

**Enabling transitional justice, restoring capabilities : the imperative of participation and normative integrity**

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## **ENABLING TRANSITIONAL JUSTICE, RESTORING CAPABILITIES: The Imperative of Participation and Normative Integrity**

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### **Abstract<sup>1</sup>**

What does transitional justice require if it seeks to achieve justice in periods of radical change from oppressive regimes and violent conflict to peaceful democracies? The examination of pretransitional injustice typically reveals law's instrumentality and its pathological effects, namely those caused not only by violations of civil-political human rights but also by violations of socioeconomic human rights. A normative shift is therefore the key to legitimizing the new dispensation. Yet, given law's complicity in past injustice, a normative shift is only possible on the basis of law's own rehabilitation. Therefore, law's normative integrity can only be recovered through a substantive rehabilitation of victims' capabilities negatively affected by previous human rights violations, especially violations of socioeconomic rights. With their capabilities restored, victims of historical injustice will be able to participate in the operations of transitional justice and to function as equal citizens in the new dispensation. Accordingly, the imperative of participation based on human rights to socioeconomic capabilities is at the heart of this reconceptualization of transitional justice.

**Keywords:** human rights, capability rights, victims/survivors, structural inequalities, transformative justice

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## Introduction

*What we are inheriting is not just inequality, but a system of structured inequality, and one brought about by deliberate state policy. Removing the barriers to equal participation ... is a national task requiring active steps by all of us.*

– Albie Sachs<sup>2</sup>

Authoritarian regimes and violent conflict are typically associated with political disenfranchisement, social discrimination and economic deprivation, largely engineered by law.<sup>3</sup> The resulting structural disadvantage leads to effective disempowerment, thereby making it extremely difficult for the affected population to open the door to change. Socioeconomic disadvantage tends to be reproduced, if not accumulated, over generations.

The current primary focus of transitional justice on physical integrity rights and its neglect of economic, social and cultural rights underestimates the entrenched socioeconomic deprivation of victims manufactured by previous regimes.<sup>4</sup> While transitional justice scholars increasingly argue in favour of economic, social and cultural rights being taken into account,<sup>5</sup> the terrain of transitional justice is still contested in this respect.<sup>6</sup> Victims

<sup>2</sup> Albie Sachs, *Advancing Human Rights in South Africa* (Cape Town: Oxford University Press, 1992), 141.

<sup>3</sup> See, e.g., the overview of apartheid legislation in South Africa at South African History Online, 'Apartheid Legislation 1850s-1970s,' <http://www.sahistory.org.za/politics-and-society/apartheid-legislation-1850s-1970s> (accessed 24 November 2014); John Dugard, 'The Legal Framework of Apartheid,' in *South African Dialogue: Contrasts in South African Thinking on Basic Race Issues*, ed. Nicolaas J. Rhooie (Johannesburg: McGraw-Hill, 1972). For the laws of the Nazi regime in Germany, see, Michael Stolleis, *The Law under the Swastika: Studies on Legal History in Nazi Germany*, trans. Thomas Dunlap (Chicago: University of Chicago Press, 1998).

<sup>4</sup> For an early critique, see, Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity Press, 2002). For a comparison of the limitations of the dominant transitional justice paradigm as regards the transitions in South Africa (1994) and Northern Ireland (1998), see, Thomas Bundschuh, 'Justice, Truth and Capabilities: Towards a New Architecture of Transitional Justice including Socio-Economic Rights' (Ph.D. diss., University of Ulster, 2009). As Makau Mutua notes, 'the human rights movement's primary grounding and bias towards civil and political rights ... is one of its major weaknesses in the African post-colonial context.' Makau Mutua, 'A Critique of Rights in Transitional Justice: The African Experience,' in *Rethinking Transitions: Equality and Social Justice in Societies Emerging from Conflict*, ed. Gaby Oré Aguilar and Felipe Gómez Isa (Cambridge: Intersentia, 2011), 36.

<sup>5</sup> Louise Arbour, 'Economic and Social Justice for Societies in Transition,' *New York University Journal of International Law and Politics* 40(1) (2007): 1-14; Lisa J. Laplante, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework,' *International Journal of Transitional Justice* 2(3) (2008): 331-355; Zinaida Miller, 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice,' *International Journal of Transitional Justice* 2(3) (2008): 266-291; Ismael Muvungi, 'Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies,' *International Journal of Transitional Justice* 3(2) (2009): 163-182.

<sup>6</sup> Lars Waldorf, 'Anticipating the Past,' *Social and Legal Studies* 21(2) (2012): 171-186; Frank Haldermann and Rachele Kouassi, 'Transitional Justice without Economic, Social, and Cultural Rights?' in *Economic, Social, and*

of past socioeconomic injustice do not benefit much from the prevailing conceptualization of transitional justice. Structural disadvantage and disparities generated by previous authoritarian regimes and violent conflict persist. The protracted legacies of South Africa's apartheid, slavery in the US and the continuing plight of Aboriginal peoples in Australia illustrate this point. It has been noted that in South Africa 'apartheid characteristics are [still] entrenched in the labour market.'<sup>7</sup> This is to say,

Unemployment within race groups remains extremely high for both the African and coloured groups, at 29 per cent and 22.6 per cent respectively, and much lower for the Indian and white groups, at 11.5 per cent and 5 per cent respectively.<sup>8</sup>

Black South Africans have a life expectancy of 45 years, while white people have the prospect of living to the age of 74 on average.<sup>9</sup> These figures are in keeping with the observations of Murray Leibbrandt and his colleagues, who state, 'We see clear poverty dominance across population groups in the order of African, Coloured, Indian/Asian and White. This shows that the legacy of Apartheid is strongly persistent even in 2008.'<sup>10</sup>

Consider the legacy of slavery in the US. As Kyle Logue notes,

blacks as a group lag behind whites in every meaningful measure of social and economic well-being: income, wealth, housing, education, employment, health, life expectancy, and even subjective assessments of individual happiness. (...) Much of the inequality between blacks and whites involves children. Black children, for example, are more likely to die as infants, more likely to be born into poverty, more likely to be uninsured, more likely to be abused or neglected, and more likely to drop out of school than white children.<sup>11</sup>

Logue asks, 'If some combination of slavery, Jim Crow, and current discrimination is not the explanation, then what is?'<sup>12</sup>

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*Cultural Rights In International Law*, ed. Eibe Riedel, Gilles Giacca and Christophe Golay (Oxford: Oxford University Press, 2014).

<sup>7</sup> Jan Hofmeyr, ed., *Transformation Audit 2011: From Inequality to Inclusive Growth – South Africa's Pursuit of Shared Prosperity in Extraordinary Times* (Cape Town: Institute for Justice and Reconciliation, 2011), 31. For a history of inequality and its legacy in contemporary South Africa, see, Sampie Terreblanche, *A History of Inequality in South Africa, 1652–2002* (Pietermaritzburg: University of KwaZulu-Natal Press, 2002).

<sup>8</sup> Hofmeyr, supra n 7 at 31.

<sup>9</sup> Ibid.

<sup>10</sup> Murray Leibbrandt, Ingrid Woolard, Arden Finn and Jonathan Argent, 'Trends in South African Income Distribution and Poverty since the Fall of Apartheid,' OECD Social, Employment and Migration Working Paper No. 101 (2010), 42. As a result, 21 percent of African children reported hunger in 2008, compared to 3 percent of white children. See, Statistics South Africa, *Social Profile of South Africa, 2002–2012: Social Profile of Vulnerable Groups, 2002–2012* (2013), fig. 2.15.

<sup>11</sup> Kyle D. Logue, 'Reparations as Redistribution,' *Boston University Law Review* 84(5) (2004): 1348-1352.

<sup>12</sup> Ibid., 1352-1353.

Note further the health inequality experienced by Aboriginal and Torres Strait Islander peoples in comparison to the rest of the population in Australia:

In the period 2000–2002, babies of Indigenous mothers continued to be twice as likely to be of low birth weight as babies born to non-Indigenous mothers (13% compared to 6%).<sup>13</sup>

In this context, a rethinking of transitional justice is required that will enable the field to take enduring legacies of injustice into account. As law was utilized to preserve privileges, thereby generating systemic deprivation leading to disempowerment, law not only needs to change formally but also to contribute to transformation in substance. At the core of this change is the imperative of participation. A focus on the empowerment of victims affected by law's pathology is needed. Two reparative trajectories have to be put in motion at the same time: law has to be rehabilitated (the first trajectory) by initiating and creating the conditions for the rehabilitation of victims (the second trajectory), namely victims affected by economic, social and political structural disempowerment. The measure of such enabling transitional justice is the degree and scope of enabled participation, including a response to violations of socioeconomic rights. This article suggests that an enabling transitional justice framework is best achieved by starting with a conceptualization of human rights based on the capability approach advanced by Amartya Sen<sup>14</sup> and expanded by Martha Nussbaum.<sup>15</sup>

This article proceeds as follows. First, the capability approach as a basis for human rights is explored. The capability approach to human rights reveals the structural transformation necessary for the realization of human rights. Second, the article develops the concept of capability rights as rights to participatory capabilities. The 'agent-rooted' dimension of participatory capabilities has one goal, namely the repair and expansion of capabilities necessary to function as equal citizens. Third, the implications of these concepts for the current paradigm of transitional justice are examined. 'De-clustering' of multiple

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<sup>13</sup> Human Rights and Equal Opportunity Commission, *A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia* (August 2006).

<sup>14</sup> Amartya Sen, *The Idea of Justice* (London: Allen Lane, 2009); Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999).

<sup>15</sup> Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, MA: Belknap Press of Harvard University Press, 2011); Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, MA: Belknap Press of Harvard University Press, 2006).

disadvantages represents an important instantiation of transitional justice, opening the way to transcend structural exclusion and to create the socioeconomic conditions for participation in the new dispensation. Fourth, critical elements of a new architecture of transitional justice are offered. The restoration of rights subjectivity of victims of historical injustice, including violations of socioeconomic rights, largely depends on the transformation of unjust, rights-affecting pretransitional structures. The repair and realization of rights to socioeconomic capabilities, allowing victims to be able to be and to do what they have reason to value, will indicate the effectiveness of justice in transition.

### **Human Rights as Capability Rights**

By asking the fundamental question ‘What is each person able to do and to be?’ the capability approach is ‘concerned with entrenched social injustice and inequality.’<sup>16</sup> This is particularly relevant in transitional contexts where so-called capability failures emerge as ‘the result of discrimination and marginalization.’<sup>17</sup> Hence the task of governments, as Nussbaum notes, to promote ‘a set of opportunities, or substantial freedoms, which people then may or may not exercise in action.’<sup>18</sup> Capabilities are substantial freedoms that ‘a person actually has to do this or be that – things that he or she may value doing or being.’<sup>19</sup> As Sen writes, ‘the capability perspective does point to the central relevance of the inequality of capabilities in the assessment of social disparities’<sup>20</sup> – the latter all too often being a feature of transitional societies. Capabilities can concern the ability to live a healthy life of normal length or the ability to reason in a way that is informed by an adequate education.<sup>21</sup> It is however important to keep in mind that these capabilities ‘are not just abilities residing inside a person but also freedoms or opportunities created by a combination of personal abilities

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<sup>16</sup> Nussbaum, 2011, supra n 15 at 18-19.

<sup>17</sup> Ibid., 19. Furthermore, as Martha Nussbaum points out, the capability approach has these characteristics: each person is taken as an end, a focus on choice or freedom and a pluralist nature regarding values. Ibid., 18.

<sup>18</sup> Ibid., 18.

<sup>19</sup> Sen, 2009, supra n 14 at 231-232.

<sup>20</sup> Ibid., 232.

<sup>21</sup> Cf. Nussbaum, 2011, supra n 15.

and the political, social, and economic environment.<sup>22</sup> Referring to this kind of necessary environment, Sen distinguishes five types of 'instrumental freedoms that tend to contribute to the general capability of a person to live more freely':<sup>23</sup> political freedoms, economic facilities, social opportunities, transparency guarantees and protective freedoms.<sup>24</sup>

Sen asks the question, 'Can human rights be seen as entitlements to certain basic capabilities, and will this be a good way of thinking about human rights?'<sup>25</sup> According to Sen, it can be argued 'that human rights are best seen as rights to certain specific freedoms,' whereas 'capabilities can be seen, broadly, as freedoms of particular kinds.'<sup>26</sup> Human rights can indeed be regarded as entitlements to certain basic capabilities. As Sen confirms, 'the two concepts – human rights and capabilities – go well with each other, so long as we do not try to subsume either entirely with the other.'<sup>27</sup> Harry Brighouse captures the relation between rights and capabilities best when he suggests 'think[ing] of capabilities as the bases of rights claims.'<sup>28</sup> As Brighouse explains,

If someone claims that there is a fundamental right to X, it is incumbent on them to justify it; and justification will proceed by showing how the right to X is required to serve some capability. If there is no capability that it serves, then it is not a fundamental right.<sup>29</sup>

Nussbaum has introduced her own approach to human rights and capabilities. She agrees with Sen as far as the complementarity of the two concepts is concerned.<sup>30</sup> Referring to the right to political participation, the right to the free exercise of religion and the right to free speech, she emphasizes that 'these and others [rights] are all best thought of as secured to people only when the relevant capabilities to function are present.'<sup>31</sup> Nussbaum

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<sup>22</sup> Ibid., 20.

<sup>23</sup> Sen, 1999, supra n 14 at 38.

<sup>24</sup> Ibid.

<sup>25</sup> Amartya Sen, 'Human Rights and Capabilities,' *Journal of Human Development* 6(2) (2005): 152.

<sup>26</sup> Ibid., 152.

<sup>27</sup> Sen, supra n 25 at 163.

<sup>28</sup> Harry Brighouse, *Justice* (Cambridge: Polity Press, 2004), 80.

<sup>29</sup> Ibid., 80.

<sup>30</sup> Martha C. Nussbaum, 'Capabilities and Human Rights,' *Fordham Law Review* 66(2) (1997): 273-300.

<sup>31</sup> Ibid., 287.

sees human rights as ‘combined capabilities to function in various ways.’<sup>32</sup> Combined capabilities ‘will usually involve both an internal component – a basic human functioning – and an external component’,<sup>33</sup> i.e., ‘suitable external conditions for the [development<sup>34</sup> or] exercise of the function.’<sup>35</sup> It is worth noting that, as Nussbaum asserts, ‘the [capability] approach stresses the interdependency of liberties and economic arrangements.’<sup>36</sup> She argues that basic liberties, which are all defined as abilities to do something, ‘have not been secured to people if, because of economic or educational deprivation, people are unable actually to function in accordance with the liberties that are guaranteed to them on paper.’<sup>37</sup>

The synthesis of these convergent lines of thought opens the way to conceive capability rights as justified claims to secure both basic human functionings and the necessary external instrumental freedoms (Figure 1). Importantly, it is in interaction with instrumental freedoms that potential human functionings are developed (e.g., the ability to read) and realized (e.g., by reading a book). Through such actualization, potential functionings become achieved functionings.

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<sup>32</sup> Ibid., 292.

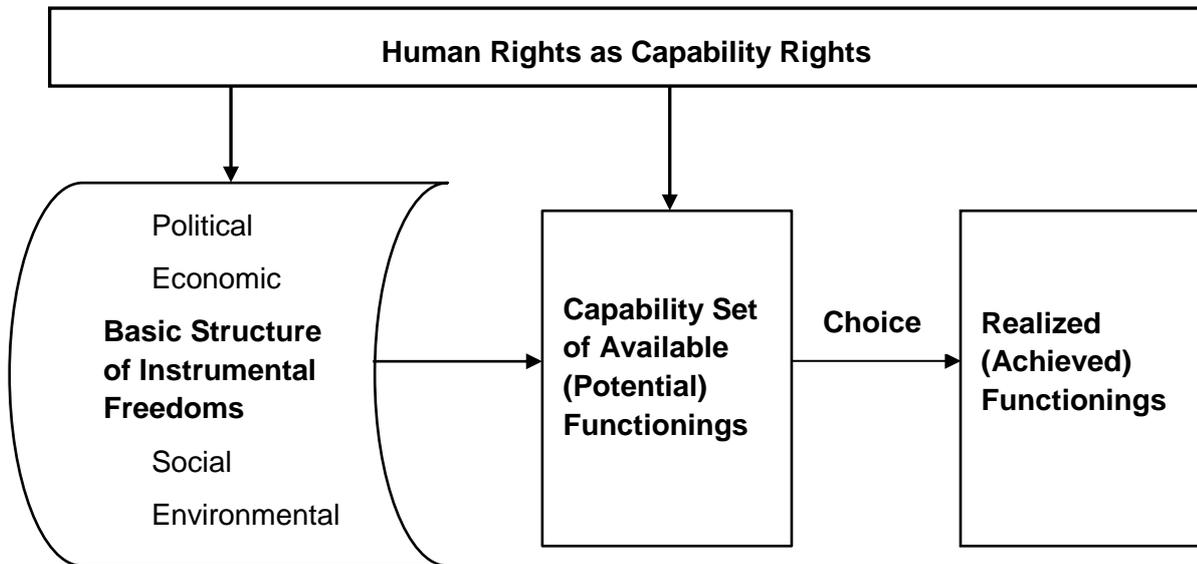
<sup>33</sup> Ibid., 293

<sup>34</sup> Martha C. Nussbaum, ‘Human Capabilities, Female Human Beings,’ in *Women, Culture, and Development*, ed. Martha C. Nussbaum and Jonathan Glover (Oxford: Clarendon Press, 1995). Nussbaum affirms, ‘We believe that certain basic and central human endowments have a claim to be assisted in developing, and exert that claim on others, and especially, as Aristotle saw, on government.’ Ibid., 88.

<sup>35</sup> Nussbaum, *supra* n 30 at 290.

<sup>36</sup> Nussbaum, 2006, *supra* n 15 at 290.

<sup>37</sup> Ibid., 290.

**Figure 1. Human Rights as Capability Rights<sup>38</sup>**

Clearly, this trajectory from potential to realized functionings is dependent upon the existence of instrumental freedoms, that is, a person's possibility to interact with and benefit from the corresponding social arrangements. Instrumental freedoms create the conditions necessary for both the development and the exercise of human functionings and are therefore constitutive of certain basic capabilities to which every person is entitled.<sup>39</sup> What does the capability approach to human rights imply in the context of transitional justice and beyond? To examine that question, the article draws on Elizabeth Anderson's concept of democratic equality.

<sup>38</sup> Adapted from Ortrud Lessmann and Felix Rauschmayer, 'Re-Conceptualizing Sustainable Development on the Basis of the Capability Approach,' *Journal of Human Development and Capabilities* 14(1) (2013): 95–114, fig. 1. As Ortrud Lessmann and Felix Rauschmayer state, 'an individual's capability set comprises all ways of life (combinations of functionings) feasible for the person given her embeddedness in the natural and manmade system.' *Ibid.*, 98.

<sup>39</sup> For a list of such capabilities, see, e.g., Nussbaum, 2011, *supra* n 15 at 33-34: (1) life; (2) bodily health; (3) bodily integrity; (4) senses, imagination and thought; (5) emotions; (6) practical reason; (7) affiliation; (8) [concern for] other species; (9) play; (10) control over one's environment, (a) political, and (b) material. Note that there is an ongoing debate concerning the justification of such lists.

## Capability Rights as Rights to Participatory Capabilities

### *Democratic Equality*

Anderson focuses primarily on the ‘capabilities necessary for functioning as an equal citizen.’<sup>40</sup> She asks, ‘Which capabilities does society have an obligation to equalize?’<sup>41</sup> The imperative of participation is integral to her conceptualization of equality. Participation is significant because of three key qualities. As Jay Drydyk asserts, ‘participation is intrinsically valuable insofar as it enhances the participants’ agency.’<sup>42</sup> Participation also has instrumental value in expressing the hearing that people get for their claims (including claims of economic needs).<sup>43</sup> Finally, participation in public debates can have a constructive role in the formation of values and norms (including the conceptualization of needs).<sup>44</sup>

To be able to participate in the public sphere and function as an equal citizen involves, as Anderson posits, ‘not just the ability effectively to exercise specifically political rights but also to participate in the various activities of civil society more broadly, including participation in the economy.’<sup>45</sup> This ‘presupposes functioning as a human being.’<sup>46</sup> Consequently, Anderson submits three critical aspects of individual functioning, all concerned with the capability to participate, namely functioning ‘as a human being, as a participant in a system of cooperative production, and as a citizen of a democratic state.’<sup>47</sup>

These aspects encompass the following elements:

To be capable of functioning as a human being requires effective access to the means of sustaining one's biological existence – food, shelter, clothing, medical care – and access to the basic conditions of human agency – knowledge of one's circumstances and options, the ability to deliberate about means and ends, the psychological conditions of autonomy, including the self-confidence to think and judge for oneself, freedom of thought and movement.

<sup>40</sup> Elizabeth S. Anderson, ‘What Is the Point of Equality?’ *Ethics* 109(2) (1999): 317.

<sup>41</sup> *Ibid.*, 316.

<sup>42</sup> Jay Drydyk, ‘Democratic Capability’ (paper presented at the Fourth International Conference on the Capability Approach, Pavia, Italy, 5–7 September 2004), 8.

<sup>43</sup> Amartya Sen, ‘Democracy as Universal Value’, *Journal of Democracy*, 10(3) (1999):10. While Sen addresses primarily the value of democracy, it is evident that, for him, democracy and participation in public reasoning are inextricably intertwined.

<sup>44</sup> *Ibid.*; Sen, 1999, *supra* n 14 at 148; Drydyk, *supra* n 42.

<sup>45</sup> Anderson, *supra* n 40 at 317.

<sup>46</sup> *Ibid.*, 317.

<sup>47</sup> *Ibid.*, 317.

To be capable of functioning as an equal participant in a system of cooperative production requires effective access to the means of production, access to the education needed to develop one's talents, freedom of occupational choice, the right to make contracts and enter into cooperative agreements with others, the right to receive fair value for one's labor, and recognition by others of one's productive contributions.

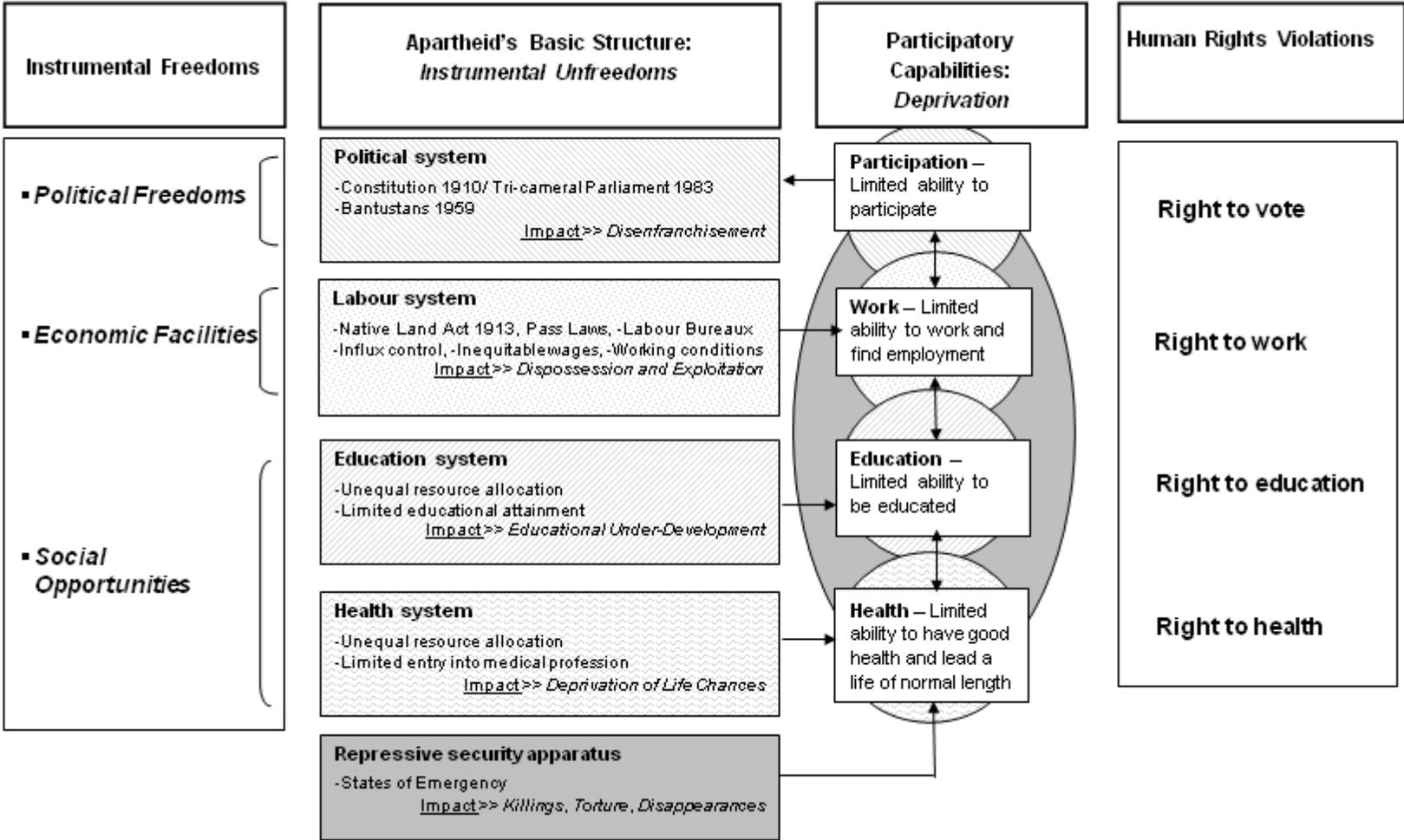
To be capable of functioning as a citizen requires rights to political participation, such as freedom of speech and the franchise, and also effective access to the goods and relationships of civil society. ( ... ) This also entails the social conditions of being accepted by others, such as the ability to appear in public without shame, and not being ascribed outcast status.<sup>48</sup>

Taking South Africa's apartheid as an example, Figure 2 elucidates the significance of the sociopolitical conditions referred to by Anderson, or, in Sen's terms, instrumental freedoms as part of the capability approach to human rights in transitional contexts. Sen's instrumental freedoms correlate with certain legally constituted systems of unfreedom revealing the basic structure of apartheid and its negative impact on the participatory capabilities of the black majority of South Africans. The resulting violations of political and socioeconomic rights are evident.

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<sup>48</sup> Ibid., 317-318. Similarly, James Bohman argues that participation is dependent on 'equality of effective social freedom, understood as equal capability for public functioning.' James Bohman, 'Deliberative Democracy and Effective Social Freedom: Capabilities, Resources and Opportunities,' in *Deliberative Democracy: Essays on Reason and Politics*, ed. James Bohman and William Rehg (Cambridge, MA: Massachusetts Institute of Technology Press, 1997), 322. Accordingly, citizens must be able to develop the 'capabilities necessary for effective deliberation,' including those 'that give them effective access to the public sphere.' Ibid., 323, 333.

Figure 2. Apartheid's Basic Structure and Its Impact: Deprivation of Participatory Capabilities = Violations of Human Rights



Anderson argues that ‘people are entitled to whatever capabilities are necessary to enable them to avoid or escape entanglement in oppressive social relationships.’<sup>49</sup> She is concerned with ‘capabilities required to overcome “oppression” and “exploitation.”’<sup>50</sup> Consequently, transitional justice needs to address those capabilities when it comes to tackle pretransitional regimes of injustice marked by oppression and exploitation. And Anderson’s proposition sets the stage for further examination as she brings into focus what is at stake in contexts of transitional justice: the question of agency and its rehabilitation. On the premise that law was generally complicit in the creation and maintenance of pretransitional injustice, the question of rehabilitation becomes one of law’s own rehabilitation, provided transitional justice is indeed concerned with a decisive normative shift and effective legal change. What is at stake is nothing less than the (re)construction of law’s normative integrity.

As Ruti Teitel asserts, ‘transitional legality reconstructs rules and conditions of political membership, representation, and participation that are basic to the individuals place in community.’<sup>51</sup> To be effective and meaningful, however, this legal reconfiguration must address law’s own contribution to pretransitional injustice. Thus, two related aspects need to be distinguished: law’s dysfunctional instrumentality, that is, its complicity in generating human rights violations, and the impact or pathology that law’s complicity entailed. Accordingly, normative change depends not only ‘on a redefinition of understandings of individual status, rights, and duties’<sup>52</sup> but also on law’s rehabilitation through the remediation of law’s pathology inflicted on victims of human rights violations, including violations of socioeconomic rights.

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<sup>49</sup> Anderson, *supra* n 40 at 316.

<sup>50</sup> John M. Alexander, *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum* (Aldershot: Ashgate, 2008), 70.

<sup>51</sup> Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000), 227.

<sup>52</sup> *Ibid.*, 227.

### **Agency: From Exclusion to Participation**

To restore law's normative integrity, it is argued that law needs to instantiate the rehabilitation of 'sufficient agency'<sup>53</sup> of victims who suffered human rights violations. In pretransitional environments, human agency is usually stifled by the abuse of civil-political rights and by violations of rights to socioeconomic capabilities. Moreover, given the persistence of the pretransitional system's basic social structure, socioeconomic disadvantage is generally hard to escape. The reasons for this are that socioeconomic marginalization is often coupled with *de iure* and *de facto* political disenfranchisement,<sup>54</sup> and that patterns of socioeconomic disadvantage tend to perpetuate themselves over generations and become even more entrenched and burdensome.

As regards the new dispensation, it is therefore submitted, following Kevin Olson, that 'citizens must minimally have the capability to ensure their own agency as citizens.'<sup>55</sup> Sufficient agency implies, as Olson states, that citizens are able 'to ensure that they do not sink into political or cultural invisibility.'<sup>56</sup> Having survived violent conflict or an oppressive regime, no group should be left at risk of falling again 'into a downward spiral of political marginalization and increasing lack of participatory opportunities.'<sup>57</sup> The solution Olson advances requires that 'citizens must be able to determine the *content* of citizenship':<sup>58</sup>

When all citizens can participate to an adequate level, they are able to claim the means to political equality. They can articulate rights and policy measures to ensure their ongoing agency.<sup>59</sup>

<sup>53</sup> Kevin Olson, *Reflexive Democracy: Political Equality and the Welfare State* (Cambridge, MA: Massachusetts Institute of Technology Press, 2006), 140. This section draws extensively on Olson's volume.

<sup>54</sup> See, e.g., Tennessee's Jim Crow Law in Education (1901), in *Civil Rights and African Americans: A Documentary History*, ed. Albert P. Blaustein and Robert L. Zangrando (Evanston, IL: Northwestern University Press, 1992), 314-315; see also supra n 3 on discriminatory legislation in Nazi Germany and during South Africa's apartheid regime.

<sup>55</sup> Olson, supra n 53 at 140.

<sup>56</sup> *Ibid.*, 140.

<sup>57</sup> *Ibid.*, 140.

<sup>58</sup> *Ibid.*, 140. What is at stake is, as Olson notes, that citizens have 'full capabilities to articulate arguments about their own values and institutions.' *Ibid.*, 150. In a transitional context, however, this criterion may be said to correspond to the analogous demand for victims of pretransitional injustice to be able to establish the content of injustice.

<sup>59</sup> *Ibid.*, 140-141. It is noteworthy that equal opportunities to participate have a particular relevance in transitional contexts as previously marginalized citizens 'will be able to raise redistributive claims in the political sphere as they see fit.' *Ibid.*, 17.

It is important to keep in mind, however, as Olson notes, that ‘sufficiency and equality are deeply intertwined.’<sup>60</sup> As he further states, ‘only when agency is both equal and sufficient can we claim that participation will enable citizens to sustain the means of their own agency.’<sup>61</sup> Sufficient and equal agency presupposes participatory capabilities<sup>62</sup> that enable citizens’ participation.

Participatory capabilities can be usefully differentiated with regard to four levels: the political level, which corresponds to the terrain of civil and political rights; the institutional level, as defined by participatory spaces or structures;<sup>63</sup> the procedural level that defines forms of participation,<sup>64</sup> rules of fairness<sup>65</sup> and effective influence<sup>66</sup>; and the socioeconomic conditions associated with the contents of socioeconomic rights. Together with the institutional and procedural dimensions of transitional justice, this article focuses primarily on participatory capabilities as encompassing the socioeconomic requirements enabling participation. This is in line with the essence of the capability approach, which directs ‘our attention to what people are actually able to do and to be’,<sup>67</sup> including the right to political participation.

As Henry Richardson points out, ‘the basic institutions of society should be arranged so as to support the capability of each citizen to engage meaningfully in democratic deliberation.’<sup>68</sup> Economic support and education figure prominently in Richardson’s argument.<sup>69</sup>

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<sup>60</sup> Ibid., 141.

<sup>61</sup> Ibid., 141.

<sup>62</sup> For the notion of participatory capabilities, see, *ibid.*

<sup>63</sup> As Bohman remarks, ‘human diversity flourishes in a well-functioning democracy with a vibrant public sphere accessible to all citizens.’ Bohman, *supra* n 48 at 346. Yet, as Olson argues, promoting the equality of participatory capabilities may ‘require levelling structures that amplify the voices of some and diminish the voices of others.’ Olson, *supra* n 53 at 145.

<sup>64</sup> David A. Crocker, *Ethics of Global Development: Agency, Capability, and Deliberative Democracy* (Cambridge: Cambridge University Press, 2008), discussing a spectrum of modes of participation, 342-344.

<sup>65</sup> Henry S. Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy* (Oxford: Oxford University Press, 2002).

<sup>66</sup> Drydyk, *supra* n 42, discussing the question of political influence over valuable capabilities.

<sup>67</sup> Nussbaum, 2006, *supra* n 15 at 289-290.

<sup>68</sup> Richardson, *supra* n 65 at 89. David A. Crocker, ‘Sen and Deliberative Democracy,’ in *Capabilities Equality: Basic Issues and Problems*, ed. Alexander Kaufman (New York: Routledge, 2006).

<sup>69</sup> Richardson, *supra* n 65 at 88-90.

The reluctance of the current transitional justice paradigm to pay attention to the socioeconomic dimension risks undermining the democratic project inherent in transition. The perpetuation of capability deprivation and disadvantage hinders political and social participation and leads effectively to structural exclusion mediated by law. In light of the capability perspective, 'social exclusion [is] seen as the failure of people to have access to critical capabilities relating to their integration into society.'<sup>70</sup> A formal change of law may only provide the formal status of membership to victims who have been marginalized in the past, but law *per se* does not make the formal status effective in a way that would enable victims to counter past domination. As Bohman points out,

The lack of participation in civil society is in this way not merely a matter of distributive justice, but of the freedom from domination that comes with the condition or status of membership.<sup>71</sup>

As for the current transitional justice paradigm, victims of historical injustice are not only invisible as structures of exclusion and domination experienced in the past persist, they *remain* 'invisible as a consequence of the structural features of markets'<sup>72</sup> to the extent that markets fail to bring about redress by trickle-down benefits. What is the remedy?

### ***Participatory Capabilities and the Democratic Minimum***

This article advances the capability perspective to reframe transitional justice in such a way that it is able to respond to the structured features of pretransitional socioeconomic rights violations. Bohman's account lends support to this view. As he asserts,

Instead of integrity, respect, or esteem, structural exclusion requires a capabilities-based approach to freedom in order to provide its diagnosis and remedy. In the same way that capabilities cannot be addressed as a matter of the distribution of resources, structural exclusion cannot be directly addressed in the categories of recognition; domination is a matter of freedom, and capabilities are a matter of realizing substantive freedoms and functionings.<sup>73</sup>

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<sup>70</sup> Klasen Stephan, 'Social Exclusion, Children and Education. Implications of a Rights-Based Approach,' *European Societies* 3(4) (2001): 413. Social exclusion is particularly precarious for children. As Klasen argues, 'childhood social exclusion ... has larger negative social effects ... People who have suffered from childhood social exclusion in education are at risk of being poor and unemployed for longer and more often than others. Apart from the exclusionary effects of these problems, they are associated with lower health outcomes, decreased access to housing and to food, and poorer access to healthcare.' *Ibid.*, 437.

<sup>71</sup> James Bohman, 'Beyond Distributive Justice and Struggles for Recognition: Freedom, Democracy, and Critical Theory,' *European Journal of Political Theory* 6(3) (2007): 270.

<sup>72</sup> *Ibid.*, 270.

<sup>73</sup> *Ibid.*, 271.

This view is particularly relevant in transitional contexts where past destitution produced disadvantage in the form of unequal starting positions at transition point. As US President Lyndon B. Johnson famously said,

You do not take a person who for years has been hobbled by chains and liberate him, bring him up to the starting point of a race, and then say, 'You are free to compete with all the others,' and still justly believe you have been completely fair. (...) We seek not just freedom, but opportunity – not just legal equity but human ability – not just equality as a right and a theory but equality as a fact and as a result.<sup>74</sup>

What is critical to remedying systemic historical exclusion, according to Bohman, is the 'achievement of a normative status sufficient for citizens to exercise their normative and creative powers to reshape democracy according to the demands of justice.'<sup>75</sup> Bohman calls this normative status the 'democratic minimum,' which requires 'achieving a fundamental threshold of freedoms and the powers that they entail.'<sup>76</sup> Importantly, Bohman cautions,

The purpose of the conception of the democratic minimum is thus not to describe the ideal conditions of full parity; rather it is to describe the necessary but not sufficient conditions for democratic arrangements to be a means to realize justice under nonideal conditions.<sup>77</sup>

As he asserts, 'the obvious place to begin developing the democratic minimum is in terms of the republican account of those human rights that contribute to having the status of a free citizen.'<sup>78</sup> More specifically, as Bohman notes, 'the mere absence of tyranny does not reach the democratic threshold' as it is 'insufficient to establish the potential reflexivity about normative powers that is necessary for rectifying injustice.'<sup>79</sup> For Bohman, it is the 'ability to begin, to initiate deliberation' that 'provides the basis measure for the normative status of persons required for the democratic minimum.'<sup>80</sup> Thus, he points to the capabilities necessary for participatory agency. As this article suggests, participatory agency is, *inter*

<sup>74</sup> Lyndon B. Johnson, 'Commencement Address at Howard University: "To Fulfill These Rights," June 4, 1965,' in *Civil Rights and African Americans: A Documentary History*, supra n 54 at . 560-561. . .

<sup>75</sup> Bohman, supra n 71 at 270-271.

<sup>76</sup> Ibid., 271. Significantly, this view reflects the description of capabilities in Olson, supra n 53.

<sup>77</sup> Bohman, supra n 71 at 272.

<sup>78</sup> Ibid., 273.

<sup>79</sup> Ibid., 273.

<sup>80</sup> Ibid., 273-274.

*alia*, dependent on the rights to socioeconomic capabilities such as the ability to find work, to become educated and to lead a healthy life of normal length.<sup>81</sup> Therefore, transitional justice has to respond to the corresponding capability deprivation in pretransitional contexts. As Bohman succinctly argues, ‘the forms of extreme destitution, historical injustice, and social exclusion ... create conditions of capability failure that are functionally equivalent to tyranny and the absence of political rights.’<sup>82</sup>

As legal systems prevailing in the past generally played a negative role by contributing to capability deprivation, any transitional justice response has to start with the law. The goal of transitional justice must be the restoration and, hence, the instantiation of substantial freedom in terms of capabilities to social, economic and political participation. Consequently, freedom will be, in the words of Bohman, ‘a freedom through mutual accountability mediated through norms.’<sup>83</sup>

Given the inherent nexus between the political and the economic sphere, between participation and material inequality,<sup>84</sup> the rights to socioeconomic capabilities such as those related to work, health and education, for instance, may in fact be considered rights to participatory capabilities.<sup>85</sup> Claims for redress of socioeconomic capability rights violations represent simultaneously claims to redress in their own right as well as claims to the equalization of socioeconomic capabilities in order to enable effective participation. As a result, transitional law needs to be concerned not only with levelling the playing field in the future but also laying the groundwork for levelling the playing field at the transition point. This requirement is justified as the emerging, reconfigured polity derives its democratic legitimacy from the instantiation of equal opportunities for victims of pretransitional injustice, enabling them to participate not only in

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<sup>81</sup> As Nussbaum contends, ‘it is very difficult to participate in political life on a basis of equality with others, or to enjoy the freedom of speech, if one has not had access to basic health care, or the opportunity for a decent education.’ Martha C. Nussbaum, ‘Constitutions and Capabilities: “Perception” against Lofty Formalism,’ *Harvard Law Review* 121(4) (2007): 23.

<sup>82</sup> Bohman, *supra* n 71 at 274. For historical examples, see the transitions in South Africa, Guatemala or East Timor. Significantly, the prevailing legal systems at the time generally played a negative role in these cases by contributing to capability deprivation.

<sup>83</sup> Bohman, *supra* n 71 at 269.

<sup>84</sup> Olson, *supra* n 53.

<sup>85</sup> Compare Olson, who states, ‘Agency should be seen as a matter of capabilities evaluated from political, cultural, and economic perspectives.’ *Ibid.*, 207.

transitional justice mechanisms but also in the formulation of 'norms, laws, and policies under which they live.'<sup>86</sup> It is in these two ways – formal legal change, on the one hand, and substantive and sustainable rehabilitation of victims' capabilities, on the other<sup>87</sup> – that law is mandated to operate a normative shift in transition.

## Rethinking Transitional Justice

### *Legitimacy through Transitional Justice*

The basic axis of the architecture of transitional justice is the normative shift to legitimate law with the rehabilitation of participatory capabilities as a key element allowing the new state to create the conditions of its own legitimacy. The normative shift is usefully conceived as the founding act of the transition<sup>88</sup> and at the same time constitutive of the new dispensation. Thus, the transitional legal response initiates the normative shift to legitimate law. As Teitel notes, 'at some level, one might say that the legal responses create transition.'<sup>89</sup> However, while the 'legacies of injustice have a bearing on what is deemed transformative,'<sup>90</sup> standards of transitional law and its inclusiveness determine in turn both law's ability to respond to that legacy and the degree of legitimacy it is able to generate. First, this implies the application of 'uncompromised' sources of law, typically the use of international standards such as international human rights<sup>91</sup> but also the inclusion of victims of socioeconomic rights as the constituency of this founding act of justice, which is the

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<sup>86</sup> Ibid., 209.

<sup>87</sup> The notion of 'sustainable' rehabilitation refers to the necessary structural change without which even rehabilitated victims would remain vulnerable to further or renewed violations of their socioeconomic rights. In other words, structural change is considered the *conditio sine qua non* to address root causes of human rights violations and prevent their recurrence.

<sup>88</sup> Ruti Teitel calls the normative shift 'transitions' defining feature.' Teitel, *supra* n 51 at 215. Moreover, the normative shift can be conceived as possibly spread out in multiple enactments of a diverse nature. As Teitel notes, 'Transitional operative acts include pronouncements of indictments and verdicts; the issuing of amnesties, reparations, and apologies; and the promulgation of constitutions and reports...' Ibid., 220.

<sup>89</sup> Ruti G. Teitel, 'Transitional Rule of Law,' in *Rethinking the Rule of Law after Communism*, ed. Adam Czarnota, Martin Krygier and Wojciech Sadurski (New York: Central European University Press, 2005), 280.

<sup>90</sup> Ibid., 280.

<sup>91</sup> A cautionary note might be needed here, however. As Mutua asserts regarding Africa, 'to be of utility to Africa, and fundamentally transform the continent's dire fortunes, human rights must address economic powerlessness and the scandalous international order.' Mutua, *supra* n 4 at 37.

normative shift, albeit with multiple enactments.<sup>92</sup> The normative shift becomes the locus of justice aptly captured by Emmanuel Levinas:

The original locus of justice [is] a terrain common to me and the others where I am counted among them, that is, where subjectivity is a citizen with all the duties and rights measured and measurable.<sup>93</sup>

Second, it is not sufficient to apply legal standards only formally or make only formal provision for the inclusion of victims. The crucial link between changing legal norms and enabling the participation of victims are victims' capabilities and, in particular, their rights to participatory capabilities. This is so because participation depends on material preconditions, and it is law's task to make provision to guarantee those conditions, not least because people's participation in authoring laws is predicated on them. As Olson asserts, 'a legal system must attempt to ensure the conditions necessary of its own legitimacy.'<sup>94</sup> This requirement in turn implies that 'a system of laws must include a guarantee of agency sufficient to ensure that people will be able to function as equal participants in authoring law.'<sup>95</sup>

It is in this respect that transitional law has largely failed in the past,<sup>96</sup> a failure that left its mark on people's ability to participate in social life, in the economy or in the public sphere, including the making or authorizing of laws. Thus, in order to enable people to participate again, or for the very first time, participatory capabilities are to be rehabilitated and conditions must be created for their sustainability.<sup>97</sup> Accordingly, law can be rehabilitated as its enabling function is restored via the rehabilitation of participatory

<sup>92</sup> For the use of the concept of constituency in the 'transitional' context of Australian Aboriginals, see, Raimond Gaita, *A Common Humanity* (Melbourne: Text Publishing, 1999).

<sup>93</sup> Emmanuel Levinas, *Otherwise than Being or Beyond Essence*, trans. Alphonso Lingis (The Hague: Martinus Nijhoff, 1981), 160.

<sup>94</sup> Olson, *supra* n 53 at 187.

<sup>95</sup> *Ibid.*, 203.

<sup>96</sup> See, e.g., three critical decisions of the highest courts in the land, namely *Brown v. Board of Education* (1954) in the US, *Mabo v. State of Queensland (No. 2)* (1992) in Australia and *Government of South Africa v. Grootboom and Others* (2000) in South Africa. While these judgments reflect change in legal thought, their real impact in terms of the structural changes required has been limited. For the limitations of South Africa's Truth and Reconciliation Commission, see, e.g., Mahmood Mamdani, 'The Truth According to the TRC,' in *The Politics of Memory: Truth, Healing, and Social Justice*, ed. Ifi Amadiume and Abdullahi An-Na'im (London: Zed Books, 2000).

<sup>97</sup> It is on this basis, as Olson affirms, that people 'can articulate rights and policy measures to ensure their ongoing agency.' In this way, citizens will acquire 'the means to prevent their own marginalization.' Olson, *supra* n 53 at 141.

capabilities. The extent to which law is successful in that respect demonstrates the degree of legitimation of the new dispensation.<sup>98</sup> Thus, the normative shift ties together the formal change of law, what may be called its *trans-normation*, and its substantive impact, that is, the actual *trans-formation* evidenced in victim's lives and reflected in the recovery of participatory capabilities. Such a recovery has its challenges, however, as the harm inflicted reveals a complex aetiology, explored below.

### Corrosive Disadvantage

Law's pathology can lead to capability deprivation in diverse areas of life, such as education, health or work, either at the same time or across time. The deficits concerning distinct participatory capabilities may interact synchronically or diachronically and produce 'multiple, severe disadvantage.'<sup>99</sup> Consequently, the transitional justice response becomes even more urgent when it comes to addressing disadvantage.

Jonathan Wolff and Avner De-Shalit usefully propose what can be called a 'dynamic view' of capabilities. They distinguish three forms of disadvantage: clustering, dynamic clustering and corrosive disadvantage.<sup>100</sup> 'Clustering' is understood as the accumulation of disadvantage over time. With 'dynamic clustering,' they identify the two cases 'where a person "accumulates" disadvantages over time, and the reproduction of disadvantage over generations.'<sup>101</sup>

At the heart of these forms of disadvantage is capability deprivation, that is, 'poor or insecure functionings'<sup>102</sup> where societies' 'instrumental freedoms have not been allowed to develop and exercise sufficient levels of functionings. Insufficient functionings build up 'corrosive disadvantage,' which is understood as the 'sort of disadvantage that has negative

<sup>98</sup> Olson points out that to be democratically legitimate a democratic state must provide 'its citizens with equal opportunities to formulate the norms, laws, and policies under which they live.' *Ibid.*, 209.

<sup>99</sup> Jonathan Wolff and Avner De-Shalit, 'On Fertile Functionings: A Response to Martha Nussbaum,' *Journal of Human Development and Capabilities* 14(1) (2013): 161.

<sup>100</sup> Jonathan Wolff and Avner De-Shalit, *Disadvantage* (Oxford: Oxford University Press, 2007), 120-121.

<sup>101</sup> *Ibid.*, 120.

<sup>102</sup> *Ibid.*, 121.

effects on other functionings.<sup>103</sup> Corrosive disadvantage becomes particularly harmful in combination with dynamic clustering. Multiple and accumulated disadvantage in parents can cause harm for children and disadvantage once they grow up.<sup>104</sup>

This raises the question ‘Which functionings are relevant here?’ Wolff and De-Shalit have identified six ‘core’ functionings: life, bodily health, bodily integrity, affiliation, control over the environment and sense, imagination and thought.<sup>105</sup> Significantly, some of these functionings are directly related to the rights to certain socioeconomic capabilities. Sense, imagination and thought are informed by and connected to the capability right to be educated. Life, bodily health and bodily integrity concern the human right to the capability to have good health and lead a life of normal length. Control over one’s environment includes control over one’s work, including the human right to the capability to seek and find employment. As Richard Wilkinson and Michael Marmot point out, ‘evidence from a number of countries shows that, even after allowing for other factors, unemployed people and their families suffer a substantially increased risk of premature death.’<sup>106</sup> Clearly, not being able to work proves to be corrosive for the health capability. The notion of corrosive functionings and corrosive disadvantage is able to elucidate that correlation powerfully.

Accordingly, it is critical for societies’ political and biological well-being to examine violations of socioeconomic rights in transitional contexts. Moreover, it is the interconnection in the present and over time through corrosive dynamic clustering that confronts transitional societies with deadly consequences if not addressed – potentially decreasing human flourishing in the present and leading to premature death in the future. This would be a tragic outcome for the victims who were deprived of their capabilities either by deliberate legal engineering or neglect and omission. It is the task of transitional justice to begin with reversing corrosive capability deprivation and multiple disadvantage. A normative shift by

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<sup>103</sup> Ibid., 121.

<sup>104</sup> Wolff and De-Shalit cite research from the US which highlights that ‘parents who worked at night were 2.7 times as likely to have a child who had been suspended from school than parents who did not have to work nights.’ Ibid., 209, n. 1.

<sup>105</sup> Ibid., 122.

<sup>106</sup> Richard Wilkinson and Michael Marmot, *Social Determinants of Health: The Solid Facts*, 2nd ed. (Copenhagen: World Health Organization Regional Office for Europe, 2003), 20.

formal change of law alone remains meaningless if it is unable to instantiate the restoration of socioeconomic capabilities, the foundation for the exercise of equal citizenship. Critical in this context is the interdependent nature of political equality, which will be examined next.

### **Capabilities and Political Equality**

The capability perspective undercuts mainstream transitional justice, which appears to assume the insulation of political equality from other domains of the societal structure. Instead, Sen stresses the 'extensive interconnections between political freedoms and the understanding and fulfilment of economic needs.'<sup>107</sup> Sen's concept of instrumental freedoms – political freedoms, economic facilities, social opportunities, transparency guarantees and protective security – points to the extensively heterogeneous nature of political equality. As Sen notes, 'These instrumental freedoms directly enhance the capabilities of people, but they also supplement one another, and can furthermore reinforce each other.'<sup>108</sup> In addition, they can work as what may be called detrimental unfreedoms and thus produce or perpetuate, for example, political inequality. Consequently, it can be argued that the capability rights perspective expresses the interdependence of political equality and socioeconomic equality. Guillermo O'Donnell, for instance, points to the link that 'runs from an inegalitarian socio-economic structure to the weakness of political and, especially, civil rights.'<sup>109</sup> He notes that 'deep inequality and its usual concomitant of widespread and severe poverty' entail 'the dramatic curtailment of capabilities.'<sup>110</sup> As a result, those whose socioeconomic rights have been violated in pretransitional contexts without being offered

<sup>107</sup> Sen, 1999, supra n 14 at 147.

<sup>108</sup> Ibid., 40.

<sup>109</sup> Guillermo O'Donnell, 'Polyarchies and the (Un)Rule of Law in Latin America: A Partial Conclusion,' in *The (Un)Rule of Law and the Underprivileged in Latin America*, ed. Juan E. Méndez, Guillermo O'Donnell and Paulo Sérgio Pinheiro (Notre Dame, IN: University of Notre Dame Press, 1999), 322.

<sup>110</sup> Ibid., 322. In addition, O'Donnell emphasizes 'that the huge social distances entailed by deep inequality foster manifold patterns of authoritarian relations in various encounters between the privileged and the others.' Ibid.

redress will find their capacity 'to control public decision-making and to ensure policy outcomes' significantly reduced.<sup>111</sup>

Edward Muller's study corroborates the negative impact of income inequality on democratization, especially if not addressed by transitional justice.<sup>112</sup> As Muller insists, 'the prospect for long-term consolidation of democracy is poor in countries where highly inegalitarian income distributions prevail.'<sup>113</sup> Similarly, Gabriel de la Paz demonstrates 'a clear positive correlation between social inequality and civil and political rights.'<sup>114</sup> In particular, he emphasizes that the causal nexus goes from social inequality to democracy and not in the reverse direction.<sup>115</sup> This perspective is supported by the findings of Adam Przeworski and colleagues, who assert that

it appears that democracies are less stable in societies that are more unequal to begin with, in societies in which household income inequality increases, and in societies in which labor receives a lower share of value added in manufacturing.<sup>116</sup>

An assessment of the empirical literature by Daron Acemoglu and James Robinson points in the same direction, namely that democracies seem to have a better chance to survive in less unequal societies.<sup>117</sup>

To conclude, the research discussed underscores that conceptualizations concentrating only on political or legal processes while excluding the socioeconomic dimension are insufficient as they provide only partial answers. Furthermore, the research presented challenges current transitional justice assumptions, according to which

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<sup>111</sup> Steven Friedman, 'Democracy, Inequality, and the Reconstitution of Politics,' in *Democratic Governance and Social Inequality*, ed. Joseph S. Tulchin and Amelia Brown (Boulder, CO: Lynne Rienner, 2002), 14.

<sup>112</sup> Edward N. Muller, 'Economic Determinants of Democracy,' *American Sociological Review* 60(6) (1995): 966-982.

<sup>113</sup> *Ibid.*, 981.

<sup>114</sup> Gabriel de la Paz, 'Desigualdad social y democratización a finales del siglo XX,' *Foro Internacional* 169 (2002): 523.

<sup>115</sup> *Ibid.* According to de la Paz, the development of civil society is key to understanding this causal connection. As social inequality is generally associated with high levels of poverty and illiteracy, 'it has a negative impact on the development of civil society.' Civil society, however, appears to be necessary to provide the fundamental conditions for democracy. *Ibid.*, 523.

<sup>116</sup> Adam Przeworski, Michael E. Alvarez and Fernando Limongi, *Democracy and Development: Political Institutions and Well-Being in the World, 1950-1990* (Cambridge: Cambridge University Press, 2000), 121-122.

<sup>117</sup> Daron Acemoglu and James A. Robinson, *Economic Origins of Dictatorship and Democracy* (Cambridge: Cambridge University Press, 2006), 62, see also . figs. 3.13-3.16, on pages 59-61.

'democratization of institutions precedes the democratization of society,'<sup>118</sup> where 'civil and political rights appear as prior to social economic and social rights,'<sup>119</sup> and where the transition to democracy 'is cast independent of changes in the organization of economic life.'<sup>120</sup> Conversely, the research available confirms the capability rights perspective advanced here, which holds that the political and the economic sphere are profoundly interconnected, an insight that cannot be neglected when rethinking transitional justice in terms of the recovery of victims' capability rights.

### **Towards a New Architecture of Transitional Justice**

This article attempts to show that the whole spectrum of human rights via the capability rights perspective can and needs to be part of the transitional justice framework, enabling it to respond comprehensively to historical injustice. The underlying new conceptualization of the normative shift is crucial in that regard. How can law lay claim to change if it is excluding *a priori* one potential dimension of pretransitional injustice?

### ***Evolving Normative Integrity***

The *conditio sine qua non* of the normative shift is law's responsiveness, that is, its ability to respond to previous injustice. Transitional justice is contingent upon its response to all forms of injustice, including the repair of harm produced by previous regimes. Consequently, to the extent that law is able to respond to prior injustice it is able to perform the required normative shift from *Unrechtsstaat* to *Rechtsstaat*, from the un-rule of illegitimate law to the rule of legitimate law. As domestic law was compromised in the past, the normative shift is rendered possible via external standards such as international human rights law.<sup>121</sup>

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<sup>118</sup> Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford: Oxford University Press, 2000), 71.

<sup>119</sup> *Ibid.*, 71-72.

<sup>120</sup> *Ibid.*, 72.

<sup>121</sup> On the mediating role of international law, see, Ruti G. Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation,' *Yale Law Journal* 106 (1997): 2009-2080; Teitel, *supra* n 51.

A normative shift is able to contribute genuinely to the legitimacy of the new dispensation provided socioeconomic rights form part of these external standards. The conceptualization of human rights as capability rights derived from the capability approach demonstrates the indivisibility and interdependence of all human rights, in particular of civil-political rights and socioeconomic rights.

### ***Responding to Structural Exclusion***

The reconceptualization of transitional justice proposed here takes up law's challenge in transition to embody a fundamental responsiveness to pretransitional injustice, particularly in terms of violations of socioeconomic rights. As Philippe Nonet and Philip Selznick assert, 'responsive law aims at *enablement and facilitation*.'<sup>122</sup> Enablement and facilitation cannot be thought of as independent of socioeconomic needs. Otherwise, law, that is, genuinely responsive law, will not be able to (re)construct and sustain a 'political community that is inclusive, not the property of a few.'<sup>123</sup> As the capability rights perspective involves both an 'agent-rooted' and a structural-institutional dimension, it is well suited to instantiate the fundamental structural changes needed to overcome the vicious cycle of injustice marked by powerlessness. Without this new framework, structural exclusion and its consequences persist and threaten the democratic viability of the new polity as the victims of violations of socioeconomic rights remain deprived of their capabilities, unable to participate as equal citizens in social life, in the labour market and in the public sphere.

### ***Principles of Transformative Justice***

People whose socioeconomic rights have been violated have claims of justice,<sup>124</sup> claims that address pretransitional legacies of deprived agency and socioeconomic exclusion. Five

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<sup>122</sup> Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (New Brunswick, NJ: Transaction Publishers, 2001 [1978]), 111.

<sup>123</sup> *Ibid.*, 117-118.

<sup>124</sup> As John Alexander points out, 'when the capability shortfalls and deprivation that people face are things that they themselves have not asked for, a just society should address them as a claim of justice.' Alexander, *supra* n 50 at 170.

transitional justice principles based on the capability approach are submitted to fulfil this task, informing the justice claims of victims while providing guidance for an institutional response apt to deliver transitional justice.

The first two principles are foundational and inform the other three principles. The two foundational principles are the principle of sufficient and equal agency, understood in terms of capabilities,<sup>125</sup> and the principle of inclusive participation.<sup>126</sup> Both principles reflect what John Alexander calls ‘the “agency” and “participation” route,’ considering it ‘most often the proven way to enhance people’s well-being.’<sup>127</sup> Based on recognition of the ‘inherent connection between participation and material inequality,’<sup>128</sup> the principles are intertwined as articulated in the notion of ‘participatory capabilities.’<sup>129</sup> They both have a distinct transitional justice task: the principle of sufficient and equal agency secures the enablement of victims to counter deprived agency and initial comparative disadvantage, and the principle of inclusive participation advances the increasing participation of those previously excluded to raise their voices and to be heard.

These two principles ground and inform the other three operative principles: the principle of nonselective factual acknowledgement of pretransitional injustice as a basis for responsive and cooperative change; the principle of legislation to incorporate formal legal change; and the principle of transformation, focusing on individual and collective redress as well as on structural transformation to make redress durable and sustainable. Ultimately, genuine transitional justice *is* transformative justice. Following Robert Alexy, these principles may be seen as ‘optimisation requirements,’<sup>130</sup> furthering the transformation underway.

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<sup>125</sup> The proposition of this principle builds primarily on Olson, *supra* n 53. For the concept of agency generally and its significance in the context of the capability approach, see, Crocker, *supra* n 64.

<sup>126</sup> For the underlying notion of deliberative participation, see, David A. Crocker, ‘Deliberative Participation in Local Development,’ *Journal of Human Development* 8(3) (2007): 431-455.

<sup>127</sup> Alexander, *supra* n 50 at 58.

<sup>128</sup> Olson, *supra* n 53 at 201.

<sup>129</sup> *Ibid.* As Olson argues, ‘only when agency is both equal and sufficient can we claim that participation will enable citizens to sustain the means of their own agency,’ that is, ‘the means to prevent their own marginalization.’ *Ibid.*, 141.

<sup>130</sup> Robert Alexy, *A Theory of Constitutional Rights*, trans. Julian Rivers (Oxford: Oxford University Press, 2002), 47. According to Alexy, ‘Principles are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities ... The scope of the legally possible is determined by

A society concerned for those who suffered especially from violations of socioeconomic rights should demonstrate a strong commitment to these five transitional justice principles as a basis for collective responsibility in order to address the legacy of the past and to ground a democratic future. As Charles Taylor notes, 'democracies are path dependent; the founding transitions they undergo mark their future.'<sup>131</sup>

### **Enabling Transformative Justice**

Law's pathology and its corrosive legacy, if not addressed, put the required normative shift in peril. In fact, this article suggests that a twofold rehabilitation is necessary: the rehabilitation of law in tandem with the rehabilitation of victims' capabilities. Both together empower victims in order to prevent the recurrence of deprivation effectively (e.g., via truth commissions and public debate). However, the possibility of political participation also has its material preconditions. This perspective is reflected in the concept of capability rights, for instance, the right to the capabilities of being able to find work, of becoming educated and of being able to live a healthy life of normal length. These socioeconomic capabilities have been shown to embody critical participatory capabilities. The recovery of participatory capabilities stands ultimately for the rehabilitation of victims as persons in freedom. Provided transitional law offers a process allowing victims of historical injustice to achieve sufficient and equal agency, victims have the opportunity to regain their agency as rights bearers, their rights subjectivity.<sup>132</sup> At the same time, transitional responsiveness needs to be attentive to the urgency of these claims of justice due to the corrosiveness of disadvantage and structural deprivation. These enduring harms demand structural change based on an investigation of historical, political and economic constraints on capabilities and the resulting capability deprivation. Without such transformation, new laws will 'largely codify these

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opposing principles and rules.' *Ibid.*, 48. Accordingly, and especially in a context of transitional justice, the principles enumerated may have to compete, for example, with principles of international criminal law.

<sup>131</sup> Charles Taylor, 'Cultures of Democracy and Citizen Efficacy,' *Public Culture* 19(1) (2007): 120.

<sup>132</sup> As Teitel states, 'transitional reparatory remedies advance "entitlements" that seek to correct violations of rights in the past precisely in order to embed them simultaneously in the future.' Teitel, *supra* n 51 at 218.

constraints'<sup>133</sup> and sustain the inherited socioeconomic injustice. It is important to bear in mind that effective participation in transitional justice mechanisms paves the way to equal participation in the new dispensation.

### ***Transition and Beyond: Diagnosis and Transformation, Measuring and Monitoring***

How might the instantiation of participatory transitional justice processes that aim at achieving equal and sufficient agency and at transforming the entrenched structural impediments blocking the way to such empowerment look? Such participatory processes would need to tackle both diagnosis and therapy of pretransitional injustice. That is to say, violations of rights to socioeconomic capabilities need to be identified, as well as measures of repair.

Diagnostic fora for participation may include public hearings and truth commissions with a primary focus on socioeconomic rights violations and their victims. Diagnostic fora should also be able to draw on experts as part of an epistemic community realizing this holistic and transformative paradigm of transitional justice.<sup>134</sup> Transformative fora, in turn, might draw on examples such as Brazilian experiences with public budgeting.<sup>135</sup> Decisions taken in such fora to advance socioeconomic transformation would also require appropriate institutions to monitor the implementation of such decisions, for example, national human rights commissions or other institutions dedicated to auditing the transformation.<sup>136</sup> Moreover, the monitoring of public finances from a human rights perspective could be

<sup>133</sup> Wendy Brown, "'The Most We Can Hope For ... ': Human Rights and the Politics of Fatalism,' *South Atlantic Quarterly* 103(2–3) (2004): 455.

<sup>134</sup> See, e.g., 'Germany: Law Creating The Commission of Inquiry on "Working Through The History and The Consequences of the SED Dictatorship,' Act No. 12/2597 (14 May 1992), <http://www.usip.org/sites/default/files/file/resources/collections/commissions/Germany92-Charter.pdf> (accessed 24 November 2014).

<sup>135</sup> Gianpaolo Baiocchi, 'Participation, Activism, and Politics: The Porto Alegre Experiment and Deliberative Democratic Theory,' *Politics and Society* 29(1) (2001): 43-72.

<sup>136</sup> See, e.g., Jan Hofmeyr and Ayanda Nyoka, eds., *Transformation Audit 2013: Confronting Exclusion* (Cape Town: Institute for Justice and Reconciliation, 2013).

considered.<sup>137</sup> All these fora would need to provide institutional space to enable civil society, and victims in particular, to participate.

Not only for the diagnosis itself but also for the corresponding transformative measures and the related monitoring procedures, the appropriate measurement will be critical when participatory fora assess violations of socioeconomic capabilities. The capability approach itself has been tested and served as a diagnostic tool.<sup>138</sup> The development of human rights measurement at UN level should prove useful in this regard, because of what may be called ‘the emergence of convergence’ between the capability approach to human rights and the method of human rights measurement promoted by the UN.<sup>139</sup>

### ***The Challenge: Conditions of Inequality***

Nonetheless, all these fora and procedures are contingent upon the conditions of socioeconomic inequality and the asymmetries of the inherited configuration of political power. These conditions need to be addressed, as they could hamper the exercise of public reasoning. As Henry Richardson asserts,

the process of democratic debate and decision must itself be structured so as to allow each person a fair chance to participate and to counteract to a degree the political influence of disparities in economic and political power.<sup>140</sup>

To overcome the structural inequality in deliberations, Séverine Deneulin usefully advances four procedural requirements: priority, nonarbitrariness, ethical efficiency and noncompensation.<sup>141</sup> According to the requirement of priority, ‘one should give priority to promoting the well-being of those who are below a threshold level of functioning [or

<sup>137</sup> Aoife Nolan, Rory O’Connell and Colin Harvey, eds., *Human Rights and Public Finance: Budgets and the Promotion of Economic Social Rights* (Oxford: Hart Publishing, 2013).

<sup>138</sup> Christian Arndt and Jürgen Volkert, *A Capability Approach for Official Poverty and Wealth Reports: Conceptual Background and First Empirical Results* (Tübingen: Institute für Angewandte Wirtschaftsforschung, 2007).

<sup>139</sup> ‘Human Rights Indicators: A Guide to Measurement and Implementation,’ UN Doc. HR/PUB/12/5 (2012). The division of human rights indicators into structural indicators, process indicators and outcome indicators may be related to the capability approach as follows: structural indicators can help assess instrumental freedoms whereas outcome indicators can identify achieved functionings. Institutional spaces and opportunities created to participate in public reasoning for transitional justice may be conceived as part of process indicators.

<sup>140</sup> Richardson, *supra* n 65 at 89. See also, Crocker, *supra* n 68, discussing enabling conditions.

<sup>141</sup> Séverine Deneulin, *The Capability Approach and the Praxis of Development* (Basingstoke: Palgrave Macmillan, 2006). See also, Archon Fung, ‘Deliberation before the Revolution: Toward an Ethics of Deliberative Democracy,’ *Political Theory* 33(2) (2005): 397-419.

capability].<sup>142</sup> Nonarbitrariness would require that when deliberating and making decisions, ‘one should not favour arbitrarily the promotion of one functioning [or capability].’<sup>143</sup> Following the requirement of ethical efficiency, one would ‘seek to choose, if available, the means which will promote several components of human well-being [or capabilities] at the same time rather than a single one.’<sup>144</sup> Finally, the requirement of noncompensation would entail ‘that worsening of one component of human well-being [or capability] cannot compensate for an improvement of another.’<sup>145</sup> These requirements represent a promising approach to complement the collaborative process of public reasoning in contexts of transitional justice.

## Conclusion

In sum, the more a transitional society invests in restoring and expanding participatory capabilities that constrained victims of past injustice, the more a society is able to respond ever more adequately to past injustice and overcome its consequences in the present. Former victims will not only be able to participate in transitional justice mechanisms but also be empowered to function as equal citizens as transitional justice instantiates structural transformation, thereby building the foundations of a common future. Thus, to use a phrase advanced by Jürgen Habermas, the new architecture of transitional justice will be able to transform unjust structures and reconstitute ‘social solidarity preserved in legal structures.’<sup>146</sup>

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<sup>142</sup> Deneulin, *supra* n 141 at 111.

<sup>143</sup> *Ibid.*, 112.

<sup>144</sup> *Ibid.*, 113-114.

<sup>145</sup> *Ibid.*, 114.

<sup>146</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, ed. Thomas McCarthy, trans. William Rehg (Cambridge, MA: Massachusetts Institute of Technology Press, 1996), xlii.