

**The impact of CODESA talks on the socio-economic rights of the majority of South
Africans**

by

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Declaration

I, **Konanani Happy Raliglia** declare that this mini-dissertation is original, it has not been presented to any other University or Institution. Where other people's work have been used, references and acknowledgements were provided. Hence, I declare that this research work is originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree in International Law.

Signed.....

Date.....

Supervisor: **Prof Michelo Hansungule**

Signed.....

Date.....

Dedication

I dedicate this mini-dissertation to my Ancestors.

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Abstract

Current issues concerning socio-economic challenges faced by the majority of South Africans are attributed to the former apartheid regime and its inequality policies between black and white citizens. Salient to the Convention for a Democratic South Africa talks was the centralisation of the negotiations on the political transition from the old apartheid regime to a democratic dispensation at the expense of socio-economic discussions. It is for this reason that this research study examined the historical background leading up to the Convention for a Democratic South Africa talks and the impact of the former liberation movements in the attainment of peace and stability in South Africa. The research study also examines socio-economic rights from the South African perspective and further analyse how these rights ought to be fulfilled and enforced by the courts. Further examination is on the transitional justice system towards the constitutional reforms and also on the failure by the prosecuting authorities to prosecute the perpetrators of apartheid atrocities. Comparatively, this research study focus on Zimbabwe's political climate leading up to the 2008 elections and ultimately how the transitional phase negotiations overlooked the socio-economic rights. Towards the end, this research study focused on the proposed peace framework which must include the socio-economic rights towards a new transitional period.

Table of Acronyms

ANC	African National Congress
APLA	Azanian People's Liberation Army
AWB	<i>Afrikaner Weerstandsbeweging</i>
AZANLA	Azanian National Liberation Army
AZAPO	Azanian People's Organisation
BEE	Black Economic Empowerment
CODESA	Convention for a Democratic South Africa
GPA	Global Political Agreement
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
ICSPCA	International Convention on the Suppression and Punishment of the Crime of Apartheid
IFP	Inkatha Freedom Party
MDC	Movement for Democratic Change
MK	<i>uMkhonto we Sizwe</i>
NP	National Party
NPA	National Prosecuting Authority
PAC	Pan Africanist Congress
RUF	Revolutionary United Front
SACP	South African Communist Party
TJRC	Kenyan Truth, Justice and Reconciliation Commission
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
ZANU	Zimbabwe African National Union
ZANU-PF	Zimbabwe African National Union - Patriotic Front
ZAPU	Zimbabwe African People's Union

List of Statues, Treaties and Other Instruments

South Africa

Broad-Based Black Economic Empowerment Act 53 of 2003

Constitution of the Republic of South Africa Act 200 of 1993

Group Areas Act 41 of 1950

Interim Constitution Act 200 of 1993

Promotion of National Unity and Reconciliation Act 34 of 1995

The Constitution of the Republic of South Africa, 1996

Zimbabwe

Constitution of Zimbabwe Amendment Act 19 of 2009

Constitution of Zimbabwe Amendment Act 20 of 2013

Global and Regional Instruments

1977 Additional Protocol 1 to the Geneva Conventions of 1949

Global Political Agreement of 2008

International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973

International Covenant on Economic, Social and Cultural Rights of 1966

Lancaster House Agreement of 1979

National Peace Accord of 1991

Rome Statute of the International Criminal Court of 1998

The African Charter on Human and Peoples' Rights of 1988

The Convention for a Democratic South Africa

Truth and Reconciliation Commission of 1996

Universal Declaration of Human Rights of 1948

Concluding Observations and General Comments

ANC Draft Bill of Rights, Preliminary Revised Version (February 1993)

The International Committee of the Red Cross (ICRC) *What is International Humanitarian Law?*

Advisory Service on International Humanitarian Law 07/2004

List of Cases cited

Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others 1996 (4) SA 672 (CC)

Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)

Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 721 (CC)

Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC)

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Chapter one

1. Introduction

1.1. Historical background

The old white South Africa gained its independence from the Great Britain in 1910 and became the Union of South Africa. In 1948, the National Party (NP) came into power after it had defeated the United Party. Immediately after assuming power, the NP went on to introduce a system of segregation which later became known as 'Apartheid.'¹ This system was meant to separate whites from all other groups on the bases of race and it was systematically enforced from 1948 up until 1994. However, the enactment of the Group Areas Act 41 in 1950 paved a way for the displacement of the majority of black people and this had an impact in the socio-economic disparities. Against this backdrop, Apartheid left a deep-rooted problem of poverty and inequality in South Africa.²

Following the unbanning of the major political parties (the African National Congress [ANC], Azanian People's Organisation [AZAPO], South African Communist Party [SACP], and the Pan Africanist Congress [PAC]) in 1990 and the release of Nelson Mandela, South Africa was now destined for the new-era. A peace settlement among rivalries was inevitable. It must be borne in mind that the main rivalries were between the white government and black political parties. In 1991, the first Convention for a Democratic South Africa (CODESA)³ was constituted and it is noteworthy that this convention laid the basis for the civil and political rights. The second CODESA, ran for the period 1992 to 1993 and it is within this convention where, the transitional arrangements took centre stage. Although the CODESA talks made resolutions which were aligned

¹ International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973, defines term the crime of Apartheid, "*which shall include similar policies and practices of racial segregation and discrimination as practiced in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.*"

² S Khoza *Socio-economic rights in South Africa* (2007) 21.

³ The main purpose of CODESA was to negotiate a way out of apartheid and to forge a smooth transitional process towards democracy.

to the socio-economic dimension, the negotiators side lined the socio-economic rights for civil and political rights. However, both the socio-economic and civil and political rights were encapsulated in the Interim Constitution of 1993 as well as in the final Constitution of 1996.⁴

Fast forward to 2016, South Africa commemorates 20 years after the adoption of the final Constitution and 23 years after the CODESA talks, yet it is still grappling with issues related to poor service delivery and inequality. This is despite the fact that the two main elements of the CODESA talks were inclusiveness and compromise.⁵ Comparatively, this study will also take lessons from the Zimbabwean coalition experience which was brought about by the Global Political Agreement (GPA) of 2008. It is this GPA that led to the Government of National Unity. However, this GPA Agreement in similar way as the CODESA, had very little on the socio-economic rights and how the socio-economic plight of the majority in Zimbabwe will be addressed.

1.2. Problem Statement

South Africa, in the same way as other African countries, has been grappling with poor socio-economic challenges even prior and in the post democratic emancipation in 1994. The old apartheid regime concentrated much of its service delivery to the white communities at the expense of their black counterparts. For the purposes of this study, blacks would mean African blacks, Indians, and coloureds. It is for this reason that during the CODESA talks, the ANC and other political parties pushed for the broader and better socio-economic conditions for everyone. However, the socio-economic were not encapsulated in the CODESA talks. Against this background, this study seeks to determine whether or not the socio-economic rights were part of the CODESA talks. Furthermore, this study will make a comparative analysis of the transitional dispensations in Zimbabwe in 2008. The peace agreements which led to the transitional governments in these countries just like the CODESA settlement, encapsulated the advancements, promotion and realisation of the socio-economic rights. This is despite the fact that South Africa,

⁴ The Constitution of the Republic of South Africa, 1996.

⁵ K Miti 'South Africa and conflict resolution in Africa: From Mandela to Zuma' (2014) 1 *Southern African Peace and Security Studies* 1.

which also went through the transitional dispensation, intervened in the peace processes in these countries. Towards the end, this study will investigate the South African ideal concept which will encapsulate its socio-economic conditions.

1.3. Research questions

The principal research question in this study is; what impact did the CODESA talks have on the socio-economic conditions in South Africa post 1994?

In particular, this study will interrogate the following questions:

- Why is South Africa still experiencing socio-economic challenges years after CODESA talks?
- Could lack of framework implementation, notwithstanding the Bill of Rights, and lack of political-will be the results of the poor socio-economic conditions?
- What are the global and African regional standards in dealing with socio-economic rights?

1.4. Aims and Objectives of the study

1.4.1. Aims

- To examine the impact of socio-economic rights in the CODESA talks.
- To establish if the service delivery protests are as the result of the lack of commitment by the government to fulfil the CODESA objectives.
- To examine socio-economic rights in light of the international and regional standards.

1.4.2. Objectives

- To investigate legal framework holding the political incumbents to account for their socio-economic promises.

- To investigate feasibility of the CODESA commitment on socio-economic rights in the post-1994 dispensation.

1.5. Significance of the study

Scholars did not interrogate the absence of socio-economic rights in the CODESA talks and this makes the study significant. Therefore, this study intends to validate the fact that the absence of the material or socio-economic rights in the CODESA talks has an impact in the current socio-economic challenges South Africa is facing. While it is a scholarly enterprise, the study may also serve a practical guide for lawyers, academics, executive bureaucrats, heads of governments departments, and politicians who grapple with the socio-economic challenges facing South Africa.

1.6. Methodology

This study will use the desktop research method and informal discussions for gathering literature and for reading purposes. This study will adopt the analytical research method whereby case laws, statutes, scholarly works, treaties, and policy frameworks will be consulted and analysed.

1.7. Literature review

To begin with, it is imperative to note that socio-economic rights are inherent and are universally acknowledged by the United Nation member states. However, Christine Chinkin argued that the post conflict reconstruction and efforts for transitional justice in Africa features predominantly and this is done at the expense of socio-economic rights.⁶ Christine Chinkin's argument was also supported by Stein, who contended that failure to effectively advance and enforce the socio-economic rights in Africa could be attributed to the results of the Cold War between the East and the West.⁷ Coincidentally, the ideological rift between these two centres of power could explain why the ANC delegation, which subscribed at the time to the socialist ideology, favoured the socio-

⁶ C Chinkin (2009) *The Protection of Economic, Social and Cultural rights post-conflict*. Paper series commissioned by the Office of the High Commissioner for Human Rights.

⁷ T Stein 'Constitutional socio-economic rights and International law: You are not alone' (2013) 16 *PER/PELJ* 12.

economic rights during the CODESA talks. On the other hand, the NP government, which subscribed to the western ideology, was not in favour of the socio-economic rights and this resulted in a deadlock. It was Katabaro Miti who confirmed these views and remarked that, what exacerbated the rift between the two major protagonists (the ANC and NP) in the CODESA talks was the clear divide along racial line.⁸

The gist of the CODESA, as outlined in the ‘declaration of intent’ of 1991 and signed by all parties, was “to strive to improve the quality of life of our people through policies that will promote economic growth and human development and ensure equal opportunities and social justice for all South Africans.” It is therefore clear that all parties that signed the declaration of intent acknowledged the advancement socio-economic rights as part and parcel of the negotiations. However, the growing number of scholars do not seem to trace the South African socio-economic rights as part of the CODESA talks. Against this background, most scholars only trace the socio-economic rights from the Constitution and other international frameworks such as the Universal Declaration of Human Rights (UDHR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) amongst others. This is despite the fact that the very same Constitution is the birth child of the CODESA talks settlement. According to Kirsty McLean the “negotiating parties, themselves not democratically representative, decided to create an interim Constitution which was to come into force on the date of South Africa’s first democratic elections on the 27 April 1994.”⁹

The CODESA talks were centred on the basic principles of dignity, liberty, equality, and brotherhood, proclaimed for everyone living in South Africa irrespective of the race.¹⁰ Mary Glendon further asserted that CODESA was not limited to these principles, but also to economic, social and cultural rights.¹¹ Although in some parts of the African continent, socio-economic rights are either constitutionally incorporated in weaker forms, however the current ANC government in

⁸ Miti (n 5 above) 1.

⁹ K McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 12.

¹⁰ MA Glendon ‘The Rule of Law in the Universal Declaration of Human Rights’ (2004) 2 *Northwestern Journal of International Human Rights* 3.

¹¹ Glendon (n 10 above) 3.

South Africa inherited a viable economy in 1994.¹² This is despite the fact that South Africa has been experiencing service delivery protests since the dawn of democracy and the source of these protests seem to be in the actualization and advancement of these rights. This argument was also supported by Johnson Udombana who remarked that the reason “many governments have notoriously failed to promote the common welfare of their citizens, taking cold comfort in bland arguments that socio-economic rights require costly programmes for their realisation.”¹³ However, Ilias Trispiotis disagreed with Johnson Udombana and argued that social welfare rights are usually inextricably linked with huge costs and executive policy-making.¹⁴ Ilias Trispiotis further implied that politicians are seemingly the direct source of service delivery protest through their failure to shore up political support for economic and social rights.¹⁵

Against this backdrop, Achim Wennmann argued that failure to deliver economic, social and cultural rights through national legal frameworks in accordance with international standards undermines the sought-after stability and human security post-conflict.¹⁶ It must borne in mind that prior and during the CODESA talks, South African experienced civil unrest in some parts of the country.¹⁷ However, Danie Brand seemed conciliatory and contended that “apart from their implementation, the Constitution enables the enforcement of socio-economic rights, creating avenues of redress through which complaints that the state or others have failed in their duties can be enforce. In this sense, constitutional socio-economic rights operate reactively.”¹⁸

Achim Wennmann remarked that the failure of peace agreements in other African countries has been “explained by negotiated settlements tending to be used in more intractable armed conflicts;

¹² E Wiles ‘Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law’ (2006) 22 *American University International Law Review* 64.

¹³ NJ Udombana ‘Shifting Institutional Paradigms to Advance Socio-economic Rights in Africa.’ LLD thesis, University of South Africa 2007 106.

¹⁴ I Trispiotis ‘Socio-Economic Rights: Legally enforcement or just aspirational?’ (2010) 8 *Opticon* 1826.

¹⁵ KG Young ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (2008) 33 *The Yale Journal of International Law* 173. See also See N Fraser and A Honneth *Recognition or Redistribution? A political philosophical exchange* (2003) 108.

¹⁶ C Chinkin (n 6 above) 31.

¹⁷ JGR Simpson ‘The Boipatong massacre and South Africa’s democratic transition’ (2011) 35 *African Studies Center* 3.

¹⁸ CH Heyns and D Brand ‘Introduction to socio-economic rights in the South African Constitution’ in G Bekker (ed) *A compilation of essential documents on economic, social and cultural right / Economic and social rights series* (1999) 2.

thus, making them more short-lived, while post-conflict economic recovery is often hampered by the legacies of conflict including destroyed infrastructure, poverty and diseases.”¹⁹

Toward the end, Liveson Tatira and Tobias Marevesa, argued that the Zimbabwean GPA presented severe threats and opportunities, seemingly irresolvable contradictions and a small opening for moving beyond the political impasse.²⁰

1.8. Limitation of the Study

This research will depend on the policy frameworks, and other statutes and the research notes that it might prove difficult to access these documents from the South African government and also from the Zimbabwean embassies. Therefore, it is important to highlight the fact that this study will rely heavily on the desktop literature.

1.9. Organisation of Chapters

Chapter one entails the research proposal and it is in this chapter where the historical background of the CODESA talks will be highlighted. This chapter will also determine research methods that will be used in carrying out of this study.

Chapter two examines the theoretical framework of the study.

Chapter three deals with the literature review. In this chapter, the transitional justice towards the new constitutional dispensation will be examined and analysed. This chapter will also determine the impact that the CODESA talks have on the socio-economic conditions in South Africa.

¹⁹ A Wennmann ‘Economic Provisions in Peace Agreements and Sustainable Peace building’ (2009) 1 *Négociations* 45.

²⁰ L Tatira and T Marevesa ‘The global political agreement (GPA) and the persistent political conflict arising there from: Is this another manifestation of the council of Jerusalem?’ (2011) 3 *Journal of African Studies and Development* 188. See also B Raftopoulos ‘The Crisis in Zimbabwe, 1998-2000’ in B Raftopoulos and A Mlambo (eds) *Becoming Zimbabwe: A History from the Precolonial Period to 2008* (2009).

Chapter four examines the comparative study of the Zimbabwean's GPA with respect to socio-economic rights.

Chapter five investigates the proposed framework dealing with the implementation of the socio-economic rights in South Africa. The purpose of this chapter is to ensure political commitment by the executive as part of their constitutional mandate.

Chapter six is conclusion and recommendations.

Chapter two

CODESA and socio-economic rights: Theoretical framework

2.1.Introduction

This chapter examines the CODESA talks and the impact they had on the peace process in the lead up to the 1994 first general elections. The chapter also clarifies the socio-economic rights position in the South African context. Furthermore, a brief jurisprudential discussion on the enforcement and fulfilment of the socio-economic rights, coupled with landmark cases are also investigated and analysed. Towards the end, the chapter examines the socio-economic challenges affecting the majority South Africans ranging from service delivery protests, Fees Must Fall campaign, and white minority privilege.

2.2.The Convention for a Democratic South Africa (CODESA)

The process of CODESA entails the talks for the new Constitution, which began immediately after the signing of the National Peace Accord in 1991 by all major political parties in South Africa. In other words, the CODESA talks were strived at ending the armed struggle under which the ANC vowed to unleash with the purpose of rendering the then apartheid government ungovernable. It is also in these negotiations where the then apartheid government representatives met with members of the ANC regarding the transition from apartheid to democratic rule.²¹ Subsequently, the historic first free and fair general elections was held in 1994 were as a results of the CODESA talks.

The then president of the ANC, Nelson Mandela described the CODESA talks in the following;

²¹ N Smyth *Building a New South Africa: A Report* (1995) 12.

"The convening of Codesa was like the parting of the waters, opening the way to the promised land of freedom beyond. It was a great victory for the people of South Africa, black and white."²²

It was up to individual citizens from all walks of life, from business to academia, the media and clergy, to bring together contending views and find common ground to secure our common national future.²³ However, CODESA talks were not only the process for the attainment of peace and transitional process, but also for attainment of justice. Therefore, it is imperative to examine and understand, as well, the process of reconciliatory justice.

According to Ari Kohen, the concept of reconciliation 'implies a repairing or rebuilding of some sort of relationship but, in many cases, none existed prior to the offense or neither party desires a relationship.'²⁴ This assertion was supported by Luc Huyse who argued that reconciliation prevents the use of the past as the seed of renewed conflict and he further contended that it consolidates peace, breaks the cycle of violence and strengthens newly established or reintroduced democratic institutions.²⁵ However, Ari Kohen also identified a factor which underpins the concept of reconciliation which requires that the offender accept responsibility for the harm committed and the aspect of repentance on the part of the offender.²⁶ The failure to repent on the part of the offender may put the victim in a very precarious situation to reconcile with an unapologetic offender.

Given the fact that South Africa is being considered a good example of this theory, reconciliation is a consequence of successful peace talks.²⁷ It is for this reason that it came shortly after the

²² Speech by Nelson Mandela at the Zionist Christian Church Easter Conference Moria, 20th April 1992. Available at <http://www.sahistory.org.za/archive/speech-nelson-mandela-zionist-christian-church-easter-conference-moria-20th-april-1992> (accessed on 10 March 2017).

²³ M Oosthuizen, N Binidell, and R Richards 'What would a Codesa for the new SA look like?' *Business Day* 23 November 2016

²⁴ A Kohen 'The Personal and the Political: Forgiveness and Reconciliation in Restorative Justice' (2009) *12 Critical Review of International Social and Political Philosophy* 407.

²⁵ D Boomfield, T Barnes, and T Huyse *Reconciliation after violent conflict: A handbook* (2003) 19.

²⁶ Kohen (n 24 above) 407.

²⁷ HC Kelman 'Conflict Resolution and Reconciliation: A Social-Psychological Perspective on Ending Violent Conflict Between Identity Groups' (2010) *1 Landscapes of Violence* 3.

CODESA talks in the form of the Truth and Reconciliation Commission (TRC). The foundational basis for a true reconciliation is the frankness and accommodative conflict resolution agreement. Herbert Kelman cemented this view by indicating that ‘reconciliation is, after all, a process as well as an outcome; as such, it should ideally be set into motion from the beginning of a peace process and as an integral part of it.’²⁸

There are just few examples of the success cases of this theory and South Africa is one of them. The fall of the apartheid regime and the release of political prisoners saw the emergence of the new democratic era in South Africa. A careful road map to redress the imbalances of the past as well as acknowledging the atrocities and gross human rights violation by the then apartheid regime had to be laid in the CODESA. Soon after the CODESA agreement and the establishment of the government of national unity, the TRC process launched with the express purpose of uncovering the truth about past violations of human rights, facilitate reconciliation and grant amnesty, provided that perpetrators fully disclosed politically-motivated crimes and provided evidence that led to investigations and prosecutions.²⁹ The TRC process was further legislated into law by parliament in 1995 under the Promotion of National Unity and Reconciliation Act 34 of 1995.³⁰

However, the CODESA talks were not immune to instances where the spoiler tactics were used to try and destabilise any peace process. It is significant to point out that the *Afrikaner Weerstandsbeweging* (AWB) and the Inkatha Freedom Party (IFP) were the main two chief spoilers in the peace process during the CODESA talks. The AWB is a right-wing neo-nazi paramilitary organization which was led by Eugene Terreblanche and the IFP is political party which represents mainly the majority Zulu nation under the leadership of Mangosuthu Buthelezi. The IFP feared that as the ANC was the largest party and it could take unilateral decisions in new government.³¹ These two organisations decided to form an alliance upon which the IFP would be

²⁸ Kelman (n 27 above) 3.

²⁹ South African History Online ‘South African Government of National Unity (GNU) – 1994 – 1999.’ Available at <http://www.sahistory.org.za/article/south-african-government-national-unity-gnu-%26ndash%3B-1994-%26ndash%3B-1999> (accessed on 04 January 2017).

³⁰ This Act was enacted with the aim “to provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution, within or outside the Republic.”

³¹ M Szeftel ‘Negotiated Elections in South Africa’ 1994 (21) *Review of African Political Economy* 457.

provided with the support by the AWB with the purpose of destabilising the peace talks. It is because of this alliance that resulted in the violence in parts of the then TWV region (now Gauteng province) and in the Natal Province (now Kwazulu-Natal).³² Ironically, these events also led Mandela and De Klerk to become closer because they realised that if they would not achieve an agreement, civil war was likely to break out. The violence serves as a motivation to restart peace talks.³³

Eventually, the South African government of national unity was established in 1994 with the clear mandate of paving the way for the country into a constitutional democracy. This government was given effect by clause 88 of the Interim Constitution of 1993 which provided for the inception of the government of national unity.³⁴ This government was comprised of major political parties, the ANC, NP, and IFP together with small political parties. Accordingly, Nelson Mandela became the president of the government of national unity while FW De Klerk became his deputy. Towards the end, this government of national unity achieved inclusivity amongst different political parties during the transitional period from the then apartheid regime to a constitutional democracy until its end in 1997.

2.3.Socio-economic rights in South Africa

Socio-economic rights are recognised as human rights in a number of international human rights instruments and they are recognised mainly in the 1948 UDHR and the 1966 ICESCR.³⁵ Not only are they recognized in these two main international instruments, but also in the African regional frameworks such as The African Charter on Human and Peoples' Rights and the South African final Constitution.

Before discussing the socio-economic rights in South Africa, it is useful to mention the fact that these rights did not take center stage in the CODESA talks. This is so because the CODESA talks were founded on the basis of five working groups and that is (a) creations of a for free political

³² Szeftel (n 31 above) 457.

³³ Szeftel (n 31 above) 460.

³⁴ Constitution of the Republic of South Africa Act 200 of 1993.

³⁵ Khoza (n 2 above) 19.

activity, (b) constitutional principles, (c) transitional arrangements, (d) future of the independent homeland states', and (e) timeframe and implementation. All these working groups were meant to have at least two representatives and two advisors. It must be borne in mind that part of CODESA was to pave a way to a new constitution and move away from the then apartheid Constitution of 1983. This was to ensure that South Africa deviate itself from the parliamentary rule into a constitutional democracy.

Christof Heyns and Danie Brand opined, "the CODESA talks were aimed merely at facilitating the transition to democracy and also to include only the largely uncontroversial rights contained in most other democratic constitutions."³⁶ It is because of this assertion that the CODESA Working Group on the constitutional principles stove for the inclusion of the Bill of Rights in the interim Constitution and which ultimately resulted in the adoption of the final Constitution. This is despite the National Party's implicit disapproval for the inclusion of the socio-economic rights in the interim Constitution at the CODESA.³⁷ However, other political parties that were involved in the CODESA talks presented draft Bill of Rights and constitutional proposals recognising fundamental socio-economic rights for the majority South Africans.³⁸ Article 11 of the ANC's Bill of Rights for a New South Africa stated that; "(1) All men, women and children have the right to enjoy basic social, educational and welfare rights." This article was to be read in conjunction with article 17(1) regarding the proposed enforcement and protection of the socio-economic rights.³⁹ The above articles provide an indication by the ANC of its commitment for the advancement of the more socialist policies. It is because of this assertion that the Bills of Rights are founded.

The final Constitution provides a number of ways for claiming and defending basic needs, such as our socio-economic rights to housing (section 26), health care, food, water, and social security

³⁶ C Heyns and D Brand 'Introduction to socio-economic rights in the South African Constitution' (1998) *2 Law, Democracy and Development* 155.

³⁷ South African Government Proposal on a Charter of Fundamental Rights (February 1993)

³⁸ S Liebenberg 'Socio-Economic Rights' in Chaskalson et al (eds) *Constitutional Law of SA* (Revision Service 3 (1998) 41-3. See Articles 11, 12, and 17(1) of the ANC Draft Bill of Rights, Preliminary Revised Version (February 1993).

³⁹ Article 17(1) of the ANC's Bill of Rights for a New South Africa provides; "The terms of the Bill of Rights shall be binding upon the State and organs of government at all levels, and where appropriate, on all social institutions and persons."

(section 27).⁴⁰ The inclusion of these provisions in the Constitution is based on the fact that socio-economic rights guarantees the right to adequate housing, food, health care, education, social security and water. Against this background, Ebenezer Durojaye argued that South Africa has explicitly guaranteed socio-economic rights in the Constitution, enacted pieces of legislation to give bite to these rights, and courts have developed a rich jurisprudence to clarify the content of these rights.⁴¹ Ebenezer Durojaye further contended that these developments have not in any way transformed into better living conditions for the people.⁴² This sentiment was also echoed by Christopher Mbazira who argued that the state has a moral and legal duty to ensure that all people have access to these basic goods and services and these obligations are most effectively discharged when transformed into rights that an individual may demand.⁴³ Towards the end, the strategic importance of socio-economic rights as tools in anti-poverty initiatives will diminish if the courts interpret them as imposing weak obligations on government and fail to protect them as vigorously as they do the other rights in the Bill of Rights.⁴⁴

2.4.Fulfilment and enforcement of the socio-economic rights

The fulfilment and enforcement of the socio-economic rights have been evidently tested in the Constitutional Court through the *Soobramoney v Minister of Health*,⁴⁵ *Government of South Africa v Grootboom*,⁴⁶ and the *Minister of Health and Others v Treatment Action Campaign (TAC)*⁴⁷ landmark cases. In the *Soobramoney v Minister of Health* case, the Constitutional Court ruled that;

⁴⁰ Khoza (n 2 above) 12.

⁴¹ E Durojaye E, the author reviews the book, *Socioeconomic Rights in South Africa: Symbols or Substance?* Edited by Malcom Langford, Ben Cousins, Jackie Dugard and Tshepo Madingozi and published in 2014 by Cambridge University Press.

⁴² Durojaye E *Socioeconomic Rights in South Africa: Symbols or Substance?* Edited by M Langford, B Cousins, J Dugard and T Madingozi (2014).

⁴³ C Mbazira *Realising socio-economic rights in the South African Constitution: The obligations of local government* (2006) 1.

⁴⁴ S Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty' (2002) 6 *Law, Democracy & Development* 160.

⁴⁵ *Soobramoney vs. Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

⁴⁶ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

⁴⁷ *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC).

“the right to medical treatment does not have to be inferred from the nature of the state established by the Constitution or from the right to life which it guarantees. It is dealt with directly in section 27. If section 27(3) were to be construed in accordance with the appellant’s contention it would make it substantially more difficult for the state to fulfill its primary obligations under sections 27(1) and (2) to provide health care services to everyone within its available resources.”⁴⁸

In light of the above case, Soobramoney centered his arguments on the constitutional provisions of the rights to emergency medical treatments and the right to life. On the one hand, section 27(3) of the Constitution provides that no one may be refused emergency medical treatment, while on the other section 11 provided that everyone has the right to life. It is clear that Soobramoney’s case laid bare two factors for the advancements of socio-economic rights and that is the progressive realization, as well as the legitimate and necessary activity in instances of limited resources. However, the court cautioned those who are responsible for the bureaucratic advancement of the socio-economic rights and held that;

“the provincial administration which is responsible for health services in KwaZuluNatal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters”⁴⁹

This decision is a clear indication that the court acknowledges the fact that if there is good governance at the bureaucratic level, the courts will not interfere in the enforcement of the advancement and realisation of the socio-economic rights.

On the housing front, the case of the *Government of South Africa v Grootboom* involved the right to adequate housing under section 26 of the Constitution. This section 26 makes provisions for the

⁴⁸ At para 19.

⁴⁹ At para 29.

realisation of the adequate housing to vulnerable group of people including women and children and further place such duty on the South African government to realise this right. The Constitutional Court held that;

“...issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups. The poor are particularly vulnerable and their needs require special attention...”⁵⁰

In light of the above decision, section 26(2) states that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. However, the court acknowledged the fact that “legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive.” In so doing, the court was placing the duty of the state to ensure that the right to adequate housing is realised in compliance with the constitutional provisions to section 26.

Lastly, the Constitutional Court unanimously held in the *Minister of Health and Others v Treatment Action Campaign (TAC)* case that the limited access of nevirapine in public hospitals violated the right to health enshrined in the Constitution. The court held at paragraph 20 that the Constitution requires government to comply with the obligations imposed upon and should a court find the government to be in breach of these obligations, therefore the court is required to provide effective relief to remedy that breach.

2.5.Socio-economic inequalities in South Africa post CODESA

The genesis of the social inequalities in South Africa came about as the result of both colonialism and apartheid systems. This assertion was further supported by Frederick Cooper who argued that South Africa's growth strategy, going back to the nineteenth century, was rooted in the expropriation of land and coercion of labour, through pass laws, residential restrictions, and

⁵⁰ At para 36.

intensive policing.⁵¹ These disparities were influenced by the apartheid policy. Apartheid was a government policy of segregation against the black majority South Africans by the white minority group. It was adopted and legitimized in 1948 by the then National Party which was in power. This policy relegated the majority black population in non-white racial groups to the bottom of the income and wealth distributions in the country cleanly mapped onto their total dominance of poverty incidence and shares.⁵² During the period between 1948 and 1994, black majority were deprived of the social benefits equivalent to their white minority counterparts.

However, according to Murray Leibbrandt, Arden Finn, and Ingrid Woolard, the period after 1994 marked the dawn phase of actual socio-economic developments in the post-apartheid period.⁵³ The first and most significant step in this transformation trajectory was the successful negotiation and conclusion of our widely admired constitution.⁵⁴ Many of the deep-seated social and developmental problems facing South Africa today link back to the transition processes of the early 1990s.⁵⁵ The holding of our peaceful and successful elections in 1994 was a powerful statement by all South Africans for a desire to protect and sustain a peaceful transition.⁵⁶

However, the Oxfam's report published in 2014 sub-titled "Time to end extreme inequality," presents a bleak picture of the socio-economic inequality. The report highlighted South Africa as one of the most unequal societies in the world and that inequality is greater today than at the end of Apartheid.⁵⁷ It is on the basis of this assertion that Andrew Ihsaan Gasnolar suggested that South

⁵¹ F Cooper 'Inequality in South Africa during and since Apartheid' (2007) 33 *Journal of Southern African Studies* 455.

⁵² M Leibbrandt, I Woolard, and C Woolard 'Poverty and Inequality Dynamics in South Africa: Post-apartheid Developments in the Light of the Long-Run Legacy' Prepared for the *IPC- DRCLAS workshop*, Brasilia 11-13 January 2007.

⁵³ M Leibbrandt, A Finn, and I Woolard 'Describing and decomposing post-apartheid income inequality in South Africa Development Southern Africa' (2012) 29 *Development Southern Africa* 33.

⁵⁴ T Motsahi 'Inequality may derail our democratic stability' *The Mail and Guardian* 06 September 2013.

⁵⁵ F Meintjies 'The TRC and CODESA Failed South Africa: It's Time We Reflected on This.' (2013) *The South African Civil Society Information Service*. Available at <http://sacsis.org.za/site/article/1783> (accessed on 23 March 2017).

⁵⁶ Motsahi (n 54 above).

⁵⁷ Oxfam *Even it up: Time to end extreme inequality*. A 2014 report on global inequality published by Oxfam GB for Oxfam International (Oxford, United Kingdom).

Africa is in need of an economic CODESA to address inequality and the broken system.⁵⁸ Frank Meintjies agreed with Andrew Ihsaan Gasnolar and further contended that CODESA did nothing to re-arrange economic power, while it was also silent on the need for ownership changes in major corporations.⁵⁹ The following factors are a clear resemblance that South Africa remains an unequal society even 22 years after the fall of apartheid system.

(a) Service delivery protests

Although violent protests in South Africa can be traced back to the struggle against apartheid era, however since the dawn of democracy there has been increasingly the re-emergence of violence in the black communities in the form of service delivery protests.⁶⁰ Peter Alexander observed that since 2004, South Africa has experienced a movement of local protests amounting to a rebellion of the poor and this has been widespread and intense, reaching insurrectionary proportions in some cases.⁶¹ According to Peter Alexander, the protests have been about service delivery and against uncaring, self-serving, and corrupt leaders of municipalities.⁶²

Also following Peter Alexander's observations, Susan Booysen noticed that in the two years leading up to South Africa's March 2006 local government elections, there was a range of protests concerning service delivery which affected all nine provinces.⁶³ At the heart of these service delivery protests is the equal distribution of basic services to the people and social disparities. This is given the fact that the black majority are evidently at the forefront of these protests and this is due to the fact that their living conditions have not entirely improved. According to Susan

⁵⁸ AI Gasnolar 'After the Rainbow: A cloud of tragedy and poverty of spirit' *The Daily Maverick* 25 February 2016.

⁵⁹ Meintjies (n 55 above).

⁶⁰ M Langa and P Kiguwa 'Violent masculinities and service delivery protests in post-apartheid South Africa: A case study of two communities in Mpumalanga' (2013) 27 *Agenda* 20. See also P Alexander 'Rebellion of the poor: South Africa's service delivery protests- a preliminary analysis' 2010 (37) *Review of African Political Economy* 25. M Seedat, U Lau, and S Suffla 'Collective violence in South Africa: Explaining the explanations' Paper presented at School of Graduate Seminar, UNISA, June 2010.

⁶¹ Alexander P 'Rebellion of the poor: South Africa's service delivery protests – a preliminary analysis' (2010) 37 *Review of African Political Economy* 25.

⁶² Alexander (n 61 above) 25.

⁶³ S Booysen 'With the ballot and the brick: the politics of attaining service delivery' (2007) 7 *Progress in Development Studies* 21.

Booyesen, service recipients struggle to make their voices heard in the corridors of power that meander from local municipalities upwards into the emporiums of provincial premiers and the circuit of national task teams and presidential think-tanks.⁶⁴ Material deprivation, combined with increasing use of force against popular protests, have produced and radicalised a range of new social movements that politicise socio-economic rights and demand access to land, health care, housing and public services⁶⁵

(b) Fees must fall campaign

According to Kitso Rantao, South Africa's political inheritance of freedom and equality came with the huge responsibility of educational, cultural and social integration within academic institutions.⁶⁶ Furthermore, Kitso Rantao argued that democracy also came with inequality, as political freedom did not automatically deliver economic freedom.⁶⁷ This inequality was evident during the protests against fees that grappled the universities all across the country in the academic years 2015 and 2016. These protests later became known as the Fees Must Fall campaign.

The events leading up to the Fees Must Fall campaign came about after the success of the Rhodes Must Fall movement at the University of Cape Town, which eventually saw the removal of the statue of Cecil John Rhodes. However, the Fees Must Fall campaign gained its popularity at the University of the Witwatersrand. The main objective of this campaign was to end the fees increase at the institutions of higher learning and also to ensure an acceleration of the access to higher education. As increasing numbers of South African students attempted to shutdown institutions of higher learning across the country, it is significant to point out that the impact of this campaign prompted the government's intervention.⁶⁸ President Jacob Zuma later issued a moratorium on the fee increment and instituted the Commission of Inquiry into Higher Education and Training which was subsequently established in January 2016.

⁶⁴ Booyesen (n 63 above) 21.

⁶⁵ K Stokke and S Oldfield 'Social Movements, Socio-economic Rights and Substantial Democratisation in South Africa' (2005) *International Political Economy Series* 127.

⁶⁶ K Rantao 'FeesMustFall: Demanding an affordable Bill of Rights' *University World News*, 29 October 2015.

⁶⁷ Rantao (n 66 above).

⁶⁸ H Ziady 'So you think that SA varsity fees must fall?' *Moneyweb* 20 October 2015.

Finally, it is worth noting that the Fees Must Fall campaign highlighted the existence of the socio-economic divide between the privileged and disadvantaged members of the society, including the students themselves.⁶⁹

(c) White minority privilege

According to Zeus Leonardo, racial privilege is the notion that white subjects accrue advantages by virtue of being constructed as whites.⁷⁰ This notion placed a central role in the implementation of the apartheid policy at the behest of the then National Party. However, the ANC government when it took power in 1994 undertook to redress the imbalances of the past apartheid regime by coming up with new corrective policies which were meant to benefit the majority of South Africans.

Accordingly, affirmative action policy was introduced as a remedial strategy which seeks to address the legal historical exclusion of the majority population.⁷¹ In the same vein, the government also introduced the Black Economic Empowerment (BEE) policy with the sole mandate of redressing the socio-economic inequalities of the then apartheid era. The regulatory framework of the BEE was the Broad-Based Black Economic Empowerment Act 53 of 2003 with the aims to ensuring that the economy is structured and transformed to enable a meaningful participation of the majority of its citizens and to further create capacity within the broader economic landscape at all levels. However, despite these governmental efforts to redress the imbalances of the past, Gillian Schutte remarked that whites have continued to benefit hugely from the system.⁷²

⁶⁹ A Landu 'Fees Must Fall a blessing' *The Mail and Guardian* 26 February 2016.

⁷⁰ Z Leonardo 'The Color of Supremacy: Beyond the discourse of white privilege' (2004) 36 *Educational Philosophy and Theory* 137.

⁷¹ K Adams 'The Politics of Redress: South African Style Affirmative Action (1997) 35 *The Journal of Modern African Studies* 249.

⁷² G Schutte 'A comprehensive guide to white privilege in South Africa' *The Mail and Guardian* 11 October 2013.

2.6.Conclusion

This chapter has successfully examined and interrogated the CODESA talks in context of peace resolution. The chapter further elaborated on the CODESA talks as a peace process as well as the socio-economic rights, given their controversy. The theoretical framework managed to capture these basic peace essentials in line with the South African experience of peace attainment.

Chapter three

Transitional justice towards the new constitutional dispensation

3.1. Introduction

South Africa's democratic dispensation is founded on the basis of a compromise with regards to transitional justice from the apartheid atrocities. This compromise led South Africa on a path to recovery from the brink of a civil unrest and to a reconciliation process established under the TRC. Against this background, this chapter examines apartheid as an international crime under customary international law and also reflects on the concept of transitional justice. Furthermore, this chapter seeks to explore why the National Prosecuting Authority (NPA) failed to prosecute the perpetrators of apartheid atrocities. Towards the end, the chapter investigates why South Africa chose transitional justice over prosecution for apartheid atrocities despite apartheid being classified as an international crime.

3.2. Apartheid as an international crime

The extent at which the apartheid system had on the majority of South Africans had a profound impact on the global international arena. It is on the basis of this assertion that the United Nations General Assembly decided in 1973 to adopt the International Convention on the Suppression and Punishment of the Crime of Apartheid (ICSPCA). The main objective of this convention was to criminalize and suppress all forms of apartheid. To achieve this, it is significant to note that this convention is binding on all signatories and furthermore state parties ought to undertake, in article 4, to adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid; and also to adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish perpetrators of apartheid. This international crime is founded on the basis of creation of the convention which was principally aimed at the suppression of human rights violation under the disguise of apartheid.⁷³ Article 1(1) of ICSPCA states that;

⁷³ J Dugard *International Law: A South African perspective* (2014) 157.

“the States Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.”

In light of article 1(1), apartheid was for the first time declared a crime against humanity and this article went further to highlight the individual criminal liability attached to it. Therefore, individual criminal liability comes in many forms and according to article 3 of ICSPCA “shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State, whenever they: (a) commit, participate in, directly incite or conspire in the commission of the acts mentioned in article II of the present Convention; (b) directly abet, encourage or co-operate in the commission of the crime of apartheid.”⁷⁴ John Dugard argued that the principal features of apartheid, as was evident in South Africa, ranged from murder, torture, arbitrary arrests of members of a racial group to legislative measures calculated to prevent a racial group from participating in the political, social, economic, and cultural life at the advantage of another domineering racial group.⁷⁵

The classification of apartheid as a crime against humanity was further confirmed in article 7 of the Rome Statute of the International Criminal Court. In terms of article 7(1), crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (j) the crime of apartheid. Article 7(1)(j) should be read together with article 7(2)(h) which provides that “the crime of apartheid means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of

⁷⁴ Article 3(a) and (b) of the International Convention on the Suppression and Punishment of the Crime of Apartheid (ICSPCA) of 1973.

⁷⁵ Dugard (n 73 above) 158-159.

maintaining that regime.” According to Carola Lingaas, it has been argued that the inclusion of the crime of apartheid into the Rome Statute has led to an increased harmonisation of international criminal law.⁷⁶ The expansion of the status and classification of apartheid as crime under customary international law, although not precisely certain, is also evident in the 1977 Additional Protocol 1 to the Geneva Conventions of 1949. Article 85(4)(c) of the 1977 Additional Protocol I provides that “practices of apartheid and other inhuman or degrading practices involving outrages upon personal dignity, based on racial discrimination” and shall, subsequently in article 5 of the same Additional Protocol, be regarded as war crimes.

3.3. The concept of transitional justice

Under international humanitarian law, conflict is considered international when hostilities are taking place across national borders and the primary actors are sovereign states.⁷⁷ These international armed conflicts have an impact of destabilising regional blocks and at times pose a risk to the maintenance of international peace and security. During this time, world leaders would be tempted to intervene in an effort to find peaceful solutions to the conflict. On the other hand, the International Committee of the Red Cross (ICRC) defines non-international armed conflicts, commonly known as civil wars, as those conflicts that are restricted to the territory of a single state, involving either regular armed forces fighting groups of armed dissidents, or armed groups fighting each other.⁷⁸ The end of such conflict may signal the beginning of a process of transitional justice which represents a transformation of the relationship between the warring parties.⁷⁹ However, despite an enormous amount of effort and investment, many ceasefires and peace agreements in civil wars may be unsuccessful or give way to renewed, and often escalated, violence.⁸⁰

⁷⁶ C Lingaas ‘The Crime against humanity of Apartheid in a Post-Apartheid World’ (2015) 2 *Oslo Law Review* 93.

⁷⁷ EF Babbitt ‘The evolution of international conflict resolution: From Cold War to peacebuilding’ 2009 *Negotiation Journal* 539.

⁷⁸ The International Committee of the Red Cross (ICRC) “What is International Humanitarian Law?” *Advisory Service on International Humanitarian Law* 07/2004.

⁷⁹ HC Kelman ‘Conflict resolution and reconciliation: A social-psychological perspective on ending violent conflict between identity groups’ (2010) 1 *Landscapes of Violence* 2.

⁸⁰ E Newman and O Richmond ‘Peace building and spoilers’ 2006 (6) *Conflict, Security & Development* 102.

The process of transitional justice goes beyond a realistic view of national interests. Transitional justice gained currency towards the end of the Cold War and with the eruption of civil wars in eastern and southern Europe, and also with the increased attention to conflicts in Africa which stimulated scholars and analysts to explain the changing nature of war and how to end it.⁸¹ It is significant to note that the concept of transitional justice, as observed by Robert Mugagga Muwanguzi in his doctoral thesis, has spread out to include several mechanisms or processes that embrace both retributive and restorative justice, and has also embraced measures that include not just peace building, but also concrete measures that aim at providing solutions that are directed at addressing or answering the root causes of conflicts.⁸² Kieran McEnvoy agreed with Robert Mugagga Muwanguzi's view of peace building and further asserted that developing the state's institutional capacity to deliver justice is the core element in the process of rebuilding structures of governance more generally.⁸³

Ruti Teitel has defined transitional justice as the conception of transitional justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessors.⁸⁴ By construing the concept of transitional justice in the South African context, both the ANC and the repressive NP apartheid government had to come up with the solution to deal with the atrocities and gross human rights violations committed during the apartheid era. Aeyal Gross argued that options for solving this dilemma included an amnesty process, which implies that they should leave the past behind or rather, prosecute prior offenders strictly according to the law.⁸⁵ According to Aeyal Gross, this is to create truth and reconciliation

⁸¹ T Carayannis, V Bojicic-Dzelilovic, N Olin, A Rigterink, and M Schomerus 'Practice without evidence: Interrogating conflict resolution approaches and assumptions' (2014) 11 *Justice and Security Research Programme* 2.

⁸² RM Muwanguzi *Examining the use of Transitional Justice mechanisms to redress gross violations of human rights and international crimes in the Northern Uganda conflict* LLD thesis, University of the Western Cape 2016.

⁸³ K McEnvoy 'Beyond legalism: Towards a thicker understanding of transitional justice' (2007) 34 *Journal of Law and Society* 423. See also D Brinkerhoff 'Rebuilding governance in failed states and post-conflict societies: Concepts and cross cutting themes' (2005) 25 *Public Administration and Development* 3-14.

⁸⁴ RG Teitel 'Transitional justice genealogy' (2003) 16 *Harvard Human Rights Journal* 68.

⁸⁵ AM Gross 'The Constitution, reconciliation, and transitional justice: Lessons from South Africa and Israel' (2004) 40 *Stanford Journal of International Law* 49.

commissions, which do not ignore the past, but instead grant amnesty selectively.⁸⁶ Soon after the ANC assumed political power in 1994, it decided to establish the TRC to help deal with what happened under the apartheid system and to prevent future resurrection of apartheid. The aim of prevention, according to Lisa Laplante, motivates the constantly evolving transitional justice movement.

3.4. An overview of transitional justice in South Africa

The period between 1989 and 1994 marked the South African transitional phase from the brutal apartheid era to a much more democratic state. This transitional period was founded on four pillars and that is (a) disarmament, (b) new constitutional dispensation, (c) human rights, and (d) amnesty. All these four pillars constitute transitional justice from the South African perspective and it is important to now examine each one of them.

Firstly, Robert Muggah defines disarmament as the collection, control and the disposal and destruction of small arms and light weapons, explosives and ammunition held by civilians and the organs of regular and irregular combatants and civilians.⁸⁷ Given this definition, Robert Muggah further highlighted three ways in which disarmament can be enforced and he suggested that it can (a) be administered coercively through by the army, police or a peacekeeping force; (b) can be carried out voluntarily, through amnesty initiatives and public collection campaigns administered by the army, police, peacekeeping forces or another designated actor; (c) weapons can be exchanged for another good, either cash or other incentives such as development projects.⁸⁸

Following the unbanning of the political parties and their armed wings in 1990 by the then president of South Africa, FW de Klerk, voluntary disarmament was effected with the assistance of the ANC, PAC, AZAPO and the IFP. All these political parties had their own military wings which were involved in the attacks against the former apartheid government interests, be it people

⁸⁶ Gross (n 85 above) 49.

⁸⁷ R Muggah 'The anatomy of disarmament, demobilisation and reintegration in the republic of Congo' (2004) 4 *Conflict, Security & Development* 30.

⁸⁸ Muggah (n 87 above) 30. See also S Jensen and F Stepputat 'Demobilising armed civilians' 2001 *Centre for Development Research Policy Paper*, Copenhagen.

or infrastructure, inside South Africa and abroad. The ANC had the *uMkhonto we Sizwe* (MK), which was formed in 1961 and later declared a terrorist organization by the then apartheid government as well as the United State of America. The MK unleashed series of bombings in South Africa, targeting the government interests and this included the bombing on the church street in the capital city, Pretoria, which resulted in the deaths of 19 people and many injured in 1983.⁸⁹ Two years later, 1985, the MK operative Andrew Zondo detonated a bomb in the Natal South Coast which resulted in 5 deaths and almost 40 injured people.⁹⁰ The following year, another MK operative Robert McBride detonated a bomb in 1986 at the Durban beach-front which killed 3 people and injured scored of people. Another notable bombing was at the Johannesburg Magistrate's Court and also at the military command center in Johannesburg which resulted in the deaths of 4 people respectively.⁹¹ Moreover, it is important to note that the PAC's Azanian People's Liberation Army (APLA) and AZAPO's Azanian National Liberation Army (AZANLA) were also involved in deadly attacks at the apartheid government's point of interests in the country which left many people dead during the period 1983 and 1993.

Against this backdrop, there is a conviction shared by Yasushi Akashi that multilateral arms limitation and disarmament offers a gateway to a more peaceful and secured country.⁹² This was also supported by Adrian Fisher who argued that arms control and disarmament are relatively effective approaches to the age old problem of maintaining peace by the subordination of force to a rule of law.⁹³ Therefore, there was a commitment at CODESA between both the government and political parties to avoid reigniting the hostilities. Perhaps the cessation of hostilities had a component of transitional justice on its own. This is so because those who were held responsible in the hostilities were not going to be prosecuted once granted amnesty.

Secondly, the South African transitional phase was founded on the 34 principles of the Interim Constitution. These principles contain the commitment that certain features of the Interim

⁸⁹ J Cameron-Dow *A newspaper history of South Africa* (2007) 34.

⁹⁰ AP Johnson 'South Africa, black, 19, guilty of shopping bombing' *The New York Times* 02 April 1986.

⁹¹ Weekly Mail Reporters 'Blast may be in retaliation' *The Mail and Guardian* 31 July 1987

⁹² Y Akashi 'Lessons and prospects' in Dhanapala J (ed) *The United Nations, disarmament and security: Evolution and prospects* (United Nations Institute for Disarmament Research, Geneva) UNIDIR/91/46

⁹³ AS Fisher 'Arms control and disarmament in International Law' (1964) 50 *Virginia Law Review* 1200.

Constitution needed to be entrenched in order to place them safely beyond the realm of ordinary politics.⁹⁴ Schedule 4 of the Interim Constitution makes provision for these Constitutional Principles and principle number 2 provides that “everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.”⁹⁵

Thirdly, earlier literature on apartheid indicates that the former NP government committed gross human rights violations and this led to the UN declaring it an international crime. Of particular interest was the fact that human rights later formed part and parcel of the transitional justice during the CODESA talks. Article 5(6) of the CODESA 1 Declaration of Intent provides that “all shall enjoy universally accepted human rights, freedoms and civil liberties including freedom of religion, speech and assembly protected by an entrenched and justiciable Bill of Rights and a legal system that guarantees equality of all before the law.” This Declaration of Intent was signed by the majority parties, however with the exception of the IFP and AWB among other few parties. Human rights were also acknowledged in the preamble of the Interim Constitution which stated that “...all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.” These rights are now contained in the Bill of Rights under the Final Constitution and regarded as the corner stone of the South African democracy.

Fourth and final pillar of transitional justice in the South African context was amnesty. According to Faustin Ntoubandi, “the word amnesty is derived from the Greek word *amnsetia* or *amnesis*, which means forgetfulness, oblivion, or to lose memory.”⁹⁶ However, Charles Villa-Vicencio and Erik Doxtader contended that from this old definition, “amnesty is thus less an outright forgetting than a foreclosing on the ability of individuals to use a past event as grounds for a certain behavior.”⁹⁷ Presenting a conciliatory examination of the concept of amnesty was Peter Krapp

⁹⁴ S Issacharoff ‘The Democratic risk to democratic transitions’ in S Woolman *Constitutional Court Review* (2014) 12.

⁹⁵ Schedule 4 – Constitutional Principles in the Interim Constitution Act 200 of 1993.

⁹⁶ FZ Ntoubandi *Amnesty for crimes against humanity under International Law* (2007) 8.

⁹⁷ C Villa-Vicencio and E Doxtader *The Provocations of amnesty: Memory, justice and impunity* (2003) 127.

who argued that, “amnesty is neither suspension of a duty to punish, nor abolition; in fact it is the limits of amnesty which draws the implication that the past and present cases end with its declaration.”⁹⁸ Therefore, the exclusion of remorse and repentance as argued by Eugene Baron are a core element in the granting of amnesty.⁹⁹

On 19 July 1995, the former president of South Africa, Nelson Mandela, signed The Promotion of National Unity and Reconciliation Act 34 of 1995 which provided the investigation and also to establish the possible nature, causes and extent of gross violations of human rights committed between the period from 1 March 1960 and 27 April 1994. Furthermore, this law also provided for the establishment of the TRC and it is significant not to lose sight of the fact that it was adopted on 01 December 1995 as part of the amnesty and reconciliation process. The former Archbishop of the Anglican Church, Desmond Tutu, chaired the TRC and he was deputized by Dr Alex Boraine, with Dumisa Ntsebeza as the head of the TRC Investigative Unit.

3.4.1. Hurdles and prospects of the TRC

According to Daryl Balia, the TRC ranks very high as having set an international standard in the modern paradigm of restorative justice in a transitional democracy.¹⁰⁰ This is so because it embedded a unique combination of criminal accountability and amnesty proceedings.¹⁰¹

On the international front, the South African model of TRC was also used in Sierra Leone and in Kenya. Soon after the cease-fire of the raging civil war between the Sierra Leonean government forces and the Revolutionary United Front (RUF), the warring parties decided to institute a TRC to investigate the atrocities committed during the war and to grant amnesty. Many people implicated in the war crimes came forward, those who told the commission the truth about the atrocities were granted amnesty, and those who either lied or neglected to participate in the

⁹⁸ P Krapp ‘Amnesty: Between an ethics of forgiveness and the politics of forgetting’ (2005) 6 *German Law Journal* 192.

⁹⁹ E Baron ‘Remorse and repentance stripped of its validity: Amnesty granted by the Truth and Reconciliation Commission of South Africa’ (2015) 41 *Studia Historiae Ecclesiasticae* 170.

¹⁰⁰ B Daryl ‘Truth and Reconciliation Commission’ (2004) *Encyclopedia of Public Administration and Public Policy* 297.

¹⁰¹ Muwanguzi (n 82 above).

commission were to be prosecuted. The same goes to the Kenyan Truth, Justice and Reconciliation Commission (TJRC) that was instituted following the devastating post-election violence of 2007. Many people died and score were injured in the violence that spread across the country and it was for this reason that the National Accord Reconciliation Agreement was adopted in 2008 to investigate the cause, nature, and acceptable reconciliatory mechanisms.

Looking back at the South African TRC, the work of this commission was to be carried out in three committees for (a) human rights violations, (b) amnesty, and (c) rehabilitation and reparation. All these committees were specifically tasked with functions that would enable the TRC to fulfil its mandate.¹⁰² While the TRC served as a good exemplary on transitional justice on the global front, however it is significant to note that its reconciliatory and amnesty processes left much to be desired in the following two folds;

(a) Prosecution of apartheid atrocities

The most genuine controversial point for transitional justice in South Africa was the failure by the NPA to prosecute the perpetrators of the gross human rights violations committed under apartheid regime. Accordingly, what aggravated the controversy was the former National Director of Public Prosecutions Advocate Vusumzi Patrick Pikoli, whom in 2015 blamed the political interference for the NPA's failure to prosecute apartheid-era political murders, torture and disappearances.¹⁰³ This is despite the fact that apartheid was declared crime against humanity under international law.¹⁰⁴ Furthermore, the TRC also acknowledged that;

“... as part of the international human rights community – [TRC] affirms its judgement that apartheid, as a system of enforced racial discrimination and separation, was a crime against humanity. The recognition of apartheid as a crime against humanity remains a fundamental starting point for reconciliation in South Africa. At the same time, the

¹⁰² Daryl (n 100 above) 296.

¹⁰³ F Rabkin 'Political interference blocked TRC prosecutions' *Business Day* 22 May 2015.

¹⁰⁴ Article 1(1) of the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973.

Commission acknowledges that there are those who sincerely believed differently and those, too, who were blinded by their fear of a Communist total onslaught.”¹⁰⁵

For this reason, the then apartheid government carried the greatest responsibility in the gross human rights violations against those who were opposed to the apartheid system. However, it must be borne in mind that even the MK, APLA, and AZANLA armed activities resulted somehow in the human rights violations. The TRC observed that;

“Justice of war evaluates the justifiability of the decision to go to war. The two basic criteria guiding this evaluation are: first, the justness of the cause (the underlying principles for which a group is fighting), and second, whether the decision to take up arms was a matter of last resort ... The doctrine of justice in war states that there are limits to how much force may be used in a particular context and places restrictions on who or what may be targeted.”¹⁰⁶

In light of the above observation, it is significant to point out that although the TRC was guided by the just-war theory criterion, both the apartheid government and the liberation armed forces ought to have had the respect and consideration for human rights. In 1996, constitutionality of the TRC legislation was challenged in the case of *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 672 (CC) on the ground that the granting of amnesty to members of the apartheid security forces for killing anti-apartheid activists violated norms of international law requiring prosecution.¹⁰⁷

Towards the end, the Constitutional Court found that the amnesty provisions were inconsistent with international norms and did not breach any of the country's obligations in terms of the international law instruments.

¹⁰⁵ TRC Final Report - Volume 1 - The Appendix to this chapter 4 - Apartheid as a Crime against Humanity, paragraph 1.

¹⁰⁶ TRC Final Report - Volume 1, Chapter 4, paragraphs 66-67.

¹⁰⁷ Dugard (n 73 above) 22.

(b) Amnesty and reconciliation

In the context of amnesty and reconciliation, Daryl Balia contended that although one of the foundational principles of the TRC process was that truth telling by perpetrators could be exchanged for amnesty, however this reflected sacrificing justice at the altar of truth to the detriment of apartheid's victims.¹⁰⁸ Against this background, The TRC observed that;

“Clearly, everyone who came before the Commission did not experience healing and reconciliation. However, extracts from testimonies before the Commission illustrate the varying ways and degrees in which people have been helped by the Commission to restore their human dignity and to make peace with their troubled past. They include cases where an astonishing willingness to forgive was displayed, where those responsible for violations apologised and committed themselves to a process of restitution, and where the building or rebuilding of relationships was initiated.”¹⁰⁹

In light of the above observation, it is quite clear that reconciliation and amnesty superseded justice at the TRC. While the TRC had the obligation to pursue the justice approach towards the apartheid government, it is important to note that the former liberation armed forces were to be held responsible for some of the atrocities committed during apartheid. This is despite their atrocities not having been in the same magnitude as the apartheid government.

Lastly, the atrocities of both the then apartheid government actors and the former liberation armed forces were not justified under international law and the NPA was supposed to have pursued justice.

3.5. Conclusion

One clear lesson from the South African experience on transition is that, transitional justice serves as a fundamental tool in the transfer of power at the time of transitional dispensation. It is because

¹⁰⁸ Daryl (n 100 above) 296.

¹⁰⁹ TRC Final Report - Volume 5, Chapter 9, paragraphs 3.

of this experience that this chapter examined the concept of transitional justice and further analysed the impact that this concept had during transition. The chapter also examined the crime of apartheid from the customary international law perspective and analysed relevant international instrument regulating this crime. Furthermore, this chapter also reflected on the overview of transitional justice from the South African perspective. Towards the end, it is encouraging to note that the chapter also examined the NPA's failure to prosecute the perpetrators of the apartheid atrocities despite apartheid having been declared a crime against humanity.

Chapter four

Comparative study of Zimbabwe's global peace agreement with respect to socio-economic rights

4.1. Introduction

The political climate in Zimbabwe leading up to the 2008 general elections bear the same hallmarks with those of South African transitional dispensation. It is on the basis of these analogical events which prompted this study to focus on Zimbabwe as it comparative study. Furthermore, what makes this comparative study so significant is the fact that both the South African and the Zimbabwean peace talks negotiators failed to interrogate the absence of socio-economic rights in the build-up to the peace agreements. The peace agreements being the 1990-1992 CODESA in South Africa on the one hand and the Global Peace Agreement (GPA) of 2008 in Zimbabwe on the other hand. Against this background, this chapter will examine the events leading up to the signing and adoption of the GPA. The chapter will further discuss and analyse the Zimbabwean constitutional dispensation and impact of the transitional negotiations. Towards the end, the paper will examine socio-economic rights in Zimbabwe and the impact of the GPA on the majority of Zimbabweans.

4.2. Brief overview of Zimbabwe's political climate

Southern Rhodesia, which later became known as Zimbabwe, was under the British colonial rule from the period 1888 to 1965. The name Rhodesia was derived from the surname of Cecil John Rhodes who was the British mining businessman, politician, and imperialist who colonized the land from the indigenous Shona people.¹¹⁰ In 1965 and soon after the signing of the Unilateral Declaration of Independence from Britain by Prime Minister Ian Smit's government, civil war broke out between the liberation movements; thus Zimbabwe African National Union (ZANU) and Zimbabwe African People's Union (ZAPU) against the government forces. Robert Mugabe

¹¹⁰ N Parsons 'Nation-Building Movies Made in South Africa (1916–18): I.W. Schlesinger, Harold Shaw, and the Lingering Ambiguities of South African Union' (2013) 39 *Journal of Southern African Studies* 642.

led the ZANU liberation movement with the People's Republic of China support, while Joshua Nkomo who had the support of the Soviet Union led the ZAPU forces.¹¹¹ It must borne in mind that the civil war in Southern Rhodesia happened at the time when most of the African countries were going through the process of independence. The Lancaster peace negotiations led to the end of the civil war in 1979 and subsequently the warring parties to the conflict signed the Lancaster Agreement. The name Southern Rhodesia was replaced by Zimbabwe and ultimately the first general elections were held. Robert Mugabe became the prime minister from 1980 to 1987. In the 1987 general election, Robert Mugabe was elected the President. Subsequent to this elections, ZANU and ZAPU eventually merged to form the Zimbabwe African National Union - Patriotic Front (ZANU-PF) in 1988.

The period between 1988 and 2008 was marked by both political and socio-economic upheavals. The country, which was revered as the breadbasket of Africa, was now experiencing food shortages and the health sector was deteriorating.¹¹² It bears mentioning that the land question which had been the sticking point of the Lancaster Agreement was now used by the ZANU-PF as its political tool. Ultimately in the year 2000, the ZANU-PF government decided to push ahead with its land reform programme which later turned violent towards the minority white farmers. In the process, there were several casualties on the side of the farmers. What triggered this violent land reform programme was as a result of the Britain's lack of commitment as agreed in Lancaster to compensate the rightful owners of the land, in this case the majority black Zimbabweans.

The use of violence as an instrument of governance continued even after the seizing of farms from the white dominated farmers.¹¹³ On 19 May 2005, the Zimbabwean government launched another infamous campaign to clean up its cities known as "Operation Murambatsvina."¹¹⁴ This operation drew much international criticism mainly because the Zimbabwean government declared and

¹¹¹ C Clapham 'The international politics of African guerrilla movements' (1995) 3 *South African Journal of International Affairs* 81.

¹¹² LM Sachikonye 'Whither Zimbabwe? Crisis & democratisation (2002) 29 *Review of African Political Economy* 13.

¹¹³ E Benyera and C Nyere 'An Exploration of the Impact of Zimbabwe's 2005 Operation Murambatsvina on Women and Children' (2015) 13 *Gender and Behaviour* 6524.

¹¹⁴ AK Tibaijuka *Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlements Issues in Zimbabwe* (2005) 1-100.

rolled out bulldozers complemented by armed police across the cities of Zimbabwe to demolish all illegal structures.¹¹⁵ Everisto Benyera and Chidochashe Nyere argued that if the Operation Murambatsvina was legally constituted, the manner in which it was executed, especially the brutality of the evictions and the resultant damage to property cannot be argued to be legal.¹¹⁶ The basis of Everisto Benyera and Chidochashe Nyere's argument was that this operation affected the most vulnerable group of citizens, particularly women and children. Against this backdrop, this constituted gross human rights violations.

In 2008, Zimbabwe headed for the parallel presidential, parliamentary, senatorial and municipal general elections despite food and fuel shortages and galloping inflation.¹¹⁷ However, the elections period was marked by intimidations and gross human rights violations. According to Gladys Mkhawa, intimidation and violence were used against the opposition and it is alleged that violence was also committed by soldiers, the police and intelligence operatives.¹¹⁸ At the polls, the Movement for Democratic Change (MDC-T), led by Morgan Tsvangirai, won 99 house of assembly seats ahead of Zanu-PF's 97 and 10 won by Arthur Mutambara's MDC-M faction.¹¹⁹ Having won the 2008 first round of elections, Morgan Tsvangirai refused to participate in a runoff because of the intimidations and attacks on his MDC-T supporters. At this moment, Zimbabwe was on the verge of a deep political crises which could culminate into civil war.

Eventually, a peace agreement in the form of the GPA brokered by the Southern African Development Community regional powers to put the two rivals into an uneasy power-sharing agreement was signed on 15 September 2008.¹²⁰ The intervention by the regional powers was due to the fact that a full blown out civil war in Zimbabwe was not only going to have a devastating

¹¹⁵ Action Aid International *The Impact of Operation Murambatsvina/Restore Order in Zimbabwe*. Action Aid International and Combined Harare Residents' Association, August 2005 Report.

¹¹⁶ Benyera and Nyere (n 113 above) 6524.

¹¹⁷ O Gagare 'Zimbabwe 2008 election: Taken by a Gun, not a Pen' *The Mail and Guardian* 10 August 2012.

¹¹⁸ G Mkhawa 'Examining Zimbabwe's Global Political Agreement' (2013) 2 *Southern African Peace and Security Studies* 26.

¹¹⁹ Gagare (n 117 above).

¹²⁰ L Polgreen 'In Heavy Zimbabwe Voting, No Repeat of Disastrous 2008 Events' *The New York Times* 31 July 2013.

impact on the oppositional discourses within the country but would also adversely affect the entire region.

4.3. Conceptions and challenges of the GPA

The signing of the GPA signalled the end of the political crisis between the three main rival parties (ZANU-PF, MDC-T, and MDC-M) which won the harmonised elections.¹²¹ Of particular interest is one of the GPA's preamble which states that;

“Recognising, accepting and acknowledging that the values of justice, fairness, openness, tolerance, equality, non-discrimination and respect of all persons without regard to race, class, gender, ethnicity, language, religion, political opinion, place of origin or birth are the bedrock of our democracy and good governance.”

In light of the above preamble, Pamela Machakanja argues that this agreement represent a framework that formally recognised the extent of the political tragedy in Zimbabwe and enshrines for the respect of human rights.¹²² However, Brian Raftopoulos viewed the GPA as one major aspect of the passive revolution that has taken place in Zimbabwe, in which a ruling party facing an organic political and economic crisis has used the space to reconfigure and renegotiate the terms of its existence with the opposition, civil society and the international community.¹²³ Pamela Machakanja further asserted and acknowledged the fact that this agreement has been able to avert greater political violence and repression that could have ensued and since there has been a notable improvement in the availability of food, a new Constitution to pave the way for fresh elections with a Bill of Rights was therefore inevitable.¹²⁴ In a more conciliatory tone, Khulekani Moyo contended that it was only the 2013 Zimbabwean Constitution; and not the GPA inspired Constitution, that only incorporated a broad range of express socio-economic rights and also

¹²¹ P Machakanja *National Healing and Reconciliation in Zimbabwe: Challenges and Opportunities* (2010) 3.

¹²² Machakanja (n 121 above) 3.

¹²³ B Raftopoulos 'The Global Political Agreement as a Passive Revolution: Notes on Contemporary Politics in Zimbabwe' (2010) 99 *The Round Table Journal* 707.

¹²⁴ Mokhawa (n 118 above) 28.

provided for these rights to be subjected to the same forms of judicial protection and remedies available in respect of the civil and political rights enshrined in the Bill of Rights.¹²⁵

Another way in which political stability in Zimbabwe was to be achieved was through the formation of the government of national unity envisioned by article 20 of the GPA. It is significant to note that the formation of this government was to serve as a yardstick on the road to a peaceful political transition, socio-economic upliftment, and also in the democratisation of Zimbabwe. Despite the great strides that the GPA framework sought to achieve, lack of political-will by the parties in the government of national unity posed a major challenge on the implementation of socio-economic upliftment of the majority Zimbabweans. The failure of the guarantors to condemn lack of political-will defeats the purpose of the GPA framework.¹²⁶

Towards the end, John Makumbe contended that for a short while, it did seem as if Zimbabwe had turned the corner, and that peaceful collaboration among the political gladiators had been achieved at last.¹²⁷ He continued to argue that the fact that over the two years of the duration of the government of national unity violence has flared up again, the rule of law is once again being trampled upon, and arbitrary arrests are the order of the day may mean that as a ceasefire agreement, the GPA has failed to deliver.¹²⁸ Indeed, the failure of the GPA to deliver was as a result of the lack of political-will by the parties to its agreement and this as well did not do proper justice to the majority of Zimbabweans who were suffering due to the socio-economic uncertainty.

4.4. Constitutional reform and socio-economic rights in Zimbabwe

In many ways, the period 1979 to 1980 remains pivotal for the Zimbabwe's constitution-making process. This is due to the signing of the Lancaster House Agreement in 1979 and also attainment

¹²⁵ K Moyo 'Zimbabwe adopts a new Constitution' (2013) *Socio-Economic Rights and Administrative Justice Research Project*. Available at <http://blogs.sun.ac.za/seraj/2013/05/28/zimbabwe-adopts-a-new-constitution/> (accessed on 31 May 2017).

¹²⁶ D Connolly 'The Global Political Agreement and Democratic Transition in Zimbabwe' (2011) *Oxford Transitional Justice Research Working Paper Series* 1.

¹²⁷ Makumbe J 'What is the Global Political Agreement?' (2011) *States in Transition Observatory* 3.

¹²⁸ Makumbe (n 127 above) 3.

of the independence from Britain in 1980.¹²⁹ According to Tawana Nyabeze, the Lancaster House Constitution maintained the Bi-cameral legislature that was in place before the coming of independence.¹³⁰ However, Howard Chitimira contended that under the Lancaster House Constitution, several socio-economic rights were neglected by the government to the detriment of many Zimbabwean citizens.¹³¹ Howard Chitimira further argued this Constitution did not protect the right to sufficient food and water while access to water and sanitation has deteriorated across all of Zimbabwe's cities and provinces, particularly in Matebeleland and rural areas.¹³²

On the other hand, Sabelo Ndlovu-Gatsheni asserted that the people of Zimbabwe have not had an opportunity to actively take part in constitution-making since 1980 and that the constitutional process that ended in the 'no vote' in February 2000 was a lost opportunity largely because of the interference of the ruling elites with the views of the people.¹³³ The main mandate of the Constitution of Zimbabwe Amendment Act 19 of 2009 was for the creation of the framework for the government of national unity and maintenance of political stability in the country. It is for this reason that the socio-economic rights did not take centre stage in the negotiations of the GPA. Having said that, Lovemore Madhuku asserted that the Constitution of Zimbabwe Amendment Act 19 of 2009 would automatically fall away from the supreme law once the GPA is terminated by its signatories.¹³⁴ The basis of Lovemore Madhuku's assertion was that if the GPA collapses, then Zimbabwe will return to the pre-GPA position.¹³⁵

Against this background, the new Constitution of Zimbabwe Amendment Act 20 of 2013 brought much hope to the majority of Zimbabweans through its much emphasis on the inclusion of the

¹²⁹ Institute for Security Studies "Zimbabwe's Tortuous Road to a New Constitution and Elections" *Situation Report* published on 12 August 2012. Available at https://oldsite.issafrica.org/uploads/SitRep2012_17Aug.pdf (accessed on 23 May 2017).

¹³⁰ TH Nyabeze 'Progressive Reform in the New Constitution of Zimbabwe: A balance between the preservative and transformative constitution making process' (2015) *Konrad-Adenauer-Stiftung* 1.

¹³¹ H Chitimira 'An Analysis of Socio-Economic and Cultural Rights Protection under the Zimbabwe Constitution of 2013' (2017) *Journal of African Law* 6.

¹³² Chitimira (n 131 above) 6.

¹³³ SJ Ndlovu-Gatsheni 'The Constitution and the Constitutional Process in Zimbabwe' (2012) *Solidarity Peace Trust*.

¹³⁴ Madhuku L 'Zimbabwe can revert to old constitution if GPA fails' *Zimbabwe Independent* 18 February 2011.

¹³⁵ Madhuku (n 134 above).

broader socio-economic rights. According to Khulekani Moyo, the 2013 Constitution explicitly states that one of its founding values is the recognition of the inherent dignity and worth of the human being.¹³⁶ Having said that, the recognition of inherent dignity of a human being can only be realised through the advancement of the socio-economic rights. The most notable socio-economic right is the right to education in section 75(1)(a) and (b) which provides that every citizen has the right to a basic State-funded education and further education, which the State, through reasonable legislative and other measures, must make progressively available and accessible. The other important socio-economic right is the right to have access to basic health-care services, including reproductive health-care services under section 76. Lastly, section 77 of the Constitution provided everyone with the right to safe, clean and potable water; and sufficient food; at the reasonable expense and measures of the State to achieve the progressive realisation of this right.

In light of the above provisions, it is clear that the legislature, the executive, and the judiciary are bound by the Bill of Rights in their advancement of the socio-economic rights of the majority Zimbabweans.

4.5. **Conclusion**

This chapter managed to examine the political overview in Zimbabwe from the 1965 leading up to the watershed general elections of 2008. The chapter further examined the prospects and challenges which confronted the GPA framework and further highlighted the legal tractions which accompanied the constitutional reforms in Zimbabwe. Towards the end, the chapter also examined the socio-economic rights position in Zimbabwe and the impact of the Bill of Rights on the majority of Zimbabweans.

¹³⁶ Moyo (n 125 above).

Chapter five

Envisioning a peace agreement framework for a peaceful transition with the inclusion of socio-economic rights

5.1. Introduction

The political breakthrough in 1994 did not manifest itself economically to the majority South Africans. This is not to say that the CODESA talks which ultimately brought peaceful transition are unimportant. However, it can therefore be affirmed that without economic emancipation to many South Africans who are living in abject poverty is bringing the political breakthrough into jeopardy. Against this background, this chapter aims to investigate the impact of the apartheid economic crimes on the socio-economic rights. The chapter will also explore feasible peace agreement framework that which will include the socio-economic rights. Towards the end, the chapter will highlight on the importance of interrogating the inclusion of socio-economic rights in the peace talks.

5.2. Apartheid socio-economic crimes

Since its inception in 1948, the apartheid policy has constantly been the subject of the UN Security Council's discussion. It must be borne in mind that the Security Council is the highest decision making body in the UN and its resolutions are binding to the member States. In 1950, the UN General Assembly adopted resolution 395(V) which declared apartheid as a policy of racial segregation that was necessarily based on the doctrines of racial discrimination. Soon after the UN General Assembly resolution 395(V), many other resolutions were adopted to deal with the scourge of apartheid in the UN Security Council.

On the economic front, two major resolutions were adopted as part of enforcing economic sanctions to the then apartheid government. In 1970, the UN Security Council adopted resolution

282 which imposed voluntary arms embargo by the member States on South Africa.¹³⁷ However, a mandatory arms embargo was imposed to the South African government in 1977 under resolution 418.¹³⁸ It is significant to point out that the impact of these sanctions were so much dire for the South African economy and subsequently had the potential of crippling the economy much further. In order to evade the effects of these sanctions, the then apartheid government involved itself in some sort of activities such as sale of weapons despite the arms embargo as well as colluding with private sectors to launder money for the purposes of busting sanctions.¹³⁹

During the time of conducting this research study, the Open Secret non-profit organisation has uncovered thousands of declassified documents showing evidence of the commission of economic crimes committed by the then apartheid government.¹⁴⁰ The later ANC led government never investigated these economic crimes. It is for this reason that the civil society movements have initiated the People's Tribunal on Economic Crime in South Africa, which will investigate allegations breaches of international and South African law by actors who facilitated the illegal supply of weapons to apartheid South Africa between 1977 and 1994.¹⁴¹ The People's Tribunal on Economic Crime also seek to investigate allegations of breaches of South African and international law by corporations and individuals in the process of the 1999 arms deal and current allegations of state capture in the post democratic dispensation.¹⁴²

Significantly, economic crimes have a negative impact towards the advancement of the socio-economic right to the majority of the citizens. Lack in the prosecution of these crimes by the NPA may also result in the slow pace of restructuring and transformation of the mainstream economy.

¹³⁷ S/RES/282 (1970) 6 "Calls upon all States to observe strictly the arms embargo against South Africa and to assist effectively in the implementation of the present resolution."

¹³⁸ S/RES/417 (1977) "Convinced that a mandatory arms embargo needs to be universally applied against South Africa in the first instance... Acting therefore under Chapter VII of the Charter of the United Nations; 5. Calls upon all States, including non-members of the United Nations, to act strictly in accordance with the provisions of the present resolution."

¹³⁹ Vuuren H *Apartheid grand corruption: Assessing the scale of crimes of profit from 1976 to 1994*. A report prepared by civil society in terms of a resolution of the Second National Anti-Corruption Summit for presentation at the National Anti-Corruption Forum, May 2006.

¹⁴⁰ Open Secrets 'Declassified: Apartheid profits: Who funded the National Party?' *Daily Maverick* 01 August 2017.

¹⁴¹ Staff Reporter 'People's Tribunal on Economic Crime in SA created' *Business Report* 20 September 2017.

¹⁴² Staff Reporter (n 139 above).

At the end, the majority of South Africans are economically dispossessed and this study suggest for the prosecution of these economic crimes with the hope of seeking compensation to empower the poor and vulnerable citizens.

5.3. Impact of the proposed peace agreement framework

As chapter two of this research study has argued, the CODESA talks epitomises the commitment to end the liberation struggle; political violence; and also to lead South Africa to a constitutional democratic state. In light of the above assertion, Joel Netshitenzhe¹⁴³ argued that;

“South Africa’s political settlement of the 1990s was precisely a product of this realisation, because the regime had come to accept that it could not stop the popular march of the people. Certainly, mass and international pressure and the nimble-footedness of the liberation movement’s negotiators saw to an outcome that is our progressive constitution. But it was all in the context of a negotiations process.”¹⁴⁴

Joel Netshitenzhe’s view was also confirmed by Jeremy Cronin¹⁴⁵ who interrogated whether;

“the South African political and economic conjuncture in the early 1990s was a debilitating stalemate in which the contending classes faced “common ruin”? There is, of course, a partial truth in this. The rising waves of semi-insurrectionary popular struggle from the mid-1970s, through the 1980s and into the early 90s had proved to be unstoppable, but also incapable of the armed overthrow of the regime.”¹⁴⁶

¹⁴³ ANC National Executive Member who sits on the Economic Transformation and Political Education sub-committees of the ANC.

¹⁴⁴ Netshitenzhe J ‘The Two delinks and the poverty of radicalism: A critique of the SACP Discussion Document *Going to the Root – A Radical Second Phase of the National Democratic Revolution*, published in African Communist, 4th Quarter 2014, Issue Number 187.

¹⁴⁵ The Second Deputy Secretary-General of the SACP.

¹⁴⁶ Cronin J ‘Why a second radical phase of the National Democratic Revolution is an imperative’ *Politicsweb* 01 July 2015.

However, the failure by the CODESA negotiators to address the socio-economic realities left the majority of South Africans economically disempowered. Perhaps this is because of the overemphasis by the various political negotiators on the political shift from the old apartheid order to a more inclusive democratic state. By any objective measure, the over overemphasis on the political shift at the CODESA at the expense of the socio-economic rights ignored the socio-economic disparity faced by the majority South Africans. This research study now seeks to attempt to come up with a framework which will address the inclusion of the socio-economic right in the peace talks.

5.4. Socio-economic rights framework

To begin with, this research study seek to pose an important question; in whose favour is the inclusion of the socio-economic rights benefits? The answer to this question will addressed towards the end of this framework. It is also significant to highlight the fact which was addressed in chapter 2, that socio-economic rights are fundamental rights which needs to be jealously guarded by the legislative frameworks in favour of the citizens. Having said that, this research study now proposes a socio-economic rights framework in the following;

5.4.1. Socio-economic construct

The way the old apartheid governments structured the South African society based on race had left a huge vacuum of socio-economic inequalities, even after the attainment of democracy in 1994. It is on the basis of this assertion that Joel Netshitenzhe has observed that social compacting seeks to address socio-economic plight of the majority South Africans in similar CODESA process and this should not suggest the suspension of class conflict or mass and other pressures, or the abandonment of skilful manoeuvres in negotiations.¹⁴⁷ But Jeremy Cronin, responding to Joel Netshitenzhe's assertion, disagreed and contended "that we need to understand the very different character of a democratic, constitutional settlement and a strategy of action to overcome the crises of unemployment, poverty and inequality embedded in a reproduced legacy of socio-economic under-development." Jeremy Cronin went further to state "that from a progressive perspective the

¹⁴⁷ Netshitenzhe (n 138 above) 187.

whole point of the new political space was (and is) to use the democratic power of majority-rule to address the (largely socio-economic) imbalances...Unless these imbalances are addressed, it is the new political space itself, our constitutional democracy that will be (and is being) eroded.”¹⁴⁸ To address these socio-economic imbalances, this research study remarks that socio-economic rights and affirmative actions should serve as the yardstick to a South Africa which is much more developmental state.

In light of the above two argumentative dimensions presented by both Joel Netshitenzhe and Jeremy Cronin, this study now seeks to present its own possible solutions based on socio-economic construct framework.

Proposed framework on the socio-economic construct

- In order to find the solutions to the socio-economic inequalities in South Africa, this research study proposes that there should be another socio-economic dialogue similar to that of CODESA but which is aimed at addressing the inequalities.
- Negotiators in the proposed socio-economic dialogue should also relook at the socio-economic mirror of the liberation struggle and to try address the question on what exactly was the struggle for the liberation about? Indeed, the struggle for the liberation was not only based on the political front, but also on the need to redress the socio-economic inequalities created by the old apartheid order. The ANC’s Freedom Charter which was adopted in 1955 should serve as guiding tool for the negotiators in this regard.
- The socio-economic rights such as the right to work, right to access to adequate health care, right to water and sanitation, and the right to housing should take centre stage in the dialogue.
- There ought to be a majority based settlement which has the characteristics of socialist ideology. However, this settlement should not present the utopian elements of fictional developmental state.

¹⁴⁸ Cronin J (n 140 above).

Towards the end, this research study acknowledges the fact that unless there is a lasting solution to the socio-economic inequalities, therefore a socio-economic revolution is inevitable in South Africa.

5.5. Conclusion

This chapter has examined the views of the two South African leading ideologists on the need to address the socio-economic inequalities. The chapter further attempted to craft a framework upon which the socio-economic dialogue base itself. Lastly, the chapter remarks that the inclusion of the socio-economic rights in the dialogue will have a pivotal impact on the majority South Africans.

Chapter six

Conclusion and recommendations

6.1. Conclusion

Chapter one began by highlighting the historical background upon which South Africa is founded. The chapter also gave a clear view of the formation of apartheid policies of the then NP government and the subsequent liberation struggle. The formation of the CODESA talks and the events leading up to the 1994 first democratic state were also highlighted. Furthermore, the chapter also examined the socio-economic disparities prior CODESA talks and how the socio-economic rights were not thoroughly interrogated by the negotiators to the peace talks.

Theoretical overview of the CODESA talks and the socio-economic rights were examined in chapter two of this research study. Several case laws relating to the socio-economic rights were revisited and examined in the context of fulfilment and enforcement of these rights. Challenges facing the majority South Africans in the form of service delivery protests, white minority privilege, and the fees must fall campaigns were also examined

Subsequently, chapter three dealt with the transitional justice towards the new constitutional dispensation. In a nutshell, this chapter examined the failure by the NPA to prosecute the perpetrators of apartheid despite it being an international crime. The chapter also examined the TRC as a transitional justice tool for South Africa to move from the old apartheid order to true democratic state based on justice, truth and reconciliation processes.

An examination on the comparative study of the Zimbabwean's GPA with respect to socio-economic rights was extensively discussed in chapter four. Failure by the SADC negotiators to interrogate the socio-economic rights was identified as the major problem for the GPA.

Towards the end, the socio-economic construct framework was identified and explored in chapter five with the main aim to address the socio-economic plight of the majority South Africans.

6.1. Recommendations

In order to address the plethora of socio-economic challenges affecting the majority of South Africans, this research study has observed that it would be important for all stakeholders to recognise that the problems society faces with regard to poverty, unemployment and inequality are not accidental but systemic. Therefore, the research study recommends for the introduction of the policy framework to restructure the mainstream economy in favour of the majority of South Africans and also to allow the state to be the main player in that economic system.

On the aspect of how socio-economic inequalities may be addressed in the post CODESA era, the research study suggests that this can only be realised by ensuring that the means of production is in the hands of the majority of South Africans as opposed to just a selected privileged few, or the elite. This can be achieved through the development of a policy framework aimed at the creation of inclusive economic activities which are investor friendly and which are open to everyone in an equitable manner.

Curbing service delivery protests remains a major challenge for the government and in order to address this phenomenon, this research study recommends that the government together with the help of the private sector; needs to ensure that enough jobs are created and/or the environment is conducive for every citizen to be productive in one way or another and can generate sufficient income. In so doing, then the majority of South Africans will become independent from the state as they can afford the basic services they need. Eventually, the government will render minimum services.

The stakeholders are encouraged to exert more pressure on the government in its fight against corruption. This is mainly due to the fact that corruption undermines and threaten economic growth, job creation, and services delivery.

The research study also recommends to the ANC, as the governing party, to revise its cadre deployment policy and further encourage it to deploy personnel who are fit and proper to hold positions of power and influence.

In order to achieve access to higher education, it is recommended that the government and stakeholders should come up with the funding modalities aimed at ensuring that the doors of higher learning are open to everyone by implementing a free education.

The greatest challenge to destroying white minority privilege is the prevalence of the new phenomenon of black elites whom when they access state power they do not use it for the majority, but for their individualistic benefit. It is therefore recommended that the stakeholders should revisit the legislative frameworks dealing with equity and affirmative action and make an assessment of the achievements thus far.

The farce about the TRC is that, it equated self-defence measure with criminal conduct. Apartheid was a crime against humanity and it ought to have been dealt with as such. The liberation struggles ought to have been recognised as self-defence measures even where innocent lives were lost. In order to achieve the objectives of the social justice, this research study recommends for the renewed prosecutions of the apartheid atrocities which were left outside of the confines of the TRC.

It is evident from chapters three and five of this research study that the NPA is dragging its feet to prosecute apartheid atrocities, socio-economic crimes and state capture. Having said that, a solution would be to restructure the NPA under the provisions of the National Prosecuting Authority Act 32 of 1998 and also to give it the necessary mandate. Further recommendation is made for the enactment of the prosecution law to provide for the NPA to deal with inaction to prosecute by the NPA officials even when there is an overwhelming evidence.

Lastly, the research study recommends that the ultimate solution to the socio-economic construct is a society without class, private property with proper freedoms, and the exclusion of the freedom of one to exploit another.

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