. 535, 540 (2009); David S. Meyer & Steven A. Boutcher, *Signals and Spillover: Brown v. Board of Education and Other Social Movements*, 5 *Perspectives on Politics* 81, 84–85 (2007); BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 31 (1998).

<sup>191</sup> Magill, M. Elizabeth, *Standing for the Public: A Lost History* 95 VA. L. REV. 1131, 1199 (2009); see generally Dianne L. Haskett, *Locus Standi and the Public Interest*, 4 CAN.-U.S. L. J. 39 (1981); Zanaida Miller, *The Injustices of Time: Rights, Race, Redistribution, and Responsibility*, 52 COLUM. HUM. RTS. L. REV. 647–737 (2021).

For example, social movements can galvanize different shades of ideas<sup>192</sup> and people in pursuit of given outcomes in democratic societies.<sup>193</sup> In transitional societies and mature democracies with historically significant questions of injustice, social movements have been central in the development and deepening of democratic ideals.<sup>194</sup> For instance, women's rights and universal adult suffrage for citizens are direct outcomes of carefully calibrated social movements.<sup>195</sup> It is also this fluidity that produces the cyclical nature of social movements—with new generations dealing with a particular loop of the cycle. It has seasons of active engagement interspaced with seasons of seeming inaction. But the most interesting aspect is that because of the nature of democracy, the study of social movements can be used to illustrate the high and low points in the democratic evolution of any country.<sup>196</sup> In the United States, social movement history is equally the history of anti-slavery, labor rights,<sup>197</sup> and anti-segregation. It is also the

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<sup>192</sup> Anma A. Akbar, Sameer M. Asher & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021). The authors highlight how social movements combine with movement law to cogenerate ideas and strategies for social change.

<sup>193</sup> Edward Rubin, *The Conceptual Role of Social Movements*, 97 AM. SOC. INT'L L. 296–99 (2003).

<sup>194</sup> DONATELLA DELLA PORTA, *DEMOCRACY IN SOCIAL MOVEMENTS* (2015).

<sup>195</sup> See generally Martha Craig Daughtrey, *Women and the Constitution: Where we are at the End of the Century*, 75 NYU L. REV. 1 (2000) (highlighting the role of social movements and leaders such as Susan B. Anthony in the recognition, respect, and legal enforcement of the rights of women in America).

<sup>196</sup> See Scott L. Cummings, *Rethinking the Foundational Critiques of Lawyers in Social Movements*, 85 FORDHAM L. REV. 1987, 2015 (2017).

<sup>197</sup> See generally Charles B. Craver, *The Impact of Labor Unions on Worker Rights and on Other Social Movements*, 26 A.B.A. J. LAB. & EMP. L. 267 (2011); see also *Civil Rights Martyrs*, S. POVERTY L. CTR., <https://www.splcenter.org/what-we-do/civil-rights-memorial/civil-rights-martyrs>. This piece chronicles a list of people who were killed because of their activism in the civil rights movement. Thus, beyond Civil Rights Leaders like Martin Luther King Jr., many ordinary people paid the steepest price to bring about change in the law and the community. Overall, the opposition to the civil rights movement, the murder, lynching, arrests, detentions, and violent repression of civil rights activists by both law enforcement and self-appointed vigilantes is a notorious fact of our contemporary legal history.

history of social justice and equal opportunity for all.<sup>198</sup> It is the story of critical legal scholarship<sup>199</sup> and anti-critical theories.<sup>200</sup> It is the story of the evolving foreign policy<sup>201</sup> of the United States and the use of force<sup>202</sup> in international law.<sup>203</sup> It is this potency of social movements that have led to the development of the literature on law and social change.<sup>204</sup> Social movements can, therefore, set the agenda for socioeconomic and cultural rights through the TRC mechanism.

In a sense, the role of social movements in helping incorporate TRCs to mainstream economic justice as a manifest function can be divided into three branches. These three branches include the following functions: (1) agenda-setting for law reform through TRCs; (2) translation, transmission, diffusion, and transplant of ideas between disciplines for the best interest of law, democracy, and society; and (3) providing a voice for marginalized communities.

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<sup>198</sup> See generally SUSAN D. CARLE, *DEFINING THE STRUGGLE: NATIONAL ORGANIZING FOR RACIAL JUSTICE 1880–1915* (2013). Many people were detained for allegations of causing the breach of public peace and other forms of crimes because of their participation in sit-ins and other forms of public organizing for justice and equality under the law. See generally *Bell v. Maryland*, 374 U.S. 805 (1963); *Gober v. City of Birmingham*, 373 U.S. 374 (1963); *Peterson v. City of Greenville*, 370 U.S. 935 (1962); *Wright v. Georgia* 370 U.S. 935 (1962); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

<sup>199</sup> See generally SCOTT L. CUMMINGS, *THE SOCIAL MOVEMENT TURN IN LAW* (2018).

<sup>200</sup> Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 *YALE L. J.* (2005); James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 *UNIV. OF PA.* 685, 780 (1985).

<sup>201</sup> See generally NICK BRYANT, *THE BYSTANDER: JOHN F. KENNEDY AND THE STRUGGLE FOR BLACK EQUALITY* (2006); Cary Fraser, *Crossing the Color Line in Little Rock: The Eisenhower Administration and the Dilemma of Race for U.S. Foreign Policy*, 24 *DIPLOMATIC HIST.* 24, no.2 (2000).

<sup>202</sup> *Id.* at 472 (2006). The image of America in the world, especially in the face of contestation for strategic power between the U.S. and the Soviet Bloc, meant that America had to settle the civil rights question, such as segregation, at home. This was said to have worried President Kennedy, hence his administration's effort towards racial equality in America.

<sup>203</sup> See generally THOMAS BORSTELMANN, *THE COLD WAR AND THE COLOR LINE: AMERICAN RACE RELATIONS IN THE GLOBAL ARENA* (2001).

<sup>204</sup> See generally MORTON G. WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1949).

Social movements are also a means of updating the law to reflect the changes in society. The need for stability in law does not insulate law to changes in society.<sup>205</sup> To this effect, social movements often prompt state institutional responses.<sup>206</sup> Often, social movements champion causes which end up in courts; classrooms; law review journals; textbooks; Congress; and, in exceptional cases, constitutional amendments.<sup>207</sup> In other words, social movements provide the platforms for the (re)generation, evaluation, cultivation, galvanization, and propagation of ideas of law reform and transitional justice. They provide the recipe, which moves communities from the state of inertia—where they are almost indifferent to the justice questions in society—to the state of transition to the next phase of democratic advancement.

Whereas one may argue that this is a rose-tinted view of social movements, the revealing aspect of the legal literature is that none of the constitutional amendments dealing with the enhancement of civil and political rights in America happened without commensurate pressure from social movements.<sup>208</sup> America's constitutional history<sup>209</sup> is, therefore, intertwined with social movements in different shapes and made of different coalitions.<sup>210</sup> A great majority of the constitutional reform moments<sup>211</sup> have also been

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<sup>205</sup> See generally Robert B. McKay, *Stability and Change in Constitutional Law*, 17 VAND. L. REV. 203 (1963).

<sup>206</sup> Social movements like the civil rights advocacy of the 1950s instigated changes, although the institutions of states were often arrayed against them. See Harold A. McDougall, *Social Movements, Law, and Implementation: A Clinical Dimension for the New Legal Process*, 75 CORNELL L. REV. 83, 84 (1989).

<sup>207</sup> See generally Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK UNIV. L. REV. 27 (2005).

<sup>208</sup> See generally Gerald Rosenberg, *The 1964 Civil Rights Act: The Crucial Role of Social Movements in the Enactment and Implementation of Anti-Discrimination Law*, 49 SAINT LOUIS UNIV. L. J. 1147 (2004).

<sup>209</sup> See generally MARK TUSHNET, *SOCIAL MOVEMENTS AND THE CONSTITUTION* (2015).

<sup>210</sup> Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323 (2006).

<sup>211</sup> See generally BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

social movement moments in America.<sup>212</sup> It is argued that social movements can also play a role in centralizing TRCs—especially in established democracies—and thus can help towards the realization of economic, social, and cultural justice in established democracies.

For reform-minded legal scholars,<sup>213</sup> social movements are allies to progressive changes<sup>214</sup> in law and society. For those primed for the defense, deference, and veneration of the existing legal and sociopolitical frameworks, social movements serve as a wakeup call. It assists everyone—progressives and conservatives, minorities and majorities—to reflect on the existing frameworks and sometimes consider what concessions are possible within the circumstances—albeit reluctantly. For congressional representatives, it helps them check the pulse of the society and decide on what legislative interventions are needful if not for the larger enhancement of democracy, then to mitigate the potential rupturing of the society and its possible and far-reaching consequences.<sup>215</sup> Congressional representatives may equally intervene to secure their political mandates or insulate themselves against losses during elections.

Social movements nail on the conscience of society the minimum demands for reform, thus setting the agenda for democratic deliberations. Like the

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<sup>212</sup> See Juliano Zaiden Benvindo, *The Seeds of Change: Popular Protests as Constitutional Moments*, 99 MARQ. L. REV. 363, 364–70 (2015).

<sup>213</sup> See generally Harold A. McDougall, *Social Movements Law, and Implementation: A Clinical Dimension for the New Legal Process*, 75 CORNELL L. REV. 83 (1989).

<sup>214</sup> See Janet E. Mosher, *Legal Education: Nemesis or Ally of Social Movements?*, 35 OSGOOD HALL L. J. 613, 615 (1997).

<sup>215</sup> Kenneth T. Andrews & Sarah Gaby, *Local Protest and Federal Policy: The Impact of the Civil Rights Act*, 30 SOCIOLOGICAL FORUM S1 (2015). It is generally believed that the civil rights movement undermined America's international stature as the leader of the democratic world. The civil rights demonstrations in places such as Selma included the jailing of civil rights leaders, and the extreme police repression assisted countries like Russia in their propaganda efforts against the United States of America. See MARY L. DUDZIAK, BIRMINGHAM, ADDIS ABABA, AND THE IMAGE OF AMERICA: INTERNATIONAL INFLUENCE ON U.S. CIVIL RIGHTS POLITICS IN KENNEDY ADMINISTRATION 181, 183–84 (2003).

thesis of Martin Luther nailed on the doors of the church,<sup>216</sup> social movements nail to the doors of courts, congresses, and legal and public spheres the notable injustices and the demands for remediation, restoration, or reparation. When suffragettes made the Women’s Declaration, they set an agenda and began a conversation about the law and society.<sup>217</sup> That conversation unlocked many hitherto impregnable spaces and subsequently led to the amendments made in the law to provide for the rights of women as equal and contributing members of society.<sup>218</sup>

When the American Civil Rights Movement began, it was considered irresponsible and disruptive.<sup>219</sup> State powers were deployed to quell it.<sup>220</sup> Yet, it managed to set the agenda of the age and renew the manifesto of equality, equal opportunity, and equal protection—the self-evident truths of American independence and constitutional foundation.<sup>221</sup> It suffices to say that what often begins as limited and not so robustly articulated slogans or spontaneous hashtags often end in courts. This forces the institution of justice to decide on the issues raised. No matter how these issues are determined by the courts,

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<sup>216</sup> C Scott Dixon, *Luther’s Ninety-Five Theses, and the Origins of the Reformation Narrative*, 132 *ENG. HIST. REV.* 533, 569 (2017).

<sup>217</sup> See generally Sandra D. O’Connor, *The History of the Women’s Suffrage Movement*, 49 *VAND. L. REV.* 657 (1996).

<sup>218</sup> Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the Living Constitution*, 76 *NYU L. REV.*, 1456–1526 (2001).

<sup>219</sup> Maggie Astor, *Why Protest Movements Are ‘Civil’ Only in Retrospect*, *N.Y. TIMES* (June 16, 2020), <https://www.nytimes.com/2020/06/16/us/politics/us-protests-history-george-floyd.html> [<https://perma.cc/4Y9Z-MXKH>] (noting that, “[o]nce history has endorsed a social movement, people tend to simplify it and downplay the opposition it faced. But while movements are happening, historians say, they are always messy.”).

<sup>220</sup> *Id.* When gay rights became the subject, the police were also used to repress the rights of these minority members of the community. It took strong social movements to bring social change. See also Michael Wilson, *The Night the Stonewall Inn Became a Proud Shrine*, *N.Y. TIMES* (June 27, 2019) <https://www.nytimes.com/2019/06/27/nyregion/stonewall-inn-nyc-1969.html> [<https://perma.cc/96DK-Q84F>]; Suzanne B. Goldberg, *Obergefell at the Intersection of Civil Rights and Social Movements*, 6 *CALIF. L. REV. CIRC.* 157 (2015).

<sup>221</sup> See generally Judge Joseph A. Greenaway, Jr., *The Promise of America*, 37 *CARDOZO L. REV.* 4 (2016).

they sow the seeds of future movements. If the issue was wrongly determined, it would become a new instrument with which to reclaim the denied justice in the future. They become emblematic<sup>222</sup> of the systemic injustice<sup>223</sup> these social movements have always championed against.

Often, unjust decisions from courts shed light on further systemic injustice and ignite further dissent and protest.<sup>224</sup> Nothing encourages the emergence and sustenance of social movements much more than the rendering of a manifestly unjust judgment by courts. It forces hopelessness that can rekindle citizens' participation through social movements. Without social movements, the prevailing axiology and legal instruments of society will relax in their gilded complacency because they cannot imagine a different possibility. Social movements sharpen the imaginative capacities of the law and thus facilitate the progressive realization of justice for all. TRCs need the nudge of social movements to mainstream economic justice both in its cannon and procedural frameworks.

Furthermore, TRCs can gain a lot from the capacity of social movements to galvanize ideas. Democracy, the rule of law, equality under the law, equal opportunity, and social justice are all ideas. Social movements play the critical role of not only galvanizing them but transmitting them across boundaries of knowledge, systems, beliefs, and methodologies in society. This interdisciplinary diffusion, transmission, collaboration, and application help the law to grow and perform its assigned duties of equal protection, due process, and respect for the dignity of all the members of any given society. Social movements often help propel these ideas beyond these systemic lockdowns and help society to confront the true nature of things. In a way, social movements lift the veil of society in ways that show the limitations and the need for new metaphors, approaches, and vocabularies for justice.

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<sup>222</sup> See generally *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

<sup>223</sup> See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>224</sup> Robert A. Burt, *What Was Wrong with Dred Scott, What's Right About Brown*, 42 WASH. & LEE L. REV. 1 (1985).

Hence, racial justice, economic justice, reparative justice, corrective justice, restorative justice, and social justice are all different iterations of the search for justice, and social movements enhance the capacity of these ideas to move beyond boundaries.<sup>225</sup>

Finally, social movements have an uncommon way of forcing society to hear voices from the margins. It amplifies hitherto muffled or outrightly silenced voices in the community and enables the community to stop and listen to these voices. These may be wailing voices of “I can’t breathe.”<sup>226</sup> They may also be chanting voices of “no justice, no peace.”<sup>227</sup> They may also be the voice of “women’s rights are human rights”<sup>228</sup> and “love is love.”<sup>229</sup> They may be voices shouting and saying: “Ain’t I A Woman?”<sup>230</sup> Indeed there are many voices in society trampled upon and subsumed in the system, which are often seeking to find expression and to be heard.

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<sup>225</sup> See generally Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1 (2001).

<sup>226</sup> See ‘I Can’t Breathe’: *The Refrain that Reignited a Movement*, AMNESTY INT’L, (June 30, 2020), <https://www.amnesty.org/en/latest/news/2020/06/i-cant-breathe-refrain-reignited-movement/> [<https://perma.cc/YZJ6-G8HS>]; see Ben Okri, ‘I can’t breathe:’ *Why George Floyd’s Words Reverberate Around the World*, THE GUARDIAN, (June 8, 2020), <https://www.theguardian.com/commentisfree/2020/jun/08/i-cant-breathe-george-floyd-words-reverberate-oppression>, [<https://perma.cc/6NXU-866L>].

<sup>227</sup> See generally Robert J. Durán, *NO JUSTICE, NO PEACE: Examining Controversial Officer Involved Shootings*, 13 DU BOIS REV. 61, (2016).

<sup>228</sup> See Fleur van Leeuwen, *Women’s Human Rights: CEDAW*, in INTERNATIONAL, REGIONAL AND NATIONAL LAW: ‘Women’s rights are human rights!’: *The practice of the United Nations Human Rights Committee and the Committee on Economic, Social and Cultural Rights* 242–67 (2013).

<sup>229</sup> See generally Renata Grossi, *The meaning of love in the debate for legal recognition of same-sex marriage in Australia*, 8 INT’L J. L. IN CONTEXT 487 (2012) (tracing the debates and efforts at defining love and how it relates to the rights of same-sex couples in Australia); Samantha Schmidt, *Americans’ views Flipped on Gay Rights. How Did Minds Change so Quickly?*, WASH. POST (June 7, 2019), [https://www.washingtonpost.com/local/social-issues/americans-views-flipped-on-gay-rights-how-did-minds-change-so-quickly/2019/06/07/ae256016-8720-11e9-98c1-e945ae5db8fb\\_story.html](https://www.washingtonpost.com/local/social-issues/americans-views-flipped-on-gay-rights-how-did-minds-change-so-quickly/2019/06/07/ae256016-8720-11e9-98c1-e945ae5db8fb_story.html) [<https://perma.cc/RR8F-TE9A>].

<sup>230</sup> See Sojourner Truth, *Ain’t I A Woman?* Speech Delivered at Women’s Rights Convention, Old Stone Church, Akron, Ohio (1851), <https://www.nps.gov/articles/sojourner-truth.htm> [<https://perma.cc/VD58-BW8B>].

These voices find social movements empowering. This is especially so in communities where these voices are marginal because they have neither the platform nor the “accepted” framework epistemically and otherwise to mainstream their thoughts. This double challenge—of being minorities and at the same time not having access to either the public sphere or the knowledge-creating spaces of the society in which they live—tempers their communicative abilities and chokes them over time. Such silencing has harsh consequences for justice, transformative democracy, and social justice in general. Thus, no matter the subject matter—LGBTQ rights; women’s reproductive rights; racial (in)justice, as manifested in slavery, colonialism, and segregation; expropriation of Indigenous property; and laying of new oil and gas pipelines through the Indigenous property—social movements give these concerns a tongue and a voice to speak to power and seek reclamation of their rights.<sup>231</sup> For TRCs, social movements can help them centralize these marginal voices, especially in reckoning with the socioeconomic and cultural rights of these communities.

## V. CONCLUSION

Truth and Reconciliation Commissions have become critical in the scholarly and policy debates about providing lasting solutions to social problems such as conflicts, human rights violations, and systemic inequity. They feature prominently in peace agreements. Since the 1990s and the pivot towards democratization in the aftermath of the Cold War,<sup>232</sup> TRCs have

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<sup>231</sup> See Sam Levin, *Dakota Access Pipeline: The Who, What and Why of the Standing Rock Protests*, THE GUARDIAN (Nov. 3, 2016), <https://www.theguardian.com/us-news/2016/nov/03/north-dakota-access-oil-pipeline-protests-explainer> [<https://perma.cc/4PPS-MERB>]; See Sierra Crane-Murdoch, *Standing Rock: A New Moment for Native-American Rights*, NEW YORKER (Oct. 12, 2016), <https://www.newyorker.com/news/news-desk/standing-rock-a-new-moment-for-native-american-rights> [<https://perma.cc/M3NZ-WYX9>].

<sup>232</sup> See Samuel Phillips Huntington, *The Third Wave: Democratization in the Late Twentieth Century* 12–34 (1993); Renske Doorenspleet, *Reassessing the Three Waves of Democratization*, 52 WORLD POL. 384, 406 (2000).

been utilized immensely in seeking redemption for human rights violations and ensuring enduring peace. For example, the TRC in South Africa was significant in unveiling the systemic evil of apartheid and proffering solutions for healing, remediation, and sustenance of an equal society.<sup>233</sup> In other places like Colombia,<sup>234</sup> Argentina,<sup>235</sup> Canada,<sup>236</sup> and Ghana,<sup>237</sup> TRCs have also been used to assist the society in rethinking the public sphere in an inclusive way, thereby living true to the “prophecies of constitutions,” human rights, peace, and equal humanity. Interestingly, the focus has been on civil and political rights. The right to life, freedom of expression, freedom of conscience and religion, right to human dignity, right to ownership of property, right to privacy, and their corollaries have been the focus of these TRCs.

Consequently, economic, social, and cultural rights/justice—especially those linked to historical injustices such as slavery, apartheid, colonization, forced removals, and other aspects of “economic genocide”—have been left

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<sup>233</sup> CATHERINE M. COLE, *PERFORMING SOUTH AFRICA’S TRUTH COMMISSION: STAGES OF TRANSITION* (2009).

<sup>234</sup> See Lisa J. Laplante & Kimberly Theidon, *Transitional Justice in Times of Conflict: Colombia’s Ley de Justicia y Paz*, 28 MICH. J. INT’L L. 49–108 (2006); Ted Piccone, *Peace With Justice: The Colombian Experience with Transitional Justice*, BROOKINGS (2019), <https://www.brookings.edu/research/peace-with-justice-the-colombian-experience-with-transitional-justice/> [<https://perma.cc/G4FX-LQG4>].

<sup>235</sup> See Greg Grandin, *The Instruction of Great Catastrophe: Truth Commissions*, 110 AM. HIST. REV. 46, 46–67 (2005); Mark Osiel, *The Making of Human Rights Policy in Argentina: The Impact of Ideas and Interests on a Legal Conflict*, 18 J. LAT. AM. STUD. 135, 135–80 (1986).

<sup>236</sup> See generally Rosemary Nagy, *The Truth and Reconciliation Commission of Canada: Genesis and Design*, 29 CAN. J. L. & SOC’Y/REVUE CANADIENNE DROIT ET SOCIÉTÉ 199 (2014); Robyn Green, *Unsettling Cures: Exploring the Limits of the Indian Residential School Settlement Agreement*, 27 CAN. J. L. & SOC’Y 129, 148 (2012); Kim Stanton, *Looking Forward, Looking Back: The Canadian Truth and Reconciliation Commission and the Mackenzie Valley Pipeline Inquiry*, 27 CAN. J. L. & SOC. 81, 81–99 (2012).

<sup>237</sup> See Abena Ampofoa Asare, *The Ghanaian National Reconciliation Commission: Reparation in a Global Age*, 2 THE GLOB. S. 31, 53 (2008).

to the goodwill of the society. At best, generic comments have been made about them in the final reports of TRCs. This essay argued that this is not enough if society intends to excavate the genealogy or roots of the inequality in society. This essay also argued that it is time enough to make economic justice the manifest function of TRCs. This will rejuvenate the waning value of the instrumentality of TRCs arising from the fact that they have been reticent towards investigating and proffering solutions to the real structural problems created by exclusionary socioeconomic policies adopted in many societies.

Moreover, TRCs will provide a buffer against future exclusionary policies because the wielders of the instrumentalities of public policy today will understand that their actions could be revisited. Otherwise, the best way to avoid dealing with the real issues that create fragility and conflict in societies will be to concentrate on civil and political rights, while leaving socioeconomic and cultural rights to goodwill. While goodwill and donor commitments can contribute significantly to the improvement of the lives of members of the society, the advancement of society or the progressive realization of social and cultural rights cannot rest on the beneficence of donors. One reason for this assertion is that beneficence is indeterminate and unenforceable. There is no legal correlative of rights which is categorized as benevolence.<sup>238</sup> If society is not comfortable leaving civil and political rights to goodwill, it should thus review the current ambivalence towards ESCR—especially when implementing transitional justice processes. Hopefully, this essay will challenge policymakers and scholars to consider mainstreaming the foundational questions of economic, social, and cultural justice in their respective societies as manifest issues for TRCs and not forgotten alternatives in the search for peace, justice, law, and order. This approach

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<sup>238</sup> For more general ideas on jural correlatives, see Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16–59 (1913); J. M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 UNIV. MIAMI L. REV. 1119–42 (1990).

will help focus attention on human flourishing and inclusive wellbeing in a (post) COVID-19 era.

