THE STATE v CRIMES OF APARTHEID: THE TIMOL PRECEDENT AND POST-TRANSITIONAL JUSTICE IN SOUTH AFRICA

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ABSTRACT

The research is an exploratory study on the potential transitional justice (TJ) outcomes of reopening apartheid inquests, in a democratic South Africa. In the midst of the 2017 Timol judgement and the recently reopened Neil Aggett inquest, Wietekamp's Truth, Accountability, Reconciliation, Reparation (TARR) model is used to identify these potential outcomes. What do these developments mean for South Africa's conceptualisation and use of the 'truth'? What are the changes to 'accountability' mechanisms, and is there a variation in the country's initial reconciliation narrative? The sub-question examines which institutions have been responsive. Using transitional justice theories (restorative v retributive), primary sources such as the 1972 Inquest itself, the TRC volumes, legislation, as well as secondary sources by Antjie Du Bois-Pedain, Dunbar and McCargo: the research finds that South Africa is undergoing an accountability shift in its transitional justice discourse. In a democratic South Africa, it demonstrates a move away from the TRC's restorative model, to a court-based retributive mechanism. Subsequently, the established truth is contested in court, thus reopening narratives of reconciliation. Whether the inclusion of punitive justice has secured any form of accountability in a post-TRC democracy, remains to be seen.

Keywords: Transitional justice, post-transitional justice; truth; accountability; reconciliation; retributive justice; restorative justice

DECLARATION

This thesis contains no material which has been accepted for the award of any other degree or diploma at any university or equivalent institution and that, to the best of my knowledge and belief, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

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Finally, in memory of the men and women who fought so that we could rise - Ahmed Timol, Neil Aggett, Nokuthula Simelane, Steve Biko, Mathews Mabelane, Hoosen Haffejee, Imam Harron, Solwandle Looksmart. To all the heroes and heroines both known and yet to be known - justice continues. Aluta. Asante.

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ABBREVIATIONS AND ACRONYMS

AC	Amnesty Committee
APLA	Azanian People's Liberation Army
ASGISA	Accelerated and Shared Growth Initiative for South Africa
AU	African Union
AWB	Afrikaner Weerstandsbeweging
AZAPO	Azanian People's Organization
CGE	Commission for Gender Equality
CLS	Critical Legal Scholar
CODESA	Convention for a Democratic South Africa
COSATU	Congress of South African Trade Unions
DSO	Directorate of Special Operations
GEAR	Growth, Employment and Redistribution
HRV	Human Rights Violation Committee
ICC	International Criminal Court
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IFP	Inkhata Freedom Party
IMF	International Monetary Fund
IRMCT	International Residual Mechanism for Criminal Tribunals
MDM	Mass Democratic Movement
MK	Mkhonto we Sizwe
MPNP	Multi Party Negotiation Process
NDPP	National Director of Public Prosecutions
NGO	Non-Governmental Organization
NP	National Party
NPA	National Prosecuting Authority
OCJ	Ordinary Criminal Justice
PAC	Pan African Congress
PASO	Pan African Student Organization

PCLU	Priority Crimes Litigation Unit
PTJ	Post-Transitional Justice
RDP	Reconstruction Development Programme
RPF	Rwandan Patriotic Front
RR	Reparations Committee
SA	South Africa
SANA	South African National Archive
SAPS	South African Police Service
TAR	Truth, Accountability, Reconciliation
TARR	Truth, Accountability, Reconciliation, Reparation
TJ	Transitional Justice
TJM	Transitional Justice Mechanism
TRC	Truth Reconciliation Commission
TWAIL	Third World Approach to International Law
UN	United Nations
UNAMIR	United Nations Assistance Mission for Rwanda
VOC	Vereenigde Oostindische Compagnie
WWII	World War Two

CHAPTER ONE: INTRODUCTION, RESEARCH PROBLEM AND METHODOLOGY

1.1 Introduction and Contextual Background

The research is an exploratory qualitative study on the recent Transitional Justice (TJ) developments in South Africa. In 2017, the North Gauteng High Court ordered a reopening of the Ahmed Timol inquest[1] IQ01/2017[2], and prosecution of those implicated.[3] This set in motion a series of legal processes [4] to prosecute the only living party to the inquest, then 78-year old [5]Joao Rodrigues.[6] As a precedent[7] setting judgment, it subsequently paved the way for reopening Dr Neil Aggett's 1982 inquest in February 2020.[8]

The main research question seeks to explore the potential TJ outcomes of post-Truth and Reconciliation Commission (TRC) inquest proceedings, in a democratic South Africa. Using Wietekamp's TARR[9] model, the research identifies three outcomes. The contribution is therefore an exploration of truth, accountability and reconciliation (TAR)[10] elements of apartheid inquests and pending prosecutions, in a post-TRC[11]

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1 An inquest is a judicial inquiry in common law jurisdictions, particularly one held to determine a person's cause of death. In South Africa, S17A of the *Inquest Act 58 of 1959* is the applicable legislation.

2 The 1972 inquest will be referred to as the Timol inquest and the 2017 judgment will be referred to as the Timol judgment.

3 "Ahmed Timol was murdered - Justice Billy Mothle", *Polticsweb*, published October 12, 2017, http://www.politicsweb.co.za/documents/ahmed-timol-was-murdered--justice-billy-mothle.

4 Charging, investigation, bail applications in terms of s59A of the Criminal Procedure Act 2005(CPA), Inquest Act.

5 In 2017 he was 78. Thesis was completed in 2020.

6 Phumza Fihlani, "Timol inquest: Verdict gives hope to apartheid victims", *BBC news*, October 12, 2017. https://www.bbc.com/news/world-africa-41570110 ; Southern African Legal Information Institution (SAFLII), "The re-opened inquest into the death of Ahmed Essop Timol (IQ01/2017) [2017] ZAGPPHC 652 (12 October 2017)", http://www.saflii.org/za/cases/ZAGPPHC/2017/652.html.

7 In Law, a precedent is a binding court judgement which can only be overruled by higher courts eg Supreme, Constitutional Court.

8 Siviwe Feketha, "Neil Aggett inquest: Court hears how detainees were tortured to 'brink of death", I*OL News online*, February 11 2020, https://www.iol.co.za/news/politics/neil-aggett-inquest-apartheid-police-tampered-with-sacp-documents-ronnie-kasrils-42137708 ; Siviwe Feketha, "Neil Aggett inquest: He told me apartheid police assaulted him, reveals activist", *IOL news online*, February 10 2020, https://www.iol.co.za/news/politics/neil-aggett-inquest-he-told-me-apartheid-police-assaulted-him-reveals-activist-42493580.

9 Weitekamp, Elmar & Parmentier, Stephan & Vanspauwen, Kris & Valiñas, Marta & Gerits, Roel, "How to deal with mass victimization and gross human rights violations. A restorative justice approach", NATO Security Through Science Series , *E Human And Societal Dynamics*, (2006) 13. 217.

10 Truth, Accountability Reconciliation (TAR) implications - from Wietekamp's TARR model of Transitional Justice. The study will only consider the TAR implications.

11 Discussed in chapter four - it refers to countries which have undergone successful/passive political transitions.

democratic[12] South Africa. The sub-question examines which institutions were responsive in both the 1996 TRC led process, and the 2017 Timol judgment [13]. The institutional inquiry is necessitated by the country's post-TRC democratic[14] context, and its reliance on Chapter Nine Institutions[15]. Moreover, TJ mechanisms[16] create or require institutions to operate. In the absence of the TRC's involvement since 2002, which institutions have been involved in the inquests and pending prosecutorial developments?

The project is a descriptive and exploratory desktop study of South Africa's TJ developments in a democratic dispensation. Acknowledged as a set of judicial and non-judicial mechanisms of accountability and institutional reform post-conflict,[17] the research contextualises the country's recent TJ developments. It is therefore a qualitative contribution aimed at understanding the challenges of South Africa complying with the 2017 High Court judgment to charge, and prosecute former apartheid officials[18]. To this end, the Timol judgement introduces a shift in the country's hitherto approach to, and landscape of transitional justice.

Dealing with historic accountability past moments of political transitions, is an inherent feature of TJ. In 2005, Spain revised its position on the 1972 amnesty provision which protected former officials of the Franco regime. After the Genocide in 1994, Rwanda continued accountability processes well into 2012[19]. With these examples in mind, post-transitional justice[20] is thus defined as a continuation and sub-field of TJ.

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12 Referring to South Africa's government model since 1994.

13 Ibid at note 3.

14 A democratised country refers to a country that has transitioned to democracy. It also entails institutional transformation that allows for access and mobility of different races and genders by a democratic government.

15 Chapter Nine of the South African Constitution established institutions to "strengthen constitutional democracy": the Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; the Electoral Commission; and an independent broadcast regulation authority. Together, these institutions are intended to watch over the other organs of government, ensuring that their workings are made transparent and accountable to citizens, and that the government embodies democratic and constitutional values.

16 Discussed in the theoretical framework, TJ mechanisms vary from truth commissions, to prosecutions, reparation programmes, lustrations, amnesty etc.

17 Anja Mijhr, "Transitional Justice: Between Criminal Justice, Atonement and Democracy", *SIM Special 11*, Utrecht 2015.

18 Brenda Masilela, "Joao Rodrigues loses second bid to stay prosecution for Ahmed Timol murder", *IOL News* , September 19, 2019. https://www.iol.co.za/news/south-africa/gauteng/joao-rodrigues-loses-second-bid-to-stay-prosecution-for-ahmed-timol-murder-33209046.

19 Both examples are discussed in chapter two.

20 Continuation of transitional justice process after the initial political transition.

South Africa's democracy was made possible by a negotiated amnesty for "acts and omissions committed for a political motive or purpose" ,amongst other agreements.[21] Amnesty was one of the negotiated outcomes inserted in the post-amble of the Interim Constitution, and in 1995, the *Promotion of National Unity and Reconciliation Act*[22] was passed to give effect to the provision. To oversee the process, the Act also established the TRC in 1996.[23] In exchange for amnesty, the founding TJ institution required that individuals provide full disclosure of acts committed during 1960-1994. When it concluded its operations in 2002, the Commission submitted its findings on atrocities committed in the time frame, as well as recommendations for the democratic State.[24] As evidenced by the Timol judgement, one of these recommendations, namely accountability, has been tested in a democratic court.

In 2017, the North Gauteng High Court reopened the 1972 inquest and overruled the findings of the initial inquest. In 1971, Ahmed Timol died in detention, and his death was ruled as a suicide by a 1972 inquest.[25] The 2017 judgment overturned this ruling and subsequently ordered that the only living implicated former apartheid official, Joao Rodrigues, be investigated and prosecuted.[26] The study therefore seeks to explore the inclusion of a prosecutorial process to resolve apartheid crimes 24 years after democracy began in 1994. The ruling was made 15 years after the TRC concluded its operations in 2002. This suggests that the TRC accountability recommendations were not implemented, and that judicial accountability has been delayed for crimes of apartheid until 2017. Relying on Wietekamp's Truth, Accountability, Reconciliation and Reparations (TARR) model[27]- the main question is what are the potential TJ outcomes of reopening apartheid inquests outside the TRC framework?

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21 Antjie Du Bois- Pedain, *Transitional Amnesty in South Africa, (*United Kingdom: Cambridge University Press, 2007), 2-16.

22 Hereafter referred to as the Reconciliation Act.

23 Ibid, 5.

24 Ibid, 6.

25 2017 Inquest: para 335.

26 Ibid. Brenda Masilela, "Joao Rodrigues loses second bid to stay prosecution for Ahmed Timol murder", *IOL News* , September 19, 2019. https://www.iol.co.za/news/south-africa/gauteng/joao-rodrigues-loses-second-bid-to-stay-prosecution-for-ahmed-timol-murder-33209046.

27 Weitekamp, Elmar & Parmentier, Stephan & Vanspauwen, Kris & Valiñas, Marta & Gerits, Roel. "How to deal with mass victimization and gross human rights violations. A restorative justice approach." NATO Security Through Science Series , *E Human And Societal Dynamics* (2006). https://www.researchgate.net/publication/237148641_How_to_deal_with_mass_victimization_and_gross_human_rights_violations_A_restorative_justice_approach

The outcomes are particularly noted as potential because the developments are still unfolding. Thus far, only two inquests[28] have been reopened, and prosecutions are still pending. The model guides the inquiry by suggesting three inherent outcomes of TJ processes. This is what makes the TRC an important primary source. The study first identifies the truth, accountability and reconciliation outcomes of the TRC as the founding TJ institution in South Africa. As a form of continued justice, these outcomes are then contextualised and studied in a post-TRC democratic South Africa. The sub question investigates which institutional pathways were created through the TRC recommendations, and which institutions have been responsive in the recent legal developments?

1.2 Background to the Problem

Apartheid was the National Party's (NP) governing system from 1948-1994.[29] The system was a continuation of racial oppression and dispossession which ensued under the Union years from 1910-1948.[30] This was also preceded by centuries of colonial conquests marked by the arrival of the Dutch East Indies Company (VOC)[31] in 1652. Racial conflict and subjugation have thus always been a feature of South African life historically. Its legacy shaped geographical territories, and an economy which remains gendered and racialised to this day.

In 1948, the NP was elected by a small margin championing a system of separation and a false sense of equality.[32] Centred on principles of Afrikaner Nationalism, DF Malan proposed a system where races would live separately under independent governments for the bantu (black people), and white people.[33] Black people (African natives, coloured people and Asians) were confined to 7-13% of the land [34] and

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28 Timol in 2017 and Aggett in 2020.

29 Beatrice Nicolini, "The Republic of South Africa through contemporary history: the reconciliation process", Dissertation, Universita` Cattolica del Sacro Cuore – Milano, 2014.

30 TRC Vol 3, National Chronology: page 12 ; Nicolini, "South Africa through contemporary history": 104.

31 Verenigde Oostindische Compagnie. The Dutch East India Company (United East India Company) was a megacorporation founded by government-directed amalgamation of several rival Dutch trading companies in early 17th century.

32 Nicolini, "South Africa through contemporary history": 107.

33 Ibid, 109.

34 Tembeka Ngcukaitobi, *The Land is Ours: Black Lawyers and the Birth of Constitutionalism in South Africa,* (Cape Town: Penguin House) 2018: 10. *The Native Land Act 1913* was the first major piece of segregation legislation passed by the Union Parliament. It allocated only about 7% of arable land to Africans and left the more fertile land for whites.

industrial unskilled work.[35] The system introduced a host of laws that ensured the social separation of races, and economic inequality. Resistance to these laws and previous systems had always been present, but intensified in the 1960s.[36]

Apartheid thus became a tyrannical system of violence and political suppression.[37] The period is marred by executions, such as the 1960 Sharpeville massacre, the 1976 Soweto uprising, disappearances, unlawful detention and suspicious suicides concealed by members of the Security Branch.[38] By the late 1980s, the NP could no longer contain the violent state of affairs, had lost international support ,and was ready to negotiate. In 1990, negotiations were underway, but ideological differences were stark and fatal. The road to democracy was consequently blemished by killings such as the seven-day war, Sebokeng massacre, Daveyton and Afrikaner Weerstandsbeweging (AWB) attacks.[39]

South Africa's successful transition would not have been possible without a negotiated amnesty.[40] The political stalemate between the NP and liberation movements necessitated dialogue. Retention of private property and amnesty, were two of the crucial points the NP was not willing to compromise on. Furthermore, a Nuremburg prosecutorial approach was also not an option.[41] Inserted in the interim Constitution was a provision for acts or omission committed with a political motive and purpose.[42] The TRC (the Commission) became the transitional justice mechanism (TJM) tasked with granting amnesty, making sense of the above past (1960-1994), and determining what forms of justice would be adequate.[43]

The Commission fulfilled this task through three committees: The Committee on Human Rights Violations (HRV), the Amnesty Committee (AC) and the Committee on Reparation and Rehabilitation (RR).[44]The amnesty agreement influenced the basis,

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35 Nicolini, "South Africa through contemporary history": 108.

36 Nicolini, "South Africa through contemporary history": 110. The State increasingly began to use overt violence to stifle resistance.

37 Ibid.

38 Discussed in chapter three: Apartheid and the Truth and Reconciliation Commission.

39 Ibid: 108.

40 TRC vol 1: page 5-7. Du Bois- Pedain, *Transitional Amnesty*,7.

41 Ibid.

42 Louise Mallinder, "Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa", Working Paper No.2. From Beyond Legalism: Amnesties, Transitions and Conflict Transformation, *Institute of Criminology and Criminal Justice*, Queens University Belfast, 2009: 6.

43 Ibid: 7.

44 Du Bois- Pedain, *Transitional Amnesty*,8; Nicolini, "South Africa Through Contemporary History": 208.

and form of accountability for historical crimes. In exchange for impunity, it entailed full disclosure of acts committed by an individual, to the AC.[45] By the time it concluded operations in 2002, the Committee released its findings in seven volumes. They detailed the depth of atrocities committed from 1960-1994, and recommendations for justice post-operations. Of importance to the research, was the recommendation to investigate and prosecute individuals who did not apply for, or were denied amnesty.[46] The AC subsequently handed over 300 cases to the new state for prosecution.[47] The 1972 Timol inquest was one of them.[48]

In 1996, Hawa Timol appeared before the Human Rights Violation Committee. Her hope was that the wheels of justice had started turning on the suspicious death of her late son, Ahmed Timol.[49] In 1972 an inquest into his death was launched and it was ruled as a suicide.[50] The alleged 'accidental' deaths of Timol, Neil Aggett[51], Hoosen Haffejee[52], Babla Saloojee[53], Matthews Mabelane[54], the alleged 'natural' deaths of Nicodemus Kgoathe, Solomon Modipane and Jacob Monnakgotla[55], the disappearance and murder of Nokuthula Simelane following her abduction by the Security Branch in 1983- are just some of the many suspicious inquests and cases lodged with the TRC.[56] No police officials implicated in these deaths appeared before the TRC.

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45 Du Bois-Pedain, *Transitional Amnesty in South Africa*, 9.

46 TRC volume 5: page 309.

47 Du Bois-Pedain, *Transitional Amnesty in South Africa*, 54.

48 Imtiaaz Cajee, *Timol: A Quest For Justice*, (Johannesburg: STE Publishers, 2005), 12.

49 TRC: Human Rights Violation, "Hawa Timol's Testimony" , 30 April 1996, GO/O173 Johannesburg, http://sabctrc.saha.org.za/originals/hrvtrans/methodis/timol.htm.

50 Southern African Legal Information Institution (SAFLII), "The re-opened inquest into the death of Ahmed Essop Timol (IQ01/2017) [2017] ZAGPPHC 652 (12 October 2017)", http://www.saflii.org/za/cases/ZAGPPHC/2017/652.html.

51 Dr Neil Aggett was a White South African doctor and trade union organiser who died while in detention after being arrested by the South African Security Police in 1982.

52 Dr Hoosen Haffejee died on the August 3, 1977 - three days after security police arrested him under the Terrorism Act at the Brighton police station in Durban, KwaZulu-Natal. His inquest was ruled as a suicide.

53 Babla was the 4th detainee to die in detention during the apartheid era, his death was ruled a suicide during an inquest in 1996.

54 Allegedly jumped from the tenth floor of John Vorster. His inquest was ruled as suicide.

55 The Commission heard of human rights violations that occurred in the rural and homeland areas in the late 60s. Three of these detainees died in detention. They were Mr Nicodemus Kgoathe, Mr Solomon Modipane and Mr Jacob Monnakgotla. Each had been detained because of his involvement in local disputes about chiefly powers.

56 TRC volume 3: page 12; List of victims.

Many families and victims were not satisfied with the TRC's accountability framework.[57] The TRC, parliament , victims and surviving families, all agreed that amnesty had been to big a price to pay for the truth. They pursued justice outside of the TRC following its dissolution in 2002. Ahmed Timol's family sought to overturn the 1972 suicide inquest. With the help of private firms and Non-Governmental Organisations (NGOs), they sought justice[58] until the matter was heard by the North Gauteng High Court in 2017. The court made a new finding: that Ahmed Timol did not in fact jump from the tenth floor of John Vorster as alleged by the 1972 inquest.[59] Given the physical evidence that was ignored in the initial proceedings, the court found that he must have been pushed. The court thereafter ordered that the only living former official implicated, Joao Rodriquez- be investigated and prosecuted.[60] On the basis of his testimony and available evidence, he was charged for perjury, and as an accessory after the fact for the murder of Ahmed Essop Timol.[61]

In 2018, Rodrigues applied for, and was granted R2 000 bail. In the same year, he applied for prosecutions to be stayed. At the time of writing, his stay application was yet to be heard in court.[62] According to the ordinary criminal justice system, the courts need to decide on this matter first, before it can proceed to charge and prosecute in terms of the 2017 judgment[63]. In 2020, both matters were yet to be heard in court. The reopening of such an inquest was the first of its kind. It set precedent for the reopening of Neil Aggett's 1982 inquest in February 2020, applications to reopen Imam Harron's

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57 Du Bois- Pedain, *Transitional Amnesty*,217.

58 Cajee, *Quest for Justice*, 25.

59 Timol Inquest (IQ01/2017): para 335.

60 Ibid.

61 Ibid: para 334.

62 Zelda Venter, " #AhmedTimol: Joao Rodrigues wants permanent stay of prosecution", *IOL News*, March 27, 2019. https://www.iol.co.za/news/south-africa/gauteng/ahmedtimol-joao-rodrigues-wants-permanent-stay-of-prosecution-20115410 ; Brenda Masilela, "Joao Rodrigues loses second bid to stay prosecution for Ahmed Timol murder", *IOL News*, September 19, 2019. https://www.iol.co.za/news/south-africa/gauteng/joao-rodrigues-loses-second-bid-to-stay-prosecution-for-ahmed-timol-murder-33209046.

63 Politics Web. *Rodriques v The National Director of Public Prosecutions in South Africa and Another*, Case number: 76755/2018, North Gauteng High Court. https://www.politicsweb.co.za/documents/rodrigues-stay-of-prosecution-application-the-high. J Joubert. *Criminal Procedure Handbook*. (Cape Town: Juta, 2017).

1969 inquest, investigations into the PEBCO three,[64] and similar crimes of apartheid in a democratic post-TRC South Africa.[65]

1.3 Rationale and Aims of the Study

As an exploratory study, the aim of the research is therefore an attempt to understand the potential TAR (truth, accountability, reconciliation) outcomes of reopening apartheid inquests in a democratic South Africa. The rationale is to investigate what it means for South Africa's conceptualisation and use of the truth, changes in accountability mechanisms/platforms, as well as possible variations to the country's reconciliation narrative outside of the TRC.

The developments are separated from the initial TRC processes by over a decade, and introduces a discourse that is different to that of the TRC in the 1990s. From the Commission's restorative accountability model (explained in more detail below) which was rooted in truth recovery, reconciliation, and minimal to no judicial prosecutions- the aim is to understand the change or adaptation of accountability models, to deal with apartheid crimes. Furthermore, the intention is to explore the discourse associated with potential prosecutions in the new society.

Amnesty and reconciliation were crucial for South Africa's democratisation and early conceptualisation of democracy. The research therefore endeavours to understand some of the challenges around amnesty and reconciliation, in what appears to be a shift [66] towards non-restorative or punitive measures. It has taken more than a decade of unrelenting victim's agency to get a just ruling for Ahmed Timol. The main site of justice or conflict resolution has shifted from the founding institution, which is the TRC, to the courts. Given the way in which Joao Rodrigues has managed to delay prosecutions through bail, and intends on staying his proceedings permanently, the

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64 The PEBCO Three were three black South African anti-apartheid activists – Sipho Hashe, Champion Galela, and Qaqawuli Godolozi – who were abducted and subsequently murdered in 1985 by members of the South African Security Police.

65 Canny Maphanga, "State to reopen inquest into death of anti-apartheid activist, Dr Hoosen Haffejee.", *News24Online,* September 28, 2018. https://www.news24.com/SouthAfrica/News/state-to-reopen-inquest-into-death-of-anti-apartheid-activist-dr-hoosen-haffejee-20180928 ; New Frame, Justice for Hoosen Haffejee still on hold. *Daily Maverick online*. August 19, 2019. https://www.dailymaverick.co.za/article/2019-08-16-justice-for-hoosen-haffejee-still-on-hold/.

66 Developments or changes in the field. Thomas Obel Hansen. "The Vertical and Horizontal Expansion of Transitional Justice: Explanations and Implications for a Contested Field". Theories of/for Transitional Justice, Susanne Buckley-Zistel, ed., Oxford University Press, 2012. https://ssrn.com/abstract=1994382.

aim is to explore which institutions are primarily involved in South Africa's latest TJ process. Additionally, what are the legal challenges in articulating and delivering accountability for historical crimes in the new democracy? Overall, the contribution seeks to add or acknowledge the prosecutorial developments to the TRC's restorative model in democracy.

1.4 Problem Statement and Research Questions

South Africa occupies a renowned position in the field of TJ globally.[67] It is hailed as the country which chose reconciliation over retaliation.[68] Its liberal constitution is lauded for its respect and protection of human rights, and just rule of law.[69] Yet all these successes are interrogated by the 2017 Timol judgment, which poses challenging questions to a democracy built on restorative principles. The study will therefore explore the following research question:

What are the potential transitional justice outcomes of reopening apartheid inquests, in a post-TRC[70] democratic South Africa?

The sub-question to the above investigation is:
Which institutions were involved in the initial TRC model, and are currently responsive in the inquest proceedings, and pending prosecutions?

1.5 Conceptual Clarification

This section will briefly outline the main concepts that underpin the study.

1.5.1 Accountability

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67 Kobina Egyir Daniel, "Amnesty as a Tool for Transitional Justice: The South African Truth and Reconciliation Committee in profile", (LLM dissertation, University of Pretoria, 2001) .

68 Epilogue of the Interim South African Constitution.

69 Former Deputy Chief Justice Dikgang Moseneke, "Reflection on South African Constitutional Democracy- Transition and Transformation*", Key note address at the MISTRA TMALI UNISA Conference: 20 years of South African Democracy: where to now?* November 12,2014.

70 Countries which have already underwent a successful political transition. In this state, countries have proceeded to the institution building stage.

In the context of TJ, accountability refers to a process that is largely dependent on the overall objective of a transition, political contexts and platform (court/commission).[71] The intention is to address historical conflict or violations. Ricardo Blaug's definition of accountability recognises two important components in any circumstance.[72] The first is scrutiny, that is, who can be made to explain their actions; while the second is sanction, that is, what consequences will they face?[73] The accountability question in the study assesses who was made to account by whom, and how the process was overseen in relation to the prevailing conditions or moments of transitions.

1.5.2 Amnesty

Amnesty refers to a pardon extended by the government to a group or class of people, usually for a political offense.[74] It is the act of a sovereign power officially forgiving certain classes of people who are subject to trial, but have not yet been convicted. Where a suspect has been trialled and convicted, a pardon is the associated process for exoneration. [75] In the South African context, providing amnesty promised protection from criminal prosecution, from civil claims[76], and extinguished liability in exchange for full disclosure by the perpetrators.[77]

1.5.3 Democracy

Originating more than 2 400 years ago as a "rule of the people"[78], the notion of democracy adopted in this research is centred on democratic participation through general elections ,and parliamentary representation. It adheres to principles of a liberal democracy such as rule of law, respect for human dignity/individual rights, equality,

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71 Duncan McCargo, "Transitional Justice and its Discontents", *Journal of Democracy* Volume 26, Number 2 April 2015, 7.
72 McCargo, "Transitional Justice and its Discontents", 2015, 9.
73 Ibid: 7-8.
74 Mallinder, "Indemnity, Amnesty and Pardons in SA", 64; TRC vol 1: 47.
75 Daniel, "Amnesty as a transitional tool", 12.
76 Mallinder, "Indemnity, Amnesty and Pardons in SA", 64; TRC vol 1: 48.
77 Du Bois-Pedain, *Transitional Amnesty*, 15.
78 Anja Mijhr, "Transitional Justice: Between Criminal Justice, Atonement and Democracy", *SIM Special* 37, Utrecht 2015

checks, balances and separation of power [79]. This is in line with Teitel's[80] second phase[81] of TJ and Huntington's[82] third wave of global democratisation.

Post-conflict societies such as Chile (1980s) and South Africa (1994) in this period, transitioned to liberal democracies[83] ,which incorporated the above values into democratised state institutions.[84] Emphasising the TJ link to democracy is a recent approach where the field makes a stronger correlation between TJ mechanisms, or models of accountability, and the quality of democracies they produce. The supported approach acknowledges the link between TJ processes, improving civic trust in the government, and building state institutions post-conflict.[85] Lastly, consolidated democracies are democracies which have been established for a significant period, where democracy is the "only game in town" or the accepted form of government.[86]

1.5.4 Discourse

Discourse is generally used in politics to refer to text or communication by an actor to communicate specific data, or knowledge.[87] Academically, discourse is associated with a particular speech act, for example, conversations, broadcasted political speech, media publication, jargon (medical, legal), and other interconnected networks of diverse social practices or genres.

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79 Anderson, "Transitional Justice and Rule of Law", 7.

80 Teitel, Ruti G. 2003. "Transitional justice genealogy", *Harvard Human Rights Journal*. 16 (spring): 69-94.

81 Teitel uses phases to describe the periodization of the various political and legal periods. There are no acoustic separations dividing the phases, they may overlap and at times coexist. The era or phases are divided into three categories, with each producing specific models and forms of accountability for transitional justice.

82 American political scientists whose configurations of democracy as "'waves", conceptualises its evolution. Philippe Schmitter. Democracy's Third Wave - Samuel P. Huntington: The Third Wave. Democratization in the Late Twentieth Century. 1993 (Norman and London: University of Oklahoma Press, 1991. Pp. xvii, 366.

83 Liberal democracy is a political ideology and a form of government in which democracy operates under principles of classical liberalism e.g. elections , separation of powers, rule of law, market economy with private property etc. Liberal democracies often draft Constitutions to define the system in practice.

84 Teitel, "TJ Genealogy":82.; Dudley Knowles, "Liberalism and Democracy Revisited." Journal of Applied Philosophy 12, no 3 (1995): 283-92. www.jstor.org/stable/24354131.

85 Valerie Arnould and Filipa Raimundo, "Studying the impacts on transitional justice on democracy: Conceptual and methodological challenges", *paper prepared for presentation at the 7th ECPR General Conference,* September 4-7, *2013:* 4; Reiter Bernd, "Theory and Methodology of Exploratory Social Science Research", *Government and International Affairs Faculty Publications*, 2017: 132. http://scholarcommons.usf.edu/gia_facpub/132.

86 Mijhr, "TJ and Democracy": 28; Dunbar, "Consolidated Democracies", 2011: 17.

87 Norman Fairclough, "The dialectics of discourse", *Textus,* 2001, 231-242. https://www.researchgate.net/publication/309384491_The_dialectics_of_discourse.

An order of discourse, is a social structuring of semiotic differences; a particular social ordering of relationships among different ways of making meaning; and the way in which diverse genres and discourses are networked together.[88] To this end, the use of discourse in the study is used rather restrictively to focus on the various narratives around reconciliation, restorative and retributive justice in South Africa. Furthermore, it also refers to the power and knowledge institutions created by an accountability process as a social practice. In other words the discourses and narratives created by truth commissions, and pending prosecution.

1.5.5 Institutions and Democracy

Using institutions as structural units of analysis in TJ is a recent approach, which recognises the practical shortcomings of a highly theorised field.[89] In the current third phase, institutions are broadly recognised as government, organisations, law, discourse, and related power structures whether implicit or explicit.[90] The democracy connection, according to Raimundo and Arnould,[91] is the public trust and participation element required for both conflict resolution, and state building in a democracy.[92] Each TJ model (restorative/retributive) establishes an institutional pathway of [93] mechanisms (Truth Commissions/Courts), which are often the foundations of new regime eg democracy. They facilitate accountability processes, initiate or work with other institutions to establish social, and power knowledge networks. The power knowledge networks create pathways or transitional consequences that are more visible after the initial transition and determine the quality of the new system. In terms of the research, institutional pathways can be identified in the truth commission's recommendations, the Constitution, public narratives, and legislation.[94]

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88 Ibid.

89 Arnould and Raimundo: 2.

90 Geoffrey Hodgson, "What are Institutions", *Journal of Economic Issues*, Vol XL number 1, March 2006, 218-232.

91 Ibid, 220.

92 Valerie Arnould and Chandra Lekha Sriram, "Pathways of impact: How Transitional Justice impacts democratic Institution building," *Impact of Transitional Justice on Democratic Institution-building policy paper, vol1,* October, 2014.

93 V Arnould and F Raimundo, "Studying impact", 5.

94 Ibid, 6.

1.5.6 Ordinary Criminal Justice

Ordinary criminal justice (OCJ) refers to a country's observed criminal justice process for the general public, and ordinary crimes.[95] Processes or actions instituted in this framework are in accordance with general laws and regulations. OCJ is adjudicated by the courts or similar tribunals of justice which function like courts (commissions of inquiry, arbitrative hearings).[96] In an ordinary justice system, the rule of law treats everyone equally, and no special crimes exist in this legal framework.[97] South Africa's criminal justice system is a Roman Dutch/English law system. It is administered through the Constitution, *Criminal Procedure Act 1996* (and correlate legislation e.g. *Sexual offences Act* etc) by, and through, the courts of law.[98]

1.5.7 Reconciliation

In South Africa, reconciliation broadly entailed peace and nation building towards a transformed and equal society, built on democracy and respect for human rights.[99] In terms of the study however, it is interpreted rather narrowly as a restorative socio-political tool for cohesion, and refers to racial or social reconciliation. It entails the country's progressive nation building and healing objectives. Built on an accountability process of restorative justice, what would prosecutions mean for the unifying narrative? [100]

1.5.8 Restorative Justice

Restorative justice is a theory of justice that emphasises repairing the harm caused by criminal behaviour.[101] It is best accomplished through cooperative processes that allow all willing stakeholders to meet and engage. Drawing on principles of Ubuntu,[102] the South African definition and goal was to restore broken relations between victims,

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95 Eric Posner & Adrian Vermeule, "Transitional Justice as Ordinary Justice as Ordinary Justice" University of Chicago Public Law & Legal Theory Working Paper No. 40, 2003.

96 Posner & Vermeule, "TJ as Ordinary Justice", 2003: 5-6.

97 Ibid: 6-7.

98 J Jourbert. *Criminal Procedure Handbook*, 2017: 12.

99 Founding provisions/Preamble of the Promotion of National and Reconciliation Act 1995.

100 Jasmina Brankovic, "Accountability and National Reconciliation in South Africa", *Ediciones InfoJus: Derechos Humanos* 2, no. 4 (2013): 55–86.

101 David Anton Hoogenboom, "Theorizing 'Transitional Justice'",(PhD Dissertation The University of Western Ontario,2014), 133.

102 An African principle of humanity which believes in the interconnectedness of individuals. *"Motho ke motho ka batho"*- I am because you are, you are because we are.

and perpetrators.[103] The focus was more on healing the victim, than punishing the perpetrator. According to the TRC, this can lead to transformation of people, relationships and communities.[104]

1.5.9 Retributive Justice

Retributive justice is a theory of justice which holds that the best response to a crime is punishment proportional to the offense inflicted.[105] The justification is that the offender deserves punishment. A defining feature of retributive justice is that offenders are punished, and are therefore seen to 'pay' for what they have done. Examples include spending time in prison, providing material compensation to victims, or doing community work. Prevention of future crimes (deterrence) or rehabilitation of the offender, are not considered in determining such punishments.[106] Retributive justice in this context, refers to the Nuremburg accountability model of punitive justice. This form of justice is usually associated with a country's ordinary criminal justice system.

1.5.10 Rule of Law

The literature does not reflect one set definition of the rule of law,[107] but the study relies on the United Nation's (UN) expanded version. It encompasses the laws, institutions[108], procedures that ensure transparent, effective, accountable governance. It also includes substantive human rights norms that ensure an accessible, fair and equitable government.[109] Rule of law development programmes include wide legislative and institutional reform; capacity building efforts; court administration; judicial and prosecutorial training. They are all aimed at expanding the "supply" side of justice, as well as supporting human rights litigation, advocacy, and public education.[110]

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103 TRC volume 1: 7 and 8.
104 TRC vol1: 8.
105 Hoogenboom, "Theorizing TJ" , 2014: 122.
106 Hoogenboom, "Theorizing TJ", 123.
107 Elizabeth Andersen, "Transitional Justice and the Rule of Law: Lessons from the Field", 47 Case W. Res. J. Int'l L. 305, 2015. Available at: http://scholarlycommons.law.case.edu/jil/vol47/iss1/21.
108 Courts and other semi-judicial tribunals like Truth Commission.
109 Anderson, "Transitional Justice and Rule of Law", 3.
110 Ibid: 4,5.

The focus in the study is on how the rule of law and its instruments, (institutions/legislation) are used to hold perpetrators of past wrongdoings accountable. It also examines the narrative created by semi-judicial (TRC) and judicial (courts) mechanisms. Furthermore, institutional preparedness of courts in democracy is considered.

1.5.11 Truth

The truth refers to the uncovered facts, and peoples experiences of events post-conflict.[111] Truth recovery is generally the mandate of truth commissions globally, and as a relative notion, is categorised into four groups. The forensic, the narrative, social dialogue and restorative truth. The categories capture different experiences of a country's history or event.[112]

Once concepts have been defined in the conceptual clarification, the theoretical framework illustrates how these concepts will apply in the study.

1.6 Theoretical Framework

As an exploratory project seeking to understand an unfolding phenomenon, the research is merely an application of existing TJ models and literature. As such, the study is descriptive and at this stage, only contextualises and does not seek to create any new model of justice. In line with the objectives of the study, the legal aspects of TJ are emphasised and juxtaposed with South Africa's initial restorative discourse for the first time.

The research will use a combination of theoretical frameworks within TJ namely retributive and restorative theories of TJ, and post-transitional justice (PTJ). The latter (PTJ) is merely a continuation and subfield of TJ, albeit under different circumstances. Wietekamp's model is generally used in the context of restorative justice theories to identify TARR elements or outcomes of a TJ process.[113] It is South Africa's initial TRC restorative process that makes the model applicable to the study, and suitable for

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111 Eric Brahm, "Uncovering the Truth: Examining Truth Commission Successes and Impact." *International Studies Perspectives* 8, no. 1 (2007): 16-35.

112 Ibid: 17.

113 G. Zyebri & Jernej Lertner Cernic, "Transitional Justice Processes and Reconciliation in the Former Yugoslavia: Challenges and Prospects", *Nordic Journal of Human Rights*. 2015, 33. 132-157; Mary Elizabeth Aspinal & Regina, Saskatchewan, "Factors Contributing to Support for Reparation Following Mass Violence: The Case of Serbia", Master of Arts Thesis, University of Regina, 2016.

analysing the unfolding TJ developments. What is suggested in the research is that the inquests are a continuation of some of the TRC's outcomes. A genealogical approach (study of origins) is therefore necessary, and inherent in any historical analysis. It also features particularly in Teitel's three TJ phases. The aim of the phases are simply to note and follow the evolution of the TJ field in chapter two. The intention of the phases is to suggest where South Africa's TJ discourse is globally, to frame South Africa's historical context, as a build up to the post-TRC developments.

1.6.1 Transitional Justice

TJ may be defined as the conception of justice associated with periods of political change,[114] or as the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses.[115] Second, it is associated with "political decisions made in the immediate aftermath of a transition. These decisions are directed towards individuals on the basis of what they did, or what was done to them under the earlier regime".[116] Finally, it is a set of judicial and non-judicial mechanisms of dealing with the past, accountability and justice for countries post- conflict (UN). [117] According to Paige Arthur, these definitions locate the nature of TJ in three distinct spheres: (1) in the sphere of justice (accountability/rule of law), (2) in the sphere of the measures used in dealing with the past, and (3) in the sphere of government decisions (institutions).[118] The preferred definition in the study is a set of judicial and non-judicial mechanisms of dealing with the past, accountability and justice for countries post- conflict.[119]

Within the framework of TJ, Wietekamp's TARR model is used as a method of analysis.[120] Mainly applicable to restorative processes, it arranges the above definitions into a heuristic framework for identifying TJ outcomes. In full, the outcomes

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114 Posner & Vermeule, "TJ as Ordinary Justice", 2003: 7; Hoogenboom, "Theorizing TJ" , 2014: 17.

115 Office of the High Commissioner of Human Rights (2009), Analytical Study on Human Rights and Transitional Justice, A/HRC/12/18, Geneva: United Nations.

116 Posner & Vermeule, "TJ as Ordinary Justice" 2003: 8.

117 United Nations Human Rights Office of the High Commissioner, "Rule of Law - Transitional Justice", United Nations. https://www.ohchr.org/EN/Issues/RuleOfLaw/Pages/TransitionalJustice.aspx.

118 Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31(2) (2009): 321–367.

119 United Nations Human Rights Office of the High Commissioner, "Rule of Law - Transitional Justice", United Nations, https://www.ohchr.org/EN/Issues/RuleOfLaw/Pages/TransitionalJustice.aspx.

120 Weitekamp, Elmar & Parmentier, Stephan & Vanspauwen, Kris & Valiñas, Marta & Gerits, Roel: "How to deal with mass victimization and gross human rights violations. A restorative justice approach" , *NATO Security Through Science Series , E Human And Societal Dynamics*, (2006) 13. 217.

are truth, accountability , reconciliation and reparations (TARR). TJ models are either restorative ,retributive or both. These models create mechanisms such as courts, and truth commissions. Court prosecutions are judicial TJ mechanisms, while truth commissions, dialogue, reparations, are considered non-judicial TJ mechanisms.[121] Prosecutions are associated with punitive or retributive justice, while Commissions are associated with restorative justice, which intends to repair and not punish. The TARR outcomes are inherent in both judicial and non-judicial TJ mechanisms.

The line between judicial and non-judicial mechanisms, however, is not always clear and often overlaps depending on the context and purpose of TJ.[122] Whether restorative or retributive justice model, all TJ processes post conflict have to uncover the truth about the past, create accountability mechanisms and establish a common narrative. The study will only focus on the TAR outcomes of the TRC, and contextualise them in the Timol developments. The TARR model therefore operationalises the research, and sets clear targets for the research (truth, accountability, reconciliation and reparations) of what to look for in the South African proceedings.[123] The sub-question compliments the process by suggesting where to look for these targets (Institutions).

The above model and definitions illustrate an ongoing debate within TJ. Are transitions fixed and if not, at what point would another begin? [124] This conflict is exemplified by Teitel's overlapping phases. As a product of the prevailing post-conflict conditions, Teitel identifies three genealogical phases of development in TJ. Discussed in the second chapter, the phases not only provide a clear timeline of events, but they discuss important normative assumptions of the field such as time, and transitional moments.[125]Additionally, as a post conflict human rights instrument, the aim is to suggest where the field currently is locally and globally.

In Teitel's *Genealogy,* phases are acoustic timelines or periods in the TJ field. The various accountability mechanisms (courts, truth commissions), and the substance of

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121 Weitekamp, Stephan et al 2006, 5.

122 Also used as a method in : Elmar Weitekamp, Stephen Parmentier, Stephan. "Restorative justice as healing justice: looking back to the future of the concept:. Restorative Justice". 2013. https://www.researchgate.net/publication/305744715_Restorative_justice_as_healing_justice_looking_back_to_the_future_of_the_concept.

123 Ibid.

124 Teitel, "TJ Genealogy", 70.

125 Ibid: 84.

justice secured throughout the political transitions, is delineated in the phases. When do transitions stop, and at what point do we stop seeking justice? These are some of the assumptions that the field struggles with in its third phase, and in contexts beyond moments of political transitions. They will be discussed in chapter two.

1.6.1.1 Wietekamp's TARR Model

The main question of the study, which examines the potential TJ outcomes of reopening apartheid inquests and pending prosecutions, is guided by the TARR model. The definition of TJ, namely, a set of judicial and non-judicial mechanisms for accountability and reform post-conflict, is embedded in the model. It recognises core elements or outcomes of TJ: accountability, the truth, reconciliation and reparations.[126] As an exploratory study, using a tested and accepted model to guide potential outcomes in an unfolding phenomenon, minimizes the chances of researcher bias. It guides the investigation, and provides an objective way of identifying or describing the recent legal developments.

To justify the choice of elements: truth commissions are established to uncover the truth, which is important for, and is a form of accountability.[127] It essentially also influences the basis of reconciliation in a society. The TRC was established, and operated under this rationale. Throughout the study, a TAR analysis is provided to understand the potential outcomes using the three elements. The focus is on studying what it means for South Africa's conceptualisations and use of the truth; implications for accountability mechanisms; and any changes in the country's reconciliation discourse or narrative. Using the sub-question, it also investigates which institutions were created, or are responsive to those elements.

Illustrated by the model below, the elements are interrelated and at times, overlap[128]. To demonstrate: the truth is important for reconciliation and affects reparation; accountability means telling the truth; to reconcile, one needs to be held accountable; reconciliation is not possible without reparation ; the intersections could be made in perpetuity. Sub-elements: participation, reintegration, personalism, reconciliation and

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126 Weitekamp, Stephan et al, "Dealing with mass victimization", 2006: 7.
127 Weitekamp, Stephan et al, "Dealing with mass victimization", 2006: 8.
128 Ibid: 9.

reparation are equally important sub-elements for inclusionary justice.[129] Inclusive or collaborative justice is what gives restorative mechanisms their cathartic distinction: they involve and belong to everyone, thus producing a communal form of justice.[130] An aspect that is missing or minimal in ordinary retributive process. The value of the TAR analysis in the study is that it operationalises or demarcates empirical areas of assessments and targets for the study eg truth, accountability etc.

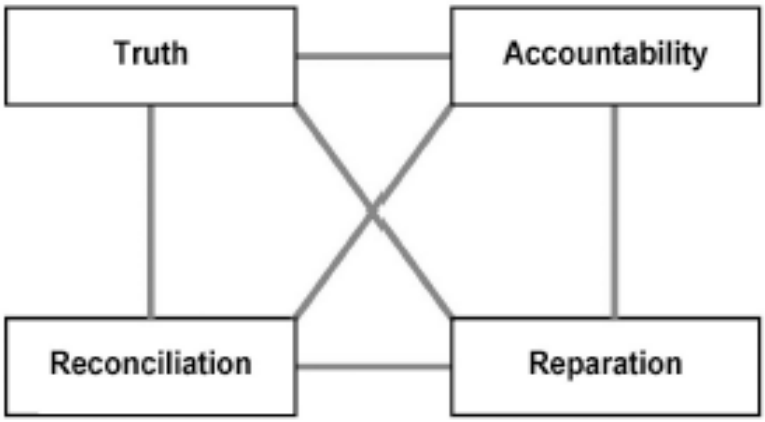

Figure 1: Wietekamp's TARR model

1.6.2 Post-Transitional Justice

Post-transitional justice (PTJ) is a contentious, yet unavoidable concept in TJ.[131] It is essentially the continuation of TJ past the initial political transition. [132] It questions the very purpose of TJ as a field associated with post-conflict societies during a particular time frame. Most significantly, it questions the "special" or "extra-ordinary" nature of TJ and its mechanisms.[133] This succession of justice describes accountability

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129 Ibid: 10.

130 Ibid.

131 I Dunbar." Consolidated democracies and the past: transitional justice in Spain and Canada*", Federal Governance*. 8(2), 15-28. (2011) https://nbn-resolving.org/urn:nbn:de:0168-ssoar-341456; Elena Andreevska, "Transitional justice and democratic change: Key Concepts", *Challenges of the Knowledge Society. Public Law*, (2013):430,http://cks.univnt.ro/uploads/cks_2013_articles/index.php?dir=1_Juridical_Sciences%2F&download=cks_201_law_art_052.pdf.

132 Ibid.

133 Thomas Obel Hansen, "The Time and Space for Transitional Justice", Research Handbook on Transitional Justice, forthcoming with Edward Elgar Publishing (2016) , *Transitional Justice Institute Research Paper* No. 16-11, University of Ulster, 4.

mechanisms used by the same post-conflict society, but in a different and continued political context. Time wise, it is significantly distant from the moment of transition, and, moreover, takes place in consolidated regimes.[134]

PTJ would in this way be a continuation of TJ.[135] It is justice pursued as a result of unresolved conflict since a country's marked political transition. [136]A useful time stamp for determining the beginning of the post-transit phase, would be from the first acknowledged political transition or justice process. An indication of a successful transition is a peaceful handover, and a move towards institution building to "create" a new society.[137] After the first successful elections, post-conflict societies proceed to build institutions that are reflective of the new state.[138] Responding to these crimes as a new state, is what the research is about.

1.7 Literature Review

The adopted definition of TJ in the study associates the field with a set of judicial, and non-judicial mechanisms of accountability. The literature reflects a long-standing TJ challenge of an assumption-driven field, constantly in transition. As circumstances develop and values change, societies may choose to reflect on notions of justice or continue processes of accountability which were not possible during the initial rupture. This not only gives rise to a volatile field, but one which also has no finality or closure. Teitel's *Transitional Justice Genealogy* ,is known for categorising the various contexts in which these assumptions were made, and provides a blueprint of the main theories and models of justice (restorative vs retributive) applied in the study. The purpose of the genealogical chapter in the study is to highlight that TJ models and mechanisms, are circumstantial. What worked and was established in one context, may not be as efficient in another.

Restorative and retributive justice are the two dominant theories of justice in the field. The volatile Latin American transitions to democracy in the 1980s necessitated a focus

134 Ibid.
135 Ibid, 16.
136 Anja Mijhr, "Transitional Justice: Between Criminal Justice, Atonement and Democracy", 36; Hansen, "Time and Space for TJ" 2016: 6.
137 Anja Mijhr, "Transitional Justice: Between Criminal Justice, Atonement and Democracy", 25.
138 I Dunbar." Consolidated democracies and the past: transitional justice in Spain and Canada," *Federal Governance*, 8(2), 15-28. (2011) https://nbn-resolving.org/urn:nbn:de:0168-ssoar-341456.

on truth, peace, reconciliation, and thus the field debate on peace versus justice.[139] Over the years, there has, however, been an aptness to adopt both restorative and retributive mechanisms. This is because transitioned societies realise the limitations of restorative platforms like truth commissions, amnesty and lustrations. As a model of punitive or retributive justice, courts on the other hand embody non-reconciliatory forms of accountability, that have been recognised as imperatives and instruments for sustaining peace.[140] The debate has thus evolved from peace vs justice, to restorative vs retributive justice. While seemingly an either/or debate, both sides agree that context determines choice and flexibility of mechanism.[141]

TJ has also undergone countless developments since its globalisation in the Nuremburg 1945 period.[142] While acknowledging its temporary nature, the UN and International Center for Transitional Justice (ICTJ) implementation guidelines, emphasize long-term measures of reform through state, and institution building.[143] Empirical evidence compiled in *Studying the Impacts on Transitional Justice on Democracy: Conceptual and Methodological Challenges*[144] and *Pathways of Impact: How Transitional Justice Impacts Democratic Institution Building, Impact of Transitional Justice on Democratic Institution Building policy paper*[145]*,* corroborate the inextricable relationship between TJ and institutional pathways of impacts. These pathways of impact are created by the justice models and mechanisms. TJ mechanisms may exist temporarily, but they have long term effects for transitioned societies, who are often not prepared to deal with the gravity of the historical crime.

Another obstacle cited and experienced in TJ discourse, is its highly theoretical nature.[146] To exemplify, what is the metric of reconciliation and justice for crimes against humanity? Furthermore, in the third phase, TJ efforts are no longer reserved

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139 Teitel, "TJ Genealogy", 2003: 75.

140 Ellen Jakobsson, "Transitional Justice – An Analysis of Restorative and Retributive Mechanisms in Sub-Saharan Africa", Bachelor thesis in peace and development, Linneuniversitet, 2018.

141 Ibid: 2,3.

142 Teitel: 73.

143 United Nations, Office of the United Nations High Commissioner for Human Rights, 2009. Rule-of-Law Tools for Post-Conflict States: Amnesties, UN Doc. HR/PUB/09/1,

144 Valerie Arnould and Filipa Raimundo, "Studying the impacts on transitional justice on democracy: Conceptual and methodological challenges", paper prepared for presentation at the 7th ECPR General Conference , September 4-7, 2013.

145 Valerie Arnould and Chandra Lekha Sriram, "Pathways of impact: How Transitional Justice impacts democratic Institution building", *Impact of Transitional Justice on Democratic Institution-building policy paper*, vol1, October, 2014.

146 Arnould and Sriram: 5.

for unstable post-conflict situations, but increasingly take place in peaceful societies or unrelated to political violence and transitions.[147] *Consolidated Democracies and the Past: Transitional Justice in Spain and Canada,*[148] examines the reasons for the sudden proliferation of TJ principles into consolidated democracies. Citing the cases of Spain and Canada, it then discusses the potential implications of attitudinal shifts, including the argument that re-examining the past may undermine fundamental societal pacts. The assertion is that they may prove to be divisive, or even destabilising.[149] These are apprehensions that were raised in Spain, and currently in South Africa's recent prosecutorial developments.

The restorative justice model is most prominently illustrated in South Africa's TRC.[150] Its first application was in the Chilean truth recovery process in 1990. The aim of truth commissions is to uncover the truth, and collate a national narrative of the past.[151] The TRC volumes are a primary codification of South Africa's history on apartheid. They hold the substance and normative assumptions around justice, as well as the different mechanisms used (e.g. amnesty and special hearings).[152]It also explains the choice of narrative post-conflict (reconciliation). *South Africa's Transitional Justice Amnesty* and *Negotiated Transitions,* narrates the crucial role that amnesty played in South Africa's transition.[153] It also highlights the importance of reconciliation as a social and political tool, in the early stages of democracy.

147 Hansen: 6.

148 I Dunbar.“ Consolidated democracies and the past: transitional justice in Spain and Canada Federal Governance”. 8(2), 15-28. (2011) https://nbn-resolving.org/urn:nbn:de:0168-ssoar-341456.

149 Dunbar 2011, “Consolidated Democracies and the Past: Transitional Justice in Spain and Canada”, Federal Governance, vol. 8 no. 2, pp 15-28.

150 Carl Stauffer, “South Africa: Truth and Reconciliation Commissions*”, Encyclopedia of Public Administration and Public Policy,* (3) 2016 , 1-9.

151 Mariana Simoni , “Localising Transitional Justice: Contributions from the Columbian Case” PhD Dissertation submitted with Institute of International Relations of the University of Brasília, 2016. ; Kasapas, George. 2008. “An introduction to the concept of transitional justice: Western Balkrans and the EU conditionality.” *Hellenic Centre for European Studies: UNISCI Discussion papers, vol 18* 59-76.

152 Stauffer: 3.

153 Du Bois Pedain 2007.

The writings of South African critical legal scholars[154] (CLS) such as Tshepo Madlingozi,[155] Joel Modiri,[156] Catherine Albertyn,[157] Sanele Sibanda,[158]were valuable towards understanding the state of post-apartheid South Africa. In the context of the study, they demonstrate why South Africa's democracy should, and is equipped to meet the accountability challenges. Among other writings, they dissect the constitutional democracy's undertaking of justice through the law, and public interest litigation.[159] In the study, parallels will be drawn between similar claims premised on historical justice. The land reform question, and pending amendment to the Constitution's property clause (section 25), are notable examples.[160] Although not specifically related to apartheid related prosecutions, the CLS perspective supports the notion that post-conflict Constitutions, as transitory institutions, have the ability to enable and disable alternative articulations of justice. In other words, while they are a legal symbol of a new society, enabling a particular kind of change, the vision to move ahead is often at the expense of historical justice for violated groups.

1.8 Methodology

The research is a qualitative, desktop exploratory study. The aim is to contextualise the Timol judgment, and subsequent attempts to prosecute former apartheid officials

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154 Critical legal studies (CLS) is a theory which states that the law is necessarily intertwined with social issues, particularly stating that the law has inherent social biases. Legal Information Institute: https://www.law.cornell.edu/wex/critical_legal_theory.

155 Dr Madlingozi is a prominent academic, critical thinker, activists and head of the Center for Applied Legal Studies (CALS). CALS is a civil society organisation based at the School of Law and practices human rights law and social justice work.

156 Dr Joel Malesela Modiri is a Senior Lecturer in the Department of Jurisprudence. He holds the degrees LLB cum laude (Pret) and PhD (Pret). His PhD thesis was entitled "The Jurisprudence of Steve Biko: A Study in Race, Law and Power in the 'Afterlife' of Colonial-apartheid".

157 Professor Cathi Albertyn is a Professor of Law and South African Research Chair in Equality, Law and Social Justice in the School of Law at the University of the Witwatersrand.

158 Sanele Sibanda, University of the Witwatersrand, School of Law, Faculty member. Studies Constitutional Law, Pan-Africanism, and Neo-colonialism.

159 For representative writings, see: S Sibanda 'Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty' (2011) 22 *Stellenbosch Law Review* 482; T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 28 *Stellenbosch Law Review* 123–147.; J Modiri 'Law's Poverty' (2015) 15 PER 224 at 246-259. Available at: http://www.scielo.org.za/pdf/pelj/v18n2/07.pdf; T Madlingozi 'Social Justice in a Time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution',*Stell LR* 123, 2017.

160 Tembeka Ngcukaitobi, "What section 25 means for land reform", *The Mail and Guardian Online*, December 13, 2019. https://mg.co.za/article/2019-12-13-00-what-section-25-means-for-land-reform/ .

within South Africa's TJ framework. The 1972 Timol inquest and its 2017 judgment are not intended to be used as case studies, but rather as a precedent-setting phenomenon to be observed. The focus is on what these accountability developments mean, in the broader context of South Africa's democracy post-TRC.

The details of the inquest and judgment are referred to briefly (facts and finding). Emphasis is placed on the judgement being rooted in a historical process, and re-emerging under different circumstances. Only the facts, findings, and recommendations of the 2017 Timol judgment will be studied. What potential truth, accountability and reconciliation outcomes does this have for South Africa's TJ project, and which institutional pathways were created by both processes. As such, the research is exploratory.[161]

Explanatory research looks for new explanations that were previously overlooked, and does so through the researcher's active involvement in the process.[162] This amplifies the researcher's conceptual tools of investigation, and provides a new explanation of the status quo from a different perspective. In Garland's configuration, it is referred to as the diagnosis or problematisation stage.[163] It presents a modern-day phenomenon or conundrum, looks at its contemporary challenges, locates it within its historical origins, and works its way back into the present.[164]

Exploratory research does not aim to prove a *priori* hypotheses. It instead asks to what extent a theory and hypothesis can explain a phenomenon, and how well it can explain it. It is also extended to how meaningful and fruitful an explanation is.[165] As a social constructivist study that acknowledges the limitations of exploratory research, the aim is to understand rather than provide a definitive explanation of the developments. According to Reiter, exploratory inquiries are successful if a formulated theory ,and hypothesis explains something very well. It has to make a strong and robust connection between a cause, and an outcome.[166]

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161 Bernd Reiter, "Theory and Methodology of Exploratory Social Science Research", *Government and International Affairs Faculty Publications*, 2017, 132. https://scholarcommons.usf.edu/gia_facpub/132.

162 Reiter: 136.

163 David Garland, "What is a ''history of the present''? On Foucault's genealogies and their critical preconditions", New York University, Punishment & Society 2014, Vol. 16(4) 365–384.

164 Garland:368.

165 Reiter: 137.

166 Reiter: 138-140.

Exploratory abductive methods are based on an explicit recognition that all research is provisional; that reality is partly social construction; that researchers are part of the reality they analyse; and that the words and categories they use to explain reality ,arise from their own minds and not from reality.[167] Used in tandem with reliable methods of interpretation and validation as suggested below, exploratory studies view positionality and personal stances, as assets in knowledge production. This is provided they are dealt with up front in the ethical consideration section.

To neutralise the above, the researcher's subjective interests in this study as a first-generation black female apartheid survivor, are shared in the ethics section below. The research design (exploratory-descriptive), extensive reliance on primary sources (interim and final Constitution, *Promotion of National Unity Act 1995*, TRC volumes 1-6, Timol inquests 1972 and 2017 Judgment), secondary sources (*South Africa's Transitional Amnesty, Theories in Transitional Justice*) and an observable judicial development[168] (the 2017 Judgment and its precedent) ,guard against research bias.

1.9 Data Collection and Interpretation

The research is an exploratory qualitative desktop study. Exploratory research offers an alternative way to "make sense" of the world. It offers new approaches, angles and counters hegemonic alternatives to the act of explaining.[169] Reiter positions Gaddamer's hermeneutic circle as an inevitable resource for making sense of reality. Exploration thus starts at the same place of deduction: namely with the explicit formulation of theories and hypotheses. But different from deductive, and into abductive reasoning- the exploration seeks to refine, adapt, or change the initial explanation in an itinerary process. It applies other explanations to the observation in a back-and-forth manner, between theory and reality.[170]

The hermeneutic circle makes use of specific information. It compares information: the general, historical, and the contextual data. It also considers the biographical

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167 Ibid: 134.
168 Public developments unfolding in court, media; is visible and traceable.
169 Ibid: 140.
170 Ibid.

information available about an author, or research subject.[171] In practice, this entailed understanding the legal implications of the occurrence as a High Court judgment, in a democratic society. While happening in an ordinary court, the historical significance of the order can be found in the judgment, primary sources such as the TRC reports, and founding legislation (interim Constitution, *Promotion of Reconciliation and National Unity Act 1995*). These sources are what confirmed the genesis of the judgment as a TJ development, and its "displacement" within the democratic regime.

Primary sources utilised in this study are legislation: the interim Constitution, *Promotion of National Unity Act of 1996, Criminal Procedure Act, Inquest Act*, Ahmed Timol inquest judgment, other apartheid related inquests ,case law, and the TRC Volumes one to six. Secondary sources utilised are journals **,**books such as *South Africa's Transitional Justice Amnesty*, documentaries[172] (TRC Hearings, *Indians Cant Fly*), newspaper articles, and media releases which give commentary on the recent developments. Academic journals were all accessible online,[173] and served as credible points of departure for understanding the initial justice models, and status quo.

1.10 Ethical Considerations

The study is exploratory desktop research. No ethical approval was therefore required. However, the researcher was responsible for ensuring that the data and information were accurately interpreted and presented. As a first-generation black female apartheid survivor, my aim was to acknowledge and document the institutional shift in South Africa's TJ discourse. It is important to acknowledge this fact, and to emphasise that every effort has been made to remain as objective as possible in undertaking and analysing the research.

1.11 Limitations, Scope of the Study, Trustworthiness

The limitations of the study are rooted in the pitfalls of abductive exploratory studies. As mentioned in the methodology section, exploratory investigations start with

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171 Ibid:

172 Enver Samuels ,"Someone to Blame", EMS Production 2018, South Africa. Enver Samuels ,"Indians Cant Fly", EMS Production, 2015.

173 Research Gate, JSOR, Sabinet, International Journal for International Law etc.

preconceived theories of a phenomenon. To this end, it is open to subjective methods of data collection and interpretation. Honesty, transparency on one's positionality and interest in the study, is recommended and utilized in the study.

As exploratory desktop research, the study does not triangulate the findings for validation. However, over-reliance on primary sources, application of existing TJ theories/models , methodology guidelines and studying the objective elements of what is currently happening (High Court judgment and reopening similar inquests Neil Aggett), assures validation and trustworthiness.

The research is not an in-depth study of the law and identified institutions. TAR implications and institutions are noted broadly with the aim of contextualising and naming the legal developments first. Dissecting apartheid as a crime against humanity is not discussed, nor is an in-depth study of democracy explored. The Gendered aspects of apartheid are also reserved for future contributions. The Timol judgement and Aggett Inquest are recent and still unfolding. This is why transitional justice theories are used rather descriptively, and the outcomes are potential and not definitive. The aim of the study is to identify what (TAR) and where (institutions) to look for TJ change in a post-TRC democracy. What will be recommended as an area of further studies, is how best to proceed with apartheid related crimes in democracy.

1.12 Chapter Outline

Chapter one serves as an introductory chapter, laying out the background, research questions and methodology. Chapter two proceeds with a theoretical discussion of the origins of TJ and the idea of post transitional justice. As with most historical discussions that take place in the present, the genealogical approach is inherent. Two examples: Spain and Rwanda, are used to illustrate the challenges of continuing prosecutions beyond the transition. Chapter three looks more closely at South Africa and the TRC. The TAR analysis and outcomes in this chapter are descriptive and discussed within its founding institutional pathway: the TRC. Chapter four examines and justifies why South Africa is a post-transitional society, the Timol inquest and a TAR analysis of its outcomes for the post-TRC society. The various institutional pathways as created by the TRC recommendations, are reviewed. Finally, chapter five summarises the potential outcomes of the legal developments, and areas of further research.

CHAPTER TWO: THEORETICAL DISCUSSION AND FRAMEWORK: GENEALOGY OF TRANSITIONAL JUSTICE AND POST-TRANSITIONAL JUSTICE

2.1 Introduction

The purpose of this chapter is to outline the history of TJ as a field. It explains TJ theory, as well as the TAR outcomes of each phase.[174] Each period will reinforce that justice was a product of the prevailing conditions, that it is contextual but also continuous.[175] The narrow definition of TJ is seemingly locked in the moment of transition, and encompasses a variety of justice processes to bring perpetrators of mass atrocities to justice.[176] This kind of justice is "reserved" for a "special" or extraordinary context towards the end, or immediately post-conflict. A field that is locked in transition means that the field is used or reserved for countries undergoing political transitions, and are regarded as extraordinary processes post-conflict. The Timol judgment has, however, revealed the importance of contextualising South Africa's TJ project in a democracy.[177]

The aim of chapter two is to also outline some of the historical circumstances and assumptions of the two accountability models, and theories of justice in question (restorative vs retributive). The aim is to furthermore outline the complexity of when transitions start and stop, as groundwork for why the field might be considered problematic, and constantly in transition. The idea of a post-transitional society is suggested. A post-transit society is one which has already undergone a successful political transition, and continues TJ processes beyond the initial transition. Countries

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174 Teitel uses phases to describe the periodization of the various political and legal periods. There are no acoustic separations dividing the phases, they may overlap and at times coexist. The era or phases are divided into three categories, with each producing specific models and forms of accountability for transitional justice.

175 Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice,' *Human Rights Quarterly* 31(2) (2009): 321–367.

176 Duncan McCargo, "Transitional Justice and its Discontents", *Journal of Democracy* Volume 26 Number 2 April 2015: 6, 7. ; Posner & Vermeule, "TJ as Ordinary Justice", 2003: 6.

177 "Ahmed Timol was murdered - Justice Billy Mothle", *Politicsweb,* published October 12, 2017, http://www.politicsweb.co.za/documents/ahmed-timol-was-murdered--justice-billy-mothle.

such as Spain and Rwanda, are used to illustrate the challenges post-transitional contexts pose to substantial and procedural [178] elements of accountability.

The historical chapter provides insight on the various contexts and assumptions which gave rise to the TAR outcomes of the field, and liberal democracies. Each phase produced a contextual articulation of accountability, the truth and reconciliation. The truth and reconciliation were closely associated with democracy in the second phase, and are entrenched values in many societies today. It was the encouraged social binder for many countries post conflict, and formed the basis of many democracies. The study explores what it means when a counter narrative is opened by a "reconciled" society like South Africa, and how countries have responded by identifying institutions involved in facilitating justice and accountability. Using the phases, the aim is to suggest where South Africa's TJ discourse is in Teitel's genealogy. Similarly, that TJ mechanisms have always been contextual, and a continuous form of justice from its inception.

2.2 Genealogy: History of Transitions

The term 'transitional justice' was first used in the context of societies transitioning from undemocratic regimes in Spain (1960s-1980s), and Central Eastern Europe (1989-1990s).[179] The idea of TJ as a separate field of research and action, was first conceived during Huntington's 'third wave' (1974-1989) of democratisation.[180] TJ is thus an application of justice for political change, and includes judicial (prosecutions) as well as non-judicial measures (amnesty, lustrations).[181] It has now become an essential component of any peacebuilding operation, and is in line with UN peacebuilding objectives.[182]

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178 The normative elements of a subject: entails the basis, the depth (what, why, who elements). Procedure refers to how a process is undertaken. Substantial and procedural fairness are required for an act to be legally valid (administrative fairness).

179 Christine Bell, "Transitional Justice, Interdisciplinarity, and the State of the 'Field' or 'Non-Field'," *International Journal of Transitional Justice 3,* no. 1 (2009): 8.

180 From dictatorships to liberal democracies. Bell, "Transitional Justice and Interdisciplinarity", 10.

181 Ruti Teitel, *Transitional Justice*, (Oxford: Oxford University Press, 2000).

182 These international standards set the normative boundaries of UN engagement, for example: the UN will neither establish nor provide assistance to any tribunal that allows for capital punishment, nor endorse provisions in peace agreements (See Guidelines for UN Representatives on Certain Aspects of Negotiations for Conflict Resolution ,1 Dec. 2006) that include amnesties for genocide, war crimes,

Although critiqued as a form of "victors justice"[183]and not a transition, it is the transition from peace to conflict that has also placed the Nuremburg tribunal from 1945-1949, as a transitional moment in history. Shklaar opines that the Nuremburg tribunal was more about the victorious allies punishing German Nazi's, than it was about securing justice for the victims. It is inevitably also a striking example of seeking justice post-after the transition.[184]Given the difference of opinion on whether or not Nuremburg was a transition, the study explores the unique merits of both the 1945 Nuremburg ,and 1980s Latin American transitional ruptures[185] in history. The justification is that both transitions demonstrate the theories or models of justice discussed in the research.

Teitel, who coined the phrase 'transitional justice' contends that a genealogy of TJ demonstrates, over time, a close relationship between the type of justice pursued, and the relevant limiting political conditions.[186] This means that the notions of justice sought post-conflict, are by-products of the then prevailing political conditions.[187] Political conditions are important. Their unique conditions are what give TJ its "extraordinary" nature and choice of TJ mechanisms. These conditions are what allow for special rules to be created, and mechanisms to be flexible with the kind of justice it conceptualises. If these political conditions or challenges are left looming and unaddressed, it puts the nature of the transition, justice and accountability under question.[188] As seen in phases below and countries like South Africa, Spain and Rwanda, this is how elements of the past are continued into the present, and create a continuous form of justice post the transition.

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crimes against humanity, and gross violations of human rights (gross violations of human rights include torture and similar cruel, inhuman or degrading treatment; extra-judicial, summary or arbitrary executions; slavery; enforced disappearances; and rape and other forms of sexual violence of comparable gravity).

183 Gary Bass, "Victor's Justice, Selfish Justice", Social Research 69, no.4 (2002): 1035-1044. www.jstor.org/stable/40971591.

184 Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir,* (New York: Skyhorse Publishing Inc. 1993), 43.

185 Another way of referring to transitional moments or moments of temporary opportunity to initiate change.

186 Teitel, "TJ Genealogy", 70.

187 Ibid.

188 Dunbar 2011: 16.

The proposed genealogy is structured along Teitel's three critical phases[189] :

2.3 Phase I: Nuremburg Trials (1945-1946)

2.3.1 Accountability: Retributive Justice

The first phase of the genealogy, the post-war phase, began in 1945. Through its most recognised symbol, the allied-run Nuremberg Trials, this phase reflects the triumph of TJ within the scheme of international law. However, this development was not enduring, due to its association with the exceptional political conditions of the post-war period.[190] After the new international regime was established by the UN in 1948, the period thereafter is followed by what Shklaar critiques as global silence.[191] The silence is in reference to the post-World War II (WWII) wars[192]. The field once again only re-emerges in the early 1980s, establishing TJ as a field.[193]

The central aim of justice in phase one was to delineate the unjust war, and the parameters of justifiable punishment by the international community. Questions confronted in this context included whether and to what extent to punish Germany for its aggression, and what form justice should take: international or national, collective or individual.[194] This continues to be one of the central questions in any TJ intervention to date: namely, how best to respond to past violations and punishment of perpetrators. At least two TJ mechanisms emerged from this response: criminal prosecutions grounded in the retributive justice paradigm, and delegitimising previous regimes.[195]Accountability for past violations or repressions was therefore the normative aspiration, and purpose with which TJ continues to be associated with

189 Teitel, "TJ Genealogy" 70.
190 Teitel, "TJ Genealogy", 72.
191 McGargo, "TJ and its Discontents", 2015: 10.
192 Korean War in the 50s; Vietnaam in 1955; the Arab/Israel conflict in the '40s etc.
193 Teitel: 89.
194 Guillermo O'Donnell, Philippe C. Schmitter :"Transitions from Authoritarian Rule: Tentative Conclusions About Uncertain Democracies" in *Transitional Justice. How Emerging Democracies Reckon with Former Regimes,* Neil J *ed,* (Washington DC: United States Institute for Peace), 1995., 57.
195 Elizabeth Andersen, Transitional Justice and the Rule of Law: Lessons from the Field, *Case Western Reserve Journal of International Law, vol 47,* (2015), http://scholarlycommons.law.case.edu/jil/vol47/iss1/2.

today.[196] The study will explore accountability as a TJ outcome in both the restorative TRC model, and the recent prosecutorial model.

2.3.2 Institutional Pathway: Rule of Law and the Courts

Although the Nuremburg transition did not result in a democracy, it undoubtedly required institutions to execute plans for justice. The formation of the Allied[197] forces can be considered a founding institution in this phase. The four emergent powers created the legal basis of the trials through the *London Charter*[198]. It restricted the trial to "punishment of the major war criminals of the European Axis countries", and had no jurisdiction over crimes which took place before the outbreak of war on 1 September 1939.[199]

Court-like tribunals were held in Nuremburg between 20 November 1945 and 1 October 1946. They were given the task of prosecuting 24 of the most important political and military leaders of the Third Reich.[200] Subsidiary trials such as the *Belzen, Auswitz* and Frankfurt trials, were conducted by the American authorities in their occupied zones. After 1949, the duties of investigation were transferred to the police authorities of the new state. However, after the *Ulm Einsatzkommando* trial in 1958, German authorities decided that a large number of Nazi crimes that had occurred outside Germany itself, had remained un-investigated.[201] To this end, a contingent approach was required to address the large number of outstanding Nazi-related investigations and prosecutions.

In December 1958, the justice ministries of German states formed the *Central Office of the State Justice Administrations for the Investigation of National Socialist*

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196 E Andersen, "TJ and rule of law",3.

197 The main Allied powers were Great Britain, The United States, China, and the Soviet Union. The leaders of the Allies were Franklin Roosevelt (the United States), Winston Churchill (Great Britain), and Joseph Stalin (the Soviet Union).

198 The Charter of the International Military Tribunal- Annex to the Agreement for the prosecution and punishment of the major war criminals of the European, was the decree issued by the European Advisory Commission on 8 August 1945 that set down the rules and procedures by which the Nuremburg trials were conducted.

199 Teitel, "TJ Genealogy",73.

200 Joe J. Heydecker; Johannes Leeb; R. A. Downie: *The Nuremberg Trial: A History of Nazi Germany as Revealed through the Testimony at Nuremberg,* (World publishing, 1962),5.

201 J Decker et al, *Nuremburg trials, 7.*

Crimes[202]. Its investigation and prosecutorial mandate continued well into the 2016 Hubert Zafke (95 years) prosecution.[203] The institutional pathway for accountability created by the Nuremburg tribunals affected more than TJ in its first phase, and transcends well into the third and current phase. It established principles for international law. Through United Nations (UN) and later the International Criminal Court (ICC), it established global mechanisms for accountability.[204] From a field perspective, it embedded retributive justice as one type of TJ model for accountability.

By using the courts as a site for accountability, it also illustrates what post transitional justice can look like when prosecuting outside political transitions and contexts. But it is in the conditions of the second phase where many of the normative practices such as truth commissions and reconciliation, were established in TJ. From a prosecutorial model in the first phase, to a more victim-centred and institutionally focused model in the second phase, the study observes the creation of an assumption-driven field where particular notions of justice, peace and democracy are encouraged. In the next phase, peace and stability are the imperatives of the transitions and not justice.[205]

2.4 Phase II: Winds of Change[206] (1980s-early 2000s)

2.4.1 Political Transitions or Justice: Truth and Reconciliation

The collapse and disintegration of the Soviet Union led to concurrent transitions throughout much of the world during the last quarter of the 20th century.[207] The one characteristic they shared was a transition from authoritarian/dictatorial to a liberal, often more democratic government.[208] In response to this, there was a theoretical consensus regarding democracy as the best available solution.[209] Among others, Larry

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202 Nuremburg Memoriam online, "Legal prosecution after 1949", https://museums.nuernberg.de/memorium-nuremberg-trials/culture-of-remembrance/legal-prosecution-after-1949/.

203 Eliza Gray and Simon Shuster, "How the Last Surviving Nazis Could Be Brought to Justice", *Time,* January 20, 2016, http://time.com/4186602/prosecute-last-surviving-nazis .

204 Teitel, "TJ Genealogy", 74.

205 Teitel, ""TJ Genealogy", 72.

206 Adapted from Harold MacMillan's speech to the South African parliament in 1960. In the text, the aim is to emphasise the global support towards liberal democracy and transitions to that effect.

207 Teitel, "TJ Genealogy", 75.

208 O'Donnel and Phillip, "Transitions from authoritarian" , 58.

209 Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice,' *Human Rights Quarterly* 31(2) (2009): 321–367.

Diamond argues that this trend established democracy as the typical form of government encouraged by the global community. By coinciding with TJ mechanisms and objectives of the time, a linear relationship was created between the TJ field and democracy.[210] The main assumption was that democracy was a by-product of TJ.

When political transitions occurred in Latin America during the 1980s, the question confronted by successor regimes was whether and to what extent to adhere to the Phase I model of TJ.[211] Given its history of repression, presence and power of the outgoing regime, it was unclear whether the Nuremburg-style prosecution would work in that context. Unlike the Allied forces transition in the late 1940s, there was no clear victor, and the balance of political forces had reached a stalemate. Paige Arthur posits that two particular discourses came from this dilemma.[212] The first discourse viewed the end result of transitions as democratic governments. The second discourse on the rise was that of international human rights with peacebuilding, reconciliation and free market precepts; to name a few.[213]

2.4.1.1. Democracy and Its Restorative Assumptions

The second phase coincided with Huntington's 'third wave of democratization' (1974-1995).[214] As Latin American countries moved from dictatorships to democracy, countries in phase two experimented and modified formal TJ mechanisms. These included non-legal mechanisms such as the truth commissions in Chile (1990), which were used for the first time.[215] A resonant challenge faced by the successive regimes was consolidating democracy and seeking justice. The challenge was to what extent do they adhere to a phase one Nuremburg prosecution, without destabilising the transitioned regime? [216]

In the interest of peaceful transitions to democracy, TJ expanded from an exclusively rule of law punitive approach. It encompassed a broader communal focus on 'truth and justice', with reconciliation as the desired outcome. In a society where many of

210 Anja Mijhr, "Transitional Justice: Between Criminal Justice, Atonement and Democracy": 23.
211 Teitel, "TJ Genealogy", 75.
212 Arthur, "How Transitions Reshaped Human Rights", 328.
213 Arthur, "How Transitions Reshaped Human Rights", 329
214 Teitel, "TJ Genealogy", 73.
215 Ibid: 74.
216 Ibid.

the questions on forced disappearances and murders were still unanswered, the importance of closure was given more recognition in this phase.[217] As a result, this gave rise to a TJ field which had to be cognisant of, and responsive to its political realities. It upheld the importance of collective healing, and institutional building for state consolidation. This can be drawn from the use of mechanisms such as criminal prosecutions coupled with amnesties, truth commissions, economic and symbolic reparations[218]. These mechanisms were employed in the Latin American TJ experience for the first time.[219]

In order to encourage or strengthen democratisation and promote peace and justice, the restorative mediums above symbolised a break from the past. It endorsed the creation of a rule of law based on respect for human rights, and deterrence of violence.[220] This created the linear expectation between restorative mediums, prospects of peace, and democracy. Due to its peacebuilding principles, restorative mediums complemented, and were thought to be necessary for a new democracy.[221] However, while TJ cannot definitively say that all truth commissions or amnesties establish democracies, the recommended approach is to assess these outcomes according to their unique societal contexts, and then to assess the quality of democracy produced.[222]

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217 Ibid: 74.

218 Anja Mijhr, "Transitional Justice: Between Criminal Justice, Atonement and Democracy" , 35. ; Teitel, "TJ Genealogy": 88.

219 Brian Frederking, "Putting Transitional Justice on Trial: Democracy and Human Rights in Post-Civil War Societies," *International Social Science Review*: (2015) Vol. 91 : Iss. 1 , Article 3. Available at: https://digitalcommons.northgeorgia.edu/issr/vol91/iss1/3 10. Teitel, "TJ Genealogy", 73. Elin Shklaar, "Truth commissions, trials or nothing? Policy options in democratic transitions", *Third World Quarterly*, Vol 20, No 6, pp 1109- 1128, 1999.

220 Chapman and Ball, "The Truth of Truth Commissions", 8.

221 Elin Skaar , "Understanding the impact of Transitional Justice on Peace", *Section 53: Human Rights and Transitional Justice in Post-Conflict Societies and Periods of Democratization,* Paper prepared *for ECPR, Reykjavik,* Iceland, 25th-27th August, 2011.

222 Ibid: 11.

2.4.2. Institutional Pathway: Democracy, TJ Discourses and Institutionalisation

The above discourses merged to create the field of TJ and, as critics would say, its idealistic claims to help countries build peaceful and stable polities.[223] In this phase, countries experimented and established a variety of mechanisms such as truth commissions in Chile, El Salvador, prosecutions in Rwanda, and avenues for redress and reparation in all interventions.[224] A more restorative approach was adopted for the sake of peacebuilding, democratic outcomes and consolidating governments through institution building. With democracy on the rise and countries emerging from war and civil conflict, it became nearly impossible to separate TJ mechanisms from democracy.

2.4.2.1 Challenges and Critique

The UN's investment in support of democracy, rule of law and peacebuilding in post-conflict societies was essential for globalising TJ as a field.[225] The normative foundation of advancing the rule of law and democracy, is the Charter of the UN. [226]This is done through the four pillars of the modern international legal system: international human rights law; international humanitarian law; international criminal law; and international refugee law.[227] It also includes the wealth of UN human rights and criminal justice standards developed in the last half-century.

In the second phase which coincided with Huntington's third wave of democracy, the UN through the International Monetary Fund (IMF) and *ad hoc* judicial institutions, responded diligently to countries post-conflict.[228] Relying on pre-existing frameworks to solve questions of justice and governance, a particular expression of democracy (peace, rule of law etc) was encouraged, and more passive outcomes of justice (reconciliation, lustrations) were favoured.[229] The Third World Approach to

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223 Frederking, Brian K, "Putting Transitional Justice on Trial: Democracy and Human Rights in Post-Civil War Societies," *International Social Science Review*: Vol. 91: Iss. 1, Article 3, 2015, http://digitalcommons.northgeorgia.edu/issr/vol91/iss1/3.

224 David Anton Hoogenboom, "Theorizing 'Transitional Justice'",(PhD Dissertation The University of Western Ontario,2014), 133. David Hoogenboom, "Post-Conflict Progress: Embedding Transitional Justice within the Liberal Framework", *Paper prepared for the Annual Meeting of the Canadian Political Science Association*, (Montreal, QC: 2010)

225 Teitel, "TJ Genealogy", 78-85.

226 United Nations, Office of the United Nations High Commissioner for Human Rights, 2009. Rule-of-Law Tools for Post-Conflict States: Amnesties, UN Doc. HR/PUB/09/1.

227 Ibid.

228 Ibid.

229 Ibid.

International Law (TWAIL) recognizes the shortcomings of westernized notions of democracies in developing countries, particularly in Africa.[230]

The above perspective reinforces Teitel and Arthur's position[231]: that TJ mechanisms are products of the prevailing political conditions, and need to be assessed within their contexts.[232] The third normalisation phase requires this approach. In this phase, initial political considerations post-conflict are questioned and reconsidered. This has resulted in a horizontal expansion of TJ. An expansion means that the discourse and its mechanisms are removed from the initial political transitions in both time and space.[233]This is explained in the third phase below.

2.5 Phase III: Transitional Justice Field Expansion

2.5.1 Post-Transitional Justice (PTJ)

The second TJ phase illustrated a vertical expansion of the field.[234] This meant that Justice was no longer adjudicated from a top-down approach like the Nuremburg Tribunal. Instead, NGOs and other civil society groups were involved or considered in TJ mechanisms (truth commissions and memorialisation).[235] According to Teitel, the establishment of the International Criminal Court in 2002 , marked the beginning of the third phase. Transitional Justice moves from the exception to the norm, in order to become a paradigm of the rule of law. In this contemporary phase, transitional jurisprudence normalises an expanded discourse of humanitarian justice, and applies

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230 Makau Mutua "What is TWAIL?", ASIL Proceedings pp 31-40, 2000; James T Gathii 'TWAILING in International Law: A Rejoinder' (1999-2000) 98 *Michigan Law. Review* pp 2066 – 2071.

231 Arthur, "How Transitions Reshaped Human Rights", 331. Derek Powell, "The role of Constitution making and institution building in furthering peace, justice and development: South Africa's democratic transition", *The international journal of transitional justice*, no 4 (2010), 230-250

232 Teitel, "TJ Genealogy", 74.

233 Thomas Obel Hansen, "The vertical and horizontal expansion of transitional justice Explanations and implications for a contested field," in *"Theories of Transitional Justice"*, ed. Susanne Buckley-Zistel et al (New York: Routledge, 2014), 105.
David Anton Hoogenboom, "Theorizing 'Transitional Justice'",(PhD Dissertation The University of Western Ontario,2014), 133. David Hoogenboom, "Post-Conflict Progress: Embedding Transitional Justice within the Liberal Framework", *Paper prepared for the Annual Meeting of the Canadian Political Science Association*, (Montreal, QC: 2010).

234 Thomas Obel Hansen, "The vertical and horizontal expansion of transitional justice Explanations and implications for a contested field" in *"Theories of Transitional Justice"*, ed. Susanne Buckley-Zistel et al (New York: Routledge,2014), 105

235 Thomas Hansen, "Vertical and horizontal expansion", 105-107.

to societies that have already transitioned.[236] As a constructed body of law associated with pervasive conflict, it further contributes towards laying the foundation for the emerging law on terrorism, and how to pursue justice during conflict or a peace agreement.[237]

What was historically viewed as a legal phenomenon associated with extraordinary post-conflict conditions, now increasingly appears to be a reflection of ordinary times.[238] Contemporary political conditions now range from war, in a time of peace, political fragmentation, weak states, small wars, and steady conflict, and thus require field mechanisms that are responsive beyond moments of transition.[239] On the other hand, continuing TJ beyond moments of political transition is what places the field at risk. It moreover places substantial and procedural elements of accountability at risk, and potentially unaddressed.

Transitions are temporary moments of political change, which often have their own set of legal rules and circumstances.[240] During this period, countries adhere to these rules, and it is generally clear what the role and mandate of transitional mechanisms are. In addition, due to its temporary "extraordinary" nature, unique rules are established and applied to mechanisms post conflict.[241] Rules and considerations which are not applicable in the new State. As temporary moments, with volatile circumstances, it is not always possible to realise all justice aspirations during the transition. As such, countries either limit or forego ideal notions of justice for the sake of peace, and establishing a new society. PTJ thereafter becomes an inevitable by-product of unresolved history, and in the South African developments, can be found in the TRC recommendations.

What makes PTJ a contested part of the field is that it continues transitional accountability processes outside, or further away from the initial moment of transition.[242] It questions the idea of a transition: when and where it ends, as well as the purpose and gravity of justice possible in the new State. In the initial rupture, the

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236 Teitel, "TJ Genealogy",89.
237 Teitel, "TJ Genealogy",90.
238 Ibid.
239 Teitel, "TJ Genealogy",90.
240 Posner & Vermeule: "TJ as Ordinary Justice", 2003: 4.; Mijhr, "TJ and Democracy": 15.
241 Ibid.
242 McCargo, "Transitional Justice and its Discontents", 2015, 10.

global community might assist countries to establish mechanisms of accountability, or recommend the involvement of the ICC. But over time, as countries declare sovereignty and build solid institutions, this option becomes less viable. In the interest of the principle of subsidiarity, post -transitional countries are less likely to grant the ICC jurisdiction over domestic issues. As a post-transit society ,a society which has completed a successful political transition ,new forms of justice are articulated. This could potentially alter initial agreements and platforms of accountability. Without the temporary political window period however, the state can't rely on special transitional rules, thus making the accountability process an ordinary one. This is discussed in chapters four and five.

The genealogy section demonstrated that dealing with historical accountability beyond the initial transition, is an inherent feature of the field. The reason why the phases overlap is because when unfinished elements of the past are not addressed by the new government, they continue into the present. Unless resolved, they manifest themselves in different ways, and pose challenging questions to the transitioned government, and its institutions. Looking at Spain and Rwanda, the next section examines accountability mechanisms adopted by both countries, as well as how a continuation of the process was a achieved in a practical, yet responsive manner.

2.5.1.1 Spain: Justice vs Time

Between 1936 and 1939: the Spanish civil war left over 500 000 people dead, and more than 100 000 people were unaccounted for. They were allegedly 'lost', and subsequently piled in mass graves.[243] A product of fascism, and led by Francisco Franco, the war created social cleavages and animosity in society. It divided conservatives, religious rights groups, heirs and defenders of Franco, the liberals, secular left, and the defeated Republicans.[244] The concluding narrative of the civil war was supported and maintained by the Spanish General Dictator Franco until 1975. Wrongdoing was attributed to all sides and he made sure that there was no monopoly

[243] Paloma Aguilar. "Collective Memory of the Spanish Civil War: The Case of the Political Amnesty in the Spanish transition to Democracy", Universidad Nacional de Educación a Distancia, Madrid.

[244] Aguilar, "Spanish Civil War" 1996: 5.

on historical pain. [245]In other words, all parties had been perpetrators and victims in some form or way.

When Franco died in 1975, the *Pacto del Olivado* (Pact of Forgetting) was agreed to by both left- and right-wing groups.[246] It was essentially an agreement to avoid dealing with the legacy of Francoism. By ensuring that there were no investigations or prosecutions for mass murders, the Pact was an attempt to leave the past behind. The focus would be on the future. The legacy of the Pact underpinned Spain's transition to democracy and amnesty in the 1970s.[247] The Pact, however, could not withstand the test of time, or socio-political transformation calling for reconciliation, and societal healing.[248] Amnesty laws were gradually enacted and amended through the *Amnesty Act* of October 1977, and the extension of the 1976 *Amnesty Act* in March 1977.[249] Although a democratic transition had been successful, factional conflicts and terror attacks continued sporadically until the mid-1980s. The attacks sustained the culture of silence, impunity, and collective memory created by the 1975 Pact of Forgetting. For the democratic Spain, a repeat of the civil unrest had to be prevented.[250]

The restorative arrangement was disturbed when a Spanish Magistrate, Baltasar Garzón, issued the warrant of arrest against former Chilean dictator Augusto Pinochet[251] in 1998.[252] The indictment was a watershed moment for historical crimes in international criminal law, and condemned the legal basis of impunity for crimes against humanity.[253] It also prompted intense debate over the moral legitimacy of the Spanish judicial system pursuing another nation's former dictator, while ignoring its own repressive history.[254] Almost two decades into democracy ,Judge Garzon's decision galvanised civic campaigns on seeking justice . The movements questioned

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245 Ibid: 8.
246 Ibid: 7-9.
247 Ibid.
248 Aguilar, "Spanish Civil War" 1996: 12.
249 Christina Franzese, "Balancing Justice and Peace: A Historical and Hypothetical Exploration of Justice During Spain's Post Franco Transitions from Dictatorship to Democracy", *Temple International and Comparative Law Journal,* 2017: 499.
250 Ibid: 512.
251 General Augusto Pinochet Ugarte, the brutal dictator who repressed and reshaped Chile for nearly two decades and became a notorious symbol of human rights abuse and corruption until 1998.
252 The Guardian, "Pinochet Arrested in London" October 17, 1998. https://www.theguardian.com/world/1998/oct/18/pinochet.chile.
253 Franzese, "Historical exploration of Spain post Franco" 2017: 502.
254 Ibid.

the politics of collective memory, and in the 2000s, forced incoming governments to adopt institutional responses to historical claims.[255]

The above social efforts paved the way for Spain's attitudinal shift and into the "politics" of exhumation. [256]In 2008, the first historical case was brought before the *Audiencia Nacional*[257] adjudicated by the very same Judge Garzón. Once an inquiry confirmed that all living former officials of the Franco era had died, he relinquished jurisdiction to the local courts. The courts were mandated to assess the legal arguments of the claims, and investigate where the bodies had been buried. The ruling caused an uproar between two far right-wing groups, and seeking justice social movements.[258] They subsequently instituted charges against the judge for flouting amnesty laws, and abuse of power.[259]

Following years of litigation, the supreme court ultimately ruled in favour of the judge.[260] However, the court expressed that using the criminal justice system to effect the order of the Spanish supreme court, would not be effective given the amount of years gone by. It rather urged government to enact policies of exhumation and memorialisation to facilitate reconciliation rather than pursue punishment through the judicial system.[261] Like South Africa, Spain's peaceful democracy and constitution was built on amnesty and reconciliation.[262] As will be discussed in the next chapter, there was also no clear victor, and the decades of civil war necessitated peace. It demonstrated the evolutionary or contextual nature of justice, and the limitations of a consolidated criminal justice system when time has dealt with the perpetrators.

2.5.1.2 Rwanda: Hybridity and Institutional Capacity

Rwanda, like 1945 Germany on the other hand, is a striking example of a political transition with a clear victor. Preceded by centuries of colonial and ethnic tension: Rwanda had become fertile ground for intolerance, violence, and ultimately a genocide

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255 Ibid: 503.

256 Ibid: 505.

257 The *Audiencia Nacional* is a centralised court in Spain with jurisdiction over all of the Spanish territory.

258 Political Organizations in Spain.

259 Reed Brody, "The Conviction of Baltasar Garzón", *The Nation*, February 2012. https://www.thenation.com/article/archive/conviction-baltasar-garzon/

260 BBC News, "Spain judge Baltasar Garzon cleared on Franco probe", *BBCNewsonline*, February 27, 2012. https://www.bbc.com/news/world-europe-17176638.

261 Franszeze, "Historical exploration of Spain post Franco" 2017: 502.

262 Du-Bois Pedain, *Transitional Amnesty* , 5.

by the 20th century.[263] Home to three main ethnic groups: Hutu (majority), Tutsi and Twa- the country had one of the highest population densities in Africa. In 1959, the Hutu revolution forced over 300 000 Tutsis out of the country. By 1961, the revolt exiled the Tutsi monarch until it gained independence in 1962.[264] Ethnically motivated violence continued after the ascension of Hutu General Juvenal Habyarimana. Preparing for resistance, the Rwandan Patriotic Front (RPF) consisting mostly of Tutsi refugees, was formed in exile.

In 1990, the exiled forces invaded Rwanda. The invasion led to a three-year civil war, which ended with the Arusha Peace Agreement in 1993.[265] Refusing to share power as per the agreement, Hutu extremists were against the pending transition and would prevent it at all costs. On 6 April 1994, a plane carrying Habyarimana and Burundi's President Cyprien Ntaryamira, was shot down over the capital of Kigali. No one survived and to this day, there are no leads on who shot down the plane. Within a few hours, roadblocks and barricades were erected by the President's guards, Rwandan armed forces, Hutu militia groups known as the Interahamwe, ("Those Who Attack Together") and Impuzamugambi ("Those Who Have the Same Goal"). The message was clear: all Tutsis and moderate Hutus had to die.[266]

Within 100 days, as many as 800 000 Tutsis and moderate Hutus were massacred across Rwanda.[267] Globalising TJ under the UN was already under way, but it was preoccupied with the Bosnian War (1990-1995). Initially, the UN was reluctant to get involved, noting the early stages of the killings as a civil war. The United Nations Assistance Mission for Rwanda (UNAMIR) was deployed to assist with the transition, but were withdrawn in April. They were later redeployed following a Security Council vote in mid-May. By then, the genocide was almost over. According to the former UN Secretary-General Boutros Boutros-Ghali[268]: "The failure of Rwanda is 10 times

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263 History, "Rwandan Genocide", History Online, https://www.history.com/topics/africa/rwandan-genocide. Paul J. Magnarella, "The Background and Causes of the Genocide in Rwanda", Journal of International Criminal Justice, Volume 3, Issue 4, 1 September 2005, Pages 801–822, https://doi.org/10.1093/jicj/mqi059

264 Magnarella, "Rwandan Genocide", 2005:

265 Ibid: 803.

266 Ibid: 804.

267 Ibid.

268 Boutros Boutros-Ghali was an Egyptian politician and diplomat who was the sixth Secretary-General of the United Nations from January 1992 to December 1996

greater than the failure of Yugoslavia. Because in Yugoslavia, the international community was interested and was involved. In Rwanda nobody was interested."[269]

As a form of institutional atonement, the UN maintained peacekeeping forces until 1996, and in October 1994[270], it also established the first international tribunal since the Nuremberg trials of 1945. The International Criminal Tribunal for Rwanda (ICTR) was located in Arusha, Tanzania. As per its jurisdiction over crimes against humanity, high ranking former Hutu officials were charged and prosecuted for genocide.[271] The tribunal delivered some of the key landmark rulings in international criminal law on genocide and crimes against humanity. It operated outside the RPF's ascension to, and consolidation of government. Operations were concluded in 2015. In total: 93 individuals were indicted, 63 sentences were passed, 14 acquittals and 10 cases were referred to national jurisdiction. Not only did the tribunal pioneer and develop the Genocide Convention[272], but its remarkable hybridity and continuation of accountability mechanisms is exemplary.

The ICTR was not the only TJ mechanism in Rwanda. Recognising the importance of justice close to home ,continuation models such as the Mechanism for International Criminal Tribunal (MICTR),[273] assumed the ICTR's residual functions in July 2012. Ethnic reconciliation was foregrounded by the RPF soon after the transition. Although accountability was spear-headed by the UN, efforts for reconciliation were driven locally, especially at grass-roots level. By the year 2000, approximately 130 000 alleged genocide perpetrators populated Rwanda. Using the national ordinary criminal justice system to charge and prosecute all suspects would have taken decades. Furthermore, it would have immobilised the transitioned economy.[274]

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269 Ibid: History online.

270 Lars Warldof. "Transitional Justice and DDR:The Case of Rwanda", Research Unit International Center for Transitional Justice. 2009. https://www.ictj.org/sites/default/files/ICTJ-DDR-Rwanda-CaseStudy-2009-English.pdf.

271 Ibid:15.

272 Ibid: 16.

273 The International Residual Mechanism for Criminal Tribunals (IRMCT or Mechanism) – is an international court established by the United Nations Security Council in 2010 to perform the remaining functions of the International Criminal Tribunal for former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) following the completion of their respective mandates.

274 Ibid: 17.

In 2001, the Gacaca court, a form of communal justice was established to complement the work of the ICTR. Over 12 000 communal courts were formed.[275] The mandate of the Gacacas was to establish the truth on what happened; accelerate legal proceedings for genocide crimes; eradicate the culture of impunity; reconcile and use the capacities of Rwandan society for healing.[276] As with all TJ mechanisms, the legacy of Gacaca is mixed. The numbers, however, reflect the immensity and importance of the mechanism. In total, the 12 103 communal courts tried over 1.2 million cases countrywide.[277]

2.5.2 Institutional Pathway: International Tribunals and Localizing Justice

As post-conflict societies progressed from transitions and into consolidation, institutionalism was used to entrench and bring about sustainable reform.[278] Countries that underwent democratic change, institutionalised or embedded TJ ideals. Ideals such as reconciliation and redress were integrated as national ideals and objectives.[279] South Africa and Rwanda for instance, encouraged and incorporated national reconciliation in their early institutional building stages. In its normalisation stage, TJ acknowledges that not all challenges of inequality and justice can or should be solved during moments of transition. Redistribution measures such as land restitution and compensation,[280] memorialisation[281] projects, ongoing or reopening prosecutions of historical crimes, are some of the ways in which TJ is normalised in a post-transitional society.

The most recognised symbol of normalisation in transitional jurisprudence is the entrenchment of the Phase I Nuremberg response. The ICC is reminiscent of the Nuremburg tribunal.[282] As an embodiment of retributive justice, it has jurisdiction on specific mass crimes (crimes against humanity), heads of state, and high ranking

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275 Ibid: 19.
276 Ibid: 20.
277 Ibid.
278 Bruce Russett, "How Democracy, Interdependence, and International Organizations Create a System of Peace," in *The Democracy Sourcebook*, ed. Robert A, Dahl, Ian Shapiro, and Jose Antonio Cheibub, (Cambridge: The MIT Press, 2003), 492; John M. Owens, "How Liberalism Produces Democratic Peace," *International Secur*ity 19, no. 2 (1994): 87-125.
279 Derek Powell, "The role of Constitution making and institution building in furthering peace, justice and development: South Africa's democratic transition", *The international journal of transitional justice*, no 4 (2010), 230-250.
280 TRC volume 6, section 5, chapter 7: 726.
281 TRC Justice for the Fallen recommendation for a memoralisation project. Ibid: 727,728.
282 Teitel, "TJ Genealogy", 93.

officials only. In order to respond to historical challenges of inequality and justice locally, consolidated governments are unintentionally the driving force behind the horizontal expansion of TJ.[283] As countries follow-up on TJ recommendations or develop alternative notions to do so, transitioned governments become key role players, thus advancing the proliferation of TJ. Redress, reparation, ongoing prosecution and the use of other TJ mechanisms in the long-term, require a transitioned/consolidated state to find contingent and contextual methods of accountability.[284] The balancing act for the new government is doing so without compromising the rule of law, or neglecting its historical value.

2.6 Conclusion

The intent behind the above genealogy was to provide a historical theoretical framework of TJ. A field emanating and associated with post-conflict societies, it is also criticised for being under constant transition. It interacts with ordinary or non-conflict circumstances, questioning it's extraordinary nature and relevance. Driven by the question of what to do with perpetrators of mass human rights violations, punitive or retributive justice was one of the TJ outcomes of the first phase. In this phase, the Nuremburg Tribunals (1945-2946) were a demonstration of retributive accountability and punitive justice. This form of accountability was punishment-driven and focused on the perpetrators. Accountability through the courts was therefore a TJ outcome of the first phase.

The second phase is located between 1970 and the late 1980s, coinciding with the global trend towards liberal democracies. These political conditions established a field that started to consider the needs of the victim, in some cases foregoing punishment and choosing political stability instead. Truth commissions and the amnesty provision were some of the highly encouraged accountability mechanisms in the second phase restorative justice models.

As will be demonstrated through the South African example and post-transitional countries such as Rwanda and Spain, prioritising stability is only a short-term solution.

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283 Valerie Arnould and Chandra Lekha Sriram, "Pathways of impact: How Transitional Justice impacts democratic Institution building", *Impact of Transitional Justice on Democratic Institution-building policy paper, vol1*, October, 2014.

284 Dunbar, "Consolidated Democracies", 2011: 18.

When societies evolve and revisit recommendations or agreements, they may choose to re-evaluate definitions of justice, and how to pursue accountability. Post-transitional Justice in the third phase recognised that although developments may take place in a modern or transitioned context, it is often difficult if not impossible to disassociate it from their historical origins. This is what adds a layer of 'extraordinary' circumstances, to what is seemingly a neutral case in a transitioned society, and what they are often not equipped for.

Not acknowledging this historical link is the challenge that institutions in transitioned or consolidated regimes face. How do institutions created with a different ethos, crafted for an 'ideal', almost a historic community, respond to legacies of the past? The aim of this chapter was to suggest tracing institutional pathways as a point of departure. In line with the genealogical framework, looking at some of the institutions used to hold people accountable initially, creates pathways and narratives for the substance of justice being sought at a later stage. This historical continuity is the kind of justice an established institution would have to respond to in a post transitional expansion.

The third TJ phase is also called the normative phase where TJ ceases to become an extraordinary discipline reserved for post-conflict settings. Much of the field's critique is situated in this phase, which is marked by the adoption of the Rome Statute in 2002. The importance of institution building, and contingent measures of justice are encouraged by the UN. Additionally, a stronger culture against impunity is advocated. Victim-centred notions of justice are pursued alongside harsher prosecutorial processes by countries themselves, or the ICC. However, in this phase, one also sees a field often at odds with itself. It expands horizontally in time and space (authoritarian to democratic), and displays a shift towards post transitional justice. Ultimately, as seen through the overlapping phases, it is easy to see where political transitions start and stop, but it is not always easy to determine what sufficient justice and accountability is, hence a the balancing act by parties post-conflict. This is a continuous inquiry and lends itself to agreements made for the purpose of a political transition, and change in societal attitudes.

The next chapter will discuss the TJ outcomes of South Africa's Truth and Reconciliation Commission through an application of Wietekamp's TARR model.

CHAPTER THREE: APARTHEID AND THE TRUTH AND RECONCILIATION COMMISSION

3.1 Introduction

South Africa's restorative justice model produced important TJ mechanisms and institutions of justice post-conflict.[285] Relying on amnesty facilitated by the TRC, it articulated contextual notions of accountability for a tumultuous, and violent period.[286] As noted in chapter two, political conditions determine the substance and extent of justice post-conflict. Centuries of colonial oppression and decades of a racial system had led South Africa to the brink of civil war.[287]Similar to Spain, the balance of forces were delicate, and required an innovative yet realistic bridge to the future.[288] The TRC oversaw the task of adjudicating crimes of apartheid, but its restorative legacy is interrogated by the 2017 Timol developments, and more recently, the 2020 Neil Aggett[289] inquest.

Chapter three is the first application of Wietekamp's TARR model in the study. As an exploratory study, the model assists in formulating tested outcomes of TJ, particularly in the South African example. It identifies the TJ outcomes of the TRC. The rationale is to explore the origins of the inquests and thus TJ in South Africa. Using the TAR analysis, what was the Commissions conceptualisation of the truth, accountability and reconciliation? The intention is to furthermore understand what was left out, in an attempt to explain what could have led to the accountability shift almost 20 years later(discussed in chapter four). A shift can be defined as a significant development or a move away from an initial position.[290]

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285 Nicolini 2014: 149.
286 Nicolini, "South Africa through contemporary history": 150.
287 Nicolini 2014: 149.
288 TRC Volume 1: 1,5
289 Azarrah Karrim, "Neil Aggett inquest: A marked Aggett and a failed treason trial", *News24*, February 08,2020. https://www.news24.com/SouthAfrica/News/neil-aggett-inquest-a-marked-aggett-and-a-failed-treason-trial-20200208
290 Dunbar, "Consolidated Democracies", 2011: 22.

According to the genealogical approach, understanding the origins of a phenomenon provides insight on what could have led to descent at a later stage.[291]By elaborating on the conflict and circumstances surrounding the Commission's work, the chapter highlights some of the initial assumptions behind the TJ outcomes. Evidenced by the time frame adopted by the Commission (1960-1994), the literature reveals that the accountability mechanism had to be both practical and sensitive.

Two institutions were created by the transitional agreements in the 1990s: The TRC itself and, a constitutional democracy. As such, the TAR analysis in this chapter is descriptive. It examines the origins of truth, accountability and reconciliation as conceptualised by the political context, and the work of the Commission. In other words, for the purpose of this chapter, emphasis is placed on the TRC as a founding institutional pathway for conceptualising all three outcomes.

It was the mandate of the TRC to establish as complete a picture as possible on gross human rights violations between 1960 and 1994.[292] Whatever notions of truth, accountability and reconciliation that would be pursued, had to be articulated in terms of amnesty and related constitutional agreements.[293] The aim of the chapter is to scrutinise some of the factors which led to the decision, and the ways in which they influenced TAR outcomes of South Africa's TJ discourse.

The chapter begins with a historical background on conflict in South Africa, all the way to the Convention of Democratic South Africa Negotiations (CODESA) in the 1990s. The TRC and its mandate is discussed as well as its truth, accountability and reconciliation outcomes. What was the established truth, accountability mechanism and as a result, what did reconciliation mean for South Africa at the time? The historical discussion below attempts to summarise the depth of atrocities which the TRC had to grapple with. Although the discussion begins with 1652, which is outside the TRC investigative mandate (1960-1994), the events are acknowledged in the Commission's chronology as the starting point of racial conflict in South Africa. The discussion also illustrates that not all elements of historical conflict can be addressed in the immediate transition. To this e nd, the chronology of events may also explain some of the

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291 Garland, "History of the Present", 371.
292 TRC volume 1: 11.
293 Du Bois-Pedain, Transitional Amnesty, 25.

dissatisfaction surrounding the TRC's articulation of accountability and justice, given the centuries of injustice.

3.2 Background : The Conflict

The road to South Africa's democracy is often described as nothing short of a miracle, and occupies a cardinal position in the TJ field.[294] As noted previously, apartheid South Africa may have been officially established in 1948, but subjugation and dispossession on the basis of race began as early as 1652. As such, although the TRC focused on gross human rights violations between 1960 and 1994, the origins of these atrocities was the culmination of settler colonialism and conquest.[295]

3.2.1 Colonial Era: 1652 -1910

In 1652, the Dutch East India company deployed a crew to the southern tip of Africa following a shipwreck in 1647.[296] What was initially a refreshment station between the travellers and the Khoisan, resulted in a twenty year war from 1658-1677. With land and agriculture as the main currency the colonial period sowed the seeds of racialised labour, capital, and the four main colonies: the Transvaal, Orange Free State, the Cape and the Natal.[297] Characterised by intra-territorial wars of expansion between the indigenous people, British and Afrikaners, the era is concluded by the Anglo-Boer war of 1899-1902. In 1906, the two groups came to an agreement and in 1910, the four colonies joined to form the Union.

3.2.2 Union of South Africa: 1910-1948

Prime Minister Louis Botha's policy of a United South Africa was premised on the cooperation between English, and Afrikaans-speaking white people. The politics of the Union were centred on the definitive subjugation of the African population.[298] A

294 Antjie Du Bois- Pedain, *Transitional Amnesty in South Africa, (*United Kingdom: Cambridge University Press, 2007), 2-16.
295 TRC volume 1: 16.
296 Nicolini: 65.
297 Ibid: 66.
298 Ibid.

continuation of the colonial blueprint, Afrikaans-speaking white people focused on agriculture, while industrial activities were dominated by the English faction.[299] Natives[300] and people of Asian descent were pushed into hard labour, with little to no social recognition or rights. Laws enacted in this period, mostly from 1910-1929 were intended to sustain the mining industry and consolidate white power. [301]*The Native Land Act of 1913*, *The Native Affairs Act 1920*, *Industrial Conciliation Act of 1924 ,* were just some of the legislation[302] that was used to divide and create an unequal and racist system. It is also marred by the Bullhoek Massacre in 1921[303]. Together, these factors galvanised the rapid migration and employment of black Africans.

3.2.3 Apartheid South Africa: 1948-1994

Apartheid was therefore a continuation of the above exclusionary social and legal framework, created by the two dominant groups. In May 1948, the NP won by a small margin under the slogan of *Apartheid*.[304] An Afrikaans slogan which translates to 'separateness'. Although it was initially not clear what the system would mean, the NP was clear that it meant the recognition and separation of specific groups of people. [305]Rooted in ideologies of ethnic purity and racial superiority, DF Malan called for a republic based on the policy of apartheid. It continued the trusteeship system that would ensure the safety of the white race, and the development of the non-white race separately. Development and recognition would be done according to a race's aptitude and abilities.[306]

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299 Ibid: 67

300 South Africa has a racially complex and challenging history. The word Natives was used to describe the black indigenous community. The use of the word is used to reflect the then literature and changes in time throughout the study.

301 Ibid: 68.

302 Wage Act of 1925, Mines and Works Amendment Act of 1926, the Native Trust and Land Act No. 18, of 1936, Native Laws Amendment Act of 1937

303 The Ntabelanga Massacre commonly known as Bulhoek massacre occurred on 24 May 1921, in the South African village of Ntabelanga in the then Cape Province (today part of Eastern Cape). After a dispute over land in Ntabelanga, dating back to 1920, an 800-strong police force from the Union of South Africa and led by Colonel Johan Davey and General Koos van der Venter, gathered at Ingxingwa Ye Nkunzini, in the Bulhoek valley, and Ingxingwa ka Stivini, Steven's Valley. The 20-minute battle, which left an estimated 163 Israelites dead, 129 wounded and 95 taken as prisoners, became known as the Bulhoek Massacre.

304 Nicolini: 104.

305 Ibid: 105.

306 Ibid: 105.

Built on principles of Afrikaans nationalism, the separatist state introduced a system of "grand apartheid".[307] It entailed a process which ensured the division of South Africans into "national groups" on the basis of the four main categories: white (Afrikaner and English), black (African Natives), coloured and Asian. *The Prohibition of Mixed Marriages Act 1949 Group Areas Act 1950, Suppression of Communism, Public Safety Act 1950,* are just some of the plethora of laws[308] enacted to divide, dispossess and maintain white supremacy. This would be done at the expense of the black, coloured and Asian majority.[309]

Furthermore, occurrences such as the Sharpeville massacre[310], POQO killings in 1962[311], the suspicious suicides of Solwandle Looksmart, Neil Aggett, Imam Abullah Harron and Ahmed Timol- were followed by resistant yet fatal moments. The Soweto Uprising in 1976,[312] Kassinga Massacre,[313] PEBCO Three,[314] Cradock Four[315], and Gugulethu Seven in 1986, [316] are some of the many forms of active resistance turned deadly. The citations are by no means a full account of the atrocities noted by the TRC, but they all form part of the 46 696 violations and 28 750 victims recorded by the Commission from 1960-1994.[317] They also illustrate the complexity of the intra-state conflict and the moral argument of wrongdoing on both sides.

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307 Ibid: 106.

308 Prevention of Illegal Squatting Act 1951, Native Laws Amendment Act 1952, Natives resettlement Act 1954, Bantu Education Action Act 1953…. TRC chronology volume 3: 12.

309 Nicolini: 108.

310 Sharpeville massacre, (March 21, 1960), incident in the black township of Sharpeville, near Vereeniging, South Africa, in which police fired on a crowd of blacks, killing or wounding some 250 of them. It was one of the first and most violent demonstrations against apartheid in South Africa.

311 POQO was formed as an armed wing to the Pan Africanist Congress (PAC) during the 1960's and was known for its aggressively violent sabotage campaign.They were the largest underground grouping of the 1960's, Poqo's strategy intentionally involved killings. Their main targets were Langa and Paarl policemen and their alleged informers as well as Transkei chiefs (read as collaborators with the apartheid regime) and their followers.

312 The Soweto uprising was a series of demonstrations and protests led by black school children in South Africa that began on the morning of 16 June 1976.

313 The Battle of Cassinga, Cassinga Raid or Kassinga Massacre was a controversial South African airborne attack on a South West Africa People's Organization (SWAPO) military base at the former town of Cassinga, Angola on 4 May 1978.

314 The Pebco Three were three black South African anti-apartheid activists – Sipho Hashe, Champion Galela, and Qaqawuli Godolozi – who were abducted and subsequently murdered in 1985 by members of the South African Security Police.

315 On 27 June 1985, four anti-apartheid activists from Cradock, Eastern Cape, were intercepted at a roadblock set up by the South African apartheid government security police outside Port Elizabeth. These activists were Matthew Goniwe, Fort Calata, Sparrow Mkhonto and Sicelo Mhlauli. They were brutally assisinated by the police in 1985.

316 The Gugulethu Seven was an anti-apartheid group of men between the ages of 16 and 23 that were shot and killed on 3 March 1986 by members of the South African Police force.

317 TRC volume 1:402.

3.3 The Transitional Period (late 1980s to 1994)

3.3.1 Convention for a Democratic South Africa

By the early 1990s, South Africa had deteriorated economically and had disintegrated politically. [318]The NP was losing international support and facing increasing levels of economic sanctions from the global community. Between 1972 and 1992, South Africa's terms of trade had decreased by 66%, and many were questioning the durability of its economy given the rising unemployment and inefficient system.[319] The overall death toll from political incidents rose sharply between 1980 and 1990. It became worse after the release of Nelson Mandela, the unbanning of the African National Congress (ANC) and other liberation movements in February 1990. [320]

As negotiations loomed, the political stalemate was clear to all parties. Although the NP had the institutional, particularly military muscle to continue a state of terror, the waning global support, and growing resistance would not sustain its politics or the economy.[321] Equally, liberation movements knew that the political dynamics might be in their favour, but they could not risk the possibility of going to war. Added to this, ideological differences were stark between liberation movements in the early 1990s, threatening the possibility of a peaceful negotiation and transition. The seven day war[322], Sebokeng shootings[323], the Train[324] and Swannieville attacks in Natal[325], Battle of the Forrest[326], Boipatong massacre[327], and the AWB[328] Ystergarde bomb attacks in

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318 Du Bois Pedain *"Transitional Amnesty*": 25; Nicolini "Contemporary History": 110.

319 Nicolini: 111.

320 Ibid.

321 Ibid: 112.

322 At least 80 people were killed and 20,000 left homeless in the so-called seven-day war which began in Msunduze valley in the KwaZulu-Natal midlands on March 25, 1990

323 Police open fire on a protest march of 50 000 people in Sebokeng in March, killing eight and injuring over 300.

324 The first train attack takes place at Inhlanzane Station in July. This marks the start of a series of attacks on train commuters in the Witwatersrand. Between 1990 and 1993, at least 572 people die in more than 600 incidents of train violence.

325 A group of about eight hundred alleged IFP supporters attack the squatter settlement of Swanieville on the East Rand on 12 May. Twenty-nine people are killed and over thirty injured.

326 In the 'Battle of the Forest' in June, twenty-three people are killed in fighting between IFP and ANC supporters in the Richmond townships of Ndaleni and Magoda, Natal.

327 In the Boipatong killings on 17 June, two hundred IFP supporters from KwaMadala hostel attack residents of Slovo Park squatter camp, killing over forty-five people.

328 The Afrikaner Weerstandsbeweging, meaning Afrikaner Resistance Movement, commonly known by its abbreviation AWB, is a South African neo-Nazi separatist political and paramilitary organisation, often described as a White Supremacist group.

1994,were violent events and circumstances which surrounded the Convention of a Democratic South Africa (CODESA) negotiations.

A significant public gathering of the Mass Democratic Movement (MDM) called the Patriotic Front Conference, preceded CODESA and took place in October 1991. It brought together a large number of cultural, religious and political organisations such as the Pan African Congress (PAC), Azanian People's Organization (AZAPO) and the ANC.[329] The conference affirmed the demand for a democratically elected Constituent Assembly; that interim structures should ensure that the NP South African regime would not preside over, or manipulate the transition; that the conference would underwrite general constitutional principles, and agree on a time frame for change to a democratic order.[330] Formal negotiations commenced in December 1991, and began with the inauguration of CODESA.[331]

The formal CODESA negotiations and the follow-up Multiparty Negotiation Process (MPNP) ,fulfilled the above objectives to a substantial extent.[332] At the beginning of the process in December 1991, three political parties were dominant: The NP representing the government and the white minority, the Inkatha Freedom Party (IFP) representing the Zulu constituency, and the ANC (multi-cultural/ethnic organisation).[333] Developments and ideological differences, however, would alter this formation. The bedrock of the consensus came to depend on the ANC and NP due to the IFP's decision to recuse itself.[334] Guided by the Harare Declarations,[335]an interim Constitution emerged. The agreement was that the final Constitution would be approved by the two elected houses of parliament. These houses jointly made up the Constitutional Assembly.[336] A looming question even before the above negotiations was amnesty.[337]

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329 Maharaj, "Negotiated Transitions",13.

330 Ibid, 14.

331 Mac Maharaj, "The ANC and South Africa's Negotiated Transition to Democracy and Peace", Berghof *Research Center for Constructive Conflict Management,* no 2, *2008.*

332 Ibid, 15.

333 Ibid.

334 Ibid ,16.

335 The Harare Declaration was adopted on 21 August 1989, by the OAU sub-committee on Southern Africa in its summit in Harare, Zimbabwe. The Declaration urged the regime to take measures to create a climate for negotiations, to put an end to apartheid and define a new constitutional order based on a set of democratic principles (also listed in the declaration). It also elaborated on the conditions for the negotiations to start.

336 Maharaj, "Negotiated Transitions", 16.

337 Ibid, 18.

3.3.2 Amnesty Provision

The question of amnesty not only concerned apartheid officials but political prisoners and combatants both in, and out of the country. As negotiations formalised, the release of political prisoners dragged on, and the sporadic return of exiles placed impetus on the uncertainty of amnesty.[338] Near the completion of the multiparty talks, the ANC and NP included a provision for amnesty to: "be granted in respect of acts, omissions and offences associated with political objectives, and committed in the course of the conflicts of the past". It was inserted in the post-amble to the interim Constitution, which governed the democratic transition.[339] Characteristic of the second phase, This created a link between the consolidation of democracy, the Constitution and amnesty.

As an ongoing process the negotiations produced an interim Constitution, and made way for the Transitional Executive Council to oversee the first democratic elections.[340] The CODESA negotiations also produced founding institutions such as the amnesty agreement. Through the *Promotion of National Unity and Reconciliation Act 1995* (Reconciliation Act), it established the TRC. As noted above, by including the amnesty agreement in the interim Constitution, it became an embodiment of the new democracy.[341] These outcomes support the position that negotiations were more about a peaceful political transition, than securing justice. Furthermore, they give credence to the argument that the negotiations failed, or even refused to acknowledge the depth of historical injustice experienced by the black majority as posited in the above historical background.[342] Political stability is indeed the first and vital ingredient to justice but the agreements made to secure stability, creates the normative framework or elements of justice post-conflict. The negotiation stages are therefore characterised by concessions and tradeoffs that are difficult, if not impossible to reverse in transitioned societies.[343]

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338 Ibid.

339 Du-Bois Pedain, *Transitional Amnesty*, 17.

340 Maharaj, "Negotiated Transitions",19.

341 Arthur P, "How Transitions Reshaped Human Rights", 331; Derek Powell, "The role of Constitution making and institution building in furthering peace, justice and development: South Africa's democratic transition", *The international journal of transitional justice*, no 4 (2010), 230-250.

342 T Madlingozi 'Social Justice in a Time of Neo-apartheid Constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution', *Stellenbosch Law Review* 123, 2013.

343 Modiri J, "Alternative Jurisprudence",304-306.

The TRC was the restorative bridge from the centuries of human rights violations, to a democratic society. According to the Commission, by the time the negotiations ended, it was no longer clear who the perpetrators and victims were. The political stalemate meant that no one was obliged to participate in a court proceeding or tribunal. But in the same way, the time for coexistence and difficult conversations had come. The next section discusses the TRC's mandate and its TJ outcomes.

3.4 Truth and Reconciliation Commission: Restorative Model

Truth commissions, located in the second phase of the transitional justice field, are founded on the central premise of the idea that public acknowledgment of suffering −the truth about injustice −will begin to restore victims' dignity.[344] In societies where repressive acts are state-sanctioned and perpetrators are sworn to secrecy, truth commissions are considered a 'third way'[345] compromise between the Nuremberg trials at the end of WWII, and blanket amnesty or national amnesia as with Latin America.[346] The 'third way' is significant for several reasons.

First, truth commissions are considered a platform for perpetrators to divulge information or experiences without fear of prosecution or punishment, specifically when combined with amnesty or lustrations.[347] Without the possibility of impunity, former state officials have no incentive to disclose information in a court proceeding, therefore leaving the victims and survivors without closure on the disappearance and death of their relatives.[348] Second, related to the first, truth commissions tend to be a more expedient model of justice when faced with a huge number of perpetrators to prosecute such as in Nuremburg or Rwanda.[349]

In South Africa, the TRC was a product of truth finding and fulfilling the amnesty provisions, as per the interim Constitution of 1993.[350] In the interest of a peaceful

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344 Chapman and Ball, "The Truth of Truth Commissions", 9-15.

345 In the opening sessions, South Africa's Truth Commission was referred to as a Third way by Chairperson of the Commission, Former Archbishop Desmond Tutu.

346 Ibid, 12.

347 Ibid, 14.

348 Explanatory Memorandum Bill to the *Promotion of Reconciliation and National Unity Act of 1995*; The *Reconciliation Act 1995 – Chapter 3,4 and 5 of the Act.;* Nicolini, "Contemporary History" :140.

349 Ibid.

350 Ibid, 19.

transition to democracy, this made the conceptual link between amnesty and truth recovery an institutional one.[351] The *Reconciliation Act 1995*, created the South African TRC. It was an official semi-judicial body with a limited tenure. The mandate was to:

> establish as complete a picture as possible of causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to the cut-off date' (May 1990); 'facilitating the granting of amnesty' ,and with 'restoring the human and civil dignity of…victims by granting them an opportunity to relate their own accounts of the violations, and by recommending reparation measures in respect of them. [352]

These instructions compartmentalised the Commission into three chambers, namely: Amnesty, Human Rights Violation and Reparations Committee[353]. Although separate in their functions, the work and findings of the Committees are interrelated. This study focuses more on the work of the Amnesty Committee and Human Rights Violation Committee. The formal TRC hearings began in April 1996 for applications received from 14 December 1994 ,to September 1997. [354]

3.4.1 The Committees of the Truth and Reconciliation Committee

3.4.1.1 Human Rights Violation (HRV) Committee

The HRV committee investigated human rights abuses which took place between 1960 and 1994.[355] Victims or surviving families submitted statements or testimonies to the Committee for investigation. The investigating unit would establish the identity of the victims, their fate or present whereabouts, and the nature and extent of the harm they have suffered. It also established whether the violations were the result of deliberate planning by the state, and whether any other organization, group or individual was involved. From the submissions and findings, the HRV identified victims

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351 Ibid.

352 Section 3 of the *Promotion of Reconciliation and National Unity Act of 1995*. Final amendment and citation: *Promotion of Reconciliation and National Unity Act 33 of 1998*.

353 Received testimonies of human rights violation by victims and probed into the roles of political parties, state bodies and institutions of civil society during apartheid.

354 Ibid, 20.

355 Ibid.

of apartheid. These victims were thereafter referred to the Reparations and Rehabilitations Committee.[356]

3.4.1.2 The Reparations and Rehabilitation Committee

The Reparations and Rehabilitations (RR) Committee formulated policy proposal and recommendations on healing survivors, their families and society at large.[357] In terms of the *Reconciliation Act*, the RR was empowered to provide victim support, and that their dignity was not infringed by the TRC processes. A presidential fund was established to pay urgent interim reparations.

3.4.1.3 Amnesty Committee

The closest structure to judicial accountability that the TRC established, was the Amnesty Committee (AC).[358] As per the interim Constitution, the AC was tasked with granting amnesty in exchange for full disclosure of acts and omissions committed for a political purpose, or motive. These acts must have been committed from 1960-1994. Although the Committee acknowledged organisational liability, only individuals could appear before the AC and account. Proceedings were conducted in a court-like manner. The Commission could question, examine, cross examine, and had the power to subpoena individuals. [359]Amnesty in the TRC was not automatically given. The Committee could decline amnesty applications based on the level of disclosure, remorse and gravity of the crime (among other criteria).

In 1996, Hawa Timol gave testimony on the suspicious death of her late son, Ahmed Timol.[360] Since neither of the former police officials implicated in the 1972 inquest had applied for amnesty[361], the family(ies) believed that the new democratic dispensation was indeed cognisant of the unjust apartheid past. Families participated in the TRC

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356 Ibid.

357 Chapter five of the Reconciliation Act.

358 Chapter four of the Reconciliation Act.

359 Nicolini: 156; Du Boid Pedain, *Transitional Amnesty* : 45.

360 TRC: Human Rights Violation, "Hawa Timol's Testimony" , 30 April 1996, GO/O173 Johannesburg, http://sabctrc.saha.org.za/originals/hrvtrans/methodis/timol.htm , accessed on 02 July 2019.

361 The other two implicated officials had died without applying for amnesty, the surviving official, Joao Rodrigues did not apply for conditional amnesty.

processes in good faith, with the expectation that more was to come in the new South Africa.[362]

The three chambers above established the truth, facilitated accountability and constructed a particular narrative of reconciliation. The TAR analysis below is a discussion of these outcomes.

3.5 South African TRC: TAR Analysis

The below outcomes are outlined to explain the TRC's outcome by describe why the truth was a currency of justice and how it was defined. It explains the choice of accountability mechanisms (amnesty) and why a restorative approach was necessary. As such, these outcomes produced a particular narrative of reconciliation, that was tied to the success of democracy and institutions after the transition.

3.5.1 Restorative Truth

Although the socio-political effects of apartheid were evident and experienced through legislation, apartheid institutions and organs of state successfully managed to suppress and destroy incriminating evidence in the withering phases of apartheid.[363] Actions by special units such as C1 Vlakplaas, inquests and suspicious deaths, had been covered up by the courts, state intelligence and police.[364] The apartheid regime regularly purged the archives of huge volumes of sensitive documents, particularly those dealing with security issues. On the eve of the political transition, the security establishment became increasingly apprehensive about certain state records passing out of their control. It undertook an even more systematic and vigorous effort to destroy state records.[365]

It is for this reason that the TRC and commissions alike were better suited as an initial, but not the only TJ mechanism post-conflict. Discussed in chapters four and five, truth commissions and court proceedings use different sets of truths for different purposes. Truth commissions are flexible and are able to create incentivising or protective laws

362 Cajee, "*Timol*: *Quest for Justice*", 36 ; Du Bois Pedain: 248-251.
363 Du Bois Pedain, *Transitional Amnesty* 24.
364 Du Bois Pedain, *Transitional Amnesty* 25.
365 Chapman and Ball, "The Truth of Truth Commissions", 18.

to access a wide variety of information. Courts on the other hand, rely on more objective standards of truth and justice.

The TRC's mandate to "establish a complete picture of the causes , nature and extent of the gross violations of human rights"[366], therefore brought about an acknowledgment of four particular truths by the Commission.[367] Being cautious of the epistemic debates on the relative or subjective nature of what the 'truth' is, the TRC's final reports distinguish between four notions of truth: "factual or forensic truth, personal or narrative truth, social or 'dialogue' truth, and healing or restorative truth."

3.5.1.1 Narrative Truth:

The TRC defined its narrative truth as explicitly evoking the cathartic benefits of storytelling.[368] Narrative truth was central to the work of the TRC, especially to the hearings of the HRVC. This was where victims told their stories in public hearings. "Victims make meaning and sense out of their experiences through narration, and under certain circumstances, storytelling contributes to psychological healing after trauma."[369]

Another purpose of the narrative truth is that it is intended to create a common understanding of a society's past. The mandate for creating shared narratives post-conflict not only establishes a TJ discourse, but has socio-political and legal implications for a post-transitioned society. To instantiate, reconciliation is much easier to facilitate when there is a common understanding of injustice and shared narrative. The TRC's narrative differs widely but is underpinned by reconciliation and forgiveness between victims and perpetrators.

3.5.1.2 Social Dialogue Truth:

The social truth was a unique feature and emphasis of the TRC which referred to the process and dialogue element of its work. As the TRC report said, "[t]he public was

366 Chapter 2, section 3 of the *Reconciliation Act.*
367 Chapman and Ball, "The Truth of Truth Commissions", 11. See, Truth and Reconciliation report 227–29 (1999); TRC Volume 1: 111.
368 Ibid, 11.
369 Ibid.

engaged through open hearings and the media, while the commission was under constant public scrutiny."[370] In contrast to forensic truths (discussed below) which are factual, verifiable and documented, former Justice Albie Sachs considered social truths as "the truth of experiences that are established through interaction, discussion and debate."[371] In contrast to restricted prosecutorial processes and spaces, the public participative nature of truth commissions, are what make them more suited to bring about societal healing and transformation.

3.5.1.3 Restorative Truth:

Restorative truth refers to the "truth that comes from putting facts in their contexts. It means placing them in their political context of power between social actors, in historical context of the sequence of contingent events, and in the ideological context in which contending visions of the social world compete".[372] The outcome of such acknowledgement is the validation of people's experiences and the restoration of the victim's dignity.[373]

3.5.1.4 Factual or Forensic Truth:

This category of 'truth' refers to the impartial and objective evidence that most truth commissions have understood as their mandate.[374] Forensic truth is considered impartial evidence that tells truth at two levels: (1) truth about individual events, cases, and people, and (2) about "nature, causes, and extent of gross violations of human rights, including the antecedents, circumstances, factors, context, motives, and perspectives that led to such violations."[375]The TRC called this "scientific and forensic" or "micro-scope" truth,[376] both of which imply that the TRC understood this kind of truth to play a very limited role in its work.

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370 Chapman and Ball, "The Truth of Truth Commissions", 11.
371 Ibid, 11.
372 Ibid.
373 Ibid.
374 Ibid.
375 Ibid.
376 TRC volume 1: 111-118.

Collective healing required an integrated approach to the truth. It was largely based on social science deductive methods for truths at a micro-level, meaning(on incidents and concerning specific people, for example, disappearances, torture, suspicious death, and at the macro-level, to identify the broader patterns underlying gross violations of human rights. [377]While there is no hierarchy of which "truth" is given more consideration in a truth commission, forensic truth would hold more gravity and preference in a court prosecution, than in a commission. It can therefore also be understood as *causa* or the basis of a claim in a legal dispute. It is factual, observable or visible within a legal episteme or framework.

An acknowledgement of the above truths and experiences was a result of the three TRC committees.[378] The above truths were imperative for creating a shared narrative of historical injustice, and a social dialogue of reconciliation and reconstruction.[379]The truths also address elements of healing that a contingent model of justice would have to respond to. Not only are they sources of direct conflict, but they are informative points of departure. They furthermore preserve the conflict and the meta-conflict elements, that is, conflict about the conflict, of a justice project in a new or transitioned state. Appreciation of the two characteristics of conflicts, conceptualises a more responsive form of justice. The conflict is the surface, objective or rather forensic elements of conflicts eg murder, torture etc. The conflict about the conflict refers to the meta or principal elements of the friction. Centuries of oppression and dispossession can be considered meta-conflicts of apartheid related crimes.

3.5.2 Restorative Accountability: Amnesty

Amnesty and not "vengeance" or "retaliation" was the vital link to reconstruction, and the creation of an equal, democratic and constitutional South Africa.[380] Reconciliation and national unity were therefore important socio-political resolutions. Their advancement relied on amnesty in respect of acts, omissions or offences, associated

377 Ibid.
378 Ibid.
379 Ibid 12.
380 Ibid.

with political objectives and committed in the course of the conflicts of the past.[381] Without amnesty, there could be no negotiations and thus no peace or reconciliation for anyone. Through the amnesty provision, accountability can therefore be considered as restorative, in that the intention was to preserve relations and not punish perpetrators. The post-amble to the interim Constitution was a direct expression and framework for the historical bridge to democracy. The AC was empowered to deal with acts committed inside or outside the Republic of South Africa between 1 March 1960 and 10 May 1994. These activities had to be directly connected to the political conflict in South Africa. [382]

3.5.2.1 Amnesty process

Participation for amnesty was based upon the timely submission of applications received between 14 December 1995 and 14 September 1997.[383] Committee members had some legal training and panels had to be chaired by an active or retired judge. The Committee became operational in April of 1996, and held its first public hearings in May of 1996. Amnesty in terms of section 20(1)-(4) of the TRC, was based on the twin concepts of individual liability,[384] and full disclosure of politically motivated crimes.[385] Collated in volume 6.1, and in *Transitional Amnesty in South Africa*, the Committee continued its work until its official dissolution by the State President Thabo Mbeki, on 31 May 2001.

At dissolution, it had held more than 250 public hearings and made 4443 formal amnesty decisions.[386] Volume 6.1 of the *TRC Report 2003* is dedicated to the work of the amnesty committee. A total of 7 127 applications were received and over 3000 of them were not within the TRC mandate. A third of the applications were withdrawn and at the end, the Commission only decided on about 1100 amnesty applications.

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381 Preamble of the TRC Act.

382 Section 3 of the TRC Act.

383 Du Bois Pedain, *Transitional Amnesty*, 20. According to s18(1) of the TRC Act, applications for amnesty had to be made within twelve months from the date of the proclamation by which the President of the Republic appointed the TRC commissioners. The proclamation was made on the 13th of December 1995. The deadline was later extended: first to 10 May 1997 and then to 30 September 1997.

384 The Commission recognized organizational liability but only individuals could appear before the panels to disclose their involvement in politically motivated crimes.

385 Du Bois Pedain, *Transitional Amnesty*, 20-23.

386 TRC Volume 1: 276 ; Mallinder 2013: 52.

Most of the applications were from liberation movements, while former apartheid officials made up 20% of the considered applications.[387]

According to the records of bona fide amnesty applicants: of the 1 100 cases decided, the Commission received applications from 293 applicants who belonged to the security forces; 109 applicants connected to the IFP; 138 applicants linked to the PAC, APLA or Pan Africanist Students Organization (PASO); 107 applicants who were members or supporters of white right-wing organisations, and 998 applicants from the ANC or ANC-related organisations.[388] It is difficult to ascertain the exact number of individuals who received or were denied amnesty, but according to Du Bois- Pedain, 80% of valid or heard applications were successful and granted amnesty.

Although having minor differences, the numbers produced by the TRC have been critiqued for not adding up, and for the numbers consisting largely of liberation movements and political parties.[389]Prior apartheid and transitional Indemnity Acts [390] reduced the TRC amnesty's prospective constituency significantly.[391] In a post TRC context, it remains unclear what the position of previous indemnity legislation would be should prosecutions continue.

Granting amnesty, as cited by Du Bois Pedain,[392] extinguished any criminal or civil liability in respect of that act for which amnesty had been granted. It was extended to the benefit of all parties that might be vicariously liable for the applicant's act. Any criminal conviction based on the act would be deemed to be expunged on all official documents and records, and the conviction would be deemed to never have taken place.[393] If amnesty was refused, the applicant remained liable to prosecution and civil claims in ordinary legal proceedings. However, any incriminating answer or evidence

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387 TRC Volume 1: 276.

388 Ibid; TRC Volume 6.1: 12; Department of Justice, "Amnesty Hearings and Decisions" https://www.justice.gov.za/trc/amntrans/index.htm.

389 Du Bois Pedain , *Transitional Amn*esty, 72.

390 The *Indemnity Act 61 of 1961* indemnified the police from the Sharpeville massacre. The *Indemnity Act 13 of 1977* created similar protection following the Sharpeville massacre. Section 103*ter* of the *Defence Act 1 of 1976* protected South African soldiers against liability from activities conducted outside the country. In the 90s, the *Indemnity Act 35 of 1990* and *Indemnity Act 151 of 1992* was passed to protect liberation movements fighters returning from exile.

391 Ibid; Mallinder 2013: 59.

392 Du Bois Pedain , *Transitional Amnesty*, 75.

393 TRC volume 6.1: 3.

obtained by the Commission in the course of its proceedings, would not be admissible in a criminal or civil case against the applicant.[394]

In light of the various truths acknowledged and discovered by the TRC through its three committees, this study argues that the above-mentioned provision worked against the possibility of future prosecutions. Although parliament's intention was not to penalise unsuccessful amnesty applicants, the inadmissibility of testimonies and findings gathered during the Commission's hearing, restricted the use of evidence available for prosecutions. This demonstrated the finality of the TRC and a sense of closure to South Africa's TJ chapter. Before the Commission concluded its operation, the amnesty clause's constitutional validity was questioned by apartheid survivors and their victims. They are argued the validity of impunity towards crimes against humanity, which was in violation of the Geneva Convention. The court decision is discussed below.

3.5.2.2 Amnesty on trial: Court decisions

In the 1996 case *Azanian People's Organisation and Others v President of the Republic of South Africa*[395], amnesty provisions in the *Reconciliation Act* were challenged, and withstood the constitutional benchmark of the transitioned state. Instituted by the relatives of five well known families of apartheid victims: Bantu Steve Biko[396], Victoria and Grifiths Mxenge[397] ,Fabian and Frances Ribeiro[398], the claim sought to have the *Reconciliation Act* invalidated. This was insofar as it enabled the AC to grant perpetrators of politically motivated crimes impunity.[399] The argument was that the amnesty legislation was incompatible with the interim Constitution. They submitted that impunity was a breach of international law to punish perpetrators of human rights violations.[400]

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394 Ibid.

395 Azanian People's Organization (AZAPO) and Others v President of the Republic of South Africa and Others (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996).Hereafter referred to as the AZAPO Case.

396 Du Bois Pedain, "Transitional amnesty", 30. Died in police custody 1977, police officials applied for amnesty and while the committee found the version of events implausible, the version given on the application did not disclose any political offense.

397 Du Bois Pedain, *Transitional amnesty*, 30. See footnote 53.

398 Du Bois Pedain, *Transitional amnesty*, 30. See footnote 54.

399 Du Bois Pedain, *Transitional amnesty*, 31.

400 Ibid.

The claimants further submitted that: “it curtailed the ‘victims’ constitutional right to have justiciable disputes settled by a court of law, or by another impartial and independent forum”.[401] Section 20(7) of the *Reconciliation Act* extinguished any criminal or civil liability of a successful amnesty applicant in respect of the relevant deeds, as well as any vicarious liability of the state or organisation behind him.[402] The claimants applied to the Constitutional Court for a declaration, and applied to the High Court for an order barring the AC from granting any amnesties while the Constitutional Court’s decision was pending.[403]

The High Court refused to grant the order, and held that the term ‘amnesty’ in terms of the interim Constitution, was wide enough to cover prospective extinction of both criminal and civil liability. [404]The Court justified restrictions imposed by the *Reconciliation Act* on the victims’ right of access to the courts, and on the Attorney General’s powers to institute criminal proceedings.[405] While acknowledging that there had been a global shift which established a duty to prosecute war criminals post-WWII (Geneva Convention), the High Court further opined that the Convention was not applicable to South Africa, and thus extinguished the duty to prosecute.[406]

The Constitutional Court upheld the High Court’s judgment. It focused instead on the socio-political importance of truth and reconciliation in South Africa.[407] While acknowledging the harshness and discomfort of the amnesty clause for victims and their survivors, the judgment essentially posited that in the South African context, where the truth about past events is shrouded in secrecy, evidence is rarely available to prosecute state perpetrators. That seeking truth could at times be a form of seeking justice.[408] Given the far-reaching consequences of apartheid as a crime against humanity, the Constitutional Court upheld the government’s right to prioritize societal development, and reconstruction over individual delictual claims and prosecutions.[409]

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401 Ibid 31.
402 Ibid.
403 Ibid.
404 Azapo v President of the Republic of South Africa: 31.
405 Ibid:32
406 Ibid.
407 Ibid, 45.
408 Ibid 48
409 Ibid, 51.

The judgments were a striking illustration of the various interests which had to be balanced during negotiations. While acknowledging the difficulties of living with "pardoned" perpetrators, it rightfully re-centres apartheid as a systemic crime ameliorated through social cohesion and deliberate state action.[410] Amnesty focused on individual criminal liability, while undoing the systemic injustice and legacy of apartheid, became a long-term constitutional objective. The result of individual liability was a narrative of apartheid articulated as a crime committed by specific "evil" individuals, who could be purged through voluntary truth telling.[411] The long term framework produced a forward-looking constitutional democracy, committed to equality through systemic redress, redistribution and representation.[412] Both approaches have since come into question through developments in the Timol judgment, Aggett Inquest and other socio-political debates, such as land expropriation.

The above cited judgments and development also illustrate the gravity of context on a country's TJ model, and the courts. As manifestations of political decisions, courts are a reflection of a governments legal norms, and are guardians of the Constitution. A constitutional democracy, amnesty and the TRC were not the only institutions established by the restorative model in South Africa. They are, however, the notable ones in the latest judicial developments

3.5.3 Restorative Reconciliation

Given the centuries of racial injustice in South Africa, the TRC was aware that reconciliation entailed redressing gross inequalities through wide-ranging structural, and institutional transformation.[413] A process too cumbersome for the Commission, then Minister of Justice Dullah Omar, was however, adamant that the Commission would uphold the principle of forgiveness, and not vengeance as per the interim

410 E Amoah-Bertrand. "The TRC: an analysis of AZAPO vs. The President of the Republic" of South Africa, case CCT/17/96, LLM thesis, University of the Witwatersrand, 1997.

411 Du Bois Pedain, *Transitional amnesty*, 23.

412 Derek Powell, "The role of Constitution making and institution building in furthering peace, justice and development: South Africa's democratic transition", *The international journal of transitional justice*, no 4 (2010), 230-250.

413 TRC Volume 1: 106.

Constitution.[414] The founding Commissioners' articulation of reconciliation was in this way centred on theological influences of mercy and national unity.[415]

In a restorative model, reconciliation is associated with the reparation of relationships between civilians post-conflict, and has no universal framework on how to do so.[416] For the South African TRC, race and ethnic relations had to be repaired in tandem with truth and amnesty objectives. A task which the Constitutional Court above acknowledged as both an unsavoury, but necessary task for the new democracy.[417] As the first step to genuine reconciliation, the Commission believed that the truth would be cathartic to victims and perpetrators. This was why emphasis was placed on full disclosure for a successful amnesty application. Moreover, victims participated and accepted the TRC's conceptualisation of reconciliation on the premise that former officials would be cooperative with the truth. The understanding was that prosecutions were not entirely precluded from the process. The belief was that Individuals who did not come forward or were honest, would be prosecuted at a later stage.[418]

The Commission's reconciliatory gains were questionable then, and have since left a mixed legacy on whether race and ethnic relations were indeed repaired. In 1998, 72% of black South Africans thought the TRC to be successful, while 55% of white South Africans answered in the negative. In April 1998, 61% of all South Africans claimed that black and white South Africans would never trust each other, and only 17% disagreed.[419] Attitudinal shifts had hardly taken place. About 44% of all white South Africans believed that apartheid was merely a good idea that was badly carried out. Less than 20% of white South Africans were willing to admit that they benefited under the system[420]. They believed life under apartheid was better, and still held on to separatist views on race and likeability. In essence, the surveys at the time revealed that most South Africans placed the responsibility of reconciliation solely on the TRC, and not in their own personal deeds and beliefs. As a common understanding of apartheid was yet to emerge, it was evident that the road to reconciliation had just begun.

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414 TRC Memorandum Bill 1995.
415 Nicolini 2014: 133.
416 Weitekamp, Stephan et al, "Dealing with mass victimization", 2006: 7.
417 AZAPO vs. The President of the Republic" of South Africa, case CCT/17/96.
418 Chapter 4 of the Reconciliation Act: Amnesty provisions.
419 CASE 1998a. Nicolini: 150.
420 Ibid.

3.6 Conclusion

As a founding institution for truth, accountability and reconciliation, the TRC's outcomes remains a primary source of South Africa's TJ history. At the end of centuries of conflict and dispossession, was a negotiated democracy made possible through an amnesty agreement. After the first democratic elections, the *Reconciliation Act* was passed in 1995. In broad terms, it was mandated to establish a complete picture of human rights violations which took place between 1960 and 1994; facilitate the amnesty agreement as per the interim Constitution, and make recommendations on reparation and reconciliation measures at the end of its operations. The Commission fulfilled its tasks through three committees namely: The Human Rights Violation Committee, Amnesty Committee and Reparations and Rehabilitation committee. In line with the aim of the study, the TAR analysis in chapter three only focussed on the HRV and the AC to identify the truth, accountability and reconciliation outcomes of the initial TRC led process.

The restorative truth was acknowledged through two chambers, the AC and HRV committee. In the HRVC, individuals shared testimonies of violations experienced by them, or on behalf of a deceased/missing relative. They could subsequently request the Commission to investigate these violations on their behalf. Once identified as victims, applicants were referred to the Reparations and Rehabilitation Committee. The AC performed a dual function. By calling on individuals to disclose the full extent of their acts in exchange for amnesty, it was also documenting the truth. South Africa's restorative truth therefore consists of forensic, social dialogue, narrative and restorative truth. All of which were cathartic to victims and survivors. In addition to a semi-formal platform, the categories were all encompassing, flexible and moreover not subject to strict rules of procedure and admissibility for testimonies.

Although it contributed towards documenting the truth, the main purpose of the AC was to facilitate restorative accountability: the truth in exchange for amnesty. Although necessary for the then volatile political conditions, this form of accountability focussed more on healing the victim, then punishing the perpetrator. The disadvantage, however, was that individual liability created the impression that apartheid was the work of a few bad individuals and neglected the systemic aspect of racial oppression.

Furthermore, prior apartheid and transitional indemnity legislation had reduced the number of apartheid officials, and liberation fighters that should have applied for amnesty. Restorative accountability under the TRC was therefore more about facilitating a peaceful political transition, and less about retributive accountability for crimes of apartheid. An approach which was necessary at the time, but has through the recent legal developments come under scrutiny.

The key finding of what reconciliation meant was structural, and became the long term mandate of the new government (ANC). Racial and ethnic relations were the immediate metric or sites of resolution. By the end of its operation, the Commission, however, acknowledged the significance of economic redress as part of reconciliation. Built on recognition of a divided past, long term institutional reform entailed a culture of respect for human rights, non-racial and non-sexist society and the supremacy of the Constitution. Statistically, it could be said that racial reconciliation had not been achieved by the work of the Commission. The legacy in that regard is equally mixed as it is contested. Nevertheless, the Commission was honest and realistic on its ability to achieve this in one sitting. The real work it conceded, was the job of all South Africans guided by the Constitution.

The findings and recommendations of the TRC were indicative of a society whose reconciliation, and accountability work had just begun, and had to continue outside the framework of the TRC. South Africa's post-TRC framework is therefore the by-product of the Commission's recommendations, and the long-term objectives of the constitutional democracy. Chapter four studies the three TAR outcomes of the TRC recommendations and the institutional pathways they established in a post-TRC democratic government. As a post-transitional development, the Timol inquest is discussed as well as implications for a democratised government. In essence, the inquiry looks at which of the truths were applicable and how they were used; what form of accountability or justice the judgment demonstrated, and the narratives of reconciliation produced in this regard.

CHAPTER FOUR: POST-TRANSITIONAL JUSTICE IN SOUTH AFRICA – THE TIMOL INQUEST AND OUTCOMES IN A DEMOCRATIC SOUTH AFRICA

4.1 Introduction

The aim of chapter four is to suggest potential TJ outcomes of the Timol precedent in South Africa. As suggested in chapter one, the first step to doing so is to trace the genealogy of the inquest in South Africa's TJ framework. This was done in chapter three. The TRC was the founding institution of TJ and produced several outcomes. Using Wietekamp's model, the research only works with three outcomes: the truth , accountability and reconciliation elements. Examining the Timol inquest, chapter four contextualises these outcomes as continuing elements in the new inquest proceedings. It specifically assesses how the truth is interpreted and used by the courts, any changes in accountability mechanisms, and what it means for the country's reconciliation narrative.

As part of its mandate, the TRC concluded its operations and submitted recommendations to the newly elected government.[421] The purpose of recommendations (amongst other functions), was to diagnose factors which led to the historical conflict, and how these atrocities could, and should be avoided by the new regime.[422] As not all justice and accountability measures are explorable during and immediately after the transition, the Commission's recommendations were a skeleton of what post-transitional justice ought to embody.[423] Chapter four essentially justifies why South Africa is considered to be a post-transitional society, by studying some of the relevant proposals from the commission, and their institutional pathways in a transitioned context.

The outline of South Africa's long term TJ project as per the TRC recommendations, is studied in the chapter. The TAR analysis in this section considers how the outcomes

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421 Reconciliation Act: section 3 *(d)*

422 Kobina Egyir Daniel, "Amnesty as a tool for transitional justice: The South African Truth and Reconciliation Committee in profile", (LLM dissertation, University of Pretoria, 2001), 45.

423 Ibid, 46.

or findings of the TRC were integrated and institutionalised in democracy. As posited by Wietekamp, the elements are interrelated: how you deal with the truth determines models of accountability, and notions of reconciliation.[424] This is particularly true after the transition when the balances of power have been addressed, and are no longer a threat to peace and stability. The rationale behind applying the TRC outcomes in democracy, is to suggest that the legal developments are a continuation of the TRC's incomplete accountability framework.

There is however no denying that revisiting transitional agreements challenges institutions of a consolidated government, and articulates alternative notions of justice. The chapter examines this by looking at the TRC's theory of justice ,and juxtaposing it with the new institutional pathway created by the 2017 Timol judgement. Also a mechanism of TJ, courts embody a particular theory of justice,[425] and are the main institutions of focus in the chapter. When they are removed from a transitional context, they are moreover subject to stringent rule of law principles such as procedural fairness, equality and neutrality.[426] These principles are capable of influencing the substance and efficacy of justice for historical crimes in a transitioned society.

Finally, the aim of the chapter is to illustrate the horizontal expansion of TJ through the recent accountability developments, as demonstrated by the Timol and Aggett inquest. The TRC recommendations can be placed in Teitel's third phase of TJ. In this phase, they increasingly interact with established institutions of transitioned governments, and stop becoming extra-ordinary processes of justices.[427] The recommendations were an acknowledgement of the Commission's limitations. They anticipated, and encouraged normalizing TJ in democracy as a form of continued justice.[428] By including institutions of education and memory, dialogue, media, churches and NGOs, the new focus was long term institutional reform in order to repair societal relations.[429] Unfortunately, investigations and prosecutions as a methods of accountability were disregarded until the 2017 Timol Judgement. The ruling set a precedent for similar

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424 Weitekamp, Stephan et al, "Dealing with mass victimization", 2006: 9.

425 Louise Mallinder, "Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa", Working Paper No.2. From Beyond Legalism: Amnesties, Transitions and Conflict Transformation, Institute of Criminology and Criminal Justice, Queens University Belfast, 2009.

426 Mallinder 2013: 48

427 Teitel, "Genealogy of Transitional Justice", 81.

428 TRC Volume 5: 306.

429 TRC Volume 5: 306.

cases as evidenced by the reopening of Neil Aggett's inquest in 2020.[430] The inquest proceedings of Imam Harron and Hoosen Haffejee are yet to be launched. However, the Department of Justice has shown renewed intention to reopen apartheid related cases.[431] By observing the Timol precedent, the potential truth, accountability and reconciliation outcomes of these state actions to continue justice, are the main focus of the study.

4.2 Post-Transitional Justice in South Africa (2002- present)

One of the features of a post-transitional society is a successful political transition, or a consolidated form of government.[432] Key indications would be a successful election, or an uncontested form of governance over a considerable amount of years. It has been 26 years since the country underwent its first democratic elections in 1994, and almost 20 years since the TRC released its recommendations in 2002.

The recommendations were not legally binding, but created a post-TRC framework of what continued justice would be for the incoming government.[433] The contents and outcomes are discussed in the next section. A crucial acknowledgment from the Commission was its limited mandate in both purpose and time. It in no way envisaged the TRC as the end all and be all process for the crimes of apartheid.[434] The aim of the TRC was to find the truth as the first step to authentic reconciliation, and national unity.

One of the institutional pathways or gains of South Africa's transition was a constitutional democracy, which would not have been possible without amnesty and reconciliation. The constitutional democracy was the immediate long term transitional justice outline.[435] It was implemented through a socio-economic rights based framework of the Bill of Rights, constitutional principles of equality, non-racism , non-

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430 Media Statements , "Update on Dr Neil Aggett and Dr Hoosen Haffejee Inquests", *Department of Justice*, August 19, 2019. https://www.justice.gov.za/m_statements/2019/20190816-Inquests.html.

431 Paddy Harper, " NPA reopens apartheid cases", *Mail and Guardian*, August 8 2019, https://mg.co.za/article/2019-08-08-00-npa-reopens-apartheid-cases/ .

432 Mijhr, "TJ and Democracy": 35.

433 Jasmina Brankovic, "Responsabilidad y Reconciliación Nacional en Sudáfrica," Ediciones InfoJus: Derechos Humanos 2, no. 4 (2013): 55–86. Translation : "Accountability and National Reconciliation in South Africa".

434 TRC Volume 5: 304-307.

435 Du Bois-Pedain, *Transitional Amnesty* , 10.

sexist society, overall structural transformation and redress.[436] The immediate objective was strengthening institutions of democracy , consolidating the new regime.[437]

Consolidating long term programmes of democracy included key socio-economic reforms such as Reconstruction and Development Programme (RDP) in 1994; the Growth, Employment and Redistribution (GEAR) strategy in 1996; the Accelerated and Shared Growth Initiative - South Africa (ASGISA) in 2007; the New Growth Path (NGP); and the National Development Plan (NDP) in 2010.[438] To date, structural redress and reform policies have been the core focus of the post-TRC government.

Post-transitional justice has therefore always been an anticipated chapter of South Africa's democracy through the Constitution's long term objectives.[439] As suggested by Hansen, a horizontal expansion of justice takes place when acts of accountability are pursued after, or removed from the initial transition.[440] Noted by Teitel, it increasingly interacts with consolidated institutions of a transitioned government. The TRC recommendation can be seen as a preparation for the horizontal expansion. It identifies which institutions and platforms would be better suited to continue the task for justice and accountability.

What the post-TRC developments illustrate more than anything, is a local TJ discourse shift. It shifts from a restorative tribunal, to a retributive court-like model. Studying platforms of accountability (courts) and their ordinary purpose, demonstrates an institutional acceptance, and foregrounding of punishment as the new form of accountability. Forgiveness or repairing social relations is not the immediate focus. The discourse of introducing prosecutions thus illustrates a shift from reconciliation to punishment.

Chapter three focused on how the TRC defined the three outcomes in the study. In the next section, this chapter outlines the Commission's recommendations as per the

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436 D Davis, "Is the South African Constitution an obstacle to a democratic post-colonial state?" (2018) 34 *SAJHR* 359-374: 363.

437 Ibid: 364.

438 SJ Mosala, , J. C. M. Venter , E. G. Bain ,"South Africa's Economic Transformation Since 1994: What Influence has the National Democratic Revolution (NDR) Had?", The Review of Black Political Economy, Issue 3-4, Volume 44, (2017), p327-340: 328.

439 Ibid.

440 Dunbar, "Consolidated Democracies", 2011: 19; Thomas Hansen, "Vertical and horizontal expansion", 105-107.

TAR outcomes, and the institutions established to implement them post-TRC. The key areas: truth, accountability and reconciliation are considered more closely as well as the ways in which they are applicable in the recent Timol developments.

4.3 TRC Recommendations: TAR Elements

The *Reconciliation Act* required that the Commission make recommendations on creating institutions that would be conducive to a stable and fair society.[441] This included institutional, administrative and legislative measures which should be introduced to prevent future acts of human rights violations.[442] A function of truth commissions globally, the Commission was also empowered to make other recommendations related to the promotion and achievement of national unity, and reconciliation. These recommendations identified public and private sectors that the Commission believed to be vital for consolidating the democracy, securing peace and stability as well as building a culture of human rights post operations.[443]

4.3.1 Truth Recommendations

For South Africa, the truth was a form of justice which was deemed necessary to prevent the occurrence of similar future human rights violations.[444] As part of its final submission, the commission held that full disclosure of truth and understanding of why violations took place, encouraged forgiveness. In the transitioned society, records of the commission's proceedings, reports, recorded audio and video tapes of the public hearings would form a rich contribution to the public memory. They were to be made available to the public and circulated widely.[445]

The TRC publications and work did indeed play a key role in constructing South Africa's conflict and post-conflict narrative.[446] It has over the years been a primary source for TJ literature globally. As a contested and subjective notion, forensic, social

441 TRC Volume 5: 307.
442 Section 3 of *the Promotion of National Unity Act*. Giannini et al. Prosecuting Apartheid-Era Crimes? A South African Dialogue on Justice, *International Human Rights Clinic at Harvard Law School* (2009) 50
443 Ibid.
444 TRC Volume 5: 311-14.
445 Nicolini: 169.
446 Ibid.

dialogue, restorative and the narrative truth, have all in some way contributed to individual and collective healing. Similarly, the commission was mindful of records being destroyed. It identified institutions that would ensure protection of records, wide circulation of the truths, while encouraging continued dialogue in society.[447]

4.3.1.1 Institutional Pathways: Memory and Archive

Acknowledging and preserving the different truths required a diverse institutional response. In terms of the *National Archives of South Africa Act 1996*, universities, museums, the media, and establishing public and private centres of memory and education, were identified as starting points and archival institutions.[448] Sections 11(2) and 13(2)(a) of the Act prohibited the destruction of public records without authorisation from the South Africa National Archivist (SANA). The final recommendations vested TRC records under the protection of the SANA. It entrusted the Departments of Justice, Arts and Science, with the responsibility of implementing the recommendations, ensuring wide access and publications.[449]Sites of memory such as the Apartheid Museum, Hector Pieter memorial, Constitution Hill, District Six Museum, are some of the many memorialisation spaces in democratic South Africa, dedicated to preserving the various truths.[450]

4.3.2 Accountability Recommendations

Where amnesty was denied or not applied for, the Commission called for prosecutions where evidence existed that an individual had committed a gross human rights violation.[451] If necessary, the Commission would make the appropriate information concerning serious allegations against an individual available to the relevant authorities. Given that evidence submitted with the TRC cannot be used against an individual, the question of access once again arises and remains uncertain until tested in court. Appearing before the TRC diminished criminal, but not civil liability. If individuals were to pursue each other in a civil dispute, the Commission was not

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447 TRC Volume 5: 312.
448 Ibid.
449 Ibid.
450 K. Pillay , "The Place of Vicarious Memory in Post-Apartheid South Africa", *South African Journal of Higher Education,* Volume 32 No 5 (2018) , pages 236–252. http://dx.doi.org/10.20853/32-5-2603
451 TRC Volume 5: 309.

obliged to provide information contained in amnesty applications. The TRC recommendation concluded by proposing a time limit for imposing such prosecutions.[452]

As a semi-judicial body, the TRC focussed on individual and organizational liability i.e. accountability.[453] In exchange for amnesty, members of the NP, ANC, IFP,PAC, left and right wing formations, disclosed the truth and shared their experiences on human rights violations during 1960-1994.[454] Due to prior indemnity legislation and perhaps predicting the possibility of blanket amnesty, only 20% (289) of final applicants were members of the security forces. [455]With a success rate of over 80%, most of the applicants were granted amnesty. Key figures like Eugene De Kock[456], Clive Derby Lewis , [457] Janusz Waluś[458], however, were prosecuted in 1996 and 1995 respectively. After the second elections in 1999, the TRC could no longer ignore calls for prosecutions and urged government take accountability recommendations seriously.[459]

4.3.2.1 Institutional Pathways: Attorney General/National Prosecution Authority

The Attorney General as the state actor and protector was ordered to pay rigorous attention to the prosecution of members of the South African Police Service who were found to have assaulted, tortured, or killed persons in their care.[460] The instruction can be seen as both retro and prospective[461]. It facilitates a process of ongoing prosecutions against former officials, whilst placing a cautionary or preventative

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452 Ibid.

453 Du Bois Pedain: 139.

454 Du Bois Pedain 2007: 141

455 Louise Mallinder, "Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa", Working Paper No.2. From Beyond Legalism: Amnesties, Transitions and Conflict Transformation, *Institute of Criminology and Criminal Justice*, Queens University Belfast, 2009.

456 Eugene Alexander de Kock is a former South African Police colonel, torturer, and assassin, active under the apartheid government. He was sentenced to two life sentences in 1996.

457 Clive John Derby-Lewis was a South African politician, who was involved first in the National Party and then, while serving as a member of parliament, in the Conservative Party. He served a life sentence for his role in the assassination of South African Communist Party leader Chris Hani. He was sentenced in 1995.

458 Janusz Waluś was convicted for the Assassination of Chris Hani in 1993, he is currently serving life sentence where his parole application has been denied on several occasions.

459 Mallinder 2013: 47.

460 Ibid.

461 Retroactive action applies from the past moving forward, while prospective action applies to future events.

measure against similar future state action.[462] Of the 300 cases that the TRC recommended to the NPA for further investigation, only a handful have been pursued over the past 24 years.[463] Political interference and state capacity are some of the reasons cited by the Institute of Race Relations, and was revealed in the *Nkadimeng and others v National Director of Public Prosecution and others* case.[464]

At the tabling of the last two TRC volumes in 2003, the speech given by then President Thabo Mbeki, reaffirmed government's commitment to implement accountability findings.[465] In the years that followed, it seemed as though the ANC would act on the work of its 1999 specialised investigating unit under the National Director of Public Prosecutions (NDPP), Bulelani Ngcuka.[466]By the time he resigned in mid-2004 however, none of the declined amnesty applications from members of the security police had led to charges.[467]

In 2005, new prosecutorial guidelines were publicized and seemed to carry a different ethos from the TRC recommendations for justice. It gave the NDPP's Priority Crimes Litigation Unit (PCLU)[468] sole responsibility to investigate and prosecute politically motivated crimes committed before 11 May 1994. The PCLU was not an investigative agency, and therefore relied on the South African Police Services and the Director of

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462 Mallinder 2013: 52.

463 Susan Fabstein, "New Revelations of Political Interference in Prosecution of Apartheid-Era Crimes", *Human Rights@Harvard Law*, August 2015. https://hrp.law.harvard.edu/south-africa/new-revelations-of-political-interference-in-prosecution-of-apartheid-era-crimes-2/ ; Ra'eesa Pather, "NPA admits to political interference in prosecutorial decisions", *Mail and Guardian*, February, 06, 2019, https://mg.co.za/article/2019-02-06-npa-admits-to-political-interference-in-prosecutorial-decisions.

464 *Nkadimeng and others v National Director of Public Prosecution and others Case No. 32709/07 (2008) TPD*. Greg Nicholson, "NPA allowed manipulation of criminal justice system in TRC cases" *Daily Maverick*, June 4, 2019. https://www.dailymaverick.co.za/article/2019-06-04-npa-allowed-manipulation-of-criminal-justice-system-in-trc-cases/ .

465 President Thabo Mbeki 'Statement to the National Houses of Parliament, 15 April 2003; Du Bois Pedain: 56.

466 Then Director of Public Prosecution. Ibid: 57.

467 Greg Nicholson, "NPA blames Mbeki government for failure to prosecute TRC cases", *Daily Maverick*, February 6, 2019. https://www.dailymaverick.co.za/article/2019-02-06-npa-blames-mbeki-government-for-failure-to-prosecute-trc-cases/ ; Affidavit of Vusi Pikoli re *Nkadimeng and others v National Director of Public Prosecution and others Case No. 32709/07 (2008) TPD*. Former NDPP in 2005 who alleged state interference in the apartheid related case of Nokuthula Simelane.

468 The PCLU is a special directorate in the Office of the NDPP. It is mandated to manage and direct investigations and prosecutions specified in its Presidential Proclamation and the NPA's policy directives dated 1 June 2015. Key crimes dealt with by the PCLU include international crimes, terrorism, non-proliferation and cases arising from the Truth and Reconciliation Commission (TRC) process.

Special Operations (DSO), to conduct their investigations. As a result of the institutional limitation, it accepted the following DSO alterations.[469]

The amendments under the DSO introduced extensive requirements and guidelines for prosecutions. In addition to sufficient evidence, the NDPP had to assess the political nature of the crime, extent and credibility of previous exposure, degree of political indoctrination, and the potential dangers of traumatisation to the victims, or the potential to undermine ongoing reconciliation efforts.[470] The generalised and broad nature of these requirements raised serious questions about the state's commitment to post-TRC prosecutions.[471] In 2008, the NPA policy amendments were declared unconstitutional, and invalid by the *Nkadimeng v NDPP* (Nokuthula Simelane) judgment.

As one of the many cases noted by the Human Rights Violation Committee, Nokuthula Simelane's disappearance was forwarded to the Attorney General at the end of the Commission's operations. The Simelane family together with NGO's were mindful of the NPA's new policy amendments, and launched an application declaring the new policy unconstitutional. The applicants held that it amounted to a second form impunity, and that it denied victims of their right to a fair trial in the public interest. The court held that it was the responsibility of the police and prosecution to ensure that cases were properly investigated and prosecuted.[472] It ruled that it was therefore unconstitutional that the policy allowed the NPA to withhold prosecutions, even when there there was sufficient evidence to do so. The High Court went on to assert that it was against the NPA's obligations in terms of section 179[473] of the Constitution to withhold prosecutions.

The *Nkadimeng v NDPP* case was the first apartheid related case in a post-TRC democracy to challenge the State's reluctance to prosecute former officials. Although the case was heard in 2008, closure on Nokhutula's 1983 disappearance was only

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469 Sagwadi Mabunda, "Has the failure to conduct post-Truth and Reconciliation omission prosecutions in South Africa contributed to a culture of impunity for economic crimes? " , Masters dissertation University of Western Cape, 2015.

470 Appendix A Section A(1)(b) of the Prosecuting Policy and Directives Relating to Prosecution of Offences Emanating from Conflicts of the Past and Which Were Committed on or Before 11 May 1994, promulgated on 1 December 2005.

471 Mabunda, "Post TRC prosecutions", 23-25.

472 Nkadimeng v NDPP: para 16.2.3.3.

473 Ibid.

reached in 2019. After 36 years of searching and testifying at the TRC in 1997 and 1998, the North Gauteng High Court issued a death declaration certificate for Nokuthula in August of 2019. [474]In 2015, an affidavit by former Director General of the Department of Justice and NDPP Vusi Pikoli- admitted to state interference in apartheid related cases.[475] In the affidavit, he alleged that his probing into former apartheid officials is what got him fired by the Mbeki administration in 2007.

Accordingly, Anjtie Du Bois Pedain suggests that it was also a reflection of the continuing importance and influence of former state officials who were in support of a second amnesty.[476] In 2019, former TRC Commissioners called for a state inquiry into why there was a delay in post-TRC prosecution. On the basis of the invalidated NPA Bill, proceedings of the *Nkadimeng* case and affidavit by former NDPP, the study suggests that there is sufficient evidence to believe that State interreference was the one of the challenges for accountability post-TRC.

4.3.3 Reconciliation Recommendations

The Commission succeeded in highlighting the depth of human rights violations before, and towards the end of apartheid. A form of dealing with the past, the truth was cathartic. It exposed the depth of blame and pain inflicted across all races.[477] Testimonies and confessions heard by the various chambers illustrated the complexity of the crime, as well as ideas around the perfect perpetrator and victim.[478] Race and ethnic cohesion was one of the early objectives and indicators of reconciliation. Although it was not clear what reconciliation meant in full, the Commission was clear that it would not be possible without the truth; that systemic redress and reparations were paramount; and that it would require time as well as collective buy in to build a culture of humanity.[479] In the wake of what was starting to look like blanket amnesty, reconciliation seemed even more elusive, yet equally important for democracy.

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474 Baldwin Ndaba, "Nokuthula Simelane declared dead after 36 years", IOL news, August 22 2019, https://www.iol.co.za/news/politics/nokuthula-simelane-declared-dead-after-36-years-31091827.

475 Supporting Affidavit of Vusumzi Patrick Pikoli 2015: paragraph 8.

476 Du Bois Pedain, *"Transitional Amnesty"*, 52.

477 Brankovic, "Accountability and National Reconciliation in South Africa", 58..

478 TRC volume 5: 350.

479 TRC Volume 5: 351-355.

4.3.3.1 Institutional Pathways: Socio-Political Rights Based Organisations

As a wide concept that required both personal and collaborative responses, the commission called for socio-political reform of South Africa's institutions in the new dispensation.[480] Faith communities, businesses, the judiciary, prisons, the armed forces, health sector, media and educational institutions, were positioned as key leaders in facilitating reconciliation, and a culture of respect for human rights. To connect the abstract and structural aspects of reconciliation, the Institute for Justice and Reconciliation and the South African Institute for Race Relations, were established as think tanks.[481] They would promote political ideas and solutions necessary to drive economic growth in the country. More of an interpretive tool or ethos in the final Constitution, reconciliation shifted towards a stronger focus on systemic redress. It ultimately became about a democracy committed to the protection of human rights and dignity.[482]

The above recommendations were a continuation of the TRC's work. They were essentially a blueprint of post-transitional measures for the incoming government. The recommendations were also an acknowledgement of accountability avenues which could not be explored during, or immediately after the transition. The Timol inquest is one of the many cases that were reported to the Commission, yet one of the few cases to remerge in a democratic court system. [483] It is therefore considered as an important post-TRC development.

4.4 Timol Inquest : Facts of the 1972 Inquest

Ahmed Essop Timol (Timol) was born 3 November 1941 in Mpumalanga. When he was eight, the Timol family relocated to Roodepoort in Johannesburg, where he eventually obtained a scholarship, and became a teacher.[484] Through a series of events, he ended up in exile where he was recruited into the South African Communist

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480 Ibid.

481 Nicolini: 195.

482 Ibid; TRC Volume 5: 352.

483 *Nkadimeng and others v National Director of Public Prosecution and others Case No. 32709/07 (2008) TPD*. Nokuthula Simelane case which had the NPA policy amendments declared inconsistent with the Constitution of the Republic of South Africa and unlawful and invalid.

484 Ahmed Timol Inquest number IQ01/2017, pages 6-12.

Party (SACP) in the '60s, and returned in the1970s. On the 22nd of October 1971, Timol and his colleague Salim Essop, were stopped at a roadblock around 23:00. They were later detained for months where Essop only learnt at his court appearance in March of 1972, that Timol had committed suicide on the 27 of October 1971. A known tactic of the security force, they alleged that Timol threw himself from the tenth-floor window of room 1026 at John Vorster. [485]

The then Attorney General, declined to prosecute. Consequently an inquest into the death of Timol was held in Johannesburg, under case reference number 2361/71 from April to June 1972 ('the 1972 inquest'). The inquest was opened in terms of the *Inquest Act 58 of 1959*[486]. It appeared before Senior Magistrate M De Villiers , assisted by Professor Simpson, a medical doctor.[487]

The witnesses who testified in the inquest were the arresting officers, and about 14 members of the Security Branch of different ranks ranging from Constable to Colonel. The witnesses included six police officials from ranks of Warrant Officer to Major General who investigated Timol's death; Timol's parents, Yusuf and Hawa Timol; Mr M Khan a funeral undertaker; Mr Swart (a journalist); two assistant curators at the state mortuary as well as four medical officials[488]. The implicated officers in the matter were Kleyn and Thinnies *(arresting officers);* Van Wyk and Bean *(interrogators);* Gloy and Van Niekerk *(interrogators);* Bouwer and Louw *(overnight guards);* Liebenberg and Van Rensburg *(Investigators)* ,Ras and Van Rensburg *(Investigators)* and Joao Rodrigues. All former police officials accept Joao Rodriguez, are deceased. [489]

Despite the medical evidence provided by the family pathologist and undertaker, the magistrate made a peculiar ruling. He dismissed the submission that Timol was murdered because he was a valuable find to the Security Branch, who "desperately" needed to be kept alive.[490] He dismissed the idea of an accident: that he must have jumped on his own accord, and that neither of the abrasions found on Timol's body were consistent with the fall. The judge attributed the bruises on his body to a brawl

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485 Ibid.

486 Hereafter referred to as the Inquest Act.

487 Ibid.

488 Four medical officials being Dr V D Kemp, District Surgeon Johannesburg , Dr N J Schepers Senior State Pathologist, Dr H Koch the pathologist who testified on behalf of the police and Dr J Gluckman , the pathologist for the Timol family

489 Ibid.

490 Ibid.

where he was pushed around and possibly fell. The court denied any allegations of mistreatment in detention. They denied claims that suspects were treated inhumanely or uncivilized. Lastly, the 1972 inquest used Timol's political affiliation and maintained that he was a loyal member of the Communist Party. The averment was that he complied with all party orders including "rather commit suicide, then betray the organisation".[491]

At the end of the hearing, the inquest ruled that Timol had committed suicide, and that no person alive was responsible for his death. The family refused to accept the judgment and essentially lived with the magistrate's decision for over 40 years. In 1996, Hawa Timol appeared before the TRC's HRV committee, but received no relief or justice from the Commission. HRV investigations revealed that a substantial amount of evidence to the inquest had been destroyed, and that the 1972 inquest itself was incomplete. It was one of the 300 cases that was handed over to the Mbeki administration in the early 2000s.

4.4.1 Post-TRC Developments: 2017 Judgment

Although the state instituted a few prosecutions in 2007: namely that of Adriaan Vlok[492], and Johan Van der Merwe[493], the proceedings ended as soon as they started. Vlok and Van der Merwe entered into a plea bargain with the state and symbolic reconciliation with the victims.[494] A majority of victims and surviving families, however, were not as fortunate. Affected groups like the Timol family, approached the NDPP for cases that were noted by the TRC. They were initially told that there was not sufficient evidence to prosecute. As a result, the family took it upon itself to seek justice. As Narrated in *Quest for justice* and *Someone to Blame*[495], the family began contacting witnesses, and conducted their own investigations to compile a dossier of evidence.[496]The timeline of investigations post-TRC is estimated to be between 2005 and 2016.[497] Seeking justice for Timol soon became the collaborative mission of a

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491 Ibid.

492 Adriaan Johannes Vlok is a South African politician. He was Minister of Law and Order in South Africa from 1986 to 1991 in the final years of the apartheid era.

493 South Africa's former law and order Police Commissioner who pleaded guilty to the attempted murder of Reverend Frank Chikane.

494 Du Bois Pedain, *Transitional Amnesty* 58.

495 Ibid, at note 172.

496 Cajee, "*Quest for Justice*", 30.

497 Ibid: 48.

private law firm and the Human Rights Foundation, led by Timol's nephew, Mr Imtiaaz Cajee.[498]

Evidence which was not presented in the initial 1972 inquest was found and presented to the NDPP. [499]The National Prosecutor made a recommendation to the Minister of Justice and Correctional Services to reopen the inquest in terms of section 17A of the *Inquest Act*. In terms of the section, the Minister subsequently forwarded the recommendation to the Judge President of the Gauteng Division of the High Court, who designated Judge Billy Motlhe to reopen the inquest in 2017. [500] The reopening of an Inquest of this nature at a High Court was the first of its kind in South Africa. According to the judge, it was an exemplary demonstration of how citizens have to assert their rights.

The judgment found that Timol had been murdered by the three police officials who held and interrogated him in custody. In light of the new irrefutable evidence, the court held that Ahmed could not in fact have jumped from the tenth floor of John Vorster building, but was somehow pushed by one of the implicated officers. The role of Joao Rodrigues on the fateful day remains a mystery. He claims to not have seen any of Timol's injury and given how suddenly it happened, he could not have possibly been able to prevent him from jumping.[501]

Together with his colleagues, Rodriques claims that he only assisted in concealing the evidence in the first 1972 inquest trial, where he testified to make sure that it was ruled as a suicide.[502] As such, the judgement concluded that although he might have been an accessory after the fact, the same intent of *dolus eventualis*[503] could be attributed to him. To this end, further investigations into his role should be launched, and he should be prosecuted for his involvement in the incident.[504] On the basis of his testimony and available evidence, he was charged for lying under oath, and an accessory after the fact for the murder of Ahmed Timol. [505]

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498 Ahmed Timol Inquest number IQ01/2017: 2.
499 Ahmed Timol Inquest number IQ01/2017: 11.
500 Ibid: 3.
501 Ibid: 85.
502 Ibid: 88.
503 Intent in the form of *dolus eventualis* or legal intention is present when the perpetrator objectively foresees the possibility of his act causing death and persists regardless of the consequences.
504 Ibid: 125.
505 Ibid: 128.

The 2017 judgment further acknowledged the plight of families who are still awaiting justice due to insufficient evidence.[506] This was particularly in cases where the inquests returned a finding of death by suicide. It recognised the institutional link in a democracy by calling on the South African Human Rights Commission (SAHRC),[507] in consultation with the law enforcement agencies, to continue efforts for post-TRC prosecution. It urged them to protect the integrity of the judicial system in a constitutional democracy.[508]

The judicial developments have shown how the law can be used to initiate change in historical discourse, by reopening the inquests. They have also demonstrated how the law can be used as a protective instrument by delaying proceedings, thereby also delaying accountability. To instantiate, as an ordinary justice process, Joao Rodriques has managed to secure bail, and intends on staying his prosecutions permanently. As a frail senior citizen, the prospects of success in this regard are significantly good as time goes by. The law as a neutral norm establishing platform, articulates a particular form of retributive accountability which has to pay attention to mitigating factors of health and age. It is fair, and treats everybody equal in terms of section 9 and 33 [509] of the Constitution. Given these constitutional principles, the law has to adhere to a particular standard of neutrality as a rule of law institution in a democracy. This has the potential of jeopardizing what accountability for apartheid related crimes mean in a democratic South Africa.

In line with South Africa's Roman Dutch and English Law system, the High Court ruling set a precedent. The Minister of Justice ,Ronald Lamola, has accordingly reopened Neil Aggett's 1982 inquest and has considered reopening other apartheid related inquests of Imam Adbullah Harron, and Hoossen Haffajee.[510] To add impetus to the process, NGO's such as the Institute for Race and Reconciliation, and Foundation for Human Rights have engaged government publicly on the importance of this process.

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506 Ibid: 125.

507 The South African Human Rights Commission is the national institution established to support constitutional democracy. It is committed to promote respect for, observance of and protection of human rights for everyone without fear or favour.

508 Ibid: 127.

509 Section nine is the equality clause and section 33 protects the right to just administrative action ie: procedural fairness.

510 Anna Reporter, "Lamola presses for new inquest into deaths of activists Agget, Haffejee", *IOLnews*, August 16, 2019. https://www.iol.co.za/news/politics/lamola-presses-for-new-inquest-into-deaths-of-activists-agget-haffejee-30873374

They furthermore question whether this can be done without losing sight of the magnitude of the crimes, as crimes against humanity.[511]

The 2017 Timol judgment may have been decided in a democratic context , the TRC TAR outcomes continue to influence the recent legal developments. The TAR analysis below is an application of the truth, accountability and reconciliation elements of the TRC in a transitioned court of law. The aim is to suggest which of the four truths acknowledged by the TRC was applicable in the 2017 Timol inquest, any significant changes in accountability platforms, and potential variations to the country's reconciliation discourse. In a post TRC context- the study identifies courts as the only institutional pathway of accountability. To apply Wietekamp's model: how the truth is used in this mechanism, determines notions of accountability, and alters narratives or discourses of reconciliation in the recent inquest developments.

4.5 TAR Analysis of 2017 Timol Judgement

4.5.1 Truth

Of the four truths acknowledged by the Commission, courts in an ordinary context deal with forensic truth and to a limited extent, the narrative truth[512]. The truth is not mutually agreed to in a court case but is contested. Individuals in a court proceeding take on a burden of proof. He who alleges must prove. In a criminal matter against the State, an individual is innocent until proven guilty. It is up to the prosecutor to provide evidence beyond reasonable doubt.[513] Equally, how the truth is presented is critical to the process. A truth acknowledgment process was therefore more suitable and cathartic to post-conflict South Africa because it allowed victims to tell their story without fear of rebuttal, or production of evidence. When courts are involved, experiences are not facts and, forensic evidence is subject to strict rules of admissibility. What is suggested in chapter five, is a flexible approach to the truth. [514]

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511 Institute for Justice and Reconciliation, "IJR Endorses letter by TRC Commission", February 2019, https://www.ijr.org.za/2019/02/08/ijr-endorses-letter-by-former-trc-commissioners/ .

512 Mallinder 2013: 67 ; Posner & Vermeule, "TJ as Ordinary Justice", 2003: 15.

513 Dunbar, "Consolidated Democracies", 2011: 20.

514 Posner & Vermeule, "TJ as Ordinary Justice", 2003: 15. ; McCargo, "Transitional Justice and its Discontents", 2015, 15.

4.5.2 Accountability

In the restorative model, individuals and organizations were held accountable. Only individuals could appear before the Commission for amnesty in exchange for the truth. The recommendations cautioned the new government against impunity in the final reports, and handed about 300 cases over to the NPA after its operations.[515] Although the Commission encouraged and anticipated future prosecutions, it did not prepare the judicial system for the massive task.[516] The following section examines which accountability mechanisms were used in the recent developments, as well as some of the challenges which courts would have to consider going forward.

Prosecutions are not always possible during, or immediately after a political transition. Often times, much like in Spain and Chile, the balance of forces do not allow for prosecution. This is prevalent particularly in cases where the outgoing elite still retain a level of power, and would threaten a peaceful consolidation.[517] Another practical factor is institutional readiness to handle the influx of trials in the absence of a stable government. A political stalemate was applicable in the South African transition, hence negotiations and amnesty.[518] Institutional preparedness to continue prosecutions was a challenge from the TRC's conclusion in 2002, until the inquest finding in 2017.

When democratic or transitioned courts become sites of contestation for historical justice, the dynamics change together with substantial and procedural rules. Accountability challenges of the Timol inquest proceedings have been :

4.5.2.1 Limited Access to Evidence

All inquests are opened in terms of section 17A of the *Inquest Act* by the Minister. Should the NDPP have sufficient evidence to believe that there is ground to reopen an inquest, they may request a judge president of the supreme court… to open the inquest.[519] The study observes that exposing inquests of this nature to ordinary processes of bureaucracy has been one of the causes of delay in securing a day in

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515 Du Bois Pedain, *Transitional Amnesty*, 59.
516 Ibid, 332.
517 Aquilar 2013: 12.
518 TRC Volume 1: 5
519 News24 Online, "State to Reopen Inquest of Dr Hoosen Haffajee ", https://www.news24.com/SouthAfrica/News/state-to-reopen-inquest-into-death-of-anti-apartheid-activist-dr-hoosen-haffejee-20180928, accessed: 2, September,2019. Inquest 2017.

court.[520] As evidenced by the Timol inquests, many of the documents in some cases have been compromised, and evidence tampered with. A strict adherence to legal rules of admissibility could cause further delay, and prejudice to the family and victims.

4.5.2.2 Apartheid as an Ordinary Crime

An Inquest ruling in terms of the above Act means that ordinary judicial processes, principles and legislation, are applied.[521] This has resulted in a scenario where the defendant in the Timol case was able to secure R2000.00 bail, and has since managed to postpone his trial by staying proceedings in hopes of doing so permanently.[522] Charged as an accessory[523] after the fact to a murder inquest and decades since the first one, Rodrigues has a right to bail. He furthermore stands a fair chance at having proceedings halted on the basis of age, and lack of evidence. On the basis of procedural fairness and equality, the case has thus far been treated like all cases in South Africa. Defendants are treated equally and afforded the same recourse and access to administrative justice.

4.5.2.3 State of Amnesty and Prior Indemnity Legislation

Joao Rodrigues was one of the many former officials who did not apply for amnesty in terms of the *Reconciliation Act*. What would his position have been had he been granted amnesty, or indemnified by prior legislation? As the courts adjudicate a second apartheid inquest, their impact on future proceedings is not unlikely. As a precedent setting judgment, amnesty and prior indemnity legislation are recognized grounds of defense. A point of further exploration would be to assess the position of these agreements in a new dispensation, and the impact they would have on prosecutions, or number of perpetrators.

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520 Section 17 A of the Inquest Act.

521 Elizabeth Andersen, Transitional Justice and the Rule of Law: Lessons from the Field, *Case Western Reserve Journal of International Law, vol 47,* (2015), http://scholarlycommons.law.case.edu/jil/vol47/iss1/2 ; Andisiwe Makinana, "NPA to prioritize murders of anti-apartheid activists", 09, May, 2018, https://www.timeslive.co.za/news/south-africa/2018-05-09-npa-to-prioritise-murders-of-anti-apartheid-activists/ , accessed :10, October , 2018.

522 Ra'eesa Pather, "Families, justice minister, NPA challenge Rodrigues' attempt to escape prosecution" Mail and Guardian, November,7, 2018, https://mg.co.za/article/2018-11-07-families-justice-minister-npa-challenge-rodrigues-attempt-to-escape-prosecution. ;

523 Timol inquest, para 335: 126.

The study observes the above outcomes as challenges to securing accountability in South Africa's retributive process. The Timol Inquest and other missing persons related cases are not ordinary crimes. Due to time and evidence related challenges, they would not be able to withstand stringent laws and principles such as bail, and staying proceedings. The democratic courts as they currently are, are simply not built for this task. These violations as recognized by the Timol judgement have historical gravity and exemplify Modiri's theory of conflict and meta-conflict discussed below.[524]

The conflict or forensic details (murder, assault), are visible and can be adjudicated by the court. It is the meta-conflict, the conflict about the conflict, that is "invisible" to a democratic and neutral rule of law.[525]The meta conflict entails the historical ideologies and violations which lead to the physical or visible conflict. Recognizing this aspect and balancing procedural fairness, has been the post-TRC challenge. It has also led to courts not being able to appreciate the complete picture of the historical elements, causes and extent of the human right violation in question. This is ultimately the challenge with TJ mechanisms in the third and normative phase: responding to the duality of conflict in transitioned/ stable societies. Its historical significance and contemporary adjudication, are almost irreconcilable.

The importance of this approach, as seen with the restorative model, is that it acknowledges the historical injustice, and brings closure to the narrative. In the retributive model, it adds a new judicial chapter to South Africa's apartheid and TJ history. A point of further exploration in this regard, would be to study the structural continuities between the TRC as a quasi-judicial body, and the ordinary courts.

4.5.3 Reconciliation

As stated previously, South Africa's TJ discourse was founded on reconciliation, amnesty and a peaceful transition to democracy in 1994.[526] When the Commission concluded its tasks, it became obvious that reconciling would require more than just the truth. Additionally, that without prosecutions, amnesty undermined the dignity of

524 Modiri, "Alternative Jurisprudence": 220 ; Christine Bell, "Transitional Justice, Interdisciplinarity, and the State of the 'Field' or 'Non-Field'," *International Journal of Transitional Justice* 3, no. 1 (2009): 8.

525 Modiri: 222.

526 Du Bois Pedain, *Transitional Amnesty*, 6.

victims and their families.[527] Having sowed the seeds for dialogue and reconciliation through the TRC, building race and ethnic relations in society became one of the long term objectives of the ANC government. As structural inequalities remain largely unaddressed, the calls for historical justice grow increasingly stronger, and take on various forms.

The pending amendment to the property clause which prohibited expropriation without compensation, is one such articulation of historical justice.[528] A contentious point in South Africa, land restitution remains one of the divisive topics in society and a test for democracy. The pending prosecutions are no different. The previously invalidated NPA prosecutorial Bill cited the possibility of court cases threatening reconciliatory efforts as grounds for not continuing with apartheid prosecutions.[529] A concern that is not far-fetched. Reopening apartheid inquests and unsolved crimes inevitably reopens history, and its place in a democratic South Africa.[530] If prosecutions were to proceed, amnesty agreements would have to be re-evaluated. In some cases, the truth *vis-a -vis* history, would be contested in court. This could potentially lead to the unravelling or re-articulation of reconciliation narratives in South Africa.

Public interest in apartheid related cases is a growing trend, but not as topical as contemporary issues of corruption, debates of land expropriation without compensation, gender-based violence etc. This however has not dissuaded the state from renewing their interest in pursuing these matters. To this end, the Timol judgment on its own does not threaten social/racial reconciliation but pursuing the cluster of apartheid cases, intensifies conversations around reconciliation.

4.6 Institutional Pathway: Courts as New Sites of Conflict Resolution

Given the TRC accountability recommendations, Courts have indeed been an important institutional pathway post-TRC. Following the *Nkadimeng v NDPP*

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527 Christell Terreblanche, "Tutu Warns against blanket amnesty", *IOLNews,* April 14 2004. https://www.iol.co.za/news/south-africa/tutu-warns-against-blanket-amnesty-210571.

528 Tembeka Ngcukaitobi, "What section 25 means for land reform", *The Mail and Guardian Online*, December 13, 2019. https://mg.co.za/article/2019-12-13-00-what-section-25-means-for-land-reform/. Tembeka Ngcukaitobi, *"The Land is Ours: Black Lawyers and the Birth of Constitutionalism in South Africa"*, (Cape Town: Penguin House) 2018.

529 Du Bois Pedain , *Transitional Amnesty*, 57.

530 Dunbar, "Consolidated Democracies", 2011: 22.

judgment, Timol and Aggett inquests, courts have therefore been identified as the main sites of accountability and conflict resolution in democracy. What will be suggested in the next chapter is that they do not have to be the only ones. Courts are important for interpreting the law, and upholding the societal yardstick of norms.[531] As key institutions of democracy which uphold principles of the rule of law, justice and equality, they pronounce themselves on what is and what is not acceptable in a society. Significantly, they prescribe punishment for wrongdoing.

Punishment, depending on the justice theory, can rehabilitate (restorative) or can inflict discomfort (retributive). The distinction is not clear, as retributive justice can also be designed to rehabilitate. In this way, the punitive aspect of a prosecutorial process is not always a given. [532] Phrased differently, not every prosecution process yields or has to produce punitive or uncomfortable outcomes for the wrongdoer. More lenient sentences may be prescribed such as house arrest, community service, rehabilitation etc. Given the historical roots and gravity of crimes of apartheid, what would punishment look like for senior defendants in democracy?

So why prosecute and use methods of punitive or ordinary justice? The TJ advantage is that criminal trials express public condemnation against said conduct.[533] This would be in contrast to the restorative model whose approach was to condemn wrongdoing on both sides. In a court proceeding, there can only be one version of the truth and one perpetrator.[534] The theory in retributive justice is that non-rehabilitative punishment is a behavioral changer, and would deter people from committing future crime through punishment and public condemnation. This, however, is a point of contention between scholars on whether punishment, does or does not alter behavior.[535]

Transitional justice is a field associated with judicial and non-judicial measures of accountability and reformation post-conflict.[536] Which model or justice theory works best depends on the political context and questions of the day. There are merits to both truth commissions, and traditional prosecutions through the courts. Each

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531 Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice", *International Security*, Vol. 28, No. 3 (Winter 2003/04), pp. 5–44.
532 Ibid: 8.
533 Ibid: 12.
534 Ibid.
535 McCargo, "Transitional Justice and its Discontents", 2015, 15.
536 United Nations Rule of Law Guidelines.

mechanism delivers specific notions of justice that transitioned countries need to be mindful and proactive about.[537]Tribunals such as truth commissions are established with special rules and intentions, while courts are generally subject to pre-existing frameworks.[538] As per rule of law principles, courts have to be neutral and treat all parties equally until proven guilty. Consolidated governments therefore need to balance the gravity of the crime with procedural fairness. This begs the question of what justice really means in reality, and whether or not the courts as they are, are the appropriate mechanism to secure justice for apartheid related crimes?

4.7 Conclusion

By 2002, the TRC had concluded its operations and released its findings in seven volumes. As part of their mandate, the reports were based on the human rights violations committed between 1960 and 1994. They diagnosed factors which led to and sustained the conflict. The volumes also submitted recommendations on how to prevent similar atrocities in the new State. The recommendations were binding and a directive to the incoming government on what post-transitional justice ought to embody. This stemmed from the recognition that not all questions of justice are explorable post conflict or immediately thereafter. As such, the recommendations were also a concession from the TRC on its limited mandate and powers. They can be interpreted as an acknowledgement of the Commission's institutional restriction to find, and give full effect to truth, reconciliation, and accountability imperatives of South Africa. The recommendations are thus an edifice of post-transitional or post post-TRC justice in the country.

As a contribution focused on post-TRC proceedings , the first half of the chapter studied the truth, accountability and reconciliation recommendations of the TRC. Two of the three chambers (Amnesty Commission and Human Rights Violation) were the main sources of truth for the Commission. The HRV committee allowed individuals and families to give testimonies of crimes perpetrated against them. In exchange for full disclosure on human rights violations committed between 1960-1994, the AC granted impunity to former apartheid officials, and liberation.

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537 Dunbar, "Consolidated Democracies", 2011: 10.

538 Snyder and Vinjumari,"Trials and Errors": 6.

In the transitioned state of affairs, the social dialogue, narrative, restorative and forensic truth- were regarded as being a cathartic collation of a divided past. Assembled throughout the six volumes, the testimonies (audio, written, video) were archived with the South African National Archives (SANA). To avoid collective amnesia- institutions of memory, education, media, churches and other Non-Government Organizations (NGO's) ,were urged to continue and encourage dialogue on experiences of the past and reconciliation. The truth as collected by the TRC has become one of the most influential literature in TJ. It detailed the justifications for the restorative model, its gains, and established South Africa's TJ narrative.

The TRC established four categories of truth but only one is more applicable in the post-TRC developments. The forensic, factual or scientific truth is admissible in court or legal proceedings. In terms of accountability, the Commission recommended that the incoming State investigate and pursue those who did not apply or were denied amnesty. The Attorney General was identified as the main institutional pathway for accountability after the TRC operations. As the NPA, it later amended prosecutorial guidelines which was one of the early signs of political interference. The *Nkadimeng v NDPP* cas as well as former NDPP supporting affidavit, illustrated the lack of political will. Evidenced by the robust economic programmes over the years, the democratic government prioritized structural redress over prosecutions.

The reconciliation recommendations were broad and realistic. They considered all aspects of reconciliation with social and economic transformation as the ultimate goal. The commission acknowledged that there could be no reconciliation without truth, accountability and economic redress. Reconciliation would therefore be a collaborative work in progress. To merge the structural and social aspects of what reconciliation would mean, the Institute for Justice and Reconciliation and the South African Institute for Race Relations were established. The recommendations were a continuation of the Commission's work, and thus a post-TRC framework for the ANC in democracy. Despite state interference and limited institutional preparedness, families such as the Timol family continued accountability efforts after the TRC's dissolution in 2002.

Although the TRC had concluded its operations, the family continued seeking justice for Timol. Through collaborative efforts with private law firms and NGO's, the inquest

was finally received by the Minister of Justice. The application to reopen the inquest was approved, and the matter was placed before the North Gauteng High Court in 2017. Almost 20 years since the TRC ended. The inquest was cited as the first of its kind in a democratic South Africa by Judge Billy Motlhe. A precedent setting judgement, it essentially over ruled the 1972 inquest and ordered investigations and prosecutions against the only surviving former police official, Joao Rodrigues. At the age of 78, he faces charges of perjury, and being an accessory after the fact for the murder of Ahmed Timol.

The 2017 judgment is important because it means that apartheid related inquests or cases such as Neil Aggett and Imam Harron, can rely on the same principles for relief. Conversely, it also means that suspects in a similar position to Joao Rodriques can apply for bail, or have their proceedings stayed or delayed. This is but one legal challenge to the change in accountability platforms. The accountability shift is perhaps the most paramount change the 2017 judgment has made to South Africa's TJ discourse.

Courts and/or the rule of law are the main institutional pathways established by the 2017 Timol Judgment. This has implications for the truth, and invariably also alters narratives around reconciliation. The forensic truth is the preferred truth in court. Unlike the Truth Commission, which used all four categories of truth to 'complete the picture', courts of law rely on strict rules of admissibility to prove guilt. The truth is not given, it is contested and its proceedings are handled in a formal manner. The shift from restorative to retributive justice is therefore the main accountability implication resulting from the 2017 Timol inquest. The mechanism shifts from a restorative truth commissions, to retributive court proceedings.

Finally, reconciliation is the outcome of how TJ mechanisms use the truth to secure accountability for historical crimes. In the post-TRC Timol developments, the courts as mechanism of accountability embody a punitive form of justice. They use strict rule of law principles and thus rely on the forensic truth. If the truth is no longer open ended but contested, it lowers the chances of a common understanding of apartheid as a crime. The potential outcome is that the basis of reconciliation democracy will now include retributive justice, and not only restorative justice.

CHAPTER FIVE: SUMMARY, RESEARCH FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction and overview

The title of the research, *The State v Crimes of Apartheid (S v Apartheid*) draws on the South African citation of criminal prosecutions under state obligation. The crime in question being that of apartheid, a crime against humanity under international law. In the South African context, this obligation was passed onto the new government by the TRC in its 2002 closing recommendations. As a result of years of victim's agency, the State only acted on the TRC recommendations in 2017. **The main question of the study examined what the potential TJ outcomes of these court proceedings were in a post-TRC democratic South Africa**. Using Wietekamp's TARR model - three outcomes were identified. Truth, accountability and reconciliation were recognised in the initial TRC process, and furthermore contextualised in a post-transit society. Although acknowledged in the original TARR model, reparations were not considered or analysed as part of the judicial developments. Due to the inquest's connections to the TRC, the research was grounded in TJ theory: a set of judicial and non-judicial mechanisms of accountability and reform post conflict.[539]

The sub question made the study feasible or observable. It asked which institutions were responsive in both the TRC led process, and the 2017 Timol judgment. In a post-TRC context where transitional platforms have been concluded, identifying institutions demystifies the process of accountability for crimes of apartheid. Questions of historical justice are generally perceived as impractical inquiries. In this chapter, the research recommends that South Africa's democracy is well suited and institutionally prepared to take on the project.

The Timol judgment was a watershed moment in South Africa's TJ discourse, but it has not been without challenges. To date, Joao Rodrigues is still awaiting prosecution. The Minister of Justice Ronald Lamola and the NPA, have however, showed renewed

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539 United Nations Human Rights Office of the High Commissioner, "Rule of Law - Transitional Justice", United Nations, https://www.ohchr.org/EN/Issues/RuleOfLaw/Pages/TransitionalJustice.aspx.

interest towards reopening more inquests. The aim of the study was to note the potential challenges that come with courts as sites of conflict resolution, and to note the accountability shift. South Africa's TJ discourse is moving to unchartered notions of justice. The significance of the contribution was understanding this gap. Although exploratory, the study was guided by ethical standards of interpretation and data collection. In addition to declaring positionality and interest in the study, the research paid more consideration to primary sources such as case law(inquests) and legislation. Secondary sources were used for interpretation and context.

Chapter one was a technical framework of the study. Transitional justice was identified as the main theory, while post-transitional justice was considered a continuation and thus subcategory of transitional justice. As a qualitative desktop exploratory study: the main question sought to understand the potential TJ outcomes of reopening apartheid inquests, in a democratic South Africa. It used Wietekamp's TARR model to identify key outcomes which were the truth, accountability and reconciliation. The sub question identified which institutions were responsive in the TRC led process and the recent Timol developments. The main question was a phenomenal inquiry and studied conceptualizations and use of the truth, changes in accountability mechanisms and narratives or discourses around reconciliation. To illustrate the accountability shift, two theories of TJ were dominant in the study: restorative and retributive justice. The sub question was a structural assessment.

The intention behind **chapter two** was to provide a historical or genealogical background of TJ. The aim was firstly to highlight the flexibility of the field as a context driven discipline. Where transitions start and stop is often unclear, and therefore also difficult to know where a post-transitional context begins. Using Teitel's phases, chapter two provided acoustic timelines of the field's evolution. It concluded with a theoretical discussion on PTJ.

Chapter three was an arrangement of South Africa's apartheid history and the TRC. This was to understand the culmination of apartheid as a system, and the depth of injustice TJ had to remedy. In addition to compiling to a historical timeline of events and extent of atrocities- the core aim of chapter three was to identify the truth, accountability and reconciliation outcomes of the TRC restorative model. This entailed

studying the Commission's conceptualisations of these elements as a founding institutional pathway. Driven by the volatile political conditions of the 90s, the TRC had to articulate these elements and thus, the foundation of the South Africa's TJ discourse.

Chapter four continued the TRC's outcomes but studied the truth, accountability and reconciliation recommendations of the TRC. The recommendations were accepted as a post-TRC framework of justice for crimes of apartheid. Chapter four undertakes a TAR analysis of the recommendations, with a particular focus on the various institutional pathways created in democracy. In Chapter three, only one institution was studied on the basis of its foundational impact. Truth, accountability and reconciliation were all conceptualised under one model and institution- the TRC. In chapter four, these outcomes have recommendations and with them, identified various institutions of implementation or action.

In democratic society, the recommendations have multiple institutions. The aim was to explore their involvement in a post-TRC context, in order to understand why judicial justice was not implemented, although recommended. Furthermore, which institutions have been responsive in the recent legal developments. In terms of the reopened inquests, only courts are identified as main institutions of accountability and conflict resolution. The chapter suggested TAR implications by looking at TRC's categories of truth and how they were applied in court. Which truths were or are applicable in the courts of law? The analysis looked for any changes in accountability mechanisms or theories of justice as well as potential variations to the country's reconciliation discourse.

Chapter five is a summary of the study and recommended areas for further research. It continues analysing the Timol implications by suggesting overall potential outcomes of the 2017 judgment.

5.2 Main findings

5.2.1 Post-transitional justice (PTJ) framework

Located in the third phase of the transitional justice field, are post-transitional mechanisms to effect long term measures of redress and justice.[540] In this phase, consolidated regimes undertake this task in addition to building, and strengthening institutions. The concept of transitional justice is no longer reserved for analyzing justice tools in liberalizing political transitions. Instead, it would seem that justice tools are increasingly being conceptualized differently in highly diverse contexts. It starts to include undemocratic political transitions, as well as transitions from a violent conflict, to a more peaceful order. It includes situations where there is no ongoing transition, political or otherwise. [541] From this perspective, although South Africa successfully transitioned to democracy in 1994, restorative TJ measures officially started in 1996 with the TRC. Post-transitional justice can therefore be considered the period after the TRC in 2002, and is the continuation of apartheid related justice and accountability in democracy.

The PTJ measures in South Africa over the last two decades as recommended by the TRC, have been mainly structural, memory and education based. Museums such as the Apartheid Museum, the Hector Pieterson Memorial, and Constitution Hill, are some of the many sites of memory dedicated to keeping the truth alive and educating society on the country's divided history. NGOs such as Khulumani, Foundation for Human Rights, and The Centre for Violence and Reconciliation Studies, have been integral in questioning the basis of reconciliation on an ongoing basis. They also encourage and facilitate difficult dialogues on apartheid history and human rights.

While it is apparent that the TRC's recommendations on memory, education and dialogue have for the most part been complied with, implementing accountability recommendations have not been as expedient. PTJ has over the last two decades mainly focused on economic or structural redress using the Constitution. Given the legal developments however, the state is implementing accountability

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[540] Dunbar, "Consolidated Democracies", 2011: 8.
[541] Ibid, 215.

recommendations- thereby expanding the county's TJ discourse. Now that the research has identified what (TAR) and where (institutions) to look for outcomes, a recommended area of further study is how best to continue with apartheid prosecutions in a democratic South Africa?

5.2.2 Potential Outcomes of Post-Transitional Accountability

The above state of affairs has triggered an accountability shift in South Africa's TJ discourse and processes. The study suggests three possible outcomes of the inquest judgements and pending prosecutions, in a democratic or transitioned South Africa.

5.2.2.1 Outcome 1: Accountability Shift

The use of courts in a transitioned South Africa, particularly the attempt to prosecute Joao Rodrigues- seems to indicate a gradual support towards retributive justice. Unlike restorative justice which essentially seeks to repair/restore relations, the aim of retributive justice is to punish.[542] A characteristic of the phase one Nuremburg model, courts and ordinary processes of justice are used to trial human rights violations. From this point of view, the attempt to prosecute former apartheid officials almost 20 years after the TRC's conclusion, illustrates Olsen's horizontal expansion of a country's TJ discourse.[543] It is "removed" from its initial process in both time ('90s model) and space (TRC hearings).

Furthermore, the expansion is located in Teitel's third and normative phase. TJ processes are no longer special mechanisms but interact with ordinary processes of a transitioned state.[544] Overall, it is the arena, i.e. courts and the rule of law, which shifts South Africa's TJ discourse from restorative to retributive. A point of interest is to explore the notion of prosecutions in the race against time, perpetrators alive and prior amnesty or indemnity agreements. An additional inquiry would be to investigate how the dynamics would differ towards accountability action taken against other

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542 Du Bois Pedain, *Transitional Amnesty*, 259; David Anton Hoogenboom, "Theorizing 'Transitional Justice', 134.

543 Thomas Obel Hansen, "The vertical and horizontal expansion of transitional justice Explanations and implications for a contested field," in *"Theories of Transitional Justice"*, ed. Susanne Buckley-Zistel et al (New York: Routledge,2014), 214.

544 Teitel, "Genealogy", 87.

parties such as the ANC, IFP, AZAPO and the State as recommended by the TRC's fifth volume.

5.2.2.2 Outcome 2: Institutional Preparedness

A result of outcome one, the judgement passed by Judge Billy Motlhe in October of 2017, was passed in terms of 16(2) and 17A of the *Inquests Act 58 of 1959*.[545] In summary, the Act prescribes the findings considered in an inquest, and rules regulating the reopening of all inquests. Interestingly, the judgment makes no reference to the *Promotion of National Unity Reconciliation Act*. This means that it adjudicates the Timol, Aggett inquests and related forensic evidence as ordinary crimes, using the ordinary criminal justice system and legislation.

The NPA played a limited role in bringing the proceedings to court. State interference was noted but institutional preparedness is an important consideration as well. To date, the PCLU remains under funded and the public prosecution system faces human resource, and infrastructural challenges.[546] Joao Rodrigues is currently still awaiting trial, and the State has already moved on to the second inquest. Although significant progress, it also means that prosecutions are still pending. In the race against time and senior suspects, opening inquests without acting on prosecutions timeously, might undermine the process.

5.2.2.3 Outcome 3: Prior Indemnity and Amnesty Defences

The attempt to prosecute former apartheid officials, poses various questions in terms of a 'transitioned' South Africa's rule of law and its courts. Amnesty and prior related indemnity agreements formed before and during CODESA negotiations, are equally subject to scrutiny. They can be raised as valid forms of defense or justification, which would decrease the number of former officials that can be charged. Of what value would prosecutions be if prior legislation can be used to evade accountability? The 2017 ruling has also set a precedent where the Minister of Justice has opened another

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545 Timol Inquest judgment, para 335-337.

546 National Prosecuting Authority, "Annual Report 2018/2019", National Director of Public Prosecutions, 105. https://www.npa.gov.za/sites/default/files/annual-reports/NDPP%20Annual%20Report%20-2018-19.pdf.

inquest and evaluating more. Without considering the position of amnesty legislation and indemnity, investigations without the possibility of charging individuals could be futile.

The outcomes discussed throughout the study produced varying implications for democracy . The truth as acknowledged by the TRC, articulated a reconciliatory narrative which limited the chances of punitive justice. This is somewhat undone by the 2017 Timol judgement, and the reopening of other inquests. It has furthermore challenged institutions of a consolidated regime, and expanded the country's transitional justice discourse. The TAR recommendations below more narrowly seek to suggest how these elements can be used in a democracy, without necessarily compromising notions of reconciliation. They are also identified areas of further study.

5.3 Recommendations for further study

5.3.1 Retributive Truth

As evidenced by the Timol proceedings in 2017, the notion of truth that a court of law deems admissible is forensic or factual evidence. The social dialogue, narrative and restorative truth are persuasive, but can be challenged and are moreover insufficient grounds to charge someone. The forensic truth is problematic in a post-TRC context because many of the documents and evidence were destroyed by the apartheid regime. This was one of the reasons why amnesty was only granted once individuals made full disclosure of their actions to the Commission.

Another reason why the TRC was cathartic to the country, was its innovative use of social dialogue, narrative and restorative truth. They incorporated an imperative element of public participation.[547] Public participation was a key ingredient for healing and transformation then, and should not be neglected in the unfolding model currently.[548] As victims and surviving families testified and shared their truths, they contributed to the complete picture of violations. This was done in a semi-formal way

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547 Snyder and Vinjumari,"Trials and Errors": 6.

548 TRC Volume and Two; Du Bois Pedain, *Transitional Amnesty*,247; Pillay and Scanlon , "Peace versus Justice: Truth and Reconciliation commission and War Crimes Tribunal in Africa", *Centre for Conflict resolution Seminar report* (2007): 15, 16.

where individuals could share their testimonies without being subjected to rules, format ,fear that they would be challenged, or that no one would believe them. The truth in a court of law is contested and subject to rules of admissibility in an ordinary justice process. The recommendation is therefore that the truth in the pending prosecutorial processes be dealt with in a flexible way. This is particularly in terms of sources and other admissibility criteria.

5.3.2 Retributive Accountability

The study observes rigid adherence to the rule of law as one of the obstacles for historical crimes in democracy. The cases might seem like ordinary criminal cases, but due to their TRC link- the cases have a historical significance to the country, victims, and their surviving families. Their expectation of judicial accountability is premised on the Commission's recommendations to investigate, and prosecute where there is evidence to do so.

The TRC recommendations could not have foreseen the democratic government's institutional response or challenges to prosecute. This was left entirely to the incoming government. If took almost two decades to have the inquest reopened, it may take just as long to deal with over 300 cases. This is more so when the forensic evidence shared with AC and HRV cannot be used in other court proceedings. Furthermore, given that Joao Rodrigues stands a good chance of evading prosecutions due to his age and state of health- the probability is that other living officials are entitled to the same treatment and defence against prosecutions. The follow up question is to ask: who will the state be prosecuting , when and is there institutional readiness? Time and rule of law principles on the other hand, cannot be disregarded in an ordinary justice process.

As he concluded his ruling, Judge Motlhe recommended that chapter nine institutions: the Human Rights Commission with law enforcement agencies, should assist families whose deceased relative's inquest were ruled as suicides.[549] In recognition of the institutional load that would be place on institutions, he further recommended that these institutions be resourced to help families and victims gather evidence to have

[549] Inquest 2017, para 337: 128

their inquests reopened.[550] There also seems to be a positive attitudinal shift by the State towards apartheid related prosecutions.

The accountability recommendation in this regard stems from the collaboration called upon by the Judge, and the role that time has played, and continues to play for seeking justice in South Africa. The State should by all means honor the recommendation to prosecute ,but it is suggested that courts as mechanism be reviewed. To this end, the research would suggest the exploration of a separate prosecutorial framework for the crimes of apartheid post-TRC. Section 47B of the *Reconciliation Act* empowers the Minister to reconvene or compose commissions that are in line with the purpose and objectives of the Act.

There are certain dynamics (equality, neutrality of law) and considerations (infrastructural challenges, corruption) of a democracy, which restrict articulations and efforts for historical justice post-TRC.[551] Although a seemingly regressive act to go back in time, the South African democracy through its institutions is well equipped to conceptualize collaborative retributive justice in democracy. However, a rigid adherence to retribution could also revictimize individuals and in some cases, prison might not be an option. Exploring a separate prosecutorial framework will allow the state to identify which institutions would be fitting for the task, but most importantly what justice would embody in the race against time.

Although the study focuses on the prosecution of former apartheid officials, it should be noted that the TRC reports attributed liability or wrongfulness to former officials, as well as members of the liberation movement. The recommendations were thus not only aimed at former apartheid officials, but on all parties who were involved in the conflict from 1960-1994. This would essentially mean that members of the ANC, IFP ,AZAPO and other resistance groups from both sides- can be charged and prosecuted in the post-TRC regime. The 300 noted cases by the TRC would be a point of departure, but opening the process would inevitably prompt other victims to come

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550 Ibid.

551 Dunbar, “Consolidated Democracies”, 2011: 12.

forward. If retributive accountability is to proceed, it would have to consider some of these factors.

5.3.2.1 Institutional collaboration and Civic Participation

Mentioned in previous sections, the finality of Constitutions can inhibit or encourage change. As "forward looking" post conflict institutions, they are intended to articulate a particular kind of future, while simultaneously summarizing conflict to create a common narrative. While enabling a progressive view of a new society, it disables alternative or counter discourses to the past and conflict resolution. Furthermore, a transitioned society may no longer have the foundation or resources to articulate, and secure justice for historical crimes.[552] This, however, does not have to be the case for South Africa. The following constitutional avenues are suggested for further exploration:

The participation of Chapter Nine Institution:[553] This would be aimed at the South African Human Rights Commission (SAHRC)[554] and Commission for Gender Equality (CGE)[555], as points of departure. Involving the CGE would allow for an exploration of the gendered violations of apartheid. Involving similar civic organisations of memory and education could assist in continuing and documenting the narrative. This could be towards understanding apartheid as a crime against humanity from a wider lens, than just the forensic aspect that would be considered by the courts.

Utilizing Chapter Eight Institutions:[556] The duty to prosecute former officials lies with the National Prosecuting Authority in terms of section 179(2) of the Constitution and *National Prosecuting Authority Act* 32 of 1998 . A consideration of section 180 of the Constitution, which allows for the participation of people other than judicial officers

552 Ibid.

553 Institutions of Democracy in South Africa. Intended to build and strengthen democracy by facilitating participation, encouraging and protecting principles such as human rights, transparency, rule of law etc.

554 The mission of the South African Human Rights Commission (SAHRC), as the independent national human rights institution, is to support constitutional democracy through promoting, protecting and monitoring the attainment of everyone's human rights in South Africa without fear, favour or prejudice.

555 The mission of the Commission for Gender Equality(CGE) is to promote respect for gender equality and the protection, development and attainment of gender equality in South Africa. The CGE advances, promotes and protects gender equality through research, public education, policy development, legislative initiatives, effective monitoring and litigation.

556 The Courts are considered Chapter 8 institutions.

in court decisions- could facilitate the above collaboration and most importantly, ease the infrastructural pressure off the NPA.

5.4 Reconciliation

For the Truth and Reconciliation Commission, reconciliation was both structural and social. Under the Constitution, the incoming government ensured that the legacy of racial oppression and dispossession would be remedied[557]. Although not a focus of the study, this too, is also under contestation. The land debate and amendment to section 25 of the Constitution in 2018, illustrate that even critical provisions of the Constitution are contested in a democratic society. As such, the TRC already acknowledged that reconciliation democracy, would be a moving target.

The primary fear against prosecutions was that it would hinder efforts for reconciliation. Without truth, there could be no unity. It's also emerging however, that without punitive accountability, the principles and the basis of reconciliation are also questioned. Despite the grim perception, the paper adopts an optimistic outlook on democracy's ability to deliver historical justice. Optimistically, democratic societies are more suited to handle and facilitate efforts of historical justice. It is highly unlikely that South Africa would revert or turn into a state of violence and instability due to apartheid prosecutions. On the contrary, the 2017 Timol inquest was hardly topical, and only particular NGO's and social clusters were attentive to the developments. Reopening inquests would not threaten social reconciliation. For those who are interested, it would more than likely initiate dialogue on the TRC's unfinished business, institutional involvement and in that way- a compelling exercise of South Africa's democracy.

5.5 Conclusion

To identify the possible TJ outcomes, the research explored the potential truth, accountability and reconciliation implications of reopening apartheid inquest in a post-TRC democratic South. This question was necessitated by the 2017 Ahmed Timol Judgement. By ordering the prosecution of former apartheid officials almost 20 years after the TRC concluded its operations, it altered transitional notions of justice.

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557 TRC Volume 5: 351.

Furthermore, the judgement may have been progressive and set precedent, but prosecutions are still pending. In a democratic South Africa, these changes interact or are affected by institutions. The aim of the study was to explore both the phenomenal, and the structural aspects of what the judgement meant for post-TRC South Africa.

To this end, the goal of the research was to explore the TRC's conceptualisation and use of the truth in a democratic court of law. Furthermore, what potential accountability changes has it introduced, and what difference would it make to the country's reconciliation narrative? The three elements, truth accountability and reconciliation are variables in Wietekamp's TARR model, and was the theoretical method of analysis. The model identifies outcomes of TJ in a transitional mechanism or process, and is usually used in restorative justice frameworks. The model is flexible, but it was South Africa's restorative justice foundations which made it suitable, even in a retributive model. The study was an attempt to contextualise the legal developments, and moreover to understand the challenges that come with post-TRC prosecutions.

The TRC as the founding institutional pathway for truth, accountability and reconciliation- was a significant point of departure of the study. The truth recovery is the mandate of truth commissions globally and recognises four particular truths for healing post conflict. The truth has no one set meaning but is associated with people's stories and experiences of conflict. The Commissions identify social dialogue, narrative, forensic and restorative truth. For the South African TRC, the truth was the first step to reconciliation. There could be no unity until the depth of atrocities had been uncovered and acknowledged.

The combination of truth is what gave the Commission its cathartic element. For the victims, being able to relay their experiences without procedural restrictions- was healing and brought closure. For perpetrators, truth commissions and not prosecutions, were the best way to disclose the extent of their acts. In truth commission, individuals could relay any information without fear of rebuttal or prosecutions. In a court of law however, the truth is subject to rules of admissibility and other procedures. It is furthermore not a given, but contested. The truth can have four categories but only one version has to pass the judicial benchmark of beyond reasonable doubt. There may be two sides to one story, but only one version prevails. As suggested by Wietekamp, the truth determines the nature and extent of

accountability. The truth as recorded by the TRC was archived in South African National Archives, is preserved and accessible on government websites online.

Restorative accountability meant amnesty. So as not to grant amnesty in oblivion or blanket amnesty, the Commission required full disclosure of acts or omissions committed between 1960-1994. These acts had to be politically motivated, or for a political purpose. Application for amnesty was voluntary, and failure to apply meant that individuals could be held criminally, or personally(civil) liable. The TRC acknowledged organizational liability, but only individuals could appear before the Amnesty Committee. Furthermore, amnesty (and the TRC) was not only intended for former apartheid officials. Due to the state of conflict particularly in the '90s- all parties to the conflict had to apply for amnesty or face prosecution. In accordance to the TRC's truth, apartheid had turned everyone into perpetrators of crimes against humanity. Restorative accountability was an arduous yet necessary trade off post conflict. In the absence of a clear victor like the Nuremburg context, amnesty was the social binder and bridge to a constitutional democracy. Blanket amnesty was never encouraged by the TRC, but in the same breadth, prosecutions and imprisonment, was also not an option. What the TRC could not do in the immediate context, it submitted as recommendations.

Reconciliation as conceptualised by the TRC was broad but realistic. It captured the personal aspects of the process and the structural imperatives of unity. For the Commission, there could be no reconciliation without the truth. Without knowledge of what happened to their loved ones and the depth of atrocities- victims could not be asked to unite, or dialogue with their perpetrators. The TRC therefore conceptualised racial and ethnic reconciliation, as well as structural redress through a Constitution, as the basis for reconciliation. By the time the Commission was dissolved in 2002, racial and ethnic divisions were still prevalent. Most South Africans were, however, positive about the TRC and its work. The Commission's recommendations recognised its limitations, and continuous nature of reconciliation and nation building.

The TRC recommendations anchor the TAR analysis in chapter four. As part of their mandate, the Commission had to make findings and recommendations to government on further measures of redress and justice. Not all justice objectives are deliverable immediately post conflict. Trade-offs have to be made and other ideals may need to

be prioritized. The political stalemate in South Africa required contextual, and therefore restorative justice. The picture would not have been as “complete” in a prosecutorial process, and would moreover have jeopardised the chances of negotiations or a peaceful transition. As time passes however, the balance of political powers may shift, and institutions might be more equipped to handle alternative or continuous notions of historical justice. The TRC recommendations recognised this gap in the initial process, and made prospective suggestions to the elected government (ANC). Recommendations are therefore a continuation of transitional justice, and are thus a post-transitional justice outline.

By the time the TRC was dissolved by President Thabo Mbeki in 2002, the country had undergone another successful election. The TRC recommendations were therefore a post-TRC framework of what justice for apartheid crimes ought to remedy in the new State. During the Mbeki administration however, state attitudes towards post-TRC prosecutions took a different turn. More focus was placed on structural redress through the constitution, and overall institutional reform. State interference was also alleged and in 2005, new prosecutorial guidelines were enacted. It introduced stringent and unfair requirements for apartheid related prosecutions. The *Nkadimeng v NDPP* judgement rejected these amendments, demonstrating the emergence of victim’s agency.

Accountability recommendations ordered the state to continue prosecutions where amnesty was denied or not applied for. The Attorney General (Directorate of Public Prosecutions) was mandated to continue this process ,and that the Commission would assist where possible. It concluded by warning against a culture of impunity for crimes against humanity and cautioned against prosecutions in perpetuity.

The structural aspect of reconciliation was left to the Constitutional democracy, and is equally a vibrant space for historical justice in South Africa. Although not a focus of the study, a prime example would be the expropriation of land debate, and the pending amendment to section 25 of the Constitution. Both the Timol judgment and these conversations illustrate the challenge with attributing finality to history, and drawing too bright of a line between the past and the present. Racial and ethnic relations have somewhat improved over the years. Without economic redress and equality however, reconciliation remains a challenge. Institutional pathways established for reconciliation

purposes were the Institute for Race Relations and reconciliation, Centre for Conflict Studies and Reconciliation and similar NGO's.

The 2017 Timol judgment was preceded by the above outcomes, and their institutional pathways. The ruling was passed almost two decades after the TRC's dissolution and was a watershed moment for victims of apartheid and their surviving families. In 1972, an inquest was opened into the suspicious suicide of Ahmed Essop Timol. The inquest alleged that he overpowered officials who were interrogating him, and jumped from the tenth floor of John Vorster. The family lived with the ruling for over 40 years and in 1996, Hawa Timol appeared before the TRC's HRV committee. None of the officials implicated in the 1972 inquest appeared before the TRC or applied for amnesty. The TRC was also unable to assist other surviving families with similar inquests such as Neil Aggett, Nokhuthula Simelane, Imam Harron, Hoosen Haffejee, Solwandle Looksmart and the many who suspiciously died in detention.

The Timol family thus took it upon itself to seek answers and justice for Ahmed in a post-TRC context. Following years of assistance from private law firms and NGO's, the judgement was finally overruled by the North Gauteng High Court in 2017. Based on forensic evidence presented before the court and ignored in 1972- it held that Timol could not have committed suicide, but was pushed. It called for the investigation and prosecution of the only former living official implicated in the 1972 inquest. At age 78- Joao Rodrigues would face charges of perjury and acting as an accessory after the fact for the murder of Ahmed Timol. The judgment and its recommendations have signalled a shift in discourse, but its effectiveness remains questionable.

In 2018, Rodrigues applied for bail, and that all proceedings/prosecutions against him be stayed or halted. This would mean that all charges against him would be dropped. As an ailing senior citizen, with rebuttable evidence from the prosecution- he stands a good chance of staying proceedings. In 2020, both his stay application and prosecution is yet to materialize.

The truth as used in the post-TRC Timol inquest is forensic. The narrative, social dialogue and restorative truth might be persuasive in court- but forensic evidence has a better chance at withstanding tests of admissibility in court. Furthermore, the truth is contested in court and not a given. The Commission acknowledged four categories of truth but in a court of law, a story has two sides but only one version prevails beyond

reasonable doubt. A technicality of the TRC was that evidence submitted/discovered by the Commission could not be used for prosecution. The study recommends a flexible approach to using the truth in the pending processes. To ensure that accountability is responsive to the crime, the research suggests a process that recognises all four notions of truth.

Accountability as demonstrated through the 2017 Timol judgement is substantially altered. As a process unfolding two decades after the TRC, it introduces a horizontal field expansion in time and platform. From a restorative victim and relation centred notion built on mercy and Ubuntu- the legal developments introduce a new discourse. Retributive justice through the courts is the observed expansion. Drawn from a Nuremberg model of prosecutions- the use of courts ,reliance on the rule of law and intention of punishment, is what justifies the shift as punitive.

Accountability in this model is through the courts of law. As a democratic institution, courts are subject to a different, consolidated and liberal framework. In South Africa's democratic context- the rule of law (and courts) is neutral, treats individuals and cases equally. It believes in ones' innocence until proven guilty. In addition to infrastructural challenges and institutional preparedness, rule of law principles are observed as challenges for securing historical justice. To exemplify, Rodriquez is treated like any criminal who has a right to R2000.00 bail ,and ought to stand a good chance at evading prosecutions given his senior status and health. Although unfolding in a "neutral" setting, the research notes that the crime is rooted in "extra-ordinary" circumstances which should not be ignored. Courts deal with forensic/observable conflict, and make decisions based on what is presented. They are unfortunately not designed to consider the "special character" of a case, unless expressly mandated to do so. By exposing a historical crime to an ordinary process, the courts are articulating a new form of accountability. Unfortunately, the substance and effectiveness of accountability is seemingly restricted by procedural fairness and neutrality of the process.

If accountability is to proceed, the process needs to respond to both the conflict, (forensic/observable) and the meta conflicts i.e. the conflict about the conflict. As demonstrated by the Timol judgment, a narrow focus on the forensic- results in a delay and further miscarriage of justice. To this end, the study also recommends exploring a separate prosecutorial framework or body for apartheid prosecutions post-TRC. As

is, the courts are over loaded. This would be exacerbated if the 300 TRC cases were to be added. Punishment through incarceration might be the expected outcome for an ordinary prosecution. However, where defendants are fragile senior citizens - prison might not be fitting or prescribed by the courts. This could potentially result in a prosecutorial process where people are trialled but not incarcerated. Reconstituting a separate guideline that considers and responds to these complexities in the race against time, might be helpful to the process.

A key recommendation of the 2017 judgment was that the SAHRC with other law enforcement agencies, should help survivors who are in the same position as the Timol family. To accommodate an effective retributive shift, the study endorses this collaborative approach to justice. What gave the TRC impact was its value of public participation. The process was open to all members of the public , the state and NGO's. This principle is an inherent feature of South Africa's democracy and encourages participation through its institutions. Chapter nine institutions of democracy uphold or facilitate public and meaningful engagement through its institutions. The SAHRC is one of them. To broaden the understanding of apartheid as a crime against humanity and its various manifestation: The Commission for Gender Equality and other Chapter Nine Institutions are recommended as sights for further study.

Retributive accountability ought not to be counterintuitive, or a challenge to South Africa's democracy. The wheel might not even have to be reinvented. Section 47B of the *Reconciliation Act* allows the Minister to reconstitute or construct any of the Committees for the purposes of the Act. By exploring a collaborative approach to retributive justice through institutions of a democracy, it strengthens democracy instead. The main accountability change emanating from the 2017 Timol judgement is an accountability shift from restorative justice, to retributive justice. This unfolds in a democratic context where narratives of reconciliation remain highly debated.

Reconciliation in the post-TRC sitting is not adversely affected by the Timol judgement. By the end of the TRC's conclusion, society was already questioning the basis of restorative reconciliation. Partly because structural inequality was still in place and as observed by the surveys, a common understanding of apartheid was yet to emerge. The potential prosecutions might not result in instability and violence, but it will

generate dialogue on the substance of reconciliation to date. Unfolding so far into the democracy, part of the conversations question whether to continue prosecutions given the state of corruption and the economy. As these questions continue, other engagements on race relations such as land and reparations might intensify. The effect would more than likely be an amplification of existing race and other social cleavages in the country.

Currently adjudicating it's second apartheid related inquest in the Neil Aggett matter, South Africa has progressed into a post-transitional justice framework for crimes of apartheid. The aim of the study was to explore what the potential outcomes of these developments are in a democratic context. The accountability shift from the truth commission to the courts, uses a restricted form of truth. This could have a detrimental impact on the pace of accountability and substance of justice. Without express intention, courts are not equipped to deliver historical justice ordinarily. Fortunately, the country's democracy can support the process through collaborative retributive justice. The key shift here is one from restorative to retributive. As evidenced by the TRC, public participation through Chapter Nine Institutions would not only educate and be cathartic to society, but it would strengthen democracy, and add a different nuance to South Africa's reconciliation narrative.

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