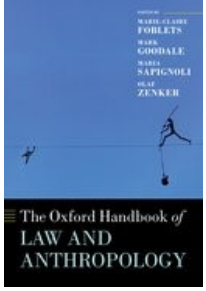

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CHAPTER

35 Inequality, Victimhood, and Redress

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Abstract

In relation to inequality, the law is ambivalent. Legal norms can be used to create or formalize differences in a society, but social groups can also use legal norms in their attempts to attenuate inequality. This contribution differentiates three ways in which law can affect structures of inequality: legislation, case law, and law enforcement, and law's discursive forms and legal practices. It focuses on the latter, or what Bourdieu calls 'the force of law', at the level of lived reality. To do so, it examines the apartheid litigations where South African victims of human rights violations turned to U.S. federal courts to seek redress, and shows how, in that pursuit, new forms of inequalities were produced. As the law needs to valuate life, the evaluation of human life poses the danger of producing new disparities. Recourse to the law can, however, also be emancipatory for the injured. Both effects—emancipation from and cementation of inequalities—have societal rather than mere technical causes.

Keywords: victims, inequality, redress, apartheid, extraterritoriality, Alien Tort Statute, Pierre Bourdieu, ethnography, South Africa

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Introduction

In the most basic sociological definition, social inequality is a societal situation in which resources are distributed unevenly among a group of individuals. Such uneven distribution is rarely aleatory. It is linked to social categories identified in a society and in turn often reinforces them. Categories such as race, class, gender, sexual orientation, and disability are reproduced in practice by inequality, and they find their expression in inequality. Legal norms are an important instrument for sorting people into categories, and sociologists of law have shown how laws can help create, maintain, or reduce inequality (see e.g. Goffman 2014; Van Cleve 2016). Legal norms can be used to create or formalize differences in a society, but social groups can also use legal norms in their attempts to attenuate inequality.

In spite of its long tradition (Goodale 2017), the anthropology of law has not developed such a clear-cut body of scholarship on law and social inequality in the way sociology has. Bronislaw Malinowski's *Crime and Custom in Savage Society* ([1926] 2013) established the anthropology of law as an empirical study. Like Schapera's *Handbook of Tswana Law and Custom* ([1938]1994), the law in these classical texts is seen as something systematic and centred on a group. Subsequently, anthropologists working in colonial and postcolonial contexts started studying the multiplicity of legal situations in which state systems exist alongside other strong normative institutions that regulate social practices. This scholarship of 'legal pluralism' broke open the compartmentalized understanding of law (Benda-Beckmann 2002). In recent decades, the anthropology of law has internationalized and been revitalized by globalization studies,

analysing transnational and international law and its appropriation in specific contexts, as well as groups' increased use of extraterritorial law to further rights at home. Its preoccupation ↳ has been with the mobilization of transnational identities, such as indigeneity, and transnational networks of solidarity and action (Goodale and Merry 2007; Griffiths, Benda-Beckmann, and Benda-Beckmann 2005; Meckled-García and Çali 2005; Wilson and Mitchell 2003). In the course of its history, however, the anthropology of law has, to a certain extent, neglected the study of law's effects on inequality in modern societies. Notable recent exceptions are studies that examine both the recourse to law and the everyday experiences of the claimants (see e.g. Sapignoli 2018 on the Central Kalahari case).

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There are at least three ways in which law can effect structures of inequality. The first is through legislation. This includes the human rights framework and laws that are passed to change society either through repression or emancipation (e.g. Bowen 2010; Thompson 1977). Second, through case law (jurisdiction) and law enforcement (Fassin 2013). Legislation does not automatically result in its enforcement, and it is often at this level that a piece of legislation is rendered effective or ineffective. This category includes the vernacularization of human rights (Merry 2006) as well as the enactment of bureaucratic rules and the interpretation of law (Maine 1861) that allows for its modification. The third way in which law influences structures of inequality is through law's discursive forms and legal practices. The engagement with the law, both in court and beyond, has societal effects (Conley and O'Barr 1990; Merry 1990). While this third approach is my focus in this chapter, my extended case-study also bears aspects of the other two possibilities for law to shape structures of inequality.

In terms of legal discourse, most anthropologists attribute some force to the law. There is consensus that law is not merely the codification of norms that exist outside of law, but that it has constitutive power (Nader 2002). To explain this force, many today have adopted a Foucauldian approach, arguing that everyone who engages with the law is subjected to the legalization of his or her personhood. Some go so far as to say that law equals power, and as a dimension of all modern social relations, law is a basic axis in the constitution of social self and other (Biolsi 1995: 543–4).

As a result of this assumed all-encompassing quality of law, many anthropologists are sceptical of the law's potential to alleviate inequality. If the legal discourse is indeed so powerful, it is difficult to translate experiences of violence into a legal language (Hastrup 2003; Merry 2008) and to translate subjective and unspeakable experiences into the logic of legal evidence and knowledge (Das 1996; Fassin and D'Halluin 2005; Scarry 1985). Consequently, legalization becomes a threat. In their work, Jean and John Comaroff refer to situations dominated by the 'fetishism of the law' (2007: 141–6) and a 'culture of legality' (2007: 146) that seem 'to be infusing everyday life' (2007: 146) and have become a common feature of the postcolony. Scholars fear that law's dominance detracts from positive visions of what a society wants to become; the narrow vocabulary of the language of human rights, for instance, is negative in the sense that it only tells us what we do *not* want for the future (Wilson 2001).

The force of law

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Despite these valid notes of caution, we cannot assume that changes in legal subjectivities automatically effect changes in lived subjectivities. This causal link between forms of action and forms of sociality needs to be critically examined. In other words, I do not think that ascribing an all-encompassing power to law is helpful or analytically correct. The question of how law can possibly assume its power remains open. All we can say for sure is that 'the law regulates identity, value, and belief in often contradictory ways' (Goodale 2017: 138).

My perspective on the law and its effects on sociability follows Bourdieu:

> Our thought categories contribute to the production of the world, but only within the limits of their correspondence with preexisting structures. 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. (Bourdieu 1986: 839)

In order to understand the 'force of law' (Bourdieu 1986) on social inequality, we need to look at the lived reality of those people affected by it. It is in these lived realities that we can track changes that result from

people's engagement with the law.

This contribution examines a case where victims turned to courts to seek redress for gross human rights violations, and how, in that pursuit, new forms of inequalities were produced. I focus on the so-called apartheid litigations that were filed by South Africans against multinational companies in U.S. federal courts in 2001, claiming their human rights had been violated by the defendant companies' aiding and abetting human rights violations at the hands of the security forces under the apartheid regime. The extraterritorial hearings stretched over sixteen years, and the outcome was disappointing for the plaintiffs (amounting to some 100,000 and potentially more individuals). During these years, they had successes and setbacks, and had to deal with their hopes and fears, the reactions from a variety of actors, and the necessity to maintain solidarity among themselves. My contribution is based on twenty-two months of ethnographic field research over ten years at both the provincial and national levels of Khulumani, a South African apartheid victims support group and a party in the apartheid litigations, and with individuals and groups of Khulumani members and their families in a number of townships on the outskirts of Cape Town, including Philippi, Langa, KTC, Crossroads, and Nyanga (Kesselring 2017).

My focus on redress and victimhood draws on long engagement in legal anthropological scholarship with conflict settlement following harm generated by violations of people's integrity. For instance, blood money —compensation for homicide or bodily injury—can be seen as an alternative to revenge and to right wrongs
p. 647 and as a means to settle disruption in a community (Ben Hounet 2017). Since the 1990s, most related ↳ anthropological research has focused on more collective and institutionalized forms of redressing past wrongs and transitioning into a new political era, such as criminal courts (Wilson 2011), truth commissions (Hayner 2001), land restitution (Zenker 2014), and localized courts (Clark 2010)—that is, a bundle of practices and institutions that have come to be known as 'transitional justice' mechanisms.

Against the backdrop of this literature, I examine processes where law offers the potential to alleviate inequalities that had been produced under apartheid through its laws and policies and the enforcement of them. I also, however, look at the backlash that results from taking recourse to the law. To claim redress, people have to position themselves as victims of crimes—a move which may deepen their victimhood socially and politically and thus further cement their unequal opportunities in society. The law has its limits when it comes to 'revaluing' life and balancing inequalities, as I will show, a fact that has societal rather than mere technical causes.

Apartheid victims in post-apartheid South Africa

After the end of apartheid, South Africa decided against prosecuting the majority of apartheid-era crimes within the criminal justice system. Instead, it pursued other avenues of redress, most prominently the Truth and Reconciliation Commission (TRC) (Bell and Ntsebeza 2003; Chapman and Van der Merwe 2008; Ramphele 2009; Sarkin-Hughes 2004). Apart from the TRC, the South African state has put in place a number of redress mechanisms to level the structural inequalities produced by apartheid, from social grants to the Black Economic Empowerment policies, affirmative action, land reform, and land redistribution programmes. Most of these programmes do not directly address the injuries people experienced under apartheid rule; rather, they are forward looking, economically oriented, and operate on a primarily individual basis (Kesselring 2017: 23ff.). The majority of apartheid's victims were not directly involved in the truth commission process. The TRC gave 'victim' status to roughly 21,000 persons who had, directly or indirectly, suffered politically motivated, 'body-bound' (Ross 2002, 11) gross human rights violations. Through this limited list, the TRC's notion of victimhood has had an enormous impact, even on the majority of victims who were not on the list, contributing to a strong societal image of who an apartheid victim is and should be. This dominant discourse excludes many different experiences of victimhood. The commission attempted to develop a representative definition of victimhood, performatively collectivizing the suffering and pain of all survivors (see Cole 2009). It did so, however, by singling out individual victims, who could then speak for all victims and survivors. As a result of its individualistic approach, the commission also lost sight of structural violence (Feldman 2003; Mamdani 2002). Hence, injury ultimately remained individualized, a fact that the movement for redress and recognition first had to overcome.

p. 648 Life for many apartheid victims twenty-five years after the first democratic elections in 1994 cannot be described as ordinary in comparison to their neighbours who had fewer degrading experiences. Many people still struggle to move beyond the past and participate in the so-called new South Africa. They go through

frequent social ruptures and often have few resources, financial and otherwise, to protect themselves from tragedies in the family (crime, death, disability, unemployment). Ruptures are also initiated by the state. Under President Mbeki, the South African government adopted a liberal approach to development and quickly turned away from the past and the experiences of victims. Even those victims on the TRC's list had to wait for five years to receive the final reparations in 2003. The money was often not enough to repay the accumulated debt or to support a child's education. In a climate shaped by a public and private inability to confront the past (Ross 2002: 163; 2003: 172), victims were often unable to come forward during the mid-1990s. Many felt excluded from a process that promised transformation and healing, but did not publicly acknowledge their own injuries (such as rape and other forms of sexual violence).

From early on, victims expressed their discontent with the TRC process. The most important voice for victims' concerns has been the Khulumani Support Group (henceforth Khulumani). The legal interventions it took, together with allied organizations, individuals, and lawyers, changed the reconciliatory and non-retributive path South Africa had taken with the truth commission, and gave it a judicial turn. Khulumani was launched in 1995 and has grown into a national organization with provincial and local branches. Its more than 105,000 members are persons who survived forms of violence emanating from the apartheid security forces or its collaborators, including torture, detention without trial, sexual assault, abuse, and harassment; banning and banishment orders; deliberate withholding of medical attention, food, and water; the destruction of homes; and the mutilation of body parts. Members also include those whose family members were abducted, disappeared, or killed.

Only about 10 per cent of Khulumani's members were officially recognized as victims by the TRC (Madlingozi 2007: 120). The organization started as a self-help group with a focus on providing psychological and social support to victims (on its early history, see Wilson 2001). However, it soon began to focus on political change and made more articulate demands for reparations. The organization relies on voluntary staff, many of whom are victims themselves.

From the outset, Khulumani was based on the idea that victims should organize and speak for themselves. Adhering to its own vision, however, has never been easy due to the societal context and an inherent tension between victimhood and activism, and it became much more difficult as the organization grew and attained international fame. In spite of its broad base, Khulumani has not always developed very democratically. Professionalization and centralization of its structures have made its leadership lose touch with the membership, and power struggles within the organization have lingered for many years. Nevertheless, at the local level, people keep the organization going with little or no financial resources.

Legal challenges after the TRC

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In spite of the reconciliatory focus of the TRC process, victims' struggles for recognition were from the start pursued in legal fora. A number of cases submitted in South Africa upheld the victims' right to be consulted in questions arising from apartheid crimes. While the rulings strengthened victims' rights, they also helped to cement the TRC's notion of victimhood.

At the international level, a different set of legal actions challenging the TRC's shortcomings garnered much more attention. In Alien Tort Statute (ATS) claims filed in U.S. courts (Henner 2009; Mattei 2003), victims demanded reparations for the injuries they had sustained at the hands of the security forces during apartheid. The ATS dates back to 1789[1] and gives foreign citizens the right to sue in a U.S. federal court over violations of international law, whether they arose in the United States or abroad. In 2001, legal proceedings were initiated against multinational companies. The original complaint, *Khulumani et al. v Barclays National Bank et al.*, led by U.S. attorney Michael Hausfeld and advised by South African attorney Charles Abrahams, sued twenty-three multinationals and banks in six different countries (Switzerland, Germany, France, the Netherlands, the United Kingdom, and the United States) and involved six different industries (arms and ammunition, oil, transportation, banking, computer technology, and mining). Khulumani and eighty-seven individuals alleged specific violations of international human rights law that corporate actions had made possible: extrajudicial killing, torture, detention, and cruel treatment (between 1960 and 1994). A few months before the Khulumani litigation was filed, the American personal injury lawyer Ed Fagan filed *Lungisile Ntsebeza et al. v Daimler Chrysler Corporation et al.* In 2002, the U.S. Judicial Panel on Multidistrict Litigation consolidated the different apartheid cases and had them heard by the Southern District Court of New York.[2]

Despite initial assurances by the cabinet of South Africa that the government neither supported nor opposed legal action in this matter, President Mbeki strongly condemned the legal actions in 2003, backed by Minister of Justice Penuell Maduna. The U.S. secretary of commerce described the litigations as an 'unhelpful development' (Friedman 2003), and the Bush administration, in a statement of interest by the Department of State, argued that the 'continued adjudication of the [apartheid litigations] risks potentially serious adverse consequences for significant interests of the United States' by threatening to be an 'irritant in U.S.-South African relations' and for international economic relations with other countries whose firms are defendants.

The 2004 Supreme Court ruling in *Sosa v Alvarez-Machain* upheld the right of foreigners to seek compensation under the Alien Tort Statute's provisions, but it also urged the federal courts to interpret the statute narrowly to avoid judicial interference in foreign affairs. As a result, later in 2004, Judge Sprizzo dismissed the apartheid litigations on the grounds that aiding and abetting international law violations was
p. 650 not a universally accepted standard of international law. Plaintiffs appealed to the Second Circuit ↳ Court of Appeals, which, in 2007, reversed the lower court's dismissal. The defendant companies petitioned the U.S. Supreme Court for an order of certiorari, but the Court could not pass judgment for a lack of quorum,[3] which allowed the Appeals Court ruling to stand.

Seizing this opportunity, the plaintiffs' legal teams changed some crucial characteristics of the case. They reduced the number of defendants to eight and reformulated the claims into a class action suit with thirteen individuals standing for the classes. The amended cases were heard by Judge Shira Scheindlin in 2009. It was she who finally issued the first substantial ruling and allowed the claims to proceed. She ordered the exclusion of banks as defendants and removed Khulumani's standing as a plaintiff. The amended complaint was met with another appeal to dismiss by the companies. Importantly, a couple of months after Judge Scheindlin's decision, the South African government reversed its opposition to the case. This good news was tempered for the plaintiffs by a decision in another ATS case, *Kiobel and Others v Royal Dutch Petroleum Company and Others*, in which the Second Circuit Court of Appeals ruled in September 2010 that companies could not be held liable for violations of international human rights law. The Nigerian plaintiffs filed a petition of certiorari with the Supreme Court, which did not rule on corporate liability, but rather on the ATS as a whole. Its April 2013 ruling restricted the application of the ATS in cases alleging torts outside U.S. territory. This prompted Judge Scheindlin to exclude non-U.S. companies (leaving only IBM and Ford). The updated complaint was nevertheless dismissed on the grounds that the plaintiffs had not shown sufficient connection to the United States. Hopeful after a ruling in the ATS case *Mastafa v Chevron Corp.*, the South African plaintiffs submitted a brief to the court appealing the dismissal of the apartheid cases, but in October 2015, the court affirmed Scheindlin's order. A petition for a writ of certiorari filed with the U.S. Supreme Court was also unsuccessful.

Law and social inequality

How do law and inequality relate here? First, the plaintiffs hope that financial redress, as a legal remedy for the political injustice they experienced under the apartheid regime, will help them to fully participate in post-apartheid South Africa. Reparations are not seen as a total remedy, but as a step in the right direction and what should rightfully be given to all victims of apartheid. Second, to hear legal claims, the law needs defined groups. Plaintiffs have to single themselves out as a distinctive group; in other words, they must, in effect, declare, 'We are victims'. This legal process produces a social reality and the associated risk that the category hardens and becomes exclusionary. Finally, the law produces procedural side-effects. People are grouped in classes according to injuries suffered, and some qualify as members of these classes whereas others do not.

All three aspects—the search for justice and remedy, the delineation or redefinition of a new group, and the
p. 651 effects of the law's procedures—are part of the fabric of law. The law ↳ has the advantage of relying on procedures and it lends itself to consensus. Procedures, however, need to be translated into the realities of the case, and it is in these realities that procedures have social effects that create, maintain, or alleviate inequality. It is to this aspect that I now turn.

Lawyers: intermediaries of procedures and universal law

A statute like the Alien Tort Statute might be (or perhaps used to be) universal, but its effects are always very localized. For obvious reasons, universal applicability of a law does not automatically streamline its effects across social and political contexts.

A number of intermediaries work to bridge not only the gaps between the experience of victimhood and legal procedures, most prominently legal practitioners (but also NGOs and researchers), as well as between different contexts, such as U.S. jurisdiction and politics and South Africa's history of dealing with its apartheid legacy. In the example at hand, administrations have changed three times in the United States—from Clinton to Obama to Trump—and three times in South Africa—from Mbeki to Motlanthe to Zuma. Given that politics exerted such direct influence on the judicial process, the strategies around the lawsuits had to continuously adapt to changed political environments.

Indeed, for Charles Abrahams, legal adviser in the Khulumani case, partner at AbrahamsKiewitz and once active in the movement calling for the cancellation of unjust and odious debts, the lawsuits were always only part of a much broader political campaign (Abrahams 2019). He always warned people not to base the campaign for redress and an opening up of the victim question on legal action alone. 'It will weaken the campaign', he cautioned. 'The lawsuit is very narrowly framed. There is lots to be campaigned for beyond the lawsuit.'

Equally, for Dumisa Ntsebeza, former TRC commissioner, president of South Africa's Black Lawyers Association and legal adviser to the Ntsebeza case, the lawsuits were about holding the South African state to its commitment to social change. In an interview, he told me, 'A government which is populated by people who were themselves the victims of the vicious regime of apartheid should now seek to deny a legitimate pursuit in legal courts by victims of the same system? This is the clearest statement that has been made by this government: where the interests of big business are at stake, they decide against their people.' Unlike their South African counterparts, for the U.S. legal teams, as much as they sympathized with the plight of apartheid victims, the apartheid litigations were primarily an opportunity to receive legal clarifications on the applicability of the ATS.

On a few occasions the U.S. and South African teams of lawyers and the named plaintiffs met. In 2009, when
p. 652 the legal teams were presented with the opportunity to amend ↳ the lawsuits after Judge Scheindlin's positive but limiting decision, the U.S. teams came to South Africa to directly interact with the plaintiffs and their South African counterparts. It was a fact-finding mission to strengthen the link between the defendants' companies and the injuries. In a two-day meeting with the named plaintiffs, Khulumani, and other concerned individuals, the lawyers presented their ideas of how to make the cases stronger. But what might have looked like a good move for the U.S. lawyers was not necessarily good in the South African political environment. For instance, the U.S. lawyers wanted to bring Desmond Tutu back in more prominently, given that Judge Scheindlin had quoted him in her decision. For South Africans, this was not a good idea; Tutu had just called on South Africans to boycott the 2009 general elections, and he had fallen from grace with the ruling ANC party. The question of how to more sharply delineate the proposed classes of injury was another issue where opinions diverged. From the U.S. perspective, the two lawsuits should propose the same classes of injury and define them as narrowly as possible; from the perspective of the Ntsebeza legal team, keeping its broad and numerous classes was a point of principle.

While these are technical and strategic discussions that are partly dictated by legal procedures, they have an effect on plaintiffs. Eventually, the classes of plaintiffs were narrowed in the Khulumani case, which also reduced the number of named plaintiffs. But being a named plaintiff comes with considerable risk in a society that is marred by social inequalities and unaddressed suspicions (Kesselring 2017: 65–70). Simple changes in a complaint can have dramatic consequences for individual plaintiffs' standing in their communities.

While lawyers were often mediators and mobilizers, they also unintentionally contributed to divisions. Even if the two litigations were consolidated by the U.S. courts, the two South Africa teams never recovered from tensions that go back to the beginning of the lawsuits, and tensions remain. As a result, there was no rapprochement between the plaintiffs of the two lawsuits. The histories of the cases prevented solidarity among victims.

Lawyers have strong motivations to be involved in human rights cases. They hope to alleviate inequality, with the ultimate aim of doing away with it entirely. While they weigh societal and juridical realities, they leave a legal mark on the matter.

Plaintiffs

Plaintiffs also contribute—often unwittingly—to inclusionary and exclusionary practices and thus help to create new inequalities. The office where potential new Khulumani members approach a provincial executive member or an administrator is a crucial place where conceptions and misconceptions about who qualifies to be a victim are formed. Since the apartheid lawsuits were filed in 2001, the stakes have increased for some potential members, since in their eyes becoming a Khulumani member automatically means that
p. 653 one will be considered a plaintiff in the lawsuits. This assumption, however, ↳ has never been confirmed in court, as the classes were never bindingly defined and Khulumani as an organization was removed as a plaintiff. Depending on the final definition of the classes, all South Africans were potential beneficiaries of a settlement or damages paid by the defendant companies. Khulumani was simply the organization that held the largest and most detailed database on apartheid victims, which was roughly five times the size of the TRC's.

I was present during hours and days of testimonies by community members who wanted to become Khulumani members. To a certain extent, the Khulumani officers copied the practice of the TRC from two decades earlier and engaged people to record victims' testimonies. In doing so, they not only applied Khulumani's constitution, but also their own perception of a 'good victim'. Most applicants were referred to Khulumani by friends or acquaintances, which allows for both inclusionary and exclusionary practices in the context of localized political histories of the struggle against apartheid. For instance, for many years, there was a conception in the communities that only the residents of certain townships qualified for membership. This distinction went back to events in the 1980s that divided certain neighbourhoods along the lines of displaced people, on the one hand, and those who had to host the displaced in already overcrowded, informal residential areas on the other. As a result, some townships dominated Khulumani's meetings and the membership base for many years; it took considerable effort to work against this divisive practice.

There were further cleavages cutting across victims. The fact that the TRC only acknowledged a particular kind of justice that denied feelings and practices of vengeance (Wilson 2001) and recognized a fraction of victims still comes into play twenty years later, fuelled by the new legal challenges in the United States and the possibility of payout. Ironically, people who received reparations through the TRC process were generally worse off than those who did not qualify or did not even try. In the expectation of soon receiving the reparations, people accumulated debt and often never fully recovered from this situation. People who received reparations were sometimes also eyed suspiciously. People know each other still today by their role in the resistance against apartheid. These histories are very localized and violent. People, especially women, were often caught between gang leaders and their fierce fights for domination (Cole 1987; 2012). In some ways, the lawsuit is reawakening those lingering divisions that were produced by what for many was a nontransparent TRC process.

Victimhood is once again at stake and a potential card to gain entry into processes of redress. In order to qualify as a victim or a Khulumani member, one has to be accepted by the officer taking the statement. It is thus not surprising that Khulumani has experienced a number of challenges from within. In some cases, powerful members in a community set up their own branch, vilified the 'official' Khulumani, distributed alternative membership forms, and made false announcements of a payout. For these and many other challenges to the group, it required considerable effort for Khulumani not to break apart, at both the regional and national levels. Moments of success in the U.S. courts served both to unify and divide. Legal and
p. 654 quasi-legal categories (going back to ↳ the TRC) thus have consequences for societal discourses and can jeopardize the chances for solidarity.

I often saw the notion of victimhood perpetuated in simplistic and almost grotesque forms, especially when outsiders and media were involved. Here, I relate an instance where two documentary filmmakers received permission to speak to the members assembled at one of the monthly general meetings to talk with them about 'forgiveness'. The filmmakers had been to other post-transitional countries such as Northern Ireland and Rwanda, and had come to South Africa presumably for its comparative value. South Africa enjoys a

reputation of successful transition based on an approach of reconciliation and forgiveness. Few people know what has followed from the truth commission or how dissatisfied and unrecognized the majority of victims feel. Hence, when asked whether any of the roughly hundred members wanted to say something about 'forgiveness', the filmmakers received the expected response. One woman promptly says, 'We can't forgive!' A man in the audience supports her: 'It's a two-way street: action must be done in order to reconcile.' Another man follows suit: 'Look at us, we have nothing. I am on medication. So what is the point of forgiving or reconciling?' Getting straight to the heart of the matter, another person explains: 'No one came to ask [us] for forgiveness.' And then Khulumani members trail off to what concerns them most: 'Our children don't respect us; we have nothing to put on the plate', and 'I have been trying to qualify for a special pension [from the state], but the system is so corrupt. I still don't receive it.'

To the attentive listener, it became quite obvious that forgiveness was not the main concern here. It was even unclear whom to forgive; no one had approached them with this request. The more mundane things were much more important: How will I feed my family tomorrow? How can I get some state support for my disability? To the inattentive listener, the picture emerging from this situation was a notion of the 'unreconciled victim' (as opposed to a person who has been reconciled and has forgiven). While this perspective is probably valid to a certain extent, it misses many important points.

As mentioned in the introduction to this contribution, there is often a gap between the experience of victimhood and the (legal) discourses afforded to talk about it. As I will show below, victimhood is embodied, held close, and difficult to articulate in words. If prompted to put it in words, people can only draw on the dominant discourses, such as the 'unforgiving' and the 'victim'. But this stock vocabulary is limiting; it cannot not capture the experience nor the complexity of victimhood, and tends to perpetuate standard binaries of good and evil, perpetrator and victim, reconciled and unreconciled.

Lived victimhood

While being at the centre of all these concerns, victims somehow have to continue to live their lives. They do so in a realm that is rather removed from legal discourses, but is nevertheless affected by them.

p. 655 Ethel Khali is one of the older women with whom I regularly passed my afternoons in Philippi. For her, there is no clear break between apartheid and post-apartheid times. She became widowed in the 1980s and was left on her own with three sons, one of them disabled. Like so many of my acquaintances and friends in the township of Cape Town, she still has close ties to the rural area formally known as Transkei, but is somewhat trapped in the urban space, which is unwelcoming and dangerous at times. Employment opportunities are slightly better than in the rural area, although her health is too poor to work and she is beyond retirement age in any case. She rents out the shacks in her backyard for a small fee.

Ms Khali is a dedicated churchgoer and an enthusiastic Khulumani member. She is part of a group of elderly women who live in the vicinity and meet regularly. In these meetings, which I participated in, the women share their daily struggles, their diabetes, high blood pressure and arthritis, and try to help each other out as much as they can. They are all Khulumani members and see themselves as victims of apartheid. This victimhood clearly relates to past experiences such as torture, the killings of their husbands, ongoing loss of property due to raids and fires, 'deportations' to the rural areas, and everyday structural discrimination. Their victimhood is entangled, however, with their position today, which does not look much different from the apartheid days, although the excessive violence has stopped. Their bodies grow older; and with age, their injuries resurface and the pain, both emotional and physical, grows stronger. Many of the women have flashbacks and cannot shake off their memories, which sit uncomfortably in their bodies and prevent them from leading ordinary lives.

During one of my first visits to Ms Khali in 2009, I could sense the pressure she felt to 'tell me her story', and I did my best to change the subject. I was cautious not to evoke strong emotions, and I never asked the women to speak about their pain. Not asking, however, often felt inadequate, not least because researchers before me had created the expectation that life stories are what researchers want. I instead asked her to show me around her house, a crumbling structure in dire need of repair. Years of the humidity of the Cape were absorbed in the bricks and wood, and the strong wind seeped through every corner of the house. She pointed out to me the shacks in the backyard, the leaking roof, but also some items that she treasures: photographs of her mother and sons, and a Singer sewing machine. Then she halted abruptly and said, 'But

once reparations from the lawsuit come through … God willing, I will also pay for the education of my son and the school fees for my grandchild.'

This small exchange describes an effect of the law that could easily be overlooked. The law is not only a piece of legislation that changes the lives of thousands, nor merely the enshrinement of a legal category assigning life chances to broad categories of people. For Ms Khali, the law has a much subtler, but very important effect. She situates herself in a political and social field in relation to a lawsuit. The fact that they feel part of a lawsuit against companies has boosted people's hopes. Ms Khali and her female friends take pride in being part of Khulumani and the classes of plaintiffs, and it has become a point of reference in parts of their lives. The hopes and the connection on which they rely create solidarity and give new meaning to a common social space. There now exists a ↳ space in which they can foreground their victimhood freely if they wish, part of which is that they do not have to hide or even explain their pain and their fits of recurring memories. This space is not created by the law, but it is reinforced by shared hopes in a legal solution.

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Like any other person, these women of course live multiple subjectivities that partly exclude and partly overlap with their victim personhood. For instance, Ms Khali is still a staunch member of the African National Congress, the ruling party that condemned apartheid victims for being selfish when they turned to U.S. courts. In church, her victimhood can much more easily dissolve into notions of prayer, hope, and community work. In her ordinary life, the apartheid litigations have given her and others a point of action. They produce the potential for emancipation, however fragile and contingent this potential is.

Inequality, victimhood, and redress

Broader societal inequality cannot be alleviated by filing suit against multinational companies. In the course of my research, two women from the small group who looked after one another have passed away. These two women died poor and unrecognized in their victimhood by the broader society. However, they were at least part of a shared sociality—the women's group and Khulumani more broadly—which drew on the energy triggered by the legal challenges. This sociality has not yet reached beyond victims, and maybe it never will. Nevertheless, I see this as a first step towards the possibility of levelling inequalities. These attempts are intimate and are probably only successful if they catch on in broader society and ignite institutional change. As outlined above, victims were confronted with a hostile post-apartheid government, which deemed the legal challenges not only unnecessary but also unpatriotic. Victims thus face a number of discursive hurdles, the most daunting of which are the narrow societal notion of apartheid victimhood as produced by the truth commission and the state's resistance against a re-engagement with the apartheid question both in courts and in domestic political processes. Against this background, non-predicated practices of solidarity and tacit recognition among victims must be seen as a seed for social change (Kesselring 2017).

Monetary redress through the law is but one specific way to address inequality, and both scholars and practitioners are often criticized for focusing exclusively on financial redress, to the neglect of other forms. No one would argue that the loss of life can be redressed with money. However, the distinctive characteristic of monetary redress for loss or injury is, I would argue, that it does hold the potential for emancipation from past experiences. It gives the compensated person or group a means to act upon the world in a self-determined manner; attached to the money is the potential of giving some degree of agency back to that person. Most post-conflict projects across the globe—many of which draw on the South African example—forget the need to offer agency to victims and overemphasize symbolic, national gestures, many of which have little effect ↳ in individuals' lives. Needless to say, financial redress does not replace other forms of inviting a person or a group of people back into a changed societal structure, but it does have an important role to play in addressing the inequality that is exacerbated by victimhood.

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For the injured, the law, then, offers a promising way to claim damages for harm or loss. It is an ambivalent path because in its logic, the law needs to *valuate* life, and with valuation comes the danger of producing *disparities* in the evaluation of human life (see Fassin 2018: 92ff.). Law, life, and redress therefore stand in a complicated relationship. The law offers the potential to valuate and appreciate (the loss of) life, especially with a fair trial and damages; but as soon as life is valued in technical terms, it also undergoes a process of devaluation—if we understand all life as ethically the same.

In this contribution, I have tried to show that the quest for redress and the hopes to reduce inequality are related on a number of levels. First, going to court is often the result of an entrenched system of inequalities (such as apartheid was and its legacy has been); second, pursuing legal means has the effect of creating disparities (between victims and non-victims, for instance); and third, it can create new cleavages within a group (breaking apart a group of victims).

The reasons for the law's role in alleviating and creating inequalities cannot be found in the nature of the law, though. The law does not automatically produce something or someone. A victim is, first and foremost, someone who feels that she has been harmed, and not because the law ascribes this subject position to her. The law thus does not subject one's personhood to its own logics (something that is often called 'legalization'). For the law to have an effect, the legal logic and societal 'preexisting structures' (Bourdieu 1986) need to coalesce. Hence, recourse to the law is a consequence of the attempt to emancipate oneself from a confining discourse (e.g. a discourse that refuses to recognize the continuing suffering of victims) under conditions in which the legal avenue is more promising than the political avenue. The search for emancipation originates in the lived realities of victimhood.

Along the same line of reasoning, the *limits of the law to achieve equality* emerge from a societal context rather than from the law itself. Certainly, on one level, legislation and jurisdiction take their effectiveness from the legal context itself. Apartheid is a case in point: it was difficult to ignore the efficacy of discriminatory law and segregation policies. Their enforcement was one of the central means of suppressing the black population and depriving it of equal opportunities, legitimating torture, and devaluating the lives of a certain group of people. At the same time the law was, for a small group of people, the means by which they successfully managed to accumulate wealth and prevent economic distribution and social change. Law was equally an important means to fight these practices; it was, in other words, politics by other means (Abel 1995).

In terms of the third way that law can effect structures of inequality—through law's discursive forms—the apartheid litigations show that in order to achieve equality, legible lines of inequality first have to be emphasized, mobilized, or even produced. These inequalities often persist long after the end of a legal
p. 658 action—in the case-study, ↳ the effects of law-use have remained with apartheid victims, and inequality has not decreased. The limits of the law are just as much the result of procedural limitations as they are of powerful actors (such as governments and corporations) who are unwilling to institute social change. The study of law and inequality must include societal processes beyond material outcomes and legal decisions.

Notes

1. 28 U.S. Code §1350: Alien's action for tort.

2. In an amended version of the case, more banks and mining companies were added to the suit, and the South African government, former president Nelson Mandela, and then president Thabo Mbeki were mentioned as defendants. Because of serious controversies around Fagan's credentials, the American human rights litigator Paul Hoffmann took over the case. For a timeline of the various apartheid litigations, see Kesselring (2012).

3. Four of the nine justices had to recuse themselves because they owned stock in some of the corporate defendants.

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