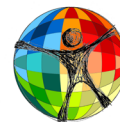


The Illusion of Redress and Redistribution: South Africa, Namibia and Black Economic Empowerment

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ABSTRACT

This paper will examine black economic empowerment strategies employed by the South African and Namibian government, in their Post-Apartheid nation states. It will focus on examining the black economic empowerment private sector strategies used in order to restructure the racial composition of domestic economies. This paper will be divided into the three areas of (1) the history of both nations, exploring specifically economic oppression and land dispossession (2) examine the Black Economic Empowerment (BEE) strategy in South Africa and New Equitable Economic Empowerment Framework (NEEEF) in Namibia, as they both operate within colonial and Apartheid legacies and (3) expose how this paradigm of market driven economic empowerment policies are wholly inadequate in reaching desired ends, and instead diverts responsibility from government failures; this section will explore the alternative constructions of (i) the Chinese model of legal and economic reform (ii) transformational constitutionalism and (iii) transitional justice. This paper will finally reflect upon dignity, duty, and socioeconomic rights in the discourse on justice, and will attempt to propose recommendations to the current struggle in the Namibian context in the attached policy paper, where the vision of NEEEF in altering the racial economic landscape post colonization and post-Apartheid proved harder to achieve when moving from theoretical frameworks to actual implementation.

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Introduction

Land, power and resources were wholly reconfigured during colonization and Apartheid in South Africa and Namibia. In the quest to seek and secure equitable outcomes for their nation states, both countries turned to the implementation of economic empowerment policies. This method sought to achieve the goals of transforming the racial economic landscape of their country and increasing access and ownership of the economy for the majoritarian Black population. In so doing, the government of each country shifted the accountability and responsibility for correcting past socioeconomic wrongs in the country, to privatized corporate social responsibility.

The central focus of my internship this past summer with the Law Reform and Development Commission was to critically analyze the weaknesses of the New Equitable Economic Empowerment Framework (hereafter, NEEEF), and to conduct a cross jurisdictional analysis on various economic action plans: from the Canadian context, to that of Malaysia and South Africa, to excavate where the Namibian framework is insufficient, and ways in which it can be bolstered and a renewed plan could be proposed as this draft Bill becomes law. In this process, I became highly critical of the use of a privatized mechanism of corporate social responsibility to combat wicked problems of poverty, land ownership, unemployment and the racial stratification of labour in the country.

The central argument of this paper is that while black economic empowerment strategies employed by the South African and Namibian government appear to be redistributive and empowering in nature, they are illusory in effect; tracing the root and correcting the wrongs of racial inequality go beyond private sector strategies and must delve into government responsibility, accountability and public provision of key elements of development in an expansive transitional justice framework- from education, and land repatriation to infrastructure and taxation. This is the only way to sustainably and transparently restructure the racial composition of domestic economies moving forward.

This paper will be divided into the three areas of analysis: (1) the history of both nations, exploring specifically the birth of

racialized economic oppression and land dispossession; (2) examination of the Black Economic Empowerment (BEE) strategy in South Africa and New Equitable Economic Empowerment Framework (NEEEF) in Namibia, and how they both operate within colonial and Apartheid legacies; and (3) exposure of how this paradigm of market driven economic empowerment policies are wholly inadequate in reaching desired ends, and instead diverts responsibility from government failures. This paper will then reflect upon dignity, duty, and socioeconomic rights when embracing the expansive socioeconomic framing of transitional justice, and will attempt to propose recommendations to the current struggle in the Namibian context in the attached policy paper, where the vision of NEEEF in altering the racial economic landscape post colonization and post-Apartheid proved harder to achieve when moving from theoretical frameworks to actual implementation. The paper will then conclude with a photo narrative, which will demonstrate how poverty, power and race are woven through the fabric of society, and how people can nevertheless mobilize and be empowered to resist and demand change.

Legacies of Colonization and Apartheid

South Africa: A Dual Economy

Starting in 1950, an all-white Parliament began to pass a series of laws that legalized and institutionalized the apartheid system—from the classification of each south African by race, to prohibitions of mixed marriages, to the legalization of police officers to commit acts of violence, torture and murder in the pursuit of official duties.¹ “Petty apartheid” consisted of the segregations of South Africans in every sphere of life while “Grand apartheid” was the physical separation of racial groups in cities and countryside.²

This legacy of Apartheid has tremendous implications on modern day geographical and racial stratification of labor in South Africa. Under the *Group Areas Act* (1950) the cities and

¹ The Editors of Encyclopaedia Britannica, “South Africa” *Encyclopedia Britannica*.

² *Ibid.*

towns of the country were divided into segregated residential and business areas as thousands of Coloureds, Blacks, and Indians were removed from white occupation classified areas.³ The government created "homelands" for people of color, where they were required to live on these reserves under hereditary chiefs, making it illegal for blacks to be in a town without a job in a white home or business.⁴ From the 1960s to 1980s, there was the brutal removal of 3.5 million blacks who were taken from towns and white rural areas (their ancestral lands) and dumped onto reserves.⁵ The education system was reformed to create state run black schools specializing in semiskilled labour, and there was a prohibition on black students attending university without special permission.⁶ Indians, colored and especially blacks suffered from widespread poverty, malnutrition and disease, as the economic gap between the wealthy nearly all white elite, and poor black masses grew, becoming larger than in any other country in the world.⁷

As a result, the key issue in South Africa is the economic and social landscape created through segregation and apartheid, whereby systematic segregation still exists in all areas of life.⁸ Despite being incredibly diverse, a 'dual economy' formed, creating two distinct societies: a white urban and capitalist agrarian system, and a rural impoverished and stagnant African sector.⁹

Namibia: The Most Unequal Country in the World

Namibia obtained independence in 1990 as the result of a UN led, and Angola and Cuba assisted decolonisation process. The territory was colonized by Germany, and then seized by South African forces during the First World War, thereafter becoming the administrator of the territory following a League of Nations Mandate.¹⁰ Subsequent to the Second World War, South

³ *Supra* note 1.

⁴ *Ibid.*

⁵ Government of South Africa. South Africa History.

⁶ *Supra* note 1.

⁷ *Ibid.*

⁸ *Supra* note 5.

⁹ *Ibid.*

¹⁰ See Jill Cottrell, "Constitution of Namibia: An Overview" (1991) 35 J Afr L 56 [Cottrell].

Africa attempted to incorporate the territory despite this being resisted by the United Nations; 1966 began an armed struggle by the current political party in power in Namibia – South West African People’s Organization (SWAPO) – and in order to force integration into the South African state, a system of Apartheid was implemented, creating a system of native authorities based on ethnicity.¹¹

In 1988, an agreement was reached under pressure from the USA and USSR for the withdrawal of Cuban troops from Angola, and the withdrawal of South Africa from Namibia.¹² As a result, the Constitution of the Republic of Namibia is not an Act of Parliament, but rather a peace treaty created under pressure, which has not been amended since.

Yet, during the making of the Constitution of the Republic of Namibia, the government in Article 23 (2) created provisions that recognize the history of the country and mandates Parliament to enact legislation providing directly or indirectly for the advancement of persons within Namibia:

“for those who have been socially, economically and educationally disadvantaged by past discriminatory laws or practices; to implement policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of discriminatory laws or practices; and to enact legislation to enable women to participate fully in all spheres of Namibian society.”¹³

After a century of German occupation and then South African settler colonialism and Apartheid, the government of Namibia held these historical forces as responsible for gross inequalities that still characterize the current post-colonial social disparities.¹⁴ Yet, the constitution when it was created, froze assets and property as they stood prior to 1990, during Apartheid – this had profound consequences, leading to the immense material and immaterial inequality in what could have been a redistributive

¹¹ Cottrell, *supra* note 10.

¹² *Ibid.*

¹³ Article 23(2), Constitution of the Republic of Namibia

¹⁴ See Melber, H. *Breeding fat cats: Affirmative action, Black Economic Empowerment, and Namibia's post-colonial elite formation* (No. 2006: 29). DIIS Working Paper., p.1

settlement. Today, Namibia remains the most unequal country in the world.¹⁵

From my time in Namibia, the people, notably elders, placed a collective emphasis on the fact that SWAPO liberated the country. Rieff's piece explores this phenomenon, whereby institutions store memories, and create and diffuse a certain collective memory.¹⁶ An evocative quote from Rieff's piece underscored how we must "ensure that collective memory contributes to the liberation rather than the enslavement of mankind".¹⁷ As this paper explores the economic empowerment strategies and the South African and Namibian social, political and economic background within which these strategies are to operate, we will see how the *collective memory of liberation* in both nations takes away from the accountability and responsibility of the government to redress and redistribute resources in the country. Governments in both nations must instead strategically choose to advance the collective memory of being the liberating party that liberated the country, behind which they hide from making critical redistributive proprietary and economic decisions.

Hermann*, 25-year-old man, law student and co-worker

"I just want to be able to take care of my Mum and provide for my siblings. I cannot afford next month's rent, and still take care of my Mum and siblings who live in the village. I have not seen them in two years. I want to go home. But I have no money for the bus. I have to wait until my studies finish, but I am sending money home for my mother's medications and siblings' school materials. I am very stressed. I don't sleep much. I get up at 5am, study before the office work, and after the office, go back to work at the restaurant till late at night. I am tired. But I must work hard to show the government man who supports me I am worthy, and that I deserve this help".

¹⁵ See Namibia Statistics Agency, [Namibia Population and Housing Census Main Report 2016](#) (Windhoek: Namibia Statistics Agency, 2017)

¹⁶ See David Rieff, "Chapter 4: The Victory of Memory over History" *In Praise of Forgetting: Historical Memory and its Ironies* (Yale University Press: 2017) 60-75.

¹⁷ *Ibid* at 62

He is a waiter, and a few months prior to May '19, a member of the political party in power met him and spoke with him while dining at the restaurant Hermann works at. He learned about his life while Hermann was waiting on his table. This government member then took Hermann under his wing, recruited him to help with the party, and is helping him pay for his expenses and schooling in Windhoek. Hermann is the eldest of 9 children; his father left when he was very young, and his mother is sick with a communicable disease and cannot work, and the medications are costly. Hermann tells us his mother was raped, and he wants to become a lawyer to defend all victims of rape.

The Creation of Black Economic Empowerment Strategies

BEE in South Africa

In 2003, in response to rising frustration and outcry at the mounting inequality in the country, South Africa released its *Broad Based Black Economic Empowerment Act* (BBBEE), in tandem with *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment*, which was to provide the framework to enact core mandates as expressed in the act. The legislation recognizes that Apartheid systematically and purposefully restricted the participation of the majority of South Africans in the economy, resulting an economic structure today, that in essence still excludes the vast majority of Black South Africans.¹⁸ This was done through the direct and indirect destruction of the assets of millions of people, and the racial restriction of access to skills and employment; this resulted in an accumulation process under Apartheid whereby wealth creation was confined to a racial minority and underdevelopment was imposed on black communities.¹⁹ The Broad Based Black Economic Empowerment Strategy is accordingly proposed as a necessary government intervention to address the systematic exclusion of the Black majority of South Africans from full participation in the economy, and to undo the feature of Apartheid where race was used to restrict and severely control

¹⁸ Republic of South Africa, [BROAD-BASED BLACK ECONOMIC - EMPOWERMENT ACT, 2003](#), *Government Gazette* (2003)

¹⁹ *Ibid.*

access to the economy by black persons, thereby ensuring that black communities were underdeveloped and the main suppliers of cheap labour. Redress is at the core of BBBEE, stating that: "Government has, over the past nine years, set about redressing this legacy of disempowerment and fundamentally transforming the country's political, social and economic landscape".²⁰

Unlike the Namibian framework which shies away from any targeted definition or usage of the word *Black*, the South African strategy specifies that BEE is for Black persons, which is a generic term that refers to indigenous Africans, Coloreds and Indians in South Africa.²¹

In order to achieve its objectives, the regulatory means used by the government is the 'balanced scorecard' to measure progress made by enterprises and sectors in achieving BEE. The scorecard, issued as a Code of Good Practice, will measure the three core elements of BEE of: (1) Direct empowerment through ownership and control of enterprises and assets; (2) Human resource development and employment equity; and (3) Indirect empowerment through preferential procurement and enterprise development.²² The government will apply BEE criteria when conducting economic activity, granting concessions to private enterprises operating on behalf of the estate, selling an asset or state owned enterprise, entering into a public-private partnership, and most importantly, choosing which enterprises are selected to procure with the government.²³ Finally, an advisory committee of composed of 4 cabinet ministers and 15 members appointed by the President will be established to advise on the implementation of the BEEE strategy. The executive Presidential appointment of evaluation committees for BEE will later become important when analyzing the potential for bribery and corruption within these strategies.

NEEEF in Namibia

Similarly, the preliminary wording included in the draft bill states that equitable as defined in the strategy is an action of fair

²⁰ *Supra* note 18 at 2.3.1.

²¹ *Ibid* at 3.1.1.

²² *Ibid* at 3.5.3.

²³ *Ibid* at 3.5.4.

redress and redistribution.²⁴ The preamble begins by stating the purpose of the framework, in recognizing the long term impact the German genocidal war and the apartheid laws has had on the people of Namibia. It takes into account: pauperism imposed on indigenous communities by the creation of reservations; the contract labour system and the denial of proper education; the social status of women under apartheid and patriarchal practices; the fact that the majority of the population is made up of youth; and that people with disabilities constitute a special social category.²⁵ These categorical distinctions and awareness of the impacts of German colonization and apartheid laws on specific communities including Indigenous black Namibians, women, and youth will be of importance when examining the effect of the draft Bill in *not impacting* these marginalized Namibian groups.

Within the definitions, the framework intentionally omits the word *Black* from the body as a whole- a political choice on the part of the ruling party to move forward from an apartheid diction. Instead, NEEEF refers to “previously disadvantaged persons (PDM) as established in Article 23(2) of the constitution, including (a) racially disadvantaged persons; (b) women; and (c) persons with any disability as defined in the National Disability Council Act, 2004 (Act No. 26 of 2004).²⁶ However, following this definition is the ambiguity around the racial identity of these PDMs, as this wording could include white women, and white men and women with disabilities- which begs the question of redress and redistribution from Apartheid and the lack of targeted wording in the legislation.

The basis of the operation of NEEEF is the implementation of a ‘scorecard’ system whereby enterprises that wish to procure with the government must meet certain pre-established compliance measures with the minimum scoring values under six pillars. These empowerment pillars are as follows (of which the first three are mandatory and all are subject to scoring): (1) Ownership; (2) Management Control and Employment Equity; (3) Human Resources and Skills Development; (4) Entrepreneurship Development and Marketing; (5) Corporate Social

²⁴ Government of Namibia Office of the President, [THE NEW EQUITABLE ECONOMIC EMPOWERMENT FRAMEWORK \(NEEF\)](#) at 4.

²⁵ *Ibid* at 4.

²⁶ *Ibid*.

Responsibilities; and (6) Value Addition, Technology and Innovation. For example, under “ownership”, NEEEF requires that 25% of new enterprises must allow 25% shareholding to PDPs, which then translates into a score of “10”. A cumulative score is thus obtained across all 6 pillars, which is then reviewed by an Advisory Committee for NEEEF. A separate verification and accreditation agency (which, I advise against in the policy recommendations paper, for potential introduction of corruption) is credited to give the official score to the Advisory committee for approval or denial to procure with the government.

Ono*, 40 years old, father of 6

He left the village in the north for a better life in the city. He worked as a driver for the government, and now is a government administrator. He sends money back every paycheck to support his family and extended family in the village (this is a common practice for family members who “make it” to the city). The drought has devastated his family’s means of sustenance from food production they grew and means of income. He is struggling to support his children in the city, sending them to school, while sending money home to the village and is considering selling his car and moving back to the village out of necessity.

Challenges Faced by Each Economic Strategy

South Africa

BEE from its inception in the mid 1990s, was aimed at being a major policy decision by democratic government in South Africa, attempting to redress effects of apartheid for *groups* that were previously disadvantaged. Yet, in practice, BEE has been a process that provides enhanced opportunities for black *individuals* to improve their position via affirmative action; this is done by allocating extra resources created by the higher economic growth, as opposed to redistributing existing resources.²⁷ BEE has been characterized as a process ultimately forming a black elite class, which provides the legitimacy to the neoliberal economic and political system, while simultaneously allowing the survival of the ‘white capitalist class’ and the defence

²⁷ *Supra* note 18 at 934.

of their property rights, as they stood at the time of apartheid.²⁸ There are also high inter-linkages between the black capitalist class and the ruling political party in power, the ANC, which also creates the opportunity for the emergence of a corrupt system of governance that is also nepotistic in nature.²⁹

What is important to highlight additionally is the overall treatment of BEE as a separate, privatized entity, relegated to the private realm for implementation and controllership. There is a disconnect between BEE and domestic economic policy in South Africa, and the failure of the ANC government to deal with structures that exist, instead treating BEE as a separate, technical entity to be governed by the principles of corporate social responsibility and auditing.³⁰ This reframing has immense consequences on the impact: (1) it moves the debate from the political realm of redistribution to one of technical corporate management, (2) it shifts responsibility for change from elected government officials to a generic system from the financial sector, (3) in creating a complex system, it legitimizes outsourcing of the management from government to the private sector and (4) it promotes the idea that redistribution is possible in a neoliberal economic policy setting, which excludes more radical options of redistribution.³¹ More radical options (explored in the policy recommendations paper) could include land reform, education reform and development, skills development and overall social funding- from health to infrastructure financing.

Another main issue with BEE is the practice of “fronting”.³² In their piece on BEE in Zimbabwe, authors Warikandwa and Osoke set to learn from South African mistakes of BEE, and explain how corrupt business practices were observed in South

²⁸ See Randall, D. J. ‘Prospects for the Development of a Black Business Class in South Africa’, *Journal of Modern African Studies* (1996) 34(4): 661–86.

²⁹ See Southall, R, “Ten Propositions about Black Economic Empowerment in South Africa”, *Review of African Political Economy* 34 (2007) (111) at 67–84.

³⁰ See Ponte, S., Roberts, S., & Van Sittert, L. “Black Economic Empowerment, Business and the State in South Africa” *Development and Change*, (2007), 38(5) at 933-955.

³¹ *Ibid.*

³² Justice Theron of the South African Constitution Court, during her speech at the McGill Faculty of Law Wallenburg Lecture, identified the *implementation* of BEE and fronting practices as being the main two challenges faces by the South African government, that undermined the predicted success of the economic strategy.

Africa, whereby black economic empowerment: "has created a reality in which the benefits of the legislation's implementation appear to accrue largely to the well connected, politically favoured elites and their associates".³³ As a result, instead of having a *broad based* effect and allowing many poor individuals to own small shares in companies as anticipated, instead, few Black elite own a large if not all of the portion allocated for 'black' ownership. Fronting as a result has been used as a token of the superficial inclusion of historically disadvantaged persons into mainstream economic activities, without actually resulting in an actual transfer of wealth or control.³⁴

Finally, and most importantly, BEE in South Africa fails to redress the core of apartheid's legacy, which is also rooted in the education system, and addressing the race based inequality and high levels of poverty due to historically black schools, which then impacts the economic opportunities available to people, and in turn results and keeps perpetuating high levels of poverty. In terms of the *meaningful participation* of black persons in the economy, this has failed to be broad based as in industry restructuring, firms shift employment to more skilled labor, which is generally white.³⁵ The issue of dispossessed land is wholly left out of the BEE strategy.

Namibia

"The term 'previously disadvantaged' [...] is being misused to the advantage of those who already have more than enough. [...] We'd do better to concentrate on efforts on the 'presently disadvantaged' because only then will we make a real difference in our very economically divided society".³⁶

This quote, made in 2003 in response to BEE in South Africa, runs to the core of the weakness of the NEEEF legislation in Namibia as it stands today. Not only does it fail to specify *Black* Namibian persons who are *currently* disadvantaged, it gives the

³³ See Warikandwa TV and Osode PC "Regulating Against Business "Fronting" to Advance Black Economic Empowerment in Zimbabwe: Lessons from South Africa"

³⁴ *Ibid.*

³⁵ *Supra* note 18 at 945.

³⁶ See Lister, Gwen "Political Perspective" *The Namibian*, (2005): Windhoek

illusion of targeted racial redistribution while having little effect on the ground. There is no literature currently on the effects of NEEEF since its implementation began only in 2015, and no data has been collected to measure the impact of ownership and accessibility to the economy by poor Black Namibians. As of 2018, youth unemployment rate stood at 46.1 percent, while the overall unemployment rate stood at 33.4 percent.³⁷ This section will argue that literature critiquing BEE in Namibia in 2003 is still relevant today, whereby the core arguments have been echoed by Namibian news outlets but without substantive data currently to enforce these claims.

Ngazetungue*, 40-year-old lawyer

“There were many rich Blacks that benefitted from Apartheid. People forget that. Traitors they were, working with the Whites, meanwhile becoming richer and richer. They are the Opposition. They are the enemy, too”.

Much like South Africa and Zimbabwe, Namibia faces the challenge of preventing ‘fronting’ practices as the NEEEF draft Bill becomes an Act. In Namibia, under current laws the practice is hard to prosecute, and measures must be taken within the NEEEF Bill (NEEEB) drafting to include provisions on fronting and consequences, as well as introduce Anti-Fronting legislation. Currently there has been an increase in the number of high profile challenges to tender decisions.³⁸ The Namibian judiciary has been reviewing many tenders and suspended a few awards, including a tender award worth NAD 6 billion to upgrade Namibia’s Windhoek airport which was nullified by Namibia’s Supreme Court after a finding that the proper NEEEF procedures had not been followed in the procurement process.³⁹

As recommended by Zimbabwean scholars, Namibia must introduce Anti-Fronting legislation and impose criminal sanctions for the failure to comply with NEEEB requirements. In 2011, following the case of *Viking Pony Africa Pumps (Pty) Ltd v Hidro-Tech Systems (Pty) Ltd*, the BEE Act in South Africa underwent a major amendment in the face of fronting practices and the *Black*

³⁷ Trading Economics, [Namibia Youth Unemployment Rate](#), (2019)

³⁸ Business Anti-Corruption Portal, [Namibia Corruption Report](#) (2017)

³⁹ *Ibid.*

Economic Empowerment Amendment Act 2013 detailed the practice of fronting and included fines, penalties and offences, including imprisonment up to 10 years. This case allowed the Constitutional Court to pronounce BEE as a constitutionally required governmental response to the economic exclusion and exploitation of black people; the Court's ruling in the *Viking Pony* case effectively "imposes an obligation on an organ of state that has received a complaint about alleged fronting to properly investigate the complaint and to act accordingly".⁴⁰

The sheer amount of wealth across racial lines that is present in Namibia, and still being held while the illusion of redistribution is being pushed, reminds of Solomon's piece, and the marking words that "poverty is not just a condition, but a relationship"⁴¹. Poverty in Namibia, or South Africa for that matter, is not simply an occurrence, or a situation where wealth will eventually *trickle down*, but a policy, practical and legal project not to redistribute wealth, publicly finance societal necessities and repatriate stolen land.

Hafeni*, 27-year-old, taxi driver

"The only way out is hard work, saving, and leaving the country. I'm going to Europe or America, saving for my pilot license and then I'm gone. But the pilot license needs practice airtime charged per hour, and that is expensive. So it will take me another 3 years, it's already been 6".

Hafeni lives with and provides for his two younger brothers. His parents live in the village in the north.

⁴⁰ See Warikandwa TV and Osode PC "Regulating Against Business "Fronting" to Advance Black Economic Empowerment in Zimbabwe: Lessons from South Africa" (2017)

⁴¹ See Margot E Salomon, "Why should it matter that others have more? Poverty, inequality, and the potential of international human rights law" *Review of International Studies* 37:1 (2011) 2137-2155.

Other Paradigms for Black Economic Empowerment, Outside of Market Driven Economic Policy

Chinese TVEs and Land Redistribution

In slightly more than three decades, China's economy has become the fastest growing economy in the world, growing more than 10 percent yearly and lifting over 300 million Chinese out of poverty.⁴² Legislative activity has been at the core of economic reforms in the country, and economic reform initially was *state-driven* where the state played a leading role by enacting laws, as opposed to *market-driven reform* where the state establishes the initial conditions to promote the development of market economy, but ultimately it is the non-government actors that devise the legal principles and institutions that will serve the market.⁴³ Here, we can note that both BEE and NEEEF frameworks align with the *market-driven* reform, relying on the private sector to reform their racial composition in order to achieve broad based economic empowerment.

One of the greatest achievements of China's economic reforms is the rapid development of township and village enterprises (TVEs). TVEs are public enterprises that are collectively owned by local residents in rural communities, such as townships and villages.⁴⁴ Distinct characteristics of "peasant" owned TVE economic units include: publicly owned but market oriented; small in size; a high degree of autonomy; and are the property of local residents (though exercised by town and village governments).⁴⁵ Remuneration of workers (as opposed to managers) in most TVEs are tied to performance.⁴⁶ Launched in 1978, by 1992, they employed over a quarter of the rural labour force and contributed

⁴² See Fred Bergstein, Chales Freeman, Nicholas R. Lardy and Derek J. Mitchell, *China's Rise: Challenges and Opportunities* 106 (2008)

⁴³ See Lubman, S. B. (Ed.), *The evolution of law reform in China: An uncertain path*, Edward Elgar (2012).

⁴⁴ Perotti, E. C., Sun, L., & Zou, L. "State-owned versus township and village enterprises in China" *Comparative Economic Studies*, (1999) 41(2-3), at 151-179.

⁴⁵ Fu, X., & Balasubramanyam, V. N. , "Township and village enterprises in China", *Journal of Development Studies*, (2003), 39(4), 27-46.

⁴⁶ *Ibid.*

40 percent of per capital rural income.⁴⁷ Importantly, TVE production has relied on China's endowments of cheap labour and specialized in labor intensive products, such as textiles, clothing, food processing, and toys.⁴⁸ Not only have TVE's substantially impacted the domestic Chinese economy including 40% of industrial output in 2000, TVEs also contributed to almost half of domestic exports in 1999.

This model that is based upon the use of the land could be one that might be replicated in the Namibian context. Agency and autonomy would need to be carefully monitored, as well as the diversification of products created (with careful attention to running the risk that similarly to the current Chinese model which exists, there would be the mass production of goods in a factory like setting). This model could work in the Namibian context through building sustainable agricultural produce and subsidizing the costs for farmers for the livestock and machinery they rely upon, while simultaneously granting the ability for local farmers to own and manage their own operations and reap the benefits of their labor. It would enforce socioeconomic rights through the provision of a stable income and propriety ownership. Education and skills training for the business end of the TVE would need to be integrated. However, just like Namibia, in China the large economic gaps exist between rural and urban residents, whereby even TVE reforms have only increased the incomes of those engaged in non-farming occupations when compared to those who rely on farming; as well as coastal versus inland residents.⁴⁹ A TVE model would also require the bargaining and repatriation of land from German and Afrikaans farmers- without which TVE will prove difficult to implement on a sufficiently large scale.

Transformational Constitutionalism

"While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. (...) But it cannot be too

⁴⁷See Yao, S. (2000). Economic development and poverty reduction in China over 20 years of reforms. *Economic Development and Cultural Change*, 48(3), 447-474.

⁴⁸ See Fu, X., & Balasubramanyam, V. N. "Township and village enterprises in China". *Journal of Development Studies*, (2003), 39(4), at 30

⁴⁹ Supra note 43.

strongly stressed that the Constitution does not mean whatever we might wish it to mean.”⁵⁰

The Constitution of the Republic of South Africa is internationally known to be the most progressive constitution in the world. It has legislated special and progressive components and provisions, including ones governing multiculturalism, gender and sexual identity, the emphasis on participation and governmental transparency, environmentalism and the extension of democratic ideals into the private sphere.⁵¹

The construction of *transformative constitutionalism* was first proposed in 1998, by Professor of Law, Karl Klare. It entails “a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction”.⁵² The ultimate goal is to create a national community grounded in the idea of being highly egalitarian, caring, and multicultural, and governed through participatory, democratic processes in both the public and private sphere.⁵³

Yet, the main question Klare posits in his proposition of transformative constitutionalism is whether this is a *viable* project for South African judges and lawyers and accordingly by extension, judges and lawyers working within other legal regimes.⁵⁴ The interpretive values of the Supreme Court Justice are clearly outlined in the constitution, thus reinforcing the need for *interpretation* of the transformative constitutionalism paradigm: to “promote and fulfill” through one's professional work the “democratic values of human dignity, equality and freedom” and to work to “establish a society based on democratic values, social justice and fundamental human rights”.⁵⁵ However, to be successful, transformative constitutionalism fundamentally relies on the Justices to be the interpreters and hence creators of

⁵⁰ State v Zuma, 1995 (4) BCLR 401 (CC), at para 17.

⁵¹ See Klare, K. E, “Legal culture and transformative constitutionalism” *South African Journal on Human Rights*, (1998), 14(1) at 152

⁵² *Ibid* at 150.

⁵³ *Ibid*.

⁵⁴ *Ibid*.

⁵⁵ The Constitution of the Republic of South Africa, 1996, Act No. 108 of 1996

meaning of the constitutional provisions they identify and apply in cases at hand.

In the context of socioeconomic rights that are not explicitly provided for, the enforcement of socioeconomic rights occurs at the discretion of Justice presiding over a case, and their desire to use their interpretation as an instrument for enforcing such rights. Ultimately, it is an insufficient paradigm within which to operate, and also requires that each case goes to court, which in an environment like Namibia where access to the courts (especially by the poor, and rural inhabitants and farmers) is extremely low.

Transitional Justice

"The field of transitional justice – in both its institutional and scholarly aspects – has historically excluded issues of economic inequality, structural violence, redistribution and development [...]"⁵⁶

In constructing a new liberal state in 1990 post-liberation, Namibia was pushed to grapple with a violent and murderous history—from German colonization and genocide, to decades of armed struggle for Independence from South Africa. Chandra Sriram states: "[t]he study and practice of transitional justice analyzes policy choices made by regimes emerging from armed conflict and/or authoritarian rule with regard to accountability or past abuses, stability, reform, and democratization."⁵⁷ Yet unlike South Africa, Namibia never established a Truth and Reconciliation Commission, and instead began immediately the project for constructing an Independent nation from South Africa. Perhaps this is why it is largely ignored in popular discourses on nation states and transitional justice.

However, following Sriram's definition, Namibia most definitely was tasked with achieving 'transitional justice', even though the mechanisms of a Truth and Reconciliation Commission,

⁵⁶ See Miller, Z. (2008). Effects of invisibility: In search of the 'economic' in transitional justice. *The International Journal of Transitional Justice*, 2(3), at 266

⁵⁷ See Chandra Lekha Sriram, 'Transitional Justice Comes of Age: Enduring Lessons and Challenges,' *Berkeley Journal of International Law* 23(2) (2005): 506.

or the prosecution of leaders who committed gross atrocities was not a part of the transitional state's actions. In this section, I will argue that fundamentally, the restitution of socioeconomic rights is fundamentally a part of transitional justice, despite these rights being largely ignored from the discourse and instead relegated to the 'separate' realm of development- though it is fundamentally connected to justice, and justice in transitional nation states. Ultimately corruption and human rights violations are mutually reinforcing forms of abuse, and although the field of transitional justice approaches civil and political rights violations, it should do the same for economic crimes, as accountability for economic crimes and large-scale corruption intersects with accountability for human rights violations.⁵⁸

South Africa is a prime example of the privileging of civil and political rights after Independence, over an approach that also includes human rights as they intersect with economic crimes. Post-apartheid South Africa's Truth and Reconciliation Commission (TRC) did not address corruption as they stated it simply fell outside its mandate. Yet the South African civil society report from 2006 demonstrates the link between human rights violations and corruption, stating that: "[w]hen the apartheid state was at its most repressive, it was also at its most corrupt."⁵⁹

The field of transitional justice compartmentalized unresolved legacies of colonization and Apartheid faced by transitioning, developing countries and constructs on compartment for human rights violations and another for corruption and economic crimes - as if they do not constitute rights violations in themselves.⁶⁰ There is a predominance of civil and political rights-focused transitional justice in developing countries that struggle with what African practitioners call *mass poverty and socioeconomic concerns* while economic crimes and large-scale corruption are excluded from mainstream transitional justice advocacy; civil and political violations are perceived as justiciable

⁵⁸ See Carranza, R. "Plunder and pain: should transitional justice engage with corruption and economic crimes?", *The International Journal of Transitional Justice*, (2008) 2(3), at 310-330.

⁵⁹ See Hennie van Vuuren, *Apartheid Grand Corruption: Assessing the Scale of Crimes of Profit in South Africa from 1976 to 1994* (Cape Town: Institute for Security Studies, 2006), 3.

⁶⁰ *Supra* note 58 at 314.

and capable of being redressed through transitional justice, while socioeconomic rights are considered non justiciable and therefore addressed through a 'catch all' reference in development programs.⁶¹

Scholar Zinaida Miller, in her piece exploring the effects of invisibility of the economic in transitional justice, identifies three possible costs of economic invisibility: (1) an incomplete understanding of the origins of conflict; (2) an inability to imagine structural change due to a focus on reparations; and (3) the possibility of renewed violence due to a failure to address the role of inequality in conflict.⁶² She argues that the field of transitional justice, both on institutional and scholarly levels, has historically excluded issues of economic inequality, structural violence, redistribution and development, and in doing so transitional justice institutions (and arguably the state led government itself) sends a powerful message to society that economic development and conflict are separable and that inequality itself is not to be prosecuted or amnestied.⁶³ This shift from civil and political rights that is emphasized, while socioeconomic rights are underplayed results in redistribution being backgrounded, and instead responsibility and attention are drawn to punishing clearly defined 'crimes'.⁶⁴ Responsibility is thereby strategically shifted from state responsibility to individual accountability; from the public, to the private sphere.

Governments may opt to pursue separate development strategies – such as the ones explored in this paper of BEE and NEEEF – while others may entail redistribution of land, which remained wholly silent in both nations' economic strategies. Yet, importantly, the divorce of development strategies from transitional justice mechanisms perpetuates the myth that the origins of conflict are political or ethnic rather than economic or resource based, and that inequality is a matter of time or development as opposed to an entrenched ideology of elites without attention paid to a past of economic oppression.

⁶¹ *Supra* note 58 at 315.

⁶² See Miller, Z. (2008). Effects of invisibility: In search of the 'economic' in transitional justice. *The International Journal of Transitional Justice*, 2(3), 266-291.

⁶³ *Ibid* at 268.

⁶⁴ *Ibid*.

In the case of South Africa and Namibia, BEE and NEEEF provide the illusion of redress and redistribution while failing in practice to fundamentally address the root of Black Namibian disempowerment in the first place. From German colonization to Apartheid, in addition to racial discrimination and oppression, there was economic oppression. Present day, inequality is not exclusively racial, as there have been many Black elites who have profited from Apartheid, and the freezing of property and assets when the constitution was drafted in 1990. There needs to be a deeper probing into the economic oppression that Black Namibians face in the country, starting from pre, during and post-Apartheid period, which will yield answers that also point to the mass dispossession of land and property which still has not been repatriated to the rightful owners, as well as the loss of education and a skilled workforce due to significantly lower publicly funded Black schools, leaving a majority of Black Namibians relegated to the low skilled labour sector. Finally, after addressing the root causes of conflict and economic disempowerment leading to present day, there needs to be a holistic expansive undertaking of justice, be it transitional or simply, justice that encompasses socioeconomic rights and the deprivation thereof following tyrannical colonial and Apartheid rule, corruption, and land dispossession. Only then can Namibia move forward to begin to build a nation based on dignity, redress and justice.

In this way, an expansive socioeconomic paradigm of transitional justice is needed in the context of Namibia to reframe the racial composition of the economy from a private sector problem, to one that is born of colonization, Apartheid, and inequitable distribution and more importantly, as one of stolen land and resources that must be repatriated to the rightful owners. Economic empowerment frameworks are illusory and shift responsibility from the government to the elite while simultaneously presenting the optics of radical racial change. What is at issue is not simply Black ownership in enterprises. It is justice for a history of resource extraction by external and domestic forces, land usurpation, labor market dominance, and the lack of economic justice for past wrongs. These expansive socioeconomic transitional justice-oriented solutions will be explored in the policy recommendations paper.

Justice: Dignity, Duty and Socioeconomic Rights

*"Populations and governments should not be forced to make a trade-off between development and justice. It is unacceptable for survivors to think they face a choice between food on their plates and justice for crimes suffered."*⁶⁵

In Namibia, it could be argued that land dispossession, rampant corruption and economic oppression are *also* crimes people suffer. Making the distinction between war crimes and atrocities, justice from such abhorrent crimes and 'development' does a disservice, and more so, an injustice to the people of Namibia. There is a profound erasure that occurs when development, socioeconomic rights, land dispossession, and economic oppression is removed from the realm of being perceived as 'crimes'. These economic crimes necessitate not individual and market-driven economic empowerment action, but rather governmental redress and redistribution and more severe measures.

On Dignity

Both the South African and the Namibian constitution use the word dignity in their legislation. Section 1 states that South Africa is a democratic state founded on the values of '*[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms*' and, section 39(1)(a) states that courts *must promote the values that underlie an open and democratic society based on human dignity, equality and freedom*.⁶⁶ Article 8 of the Namibian Constitution states that (1) *The dignity of all persons shall be inviolable*.⁶⁷ Even the introduction of the economic empowerment strategy of NEEEF states: "The Government of the Republic of Namibia is committed to pursuing economic and social policies with the aim of securing prosperity and a life of human dignity for all Namibians".⁶⁸

⁶⁵ See Rama Mani, 'Distributive Justice,' *Beyond Retribution: Seeking Justice in the Shadows of War* (Malden, MA: Polity Press, 2002) at 257.

⁶⁶ Article 39(1)(a) Constitution of the Republic of South Africa.

⁶⁷ Article 8, Article 39(a) Constitution of the Republic of Namibia.

⁶⁸ *Supra* note 24 at 6.

What does this mean in practice? After a careful economic analysis of both nation states, just as McCrudden states, the use of 'dignity' does not provide universalistic principles nor a basis for judicial decision-making in the context of human rights, and there exists little common understanding of what *dignity* substantively requires, with significant variance from jurisdiction to jurisdiction.⁶⁹ Instead, dignity as we have seen in the black economic empowerment frameworks, appears to be open to judicial manipulation, and selective manipulation at that- with a strategic emphasis on dignity as it applies to civil and political rights.

All the while, economic rights are wholly ignored. Land dispossession is wholly ignored. There has been silence in these economic empowerment frameworks, on these subjects. Dignity appears to be vague enough to be present on paper, in constitutional provisions, and even in the visionary preamble of the black economic empowerment strategies themselves, and yet easily disappears from examination where socioeconomic status, poverty, and *redistribution* is severely in need of being addressed and enforced.

McCrudden in his piece cites Ferdinand Lassalle, the founder of Germany's Social Democratic Party, who argued that the state had the duty to "improve the situation of the lower classes, who had fallen into poverty and starvation, and thus provide a true humane existence for everyone".⁷⁰ He also cites Nelson Mandela, who argued that "[o]vercoming poverty is not a gesture of charity. It is an act of justice. It is the protection of a fundamental human rights, the right to dignity and a decent life" (emphasis added).⁷¹ In these quotes by leaders, there is a strong emphasis drawn between living conditions and poverty, with justice and dignity. Similarly, Gandhi used the language of *duty*, and was said to dislike "rights-talk" of all kinds, and instead framed his rhetoric using the term of "duties".⁷² This usage of the

⁶⁹ Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights", *European Journal of International Law*, Volume 19, Issue 4, 1 September 2008, pp 655-724.

⁷⁰ *Ibid*

⁷¹ *Ibid*

⁷² Kenneth Cmiel, "The Recent History of Human Rights" (2004) 109:1 *The American Historical Review* at 117-135.

language of *duty* emphasizes that it is not merely a “socioeconomic right” that is to be fought for, it is the *duty* of the state to provide the conditions and material resources for a people to not live in poverty.

Yet domestically in North America, just as globally in countries like South Africa and Namibia, it is widely believed that poor people are responsible for their poverty through personal failings of character, morality, their ways of thinking leading to flawed behavior, resulting in unemployment, impoverishment and government expense.⁷³ In the rhetoric of American individualism that Lee posits, we can see how it has spread to other nation states. I witnessed this occurrence, where poverty as articulated by locals in Namibia is perceived as an individualized consequence of a person’s laziness and life choices. We think then to Sen, and his capabilities approach, where although we have certain constructions of agency and autonomy, we must critically reflect on the distinction between the opportunity and the capability, and see who has the *capability* - through possession of the means, instruments or permission, in addition to the freedom to make use of an opportunity or not - to pursue what one would like to do.⁷⁴

Those in poverty have neither the opportunity nor the capability.

Conclusion

“The relationship between a state’s human rights record and the extent of corruption in its government can be as simple as one of mutual reinforcement.”⁷⁵

“A corrupt government which rejects both transparency and accountability is not likely to be a respecter of human rights. Therefore, the campaign to contain corruption and the movement for the promotion and protection of human

⁷³ Jamie Alison Lee, “Poverty, Dignity, and Public Housing”, *Columbia Human Rights Law Review* 47:2 (2015) 97-157 – focus on Section II (Culturalism and its Harms – pp. 100-109) and Section IV (Extending Dignity – pp.128-157)

⁷⁴ Amartya Sen, “[Human Rights and Capabilities](#)” (2005) *Journal of Human Development* 6:2.

⁷⁵ *Supra* note 58 at 311.

rights are not disparate processes. They are inextricably linked and interdependent.”⁷⁶

In his theory of justice, Sen builds off of his capabilities approach to underscore the importance of how individuals experience justice and injustice, and to shift to this paradigm instead of focusing on institutions or a theoretical construction of a *just society*.⁷⁷ Prior to arriving in Windhoek, I had no preconceived idea of what justice meant for Namibians, who either lived through Apartheid themselves, or their parents only too recently had. I wondered how theoretical frameworks I had been exposed to during my legal education translated in practical, on the ground, and for indigenous persons who faced the reality and day to day of the atrocities I had only read about. When I would ask about racism, segregation, violence, murder or other post-Apartheid experiences in the country, there was a resounding response I never failed to receive from Black Namibians: “We want jobs. We just want jobs and opportunities”.

Prior to my internship, my notions of justice and economic development operated in siloes; a product of an education, a system, an intentional worldview that posits that justice is obtained in courts and economic development is obtained through various mechanisms, through privatized initiatives like microfinancing, or economic empowerment frameworks and strategies introduced by the public sector but executed by the private sector.

The NEEF was presented as being a way to correct racial historical wrongs born out of Apartheid policies. However, it has become a modern way to perpetuate corruption in the country. It fails in practice to achieve desired goals as the measures and mechanisms used are insufficient. Further to this, a critical transparent data examination was lacking and is desperately needed to uncover whether the attainment of these goals is being achieved. Informally, what was observed was that there was no job creation or ways through which to ensure stable income for Namibians. Instead, targeted “Black” policies simply reshuffled pre-existing Black elite into owning shares in companies they might not have previously, in order to meet NEEF requirements. This

⁷⁶ *Supra* note 58 at 311.

⁷⁷ Sen A, *The Idea of Justice*, (2010) London: Penguin.

was far from the initial ideas of justice, born post-Apartheid and as expressed by Black Namibians on the ground. Yet, by removing economic questions from the framework of transitional justice – that which Namibia is currently grappling with in legacies of colonization and Apartheid – scholarship and institutions render invisible the economic causes of conflict and the effects of the post conflict economic situation on the potential for renewed violence related to past grievances or current maldistribution.⁷⁹

We are in desperate need of an expansive understanding of justice that encompasses socioeconomic rights as fundamental in the exercise of all other rights and capabilities sought to be protected through transitional justice mechanisms. Perhaps this endeavor requires entering unknown and unfamiliar territories post conflict, post colonization, and post-Apartheid, with a blank slate, a captive ear, and an ability to understand from a narrative perspective, what justice means outside armchair theorizations, from those who have been wronged themselves.

The individualization of poverty, and the focus on market-mechanisms and the reliance on the private sector of broad based black economic empowerment I argue, is inadequate and strategically insufficient. Instead, we should adopt an expansive transitional justice model that recognizes the loss that happened prior to apartheid, and call upon the government to recognize their *fundamental duty* in this process to materially restore the dignity of its people through employment, education, health and infrastructure, among other projects and to enforce the socioeconomic rights of those members of society who were economic oppressed and whose land was dispossessed.

Only then can justice be achieved.

⁷⁹ *Supra* note 62 at 287.

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