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An Injury to One Is an Injury to All?

Class Actions in South African Courts and Their Social Effects on Plaintiffs

This article contributes to one of the key issues in recent scholarship on the relation between law and society: how does engagement with the law trigger shifts in subjectivities? Scholars suggest that as groups and individuals seek recourse to the law, their subjectivities are legalized. They are skeptical of the global increase of social issues being taken to court. I critically review these theories of 'legalization' by empirically tracing the implications of procedural rules onto forms of sociality among apartheid-era victims today. With the example of a class action, an emerging legal remedy in South Africa I will show that, on the hand, procedural pressure to personalize injuries may indeed disrupt solidarity. The reason why the law is effective in producing a suspicious subject position, however, cannot be attributed to the 'quasi-magical power' of the law, as Bourdieu called it, but has to be searched for in historically grown social and political circumstances apartheid victims' find themselves in today. The law does not simply impose its logic onto the social, it can only legalize for pre-existing societal reasons. [class action, victimhood, legalization, structural violence, witchcraft, the law, human rights, South Africa]

This article contributes to one of the key issues in recent scholarship on the relation between law and society: How does engagement with the law affect shifts in the subjectivities of those who appeal to it? Using the extended case-study method (Gluckman 1949; Van Velsen 1967) based on examples of South African victims of apartheid-era crimes, I attempt to trace the

“force of the law” (Bourdieu 1986) on the subjectivities of those who appeal to the law and stand before courts. I will show that procedural pressure to personalize injuries may, among several other possible outcomes, disrupt a solidarity that victims have established and practiced based on their shared experiences of harm.¹ This solidarity is also a product of shared activities that seek recognition from fellow South Africans and the government for their injuries today. Why the law is effective in producing a *suspicious subject position*, though, cannot be attributed to the “quasi-magical power” of law (Bourdieu 1986, 839), but has to be searched in the historically grown social and political circumstances that apartheid victims find themselves in today.

In postapartheid South Africa, as elsewhere in the world, the law has become an important means of negotiating power relations (Robins 2009; Van Marle 2008). Many scholars are skeptical about the recent increase in the number of groups and individuals who turn to the law, though. They claim that, instead of receiving a political reading, citizens’ concerns become legalized by the courts. They fear that what starts as a collective action necessarily becomes an individual one when treated by the courts. A “fetishism of the law,” as Jean and John Comaroff call it, creates a “culture of legality [that] seems to be infusing everyday life” (2007, 141–42). Furthermore, according to Jean and John Comaroff, as a result of the engagement with the law, “quite ordinary political processes [are] held hostage to the dialectic of law and disorder” (2006, 27). In other words, using the legal path to bring about social change, they argue, has the contrary negative affect of such actions.

There is broad consensus that the law does not represent how a society is organized, per se, but that it is instead normative and powerful in shaping actions in, and perceptions of, the world. Several contemporary legal anthropologists and scholars of law have written about

law's societal effects (Goodale and Merry 2007; Griffiths, Benda-Beckmann, and Benda-Beckmann 2005; Nader 2002), with some specifically looking at the logic of the law and how it shapes plaintiffs' subjectivities (Conley and O'Barr 1990; Merry 1990). Often, however, scholars adopt a Foucauldian discourse theory approach. The precise ways a discourse, or the law for that matter, changes the lives and perceptions of people who become subject to it are assumed rather than analyzed. The law does not simply impose its logic onto the social. Engagement with the law has effects, but they are empirically more complex and theoretically more challenging than is usually assumed.

“Legalization” has been defined as the discursive reduction of subjectivities that happens to those who turn to the courts with their social concerns (Comaroff and Comaroff 2006, 2007). This definition assumes that a discourse is effective. In the following, I attempt to develop the notion of legalization into a workable concept by paying close attention to the relation between discursive formations and lived experience in a particular context, and I relate my findings to processes beyond the law. Political actions, as well, have always created suspicious subject positions. The struggle against apartheid, for instance, was a collective effort, but in order to “showcase” injury, people were often singled out to serve as a discursive touchstone. Political groups, not unlike plaintiffs in court cases, have to relate lived experiences to the global public. Similarly, the South African Truth and Reconciliation Commission of the mid-1990s relied on exemplary cases to vicariously unearth past violations (Kesseling 2016; Mamdani 2002; Ross 2003b).

The Making of a Class Action Suit

This article is based on 19 months of field research among apartheid victims who organized a membership group called the Khulumani Support Group, which has roughly 105,000

members. The group organizes many mundane and day-to-day activities, but it is also involved in class actions against companies, both in U.S. and South African courts. The so-called “apartheid litigation” (*Khulumani v Barclays National Bank*) was filed in numerous U.S. Federal District Courts against multinational companies (initially more than 50 companies and eventually reduced to just Ford and IBM) under the Alien Tort Statute (28 U.S.C. §1350) for their alleged aiding and abetting of the security forces of the apartheid regime in the commission of human rights abuses (Kesselring 2012, 2015a).² These cases were ultimately consolidated in the Southern District of New York. Following the April 2013 ruling of the U.S. Supreme Court in *Kiobel v Royal Dutch Petroleum Co.* against the extraterritorial application of the Alien Tort Statute, the Southern District of New York finally dismissed the South African plaintiffs’ amended complaint on August 28, 2014 on the grounds that the plaintiffs had not shown sufficient connection with the U.S. On January 30, 2015, following the recent decision by the U.S. Court of Appeals for the Second Circuit *Mastafa v Chevron Corp.*, the South African plaintiffs submitted a brief to the Second Circuit appealing the dismissal of the apartheid case.

The South African case that this article examines accused South African companies of the infringement of socio-economic rights in today’s South Africa. It was a testing case, in which Khulumani was involved through one of its member in order to help popularize class action suits in South Africa. Contrary to the United States, such lawsuits are not an established judicial tool in South Africa. Both cases directly dealt with corporate liability and both had the potential to set precedence for a strengthened human rights framework.³

To trace the effects of what is noted as a global trend of “legalization,” this article focuses on one possible outcome of legalization—social individuation—and one means of law—class

action lawsuits. I understand individuation as a social process that changes a person's relation to others, that identifies individuals and singles them out as different from others. I hence use the term individuation in its literal sense (from the Latin *individuare*), and refer to a process that distinguishes a person from others of the same kind.⁴ At first glance, class action suits do not induce individuation; instead, they address *generalized* harm in *generalized* terms. Even in class action suits, as will become clear, the law needs representatives for the proposed classes (of injuries), which the courts then treat as individual cases. As I will show, even to adjudicate structural violations, the law needs to single out actions and differentiate suffered harm; consequently, individual cases become touchstones to test generalized harm. In sum, because of the tension between a common social experience, on the one hand, and the legal necessity to prove individual guilt and victimhood, on the other, class action suits are particularly insightful to track the efficacy of the law on plaintiffs' subjectivities.

Class Action in South Africa: A Strange Animal

In late 2010, the Western Cape High Court heard *Children's Resource Centre Trust v. Pioneer Food* (henceforth, *Consumers Case*) and *Mukaddam v. Pioneer Food* (henceforth, *Distributors Case*) as urgent matters due to prescription.⁵ The class action cases alleged structural violations of human or constitutional rights and the infringement of basic socio-economic rights by three South African bread companies (Pioneer Foods, Tiger Consumer Brands, and Premier Foods). The applicants sought permission for the class representatives to stand for the classes. Given the lack of precedence, they asked the court whether the classes had to be certified before or after the actual institution of the cases. The issues of the hearing in November 2010 was, first, deciding on the responsibility of companies to prevent the infringement of socio-economic rights, and, second, the certification of a class in a Common Law system.

The two cases followed the South African Competition Commission's findings of 2006: the three companies had participated in a cartel fixing the price of bread. The commission had handed down administrative penalties, but the consumers and distributors had not been compensated. Against this background, together the law firm of Abrahams Kiewitz Attorneys and the plaintiffs decided to file two distinct cases. Renata Williams was the advocate for the applicants; Charles Abrahams, the attorney.⁶ The plaintiffs were the consumers (in the *Consumers Case*) and the distributors (in the *Distributors Case*) of the bread. The plaintiffs in the *Consumers Case*, which I focus on here, were civil society organizations (Children's Resources Centre, Black Sash, Congress of South African Trade Unions (COSATU) Western Cape, and the National Consumer Forum) and individual bread consumers (Tasneem Bassier, Brian Mphahlele, Trevor Benjamin, Nomthandazo Mvana, and Farreed Albertus). They sought compensation on behalf of similarly situated consumers in the Western Cape province.

On November 23 and 25, 2010, Acting Judge van Zyl heard the cases; I was present during the hearings. The courtroom was visually segmented. The applicants, their lawyers, interns, and supporters were non-whites and only few were female, whereas the respondents, including their interns, were exclusively white and male. Thus, the disparities of who represented which community and interest groups were very apparent. The judge, as well, was white and male. The visuality of this arrangement testified to the legacy of segmentation in the professions involved, and amplified the issue at stake: the infringement of the basic right to sufficient nutrition. This is a connection to which I return in the following.

Judge van Zyl opened the first day of the hearing with the following question: “I am a consumer. I live in the Western Cape. Can I hear this matter?” His question is symptomatic to both the societal representation in the courtroom and the intricacies of the class notion with which the court tried to come to terms. The judge raised what troubled him most: How could he certify a class of consumers that he thought was too loosely—if at all demarcated—and of which he would unwillingly form a part? He raised the question as one of conflict of interest. For a good hour, the judge and the respondents relied on the “absurdity” of anyone eating bread and living in the Western Cape being a plaintiff in the case. Although unarticulated at first, it was clear to everyone that the *Consumers Case* had a strong poverty component to it. Only slowly it crystallized that the applicants were not only bringing forth the allegation of overcharge, but also the infringement of basic rights as listed in South Africa’s Bill of Rights. The so-called positive obligation of the state to provide access to the socio-economic rights guaranteed in the Constitution, such as the right to access to housing, had been established by the Constitutional Court in such prominent decisions as the *Grootboom* and the *Treatment Action Campaign* cases.⁷ In the bread cases, the negative obligation not to prevent or to impair existing access to sufficient nutrition was at stake. “There is a negative content to socio-economic rights,” insisted Williams, the advocate for the applicants, referring to Sections §27 1b and §28 1c⁸ in the Constitution, arguing that the negative obligations not only applied to the state but also to private persons such as companies.

In his response, JPV McNally, attorney for the first respondent, vehemently questioned this obligation for corporations, stating: “Socio-economic rights are asking the state, not private companies”. In reaction, the few supporters and the applicant plaintiffs shouted out loud, which contrasted to a dead silence through most of the hearing. McNally was referring to the progressive realization standard the Constitutional Court had established, as opposed to a

measured guarantee (say, x liters of water per day/per person) in light of the transitional process.

If this [progressive realization as opposed to measured guarantee] is so for the state, how can you possibly elevate this to the duty of a private company? [...]

We only have a vertical application, citizen–state, but no horizontal application.

You can't come to the court and allege the infringement of these rights by a private company. [...] The duty [to guarantee the non-infringement of these rights] is and always remains with the state.

Eventually, Judge van Zyl put numbers to the bread and the allegations, asking: “If I pay 50c too much [for a loaf of bread], does this infringe my rights?”. The attorney for the first respondent explained: “The fact that the bread was maybe 50c too high does not suggest at all that the rights were infringed [...] It is not enough to say that people might have been affected to live below the bread-line”. The applicants brought forth their estimate that 50 percent of the population had been affected. The defendant's attorney contended, “This needs to be proven!” He added, “Numerosity. It can only be in America that they came up with this term!”. Indeed, in US legal doctrine, it is necessary to show that there are too many affected parties for single suits to be effective.⁹

On the second day of the hearing, the defendants played out the argument of the “foreignness” of a class action suit more aggressively. The judge communicated his puzzlement with regard to class actions as “almost a foreign animal—to me it certainly is. [...] There are no rules to guide us”. As the legal grounds for a class action suit, the

applicants suggested its general application in jurisdictions such as Canada and the United States in conjunction with Section 38c of the South African Constitution:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are [...] (c) anyone acting as a member of, or in the interest of, a group or class of persons.

Judge van Zyl inquired from the respondents why they thought he could not consult foreign law to interpret Section 38c of the South African Constitution. The third respondent argued: “Common law says that there is no such animal as class action,” and advised the court to “be very careful not to import foreign federal law. [...] That’s my submission: Be wary!”.

Another attorney for the defendants said: “It is not a proper case. [...] What is the class? You don’t get an answer. [...] The class is amorphous and divergent. [...] The class is not sharing common interest in the litigation”.

The judge also inquired about representation. “What actions have the applicants undertaken to inform the people it represents?”. Williams, the advocate for the applicants, obviously could not claim having informed thousands, let alone millions, of potential plaintiffs. Instead, she said, “The poorest of the poor are the biggest consumers of bread,” thus refusing to narrow the class at this stage because it would be “prejudicial” to those excluded. “The constitution does not differentiate between rich and poor,” Williams held. Judge van Zyl replied: “This is an extremely unruly horse”. Williams insisted that the class was neither limitless nor open-ended, but rather “it is certain individuals”. The judge asked: “Do you have to decide on each individual whether he or she forms part of the class?”. Williams

replied that an objective test had to be applied, and it would be “objectively determined who is poor and who is indigent. [...] Everyone having their section 28 right infringed.” It is, she said, “poor and marginalized people of our society who usually don’t have access to litigation [...] who only want to claim what the Constitution entitles them to claim”.

What drew the hearing slightly toward the absurd was that what was at stake was indeed a *class* issue. Everyone eats bread, but not everyone may be capable of imagining that higher bread prices have an effect on one’s overall spending capacities. At some stage during the hearing, the judge phrased the class issue at stake in an unreflective manner: “If I look at the people in the court, I don’t think that we [were infringed on our basic right to sufficient nutrition]”. Marcus Solomon, from the applicant Children’s Resource Centre, who was sitting next to me whispered aptly: “Not THESE people!” It was thus not only “class” as a legal entity that caused such a turmoil and needed clarification, but also “class” as an imaginary: What does it mean to live in such a poverty that the price of bread, which is a staple in the diet of many South Africans, mattered to what else you could afford to buy?

The *Consumers Case* addressed structural issues such as income inequality, dependency on a food staple, and exclusive access to the justice system. It alleged an impersonal, structural violation that affected consumers of bread on a massive scale. The ensuing injury, however, was personal and affected each and every individual who experienced difficulties due to the higher prices of their bread. Some, of course, were more affected than others. Who suffered enough to qualify for redress? The court, in its task to certify a class, struggled with the notion of collectivity and where to draw a line to separate those affected sufficiently to qualify for class membership from ordinary citizen-consumers.

“I Can Get Killed for Nothing!”

Each battle on class certification in a court of law is linked to notions of collectivity and solidarity outside the court. This connection became strikingly clear a week before the court hearing, when I met one Khulumani member who was chosen by the legal team to represent the class in the *Consumers Case*. Brian Mphahlele is a provincial board member of Khulumani Western Cape, and someone I had known for a couple of years at that point. On that day, he was in a bad mood and, as so many times before, thought about quitting Khulumani. He felt sapped by all the demands coming from the hundreds, if not thousands, of members, and felt underappreciated for all his work on behalf of the organization. I wanted to understand what his new applicant status meant to him. He was sometimes proud of his selection, having previously said, “They hand-picked me.” Now, though, he was clearly worried about what people would be projecting onto him and saw the bread case and his representative function in it in a grim light.

Brian Mphahlele: I can get killed for nothing! ... I don't mean stabbed; I mean by other means.

Author: Like witchcraft?

BM: That's it!

According to him, “they” would think that either he received a lot of money for being selected or that he would be the first to receive some money in case of a settlement and take it all for himself. He feared that people would heed rumors about payouts, and use witchcraft to forcefully get what they thought was their share. This is not necessarily an unsubstantiated fear: false rumors of payouts have circulated in the communities before, as a result of which members occupied the provincial Khulumani office in Salt River, Cape Town, to get their share. To date, I know of no real threat of life. Beyond Khulumani, however, there are many

stories about people getting killed by envious community members for “eating money” (undue enrichment), or due to sudden fortune.

As Brian Mphahlele confirmed, witchcraft is often mentioned as the means by which revenge or jealousy is executed. The relation between individual subjectivity and collectivity, which was at stake in the court cases, strongly relates to everyday concerns of victims, thus legal logic can have consequences outside the courtroom and can find its expression in fears of witchcraft. Like law, fears of witchcraft and accusations ultimately speak to the relation between the individual and the collective; singling out individuals for lawsuits makes them suspicious and vulnerable to sanctions by their peers. I suggest that, in this case, the logic of the law created a suspicious subject position: the victim who used his experience to become different from other victims. In South African society, which is defined by shared structural suffering, to be singled out can only mean to have distanced oneself from the others through unfair means. Witchcraft accusations and its associated fears are logical means to keep anyone from breaking rank.

Some Are More Equal Than Others

It becomes evident in a class action suit when plaintiffs have a quite different idea of “class” than does a court of law. For plaintiffs, the idea relies on solidarity and similarity. As all people experienced the same injustices, all should be represented. A class is a class of individuals, so every person can be represented as a victim in his or her subjectivity. It is also a class, however, so structural issues can be addressed without personalizing them. A normal court case (not a class action suit) dealing with structural human rights violations would unfairly single out individual injustices and sever the ties between different victims’ sufferings. In a class of victims, however, the ties between the representative and the class

remain intact, and everyone shares the experience of the singled-out class representative. Nonetheless, the law still needs personal representatives to prove the injury. This personalization simultaneously threatens similarity and solidarity: some people become more equal than others.

The modern notion of “the witness” has two designated roles, so it is illuminating to overlay the differentiation in Latin in order to understand the positionality from which a person speaks or is perceived to speak from.¹⁰ *Superstes* is a person who experienced a specific event, someone who is a survivor. This person guarantees the credibility of the testimony with the authenticity of a lived experience. *Testis* is the third party who stands between two parties in an argument or a judicial process and reports on an event; this party only observed the event but was not involved in it. A testis establishes credibility through facts and the coherence of a testimony, contrary to a *superstes* who establishes credibility primarily through personhood.¹¹

In class actions, the law needs someone who is a *superstes* as a touchstone. By turning a person into a touchstone, it makes him or her into a *testis*: a neutral “case” where allegations can be tested and debated. By turning a *superstes* into a *testis*, the law enforces a shift in subjectivity. As the representative’s experience is used to testify for all others, this role becomes that of a person speaking on behalf of similar others. In other words, the legal necessity of representation forces a person to take an impossible standpoint: the unequal representative of a class of equals.

In the eyes of other victims and class members, this shift from *superstes* to *testis* is a threat. It threatens to destroy the very similarity on which trustworthiness relied. In the shift, a person can become untrustworthy and untruthful, as he or she no longer speaks only individually,

but also for others whose experiences may be different. In a political environment in which claim-making is used by individuals and groups to change their social, economic, or political status, representing a class means to become different, and class action suits tend to bring about what plaintiffs wanted to avoid: individuation.

The Force of the Law

This example suggests that, for the law, the doctrinal focus on individuality in the causal triangle of *agency, action, and harmed* is nonnegotiable. Its agents stolidly apply this focus in civil class action suits, which are filled with different causalities and concerns than, for instance, criminal cases. With regard to class actions, attorneys and justices fear the dilution of the law's focus on individuality of liability and victimhood, and of its preoccupation with establishing justiciability and evidence of violations. The law is relatively inert against changes of perspectives or priorities (for instance, individual to classes, corporate legal person to a fully liable person), and it can always rely on procedure and tradition. When plaintiffs want their concerns to be considered by the courts, procedures are given. This is why, to a certain extent, "legalization" happens when plaintiffs attempt to bridge the gap between the law and their everyday experiences. I believe, however, that we cannot speak of legalization unless the legal logic has some social effects, for which specific societal circumstances have to be given (something I further outline below).

I have shown how the law's procedural personification of harm may result in social individuation among the plaintiffs. For plaintiffs, being "managed" in courts has effects on their standing in their communities and in broader society.¹² They undergo, or are forced to undergo, shifts in subjectivities, as I have shown in the example of Brian Mphahlele. In that way, experiences of inequality in apartheid South Africa are replicated by the legal system.

Meierhenrich (2008) argues that the law created continuity of common language and discourse in the history of South Africa beyond 1994. I suggest that it also created a continuity of inequalities.

I focus on the years when cases are pending in courts. Things change, of course, once the courts decide on payouts of damages. For plaintiffs, this may bring about a new dynamic as it poses the challenge of personalized reparations; differences of injuries sustained most likely matter and become issues of contestation. The same applies to trust funds, which have recently been the outcome of some human rights cases.¹³ Here, communities (however defined) become the entity for distribution of resources, and internal mechanisms for allocation have to be found. One further has to consider that class action suits are often pending in courts for a decade or longer, and are often accompanied by civil society activities (such as self-help or advocacy groups) and by fierce contestations by their own or other foreign governments. In the *Consumers Case*, for instance, the Western Cape High Court decided to refuse to certify a class in August 2011. The Supreme Court of Appeal, however, determined the requirements for the filing of a class action in a landmark ruling on November 29, 2012.¹⁴ It referred the matter back to the Western High Court for reconsideration, where the matter is still pending at the time of writing. During this time of waiting, court cases can also be the context within which plaintiffs create new forms of socialities among themselves and develop political subjectivities (see Kesselring 2015b).

The law is forceful in that it can retreat into procedure and tradition. The law, however, cannot be socially effective unless it touches on societal realities and lived experiences (a point reflected on in the concluding part of this article). First, though, I turn to instances

where processes of individuation and the intricacy of representation I described for victims as *civil plaintiffs* are at work elsewhere.

An Injury to One Is an Injury to All?

The struggle against apartheid was only marginally fought by way of courts (Abel 1995); the fight was much more by collective political action. Still, individuals were singled out.

Political groups looked for a touchstone to make violence visible and legible to the world.

Individual suffering was the key to prove the system's wrongs, but the individual did not count in the rhetoric and practice of liberation. The idea of a class relying on solidarity and similarity quite possibly reflects the way solidarity was framed during the liberation struggle.

This logic was then partly transported into the Truth and Reconciliation Commission (TRC) process and the legal and political actions that followed from it. In the mid-1990s, the TRC looked at structural violence by singling out those who were most affected. The TRC granted individual victims the opportunity to present their personal subjectivity through testifying.

They thus spoke as superstites. At the same time, many victims spoke for late or disappeared family members, and thus simultaneously bore witness as superstites aggrieved by a person's death, and as testes. They became testifiers to what had happened under the apartheid regime in a more general sense, and official knowledge of life under the apartheid regime was largely produced through the accounts of victims. Some of their (and the perpetrators') testimonies now constitute the most expansive account of crimes committed during the apartheid era: the Final Report of the TRC.¹⁵ "Expert witnesses" such as historians remained strikingly absent in the hearings and in the process of writing the report (see Posel and Simpson 2003). Apartheid-era victims thus spoke from two positions and assumed a double subjectivity: as testes and as superstites.¹⁶ In both roles, their accounts became a part of the

official discourse on victimhood. There was thus the production of a double-witness through the workings of the TRC. The commission also attempted to define individual victims while simultaneously integrating everyone into a shared understanding of victimhood (see Wilson 2000, 80).¹⁷ By collectivizing everyone's suffering and pain performatively, the TRC made the victimhood of some vicariously subsume everyone else's.¹⁸ Of course, this fictive representation was bound to fail to some degree, not least because focusing on individual cases left no room for the consequences of structural violence. Representation thus failed in a double sense: it made the TRC blind to structural victimhood and it personalized collective experiences (see Mamdani 2002).

Apartheid-era victims turned to US courts because, among other reasons, the TRC process was unsatisfying in that it dealt only with experiences of violence on an individual (that is, exclusive) basis. However, by turning to the US courts in seeking recognition of the generalized nature of apartheid-era violations, the plaintiffs evoked very strong reactions from the South African government (see Kesselring 2012).

The debate on April 15, 2003, following the tabling of the two final volumes of the TRC report to Parliament, epitomizes the official discourse, which denounced those who sought redress for their apartheid injuries.¹⁹ Although the debate was to be on the findings of the TRC Commission and its recommendations, then-President Mbeki, several members of Parliament, and government ministers used the occasion to comment on the apartheid litigations, which had just been filed in the US courts. They condemned any demand for redress as selfish and unpatriotic. For Alec Erwin, then-Minister of Trade and Industry, the filing of a damage case against companies represented betrayal because it went against a "collectivist identity that was the origin of our strength."²⁰ This mirrors Mbeki's statement

when the first five volumes of the TRC report were tabled in 1999. Amid national and international lobbying for debts release or relief, and a growing demand for apartheid reparations at the time (Kesselring 2012), he seized the moment to clarify the state's position on apartheid-era victimhood:

Surely all of us must agree that reparation will be offered to those who fought for freedom by ensuring that monuments are built to pay tribute to these to whom we owe our liberty. ... We must however also make the point that no genuine fighter for the liberation of our people ever engaged in struggle for personal gain. There are many who laid down their lives, many who lost their limbs, many who are today disabled and many who spent their best years in apartheid prisons. None of those expected a reward except freedom itself. We must not insult them and demean the heroic contribution they made to our emancipation by turning them into mercenaries whose sacrifices we can compensate with money. Very many among these have not asked for any money, because their own sense of the dignity of the freedom fighter leads them to say that there is no cash value that should be attached to their desire to serve the people of South Africa and all humanity.²¹

The apartheid-era discourse of “personal injury for the collective cause” continued right into postapartheid and post-TRC South Africa. This reading of the liberation struggle as attempts to bring down apartheid “as a collective” suggests that the individual sacrificed his or her life for the cause, selflessly and by choice. This is, particularly in the case of women, a very problematic reading that ignores much more complex local modes of mobilization and resistance (Meintjes, Pillay, and Turshen 2001; Ross 2002; Rubio-Marín 2006; Wells 1983, 1993).

I have attempted to show in the discussions of the TRC and the apartheid litigations that the tension between generalized harm and the choice or necessity (depending on the political circumstances) to single out “a story” in order to have a presentable touchstone is not only a feature of the law, but also of the liberation struggle. The individual is played out against the collective, and vice-versa. On the one hand, the individual is important to showcase the structural; on the other hand, personalization runs against notions of solidarity and shared experiences. This tension may trigger the emergence of a suspicious suspect position in ways and forms scholars and practitioners have not paid sufficient attention to.

Preexisting Divisions

For Bourdieu, the law is “the quintessential form of the symbolic power of naming that creates the things named” (1986, 838), and a form of “active” discourse “able by its own operation to produce its effects” (839).²² However, he crucially limits the efficacy of these “magical acts” (839) by saying “symbolic acts of naming achieve their power of creative utterance to the extent, and only to the extent, that they propose principles of vision and division objectively adapted to the preexisting divisions of which they are the products” (839).

In other words, there needs to be social realities upon which law can become effective. These realities are, as Bourdieu reminds us in his writings, not just *there*, but are being produced and reproduced by actions. There needs to be a focus on the preexisting structures and on underlying societal issues in order to understand the efficacy of a discourse (which, of course, is also a product of and consequence of continuously emerging, changing, and fluent structures). Accordingly, the emergence of a suspicious subject position is not random.

In this article, I analyzed this exemplarily for apartheid-era victimhood in postapartheid South Africa. The preexisting structures created a situation where the tension between the collective and the individual dimension of injury was a persistent continuity, from apartheid into the postapartheid era. During the TRC, the individual was foregrounded with the effect that the structural dimension was left out. Since then, the state has adopted the reverse position: apartheid victimhood was dealt with by the TRC; thus, any contrary claim is relegated to a collective notion of victimhood and thereby disqualified as selfish. Victims themselves have tried to straddle the collective and the individual.

Whereas the fight for redress is predominantly fought as a political collective, the individually injured person becomes important at specific moments. First, the Khulumani Support Group, as a victims' organization—and as many NGOs and social movements during and after the struggle against apartheid—makes its concerns legible by showcasing exemplary individual stories (see Colvin 2004; Kesselring 2016). Several scholars have shown that the practice of singling out “a story” in human rights reportage (Wilson 1997) or in a transitional justice institution (Ross 2003a) transforms experiences into data that may effect the homogenization of complex social realities and relations. In this article, I sought to complement these findings by showing that singling out may have other effects, too, such as social individuation. Individuation happens because one person is made to represent all fellow superstes' experiences. Second, individuation has been instituted from “outside.” As shown in this article, the Mbeki regime and legal practitioners have at different times managed to, at least temporarily, break up the collective by exposing those who seek redress for their injuries. Finally, although people often seek to (tacitly) share their experiences with others who are similarly situated, the individual victim cannot brush aside that he or she sits

in victimhood as a person. Vicarious recognition through the TRC, or any collective political action, is not always successful and the person is then caught in the solipsist experience of pain.²³

All the above suggests that both the South African state, the Khulumani Support Group (as well as its individual members), and many other actors grapple with the same inextricable situation: the nature of apartheid violence was such that violations were inflicted structurally (i.e., not personally), but the effects on the injured person were personal. Formulated differently, it is not the law that produces suspicious subject positions or individuation (as one form of “legalization”). Legalization rests on the (lasting) injuries inflicted upon a majority of South Africans.²⁴

This sheds new light on theories of legalization. On the one hand, the law is effective and societal questions are being legalized. I concur with theories of legalization that show that law has a *procedural* logic, and that plaintiffs are subjected to it in ways that, indeed, change subjectivities. On the other hand, I disagree with the assumption of current theories of legalization that the law is—almost automatically—effective. In order for law to be effective, it needs points of contact in people’s lives that are societal from the outset.

The example at hand is individuation and the unresolved relation between the collective and individual dimension of injury. Only in a societal context, where the tension between individuality and the collective has been an issue for a long enough period of time, can the law produce suspicious subject positions. If there is no such context, the law, of course, would still personalize injury and project its power, but it would not be able to change subjectivities to the same degree. This analysis of the efficacy of the law may take it beyond

the “quasi-magical power” (Bourdieu 1986, 839) it is presumed to have to a (probably) more sober understanding of the persistence of inequalities and experiences of injustice.

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¹ Elsewhere (Kesselring, 2016), I demonstrate that the law can have equally important effects, such as creating and politicizing the basis for a collective to emerge.

² *Khulumani v. Barclay National Bank, Ltd*, 504 F.3d 254 (2d Cir. 2007), and *In re South African Apartheid Litigation*, 624 F.Supp.2d 336 (S.D.N.Y. 2009).

³ Judgement was handed down on 13 May in the Gauteng Local Division in the ongoing case against 32 mining companies of *Nkala and Others v. Harmony Gold Mining Company Limited and Others* [2016] ZAGPJHC 97 (13 May 2016). The case has not yet been reported, but can be accessed at <http://www.saflii.org/za/cases/ZAGPJHC/2016/97.html>. In this case Abrahams Kiewitz and others draw on the criteria for class certification set forth in the leading appellate decision of *Trustees for the time being of Children's Resource Centre Trust and Others v. Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA), and confirmed by the Constitutional Court in *Mukaddam v. Pioneer Foods*, 2013 (5) SA 89 (CC), which says that the main consideration in determining whether a class should be certified is “the interests of

justice” (*Mukaddam*, para 34-37). The legal representatives of approximately 500’000 current and past underground miners who who contracted silicosis and TB as a result of being exposed to dust as part of their work, lodged court papers in 2012 and 2013 (in total the five cases consolidated into one), inquiring whether the court recognized their case against the mine companies as a class action. In May 2016, the Gauteng South High Court ruled to certify the classes and the case to proceed. In the judgement, the court notes: “A class action presents a paradigmatic shift in the South African legal process (§33).

⁴ I understand this “singling out” socially, and do not refer to what psychologists and psychoanalysts see as a necessary process of estrangement in order for a person to assume maturity.

· *Mukaddam v. Pioneer Foods (Pty) Ltd* 2011 JDR 0498 (WCC); *Trustees for the time being of Children's Resource Centre Trust and Others v. Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA).

⁶ Charles Abrahams is a partner in the small law firm Abrahams Kiewitz Attorneys, located in Belleville, Western Cape. The firm, among others, works on South African cases. Three of their cases, against Anglo Platinum (re: displacement), AngloGold Ashanti (re: silicosis), and Gencor (re: asbestosis), test the instrument of class actions in South Africa.

⁷ *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46 (CC) and *Minister of Health and Others v. Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721. In another case, concerning the sale in execution of a home to cover unpaid civil debt, the Constitutional Court held that “any claim based on socio-economic rights must necessarily engage the right to dignity. The lack of adequate food, housing, and health care is the unfortunate lot of too many people in this country and is a blight on their dignity. Each time an applicant approaches the courts claiming that his or her socio-economic rights have been infringed the right to dignity is invariably implicated” (*Jaftha v Schoeman and Others, Van Rooyen v. Stoltz and Others* 2005 (2) SA 140 (CC)).

⁸ Section §27 1b reads: Everyone has the right to have access to (b) sufficient food and water. Section §28 1c reads: Every child has the right (c) to basic nutrition, shelter, basic health care services and social services.

⁹ Numerosity is one of the four standards applicant representatives generally have to show in order to prove the adequate representation of the interest of the class members. The other standards are commonality, adequacy, and typicality.

¹⁰ Agamben (1999) elaborates on this distinction (see also Fassin 2008).

¹¹ An “expert witness” is a third category, which is not of prime interest here. This is an expert who is called to provide testimony on a technical matter or matter on which he or she possesses professional expertise.

¹² Maybe this gives a clue as to how to understand the civil plaintiff’s role, as Nader notes in *The Life of the Law*: “The civil plaintiff’s role will be appreciated as something more than presenting a dispute to be managed” (2002, 211).

¹³ The International Criminal Court (ICC) has a Victims’ Trust Fund through which to compensate the victims of crimes (Rome Statute, Article 79). It is a body independent from the ICC and is mandated to implement ICC-ordered reparations and to provide physical and

psychosocial rehabilitation or material support to victims of crimes within the jurisdiction of the ICC. This is an important international recognition of the need of reparations. It advocates community redress rather than individual payouts.

¹⁴ The ruling allowed the case to proceed under the guidelines set by the court *Trustees for the time being of Children's Resource Centre Trust and Others v. Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA). The SCA considered the requirements that must be met in an application for certification.

¹⁵ This is apart from the (nonpublic) Khulumani database, which far surpasses the TRC report in the number of testimonies.

¹⁶ Ross points to the fact that victims who testified before the TRC were “doubly positioned,” as they experienced apartheid and the particular violation they testified about (2002, 175n). With regard to the two dimensions of testifying, the name for the commission—the Truth and Reconciliation Commission—can thus be applied literally: *reconciliation* generated by the personhood of the victims; *truth* generated by factual happenings in their testimonies.

¹⁷ Wilson suggests that the commission was formulaic in its endeavor to move victims beyond anger to closure and forgiveness; he also noted a “moral equalizing of suffering” in the Commission’s work (2000, 80).

¹⁸ See Ross (2003a) for the intricacies of bearing (individual) witness for a collective. She uses the example of literature.

¹⁹ Right before the debate, President Mbeki announced that he granted a one-time payment of R30,000 per victim or surviving relative, instead of the recommended Individual Reparation Grant of R20,000 per year for a period of six years. It is beyond the scope of this article to analyze this, but personalized payouts are yet another example of how some injuries are acknowledged while others are not.

²⁰ Debate on the Truth and Reconciliation Commission Report: Speech by Minister of Trade and Industry, Alec Erwin, 15 April 2003.

²¹ Statement on the Report of the TRC Joint Sitting of the Houses of Parliament in Cape Town, 25 February 1999, <http://www.dfa.gov.za/docs/speeches/1999/mbek0225.htm>.

²² This reminds me of the speech acts theory that relates the effectiveness of utterances to the socially recognized authority of the speaker (Austin 2003; Searle 1989).

²³ I have explored this dimension of victimhood elsewhere (Kesselring 2016).

²⁴ I am, of course, not suggesting that the law only effects individuation. Elsewhere (Kesselring 2015b, 2016), I show that the law can be the basis for a political collective to emerge, and I strongly believe that the law can also contribute to the leveling of inequalities.

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