

## Reconceptualising socio-economic rights in the transitional justice discipline

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#### ABSTRACT

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This article questions whether sufficient attention is given to addressing violations of socio-economic rights in the transitional justice context. Economic and Social rights (ESR) are rights associated with areas such as health, education, employment and housing. They are binding international legal standards and their protection extends to some of the most vulnerable groups in society. Transitional justice is the discipline examining the mechanisms through which the wrongs of a prior regime can be addressed when a state moves from illiberal regime to liberal democracy. The discourse has focussed increasing attention on socio-economic dimensions of transitional justice without fully grasping the nature or status of socio-economic rights law. This article uses a legal perspective in order to ask whether theories of prioritisation, judicial incrementalism and deliberative democracy will assist in ensuring pre-transition structural inequalities are addressed as part of the transitional justice paradigm and in accordance with international law requirements. It is argued that the emerging approach of addressing socio-economic rights violations through means of reparation may fail to address the structural inequalities associated with the prior regime. This article proposes that new and alternative structures must be imagined if the transitional justice discipline is to adequately address socio-economic violations in an emerging democracy with a view to establishing long term peace.

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### INTRODUCTION

Following on from the Second World War nations throughout the world sought to declare a commitment to dignity and human rights. This culminated in the Universal Declaration of Human Rights in 1948 followed by two subsequent Covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>1</sup> These treaties are known collectively as the International Bill of Rights. The international human rights structure comprises of civil, political, economic, social and cultural rights as established in the International Bill of Rights. Civil and political rights include rights such as the right to a fair trial or the right to vote. Economic, social and cultural rights include rights such as the right to education, the right to fair employment conditions, the right to adequate housing and the right to adequate healthcare. It was intended that the each of the rights (civil, political, economic, social and cultural) would be implemented concurrently and according to the principle of indivisibility.<sup>2</sup> Subsequent international treaties at both the international and regional level have confirmed the legally binding status of these rights and their indivisible nature.

The principle of indivisibility is an important aspect of the purpose and function of human rights and means that the fulfilment and enjoyment of one right is dependent on the protection and fulfilment of another (Whelan 2010). That is to say for example that the right to life is dependent on the right to adequate health care, the right to an adequate standard of living and the right to adequate housing. Likewise, full enjoyment of the right to vote and the right to political participation is dependent on exercise of the right to education and the right freedom of expression, the right to protest or the right to collectively bargain. The full enjoyment of civil and political (CP) rights is therefore dependent on the

protection and fulfilment of ESC rights – the preparatory work to the international treaties reveals that protecting civil and political rights and not economic social and cultural rights was considered an “anachronism in the twentieth century to provide for the protection of one without the other.”<sup>3</sup>

Economic, social and cultural (ESC) rights have been the focus of concerned scholars who note it is ‘difficult to raise the question [of economic, social and cultural rights] outside the accepted transitional justice (TJ) discourse’ (Miller 2008). Schmid and Nolan (2015) have argued that, although there has been an increasing emphasis on addressing economic and social dimensions of transitional justice in the discourse, these discussions suffer from ‘terminological and conceptual confusion’. This article seeks to clarify some of these ambiguities. In an analysis of the TJ literature Muvingi (2009) identifies that the most widely accepted conception of universal justice is grounded in international human rights, and many transitional justice scholars have, unsurprisingly, emphasized the primacy of human rights standards. However, as the discipline emerged and almost without exception, legal understandings of binding international human rights law in the TJ context referenced civil and political rights, which is in large part a reflection of the bias in the human rights field. Schmid and Nolan (2014) notably conclude that the claims made by transitional justice scholars with regard to ESR frequently appear to be founded on misconceptions about the substantive content and the existing scholarship relating to ESC rights. The international human rights legal regime solidifies the universality of equality in all rights (civil, political, economic, social and cultural). From its inception the Universal Declaration of Human Rights 1948 was founded on the belief that all human rights were indivisible and inalienable. Historically, a dichotomy emerged between civil and political rights, on the one hand, and economic, social and cultural rights, on the other. The protection and enforcement of ESC rights was regarded as an area of political choice as opposed to mandatory obligation – this was based

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<sup>1</sup> The International Bill of Rights comprises of the Universal Declaration of Human Rights 1948 , GA Res 217 A (III) of 10 December 1948, the International Covenant on Civil and Political Rights GA Res 2200A (XXI) of 16 December 1966 and the International Covenant on Economic, Social and Cultural Rights UN General Assembly, 16 December 1966, United Nations, Treaty Series, vol. 993, GA Res. 2200A (XXI), 3 Jan. 1976

<sup>2</sup> UN GA Res. 543 VI, 5 February 1952 (Craven 1995 p.9)

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<sup>3</sup> E/CN.4/529 Memorandum of Secretary General, Commission on Human Rights, Seventh Session, Agenda item 3, 29 March 1951

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on an erroneous interpretation of the legally binding nature of socio-economic rights – otherwise referred to as a ‘legal fiction’ (Tinta 2007). Miller (2008) concedes that the absence of ESC rights standards in TJ societies is perhaps a non-deliberate oversight in the ever expanding field of transitional justice out of step with the international legal regime. The legal literature, practice and discourse now unequivocally recognises the indivisibility of cultural, civil, economic, political and social rights and the TJ discourse requires to re-examine the socio-economic dimensions of transition in light of these developments.

In her genealogy of transitional justice, Ruti Teitel describes the TJ field as, ‘the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes’ (Teitel 2003, p.69). This definition of the transitional process is typical of the scholarly perspective which has predominantly focused on retributive justice (for crimes) and dealing with the past. Economics play almost no role in Teitel’s genealogy and there is no redistributive justice element included in her findings. In Jon Elster’s (2004) extensive discussion on the history of transitional justice he delves into the economic question in so far as the crucial monetary requirement to fund the transitional justice mechanisms. This is a valid point, but nonetheless, there is again no discussion of redistributive justice. Redistribution of wealth is therefore not considered a mandatory factor in achieving justice as part of the transition from war to peace in the transitional justice society. On the other hand, financial issues are not completely absent from the academic and political discussions. Rather than discuss redistribution, which is considered a political aspiration, the discourse focuses on the concept of compensation for victims, otherwise known as ‘reparations’ (Shelton 1992). In the context of the correlation between poverty and conflict and the corollary impact on the most vulnerable and marginalised, securing ESC rights are of paramount importance to securing a stable democracy post-conflict ‘as to the link between democracy and socio-economic rights, it is argued that the prospects of democracy are poor if the population is impoverished and illiterate, thus

unable to make use of its participatory rights’ (Koch & Vedsted-Hansen 2006, p.62). They argue that in this respect the substantive protection of ESC rights is as important as CP rights in a functioning democracy and therefore ought to feature in the transitional justice process. Reparations alone risk acting as a ‘band-aid’ to a much deeper and wider deficit in the transitional context when structural inequalities remain unaddressed.

Reparations have played an extremely prominent role within the discourse and feature as the emerging approach whereby some form of monetary compensation is offered as practical measure to address prior violations of an illegal regime (Hughes et al 2008). For instance, in tort law, reparations seek to instil *resitutio in integrum* (to restore to the original position) for the victim of a wrong, and, where that is not possible, a fiscal sum compensates instead. Reparation is a way of seeking to re-establish civic trust, acknowledge wrongdoing and provide a sense of satisfaction for the victim. Several difficulties arise from this scenario, primarily, the status of victimhood is often highly contested, reparations can thus become a source of further conflict. Second, reparations become part of the wider transitional infrastructure and their eventual payment depends upon the economic success of the new democratic state. Moreover, the actual economic beneficiaries of the conflict inadvertently avoid liability. Without redistribution of wealth and equality of access to ESR, the pre-transition divide between rich and poor will continue beyond the parameters of the transitional justice paradigm. UN Resolution 2006/60/147 makes specific provisions for the right to compensation for victims of gross violations of international human rights law and serious violations of international humanitarian law. Resolution 2006/60/147 also provides a fully comprehensive definition of victimhood that includes a specific provision for those who have suffered ‘economic’ loss. This extends the existing theory of victimhood to include a redistributive element in international law. The Resolution opens the doors for redistributive justice within the transitional justice paradigm as a mandatory obligation of international law.

One of the issues regarding victimhood is that often victim status can emerge as a ‘meta-

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conflict' around the conflict (Bell et al 2004). The politicisation of the victim can erect multiple boundaries for reparations when competing narratives over what really happened and who was responsible can mean some victims are denied reparative measures due to their perceived 'complicity' in the conflict. For example, the conflict in Northern Ireland has seen reparations mired in the politics of victimhood with initial reports denying victimhood status to those who were deemed terrorists (Bloomfield Report 1998). Subsequent research demonstrated that the average typology of victim in the Northern Ireland conflict was male, catholic and aged between 18-25 years (Ni Aoláin 2000). The original concept of victimhood therefore excluded the large majority of those who suffered death and injury during the conflict (Morrissey & Smith 2002). Scholars have criticised the hierarchy that existed between state forces and non-state paramilitary actors (Rolston 2001) (Morrissey & Smith 2002). A consequence of this hierarchy made it difficult to deal with the issue of reparations without further exacerbating the meta-conflict around victimhood status and competing narratives of what happened. In addition to the difficulty around the hierarchy of victimhood, what type of reparations should be delivered to a heterogeneous victim profile can also be a contested space with different types of victims needing different types of remedies.

### Reparations in international law

The Committee on ESC Rights has stipulated the provision of reparation measures when a victim or group of victims has suffered an ESC violation. These measures include restitution, compensation, satisfaction or guarantees of non-repetition.<sup>4</sup> Reparation for the violation of an international human right does not necessarily mean the remedy must be provided via the court, nor does it mean that the solution is purely fiscal. Shelton (1998) suggests that reparation in international law can be both punitive and compensatory and that the

method of delivery of restitution may be monetary, or can consist of apologies, declarations or the construction of monuments etc (Shelton 1998). These forms of reparation can be delivered by the state in accordance with international obligations without the need for a victim to seek a judicial remedy. However, where there is no adequate reparation by the state for gross violations of human rights, the victim(s) may seek a judicial remedy to rectify this. Tinta (2007) argues that, according to international law any violation of a primary rule, including those concerning ESC rights, ought to be open to an effective judicial remedy. Just as states can be liable for violations of civil and political rights, so too can they be liable for violations of ESC rights (Tinta 2007). This view is reflected in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1998):

It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights... As is the case with civil and political rights, both individuals and groups can be victims of violations of economic, social and cultural rights.<sup>5</sup>

Reparations also feature as a remedy identified in the UN Resolution on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>6</sup> Paragraph 15 provides:

Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international

<sup>4</sup> 'Any person or group who is a victim of a violation of the right to adequate food should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of such violations are entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition.' General Comment No. 12 Report on the Committee on Economic, Social and Cultural Rights, 20th Sess. 32 UN. Doc. E/2000/22 (1999) The Right to adequate Food

<sup>5</sup> The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, [1998] 20 Human Rights Quarterly 691

<sup>6</sup> UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147

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humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a state shall provide reparation to victims for acts or omissions which can be attributed to the state and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such a party should provide reparation to the victim or compensate the state if the state has already provided reparation to the victim.

Paragraph 8 of the Resolution defines a victim as follows:

For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, *economic loss or substantial impairment of their fundamental rights*, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

The obligation to provide restitution is therefore firmly embedded in international law with a focus on facilitating remedies at the domestic level. If the state fails to implement adequate reparation, an individual or group would have the right to seek a justiciable remedy to ‘wipe-out all the consequences of the illegal act and re-establish the

situation which would, in all probability, have existed if that act had not been committed.’<sup>7</sup>

Tinta (2007) refers to jurisprudence in the transitional justice context concerning a massacre in Guatemala, which affected hundreds of displaced victims of the internal war. The court ordered reparation measures that included measures of satisfaction such as establishing development programmes on health, education, and infrastructure in the affected communities. These programmes included providing such communities with medical care, educational programs in the native language of the victims and essential services such as access to drinkable water.

In a similar vein, Laplante (2007) has also identified transitional justice mechanisms that facilitate remedies in the way of reparations. For example, in 2003 the Truth and Reconciliation Commission (TRC) in Peru made recommendations that included criminal trials, institutional reforms and a reparation programme: the Plan Integral de Reparaciones (PIR). The TRC examined the causes of the conflict and acknowledged that economic, social and cultural inequalities fuelled the insurgency. Although the Commission did not suggest that poverty was the primary cause of the violence the report stated that poverty was ‘one of the factors that contributed to igniting [the conflict] and as the backdrop against which this drama unfolded.’ (LaPlante 2007, p.153). Laplante (2007) concludes that there was a ‘cause and effect’ interaction between violations of ESC rights and the conflict. Those living in deprivation before the conflict, were most vulnerable to violations of human rights during the conflict, and remained in a state of exacerbated deprivation following the conflict. As a result, after decades of entrenched inequality, it is more difficult for families and communities to recuperate social and economic stability and security in a post-conflict society. The TRC concluded that ‘the internal armed conflict paralyzed the process of development of the rural world and left grave consequences in the productive structure, social organisation, educational institutions and *proyectos de vida* (life

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<sup>7</sup> This is the general principle of reparation in international law as decided in *Re Factory at Chorzów (Germ. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13), para.125

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projects) of the affected population. [W]ith respect to human capital and the ransacking and destruction of the community assets, it is possible to conclude that the process of violence left a despairing economic panorama with an immense number of affected people, to whom society and the state owe reparations.' (LaPlante 2007, p.157) On this basis the distribution of reparations was to play a pivotal role in redressing violations of ESC rights during the conflict.

The issue of reparations must also be considered within the wider legal and constitutional transformation of a transitional state. In the case of Peru, Laplante highlights some concerns with reparational schemes and the constitutional and legal transformation that is required in a post-conflict state to remedy the deprivation caused by the conflict. Although many victims express a desire for economic reparations, they often remain unsatisfied with 'simple band-aid solutions' or one-off payments. Reparations can fulfil an important sense of empowerment for the victim, however, they can also serve to undermine fulfilment of substantive change or entrench conflict between different groups trying to access the same limited resources – particularly when structural inequalities are left unaddressed.

Individual reparations arguably 'pit the poor against the poor-victims' in the struggle for limited resources. It is important to note that reparations are not a cure-all in post conflict recovery. If reparations are not accompanied by institutional, social and economic reform then the goals of prevention may be frustrated. A comparison can be drawn between providing reparations for victims and providing for former prisoners or combatants in Disarmament, Demobilisation and Reintegration (DDR) schemes. Shirlow and McEvoy (2008) highlight that in the Northern Ireland context many of the combatants and prisoners come from socially and economically deprived areas and are reintegrated back into poverty and structural exclusion creating a poverty cycle which further entrenches segregation between communities. They urge that reconciliation requires an acknowledgement that it is the responsibility of governments to ameliorate the structural conditions of poverty and social exclusion which feed the prejudicial attitudes and

behaviour first leading to conflict (Shirlow & McEvoy 2008). When existing hegemonic structures of inequality create a hierarchy of socio-economic rights, reparational measures are unlikely to suffice requiring a more substantive restructuring of conflicted societies which addresses violations of socio-economic rights. In this sense socio-economic rights and violations of these rights require further attention if the transitional discourse is going to move beyond a debate on how reparations should be delivered. The systemic problems associated with poverty and social exclusion that exacerbate, if not cause, conflict require more attention in the discourse.

### **An alternative to the reparational approach**

Fuller (2012) has argued for a theory of prioritisation in a transitional society that would support a more holistic solution than that offered by arbitrary reparational measures. She suggests that the transition to a more just society depends upon society as a whole sharing the burden of the transitional process (Fuller 2012). According to the theory of prioritisation, those who are the most vulnerable and marginalised ought to be 'lifted-up' first and then the transition can move on to the next phase where the needs of the 'next-worst off' are addressed. No one person is subject to a more grievous injustice in order to rectify another group's unjust condition and so those at the top of the hierarchy bear the greatest burden as they wait the longest to benefit from reforms. Fuller argues that 'this is as it should be, since members who are located near the bottom of the social hierarchy already bear the heavy burden of diminished welfare and liberty, relative to those at the top.'

On this basis, prioritising those who are the most vulnerable in society is fairer than prioritising reforms that benefit those who are at the top:

By contrast, one might imagine a transitional process in which a burdened society becomes more just by first guaranteeing the rights it is easiest to guarantee, namely those of the middle and upper classes, after which they make slow incremental gains in securing some rights to the bottom economic quartile of society.

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Such a society, even if it were to ultimately become just or decent by such a process, would not have arrived there in a transitionally just manner, since it placed the burdens of transition on those who were already the most vulnerable. (Fuller 2012, p.384)

This might be the most difficult to establish in a political sense, because, as Fuller notes, it would be easier to secure better conditions for the middle and upper classes rather than those who are socially, economically or politically marginalised. In this sense, the non-elected judiciary could arguably play the crucial supervisory role in order to ensure the substantive fulfilment of ESC rights is prioritised for the most vulnerable by the legislature and executive within the transitional context, in particular for a society that has faced deep rooted prejudice and severe social inequality. Teitel (2000) has examined the development of an emerging theory of 'transitional constitutionalism' in the transitional justice sphere and notes the fundamental role that the judiciary can play in the transitional justice process by establishing the rule of law, and engendering legitimacy in the rule of law, post-conflict. In this sense, transitional constitutionalism can perform a dual role in addressing the past whilst also laying foundations for the future.

Rather than view judicial supremacy as imposing or usurping the sovereignty of the legislature, the case for a substantive rights-based conception of the rule of law would bind both the legislature and the judiciary to a set of fundamental principles from which neither could derogate. The transitional justice process could arguably present as an emerging constitutional framework within Teitel's transitional constitutionalist theory, meaning that human rights ought to acquire norm-based status *de jure* and *de facto* following a foundationalist role in any peace process or multilateral transition to liberal regime. In this sense the indivisibility of rights, and a rights-based approach would act as the new structural regime against which previous structures would be measured allowing for a systematic approach to addressing structural inequalities.

The literature suggests that addressing ESC violations in the aftermath of conflict is a contentious issue. Reparational mechanisms have become part of the established discourse which seeks to rectify the absence of ESC discussions in the transitional justice paradigm. Fuller's theory of prioritisation offers a potential framework for a more holistic approach to redistribution in the conflicted democracy where it is envisaged the court could play a critical role in holding the legislature and executive to account in ensuring that ESC violations are addressed.

### **Reconceptualising through theories of prioritisation, judicial incrementalism and deliberative democracy**

In terms of ESC adjudication, the South African example has been developed by a cautious judiciary that has employed a theory of deference or judicial restraint in order to try and strike a balance in the separation of powers and with the objective of ensuring that concerns relating to polycentricity and the allocation of budgetary resources are adequately addressed within the confines of the court's jurisprudence (Davis 2006). This approach has been both welcomed and criticised concurrently in the literature. Those who welcome the cautious approach argue that the judiciary has succeeded in striking the correct balance (King 2011) (Sunstein 2001) (Kende 2003). Cass Sunstein has suggested that the deferential standard of review in socio-economic rights cases is 'novel and exceedingly promising' and 'respectful of democratic prerogatives and of the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met.' (Sunstein, 2001, p.234, p.237). Those critical of the approach suggest that the judiciary has been over-cautious and failed to secure any substantive content of the rights protected in the Constitution, undermining the foundational and norm-based nature of the Constitution and, as a result, has failed to realise the transformative potential of the Constitution envisaged as part of the transitional framework (Pieterse 2006) (Leidenberg & Goldblatt 2007) (Mbazira 2008). Pieterse has argued that if the court's jurisprudence 'is to have any tangible significance for socio-economic rights' beneficiaries, the Constitutional Court needs to

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reverse its stance against the recognition of individually enforceable claims and to ground the affirmative remedies it awards in socio-economic rights cases in a purposive understanding of the entitlements entailed by the rights in question.’ (Pieterse, 2006, p.490).

The South African model adopts a mixture of substantive rights recognition, together with safeguards and limitation clauses contained in the constitution. Rights are also afforded protection to different degrees along the respect, protect, promote, fulfil axis (Section 7 of the Constitution). Some rights are afforded non-derogable status, such as rights relating to children.<sup>8</sup> Other rights are considered to be subject to progressive realisation such as the right to access adequate housing and the right to access health care, food, water and social security.<sup>9</sup> There is a general limitation clause under section 36 whereby rights may be limited if reasonable and justifiable in an open and democratic society.

The primacy of the Constitution is protected under section 172 whereby a court must declare that any law or conduct that is inconsistent with the Constitution is invalid and may make any order that is just and equitable in the circumstances. The declaration has no effect in law until it is confirmed by the Constitutional Court (so where a lower court makes an order the final decision on validity rests with the Constitutional Court). It is open to the lower courts to enforce an interim remedy pending the confirmation of the declaration by the Constitutional Court (section 172(2)(b)). The declaration of invalidity can be limited as to its retrospective effect (section 172(1)(b)(i)). Furthermore, similar to the ‘delayed remedy’ employed by the Canadian Supreme

Court<sup>10</sup>, section 172(1)(b)(ii) provides that judges may make an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to rectify the defect. This framework affords a great deal of flexibility to the court in how best to develop jurisprudence and potential remedies for violations within the parameters of its constitutional authority. The options of remedial action are open ended (the court may make any order that is ‘just and equitable’) and at the same time the impact of the orders can be controlled temporally (with the option to limit the retrospective effect of a declaration, suspend the prospective application in the immediate future and seek to apply interim measures in the meantime).

The great difficulty in affording flexibility in this respect relates to how the judiciary in South Africa should approach the degree of protection that ought to be afforded to those rights that are subject to progressive realisation within the states available resources on a case by case basis. Does the constitutional recognition of ESC rights in this way confer authority on the court to interfere in relation to how state resources are allocated? And, if so, is this interference workable in practice without a juridification of politics?

This concern essentially relates to the argument that such a constitutional power invites the judiciary to engage in issues of a high policy nature, and offer remedies that will simply shift around money within the respective department rather than increase overall funding (King 2011). There is the risk that adjudication will lead to the development of ESC constitutional norms on a case by case basis, potentially drawing public funds from one policy area to another without a holistic approach to resource allocation. This could for example lead to the allocation of funds from the

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<sup>8</sup> Such as the right to be protected from maltreatment, neglect, abuse or degradation; and the right to be protected from exploitative labour practices (section 28(1)(d) and (e)). See section 37(5)(c) for a table listing non-derogable rights in the Constitution. For a discussion on the rights of the child (particularly girls’ ESC rights) in the South African Constitution see Ann Skelton, ‘Girls’ Socio-Economic Rights in South Africa’ [2010] 26 South African Journal of Human Rights 141

<sup>9</sup> For example, section 26 of the South African Constitution provides for the right to have access to adequate housing and section 27 provides for the right to have access to health care, food, water and social security. The constitution further provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights (Sections 26(2) and 27(2) respectively)

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<sup>10</sup> See for example the delayed remedy employed in *Canada (Attorney General) v Bedford* 2013 SCC 72 in which the Supreme Court suspended the declaration of invalidity under section 52(1) of Canada’s Constitution Act 1982 for one year to allow Parliament sufficient time to avoid an eventual regulatory void. This case concerned the legality of prohibitions on sex workers that the court found violated the safety and security of prostitutes – the difficulty with the delayed remedy route places those at risk to remain in a state of violation during the interim period in which the declaration of invalidity is suspended. For a discussion on this case and the constitutional impact of delayed remedies see : Robert Leckey, ‘Suspended Declarations of Invalidity and the Rule of Law’ U.K. Const. L. Blog (12th March 2014) (available at <http://ukconstitutionalallaw.org/>)



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poorest in society to the wealthy. An example of this is evident in a Brazilian case where the court recognised an immediately enforceable right to the highest attainable health causing greater health inequities as the more privileged and wealthy gained access to costly health care (Ferraz 2009). In relation to this risk, King argues that it is possible 'to develop a theory of adjudication that gives us good reason to believe that when paying Paul, we are not always robbing Peter to do it' (King 2011, p.56).

King develops a theory of adjudication based on judicial restraint and incrementalism as a viable solution to ESC constitutionalisation and adjudication. Judicial restraint, he argues can be managed through the consideration of four principles that should temper the incremental development of jurisprudence: democratic legitimacy (legislative supremacy with strong judicial oversight); polycentricity (that the court have regard to the policy focussed allocation of resources and use discretion and flexible remedies); expertise (the court should exercise deference in relation to areas outside of the court's competence balanced with an approach which examines potential procedural failings); and flexibility (flexibility in terms of setting precedent for future development and flexibility in terms of remedies offered). By incrementalism, King argues that the principles of restraint will require only a very small departure from the status quo as the common law develops on an incremental basis – when dealing with issues of significant macro-policy (large scale polycentric issues), there ought to be, according to King, a significant degree of administrative and/or legislative flexibility by way of response to any judgment. King has identified South Africa as a constitutional model that provides an exemplary solution to this theory of adjudication.

It is argued that a combination of theories of prioritisation and judicial incrementalism offers a more appropriate model for addressing ESC rights in the post-conflict context than a 'one-off' reparational regime. The conceptual space through which these two theoretical approaches can be addressed can be found in the application of principles of deliberative democracy. Deliberative democracy can apply at both the micro and macro level (Tierney 2012). At the micro level,

constitutional transitions can be framed in terms of participatory and deliberative processes that are inclusive, fair, informed and seek to build consensus (Tierney & Boyle 2013). At the macro level deliberative democracy can be engaged by the institutions of state where the legislature, judiciary and executive each engage in a constitutional dialogue as states undergo transition. The adjudication of ESC rights is one such issue open to this type of dialogue whereby the court can deliberate on whether the legislature and executive are meeting international legal obligations and the state can respond by justifying actions in a transparent and democratic way. This is not necessarily to suggest that the court have the final say – with options such as structural interdicts available as remedies – however, this holistic approach is much more democratically accountable and facilitates a transparent dialogue on the state's duty to address structural inequalities. This leaves scope within a deliberative democratic forum for Fuller's theory of prioritisation to flourish between the different organs of state in a transparent way.

### Conclusion

King (2011) develops a theory of democratic legitimacy based on the principles of elite deliberative democracy (deliberation between institutions) that ensures legislative focus on rights and the protection of marginalised groups under the overarching constitutional framework. Benhabib (2013) argues that there is a place for the principles of democratic legitimacy (exercised by the legislature) and judicial oversight (exercised by the court through the constitution) - and that both these approaches can co-exist.

Benhabib (2013) identifies that representative democracy and formulation of rights through deliberation in the legislature complements a substantive rights based foundationalist approach to constitutionalism affording legally enforceable justiciable rights – and in the same vein a constitutional arrangement complements and benefits from a legislative system which engages with contextualising rights as justiciable entitlements (Habermas 1996). Without the basic foundation creating an environment for political agency a person or

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collective cannot exercise self-governance. It is argued that the basic foundation requires, at the very least, a minimum of ESR protection (as well as civil and political) in order to legitimately fulfil the other roles of autonomy required in a democracy. This is of particular importance in the transitional justice context when vulnerable and marginalised groups may be subject to majoritarian rule or political representation skewed through a consociational framework. A foundation is required to guide the legislature and executive as to human rights compliance. The constitution can act as the foundation and the court can act as the accountability mechanism should the legislature and executive fail to comply. This facilitates a culture of political accountability and justifies the use of judicial review. Within the transitional justice paradigm the constitution can be used as a tool to focus the legislature and executive on substantive rights based considerations. At the same time it can afford the court a role in ensuring the legislature and executive embrace this role moving beyond a case by case reparational approach and embracing theories of prioritisation and incrementalism.

This reconceptualisation of ESR in the transitional justice discipline helps address problems relating to reparational schemes that do not fully account for contested victimhood status, pervasive socio-economic deprivation, underlying structural inequalities in addition to the heterogeneity of victims and the wide variety of needs they may have. A more robust approach is to be found in a holistic framework that addresses ESR violations by restructuring society in a way that ensures ESR protection is embedded in the emerging constitutional framework of the transitional state.

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