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Commissioning the Present: Marikana and the Contemporary Moment

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The Marikana Commission of Inquiry ("the Commission") is currently hearing closing arguments. It will likely report to President Jacob Zuma by the end of March 2015. Although President Zuma's administration is not characterised by openness, and there are already fears that the report may be withheld for an extended period,[1] it is inconceivable that the report – whether in its official form or otherwise – can be kept out of circulation for long.

Whatever the report says, the facts are not now in serious dispute. In August 2012, a group of Rock Drill Operators,[2] dissatisfied with their wages, and with the representation available from either of the labour unions with a presence at the Lonmin Marikana Shaft, embarked upon an unprotected strike to push Lonmin for higher wages. The strike, and its attendant protest, soon gained widespread support, and incited a violent response – both from union officials and the police. In the days before 16 August 2012, the striking miners, union officials, Lonmin security guards, and the police themselves, all took a small number of casualties. The striking miners – about 3000 of them – retreated to the top of a small rocky outcrop just outside the Lonmin shaft compound. There they stayed for four days, demanding that Lonmin management come and address them on their demands.

We now know that the official response was marked by panic and incomprehension. Documents disclosed before the Commission show that communications between government officials, Ministers and senior Lonmin executives were remarkably ill-informed. The accepted wisdom was that the

[1]It would not be the first time. President Zuma has fought tooth and nail to restrict the release of information – often without any apparent motive other than secrecy for secrecy's sake. See, in particular, the protracted legal battles fought over the so called "spy tapes" and the Moseneke / Kampepe report on the Zimbabwean election. The tapes did not tell us anything we did not already know. Neither, at least according to the Judges who have read it, will the Moseneke / Kampepe report.

[2]Rock Drilling is a particularly arduous task – even when compared to the back-breaking work most miners do. At the very face of the platinum bearing seam, RDOs working in baking temperatures to chip away at the platinum ore.

Association of Mineworkers and Construction Union (AMCU) – the minority union at the time – was behind the strike, and that only AMCU could stop it. We now know that this was not true, although it should have been obvious at the time. When Joseph Matunjwa - AMCU's President – attempted, at the request of the police, to convince the striking miners to disperse, they simply repeated the demand that they had made all along, that Lonmin come and address them directly.

Lonmin did not come. Instead, the police moved to what they called the "tactical phase" of their operations. They encircled the outcrop with barbed wire, and made to disperse the crowd and arrest the striking miners. As they did so, a group of the miners started to descend the hill, moving toward the police line. Travelling slowly at first, with blankets over their heads and hands aloft, they sped up as they met with teargas and rubber bullets, fired to their left flank and to the rear. What happened then was televised the world over. Driven towards the police line, the miners made to go around a kraal (a small livestock pen) in order to disperse into the Nkaneng informal settlement through a small gap the police line. As they approached, the police opened fire with R5 semi-automatic rifles. This was Scene 1. 17 of the miners were killed there. Other miners ran away, and sheltered behind a small collection of boulders a couple of hundred metres behind the hill they had descended. The police gave chase and fired into, and from the top of, the boulders. Another 17 miners were killed. At the Commission, this is known as scene 2.

The police claim that they fired in self-defence at scene 1. They have never provided a clear or complete explanation for their conduct at scene 2. Since the advent of the Commission, however, the police have sought - brazenly and consistently – to manipulate the evidence. They have destroyed some of it. They have made some of it up.[3] They have led clearly perjured witnesses.[4] They have scapegoated their own officers.[5]They have done everything except acknowledge any

[3]Statement by the Marikana Commission of Inquiry [date]
[4]Witness X.
[5]Lieutenant Colonel Salmon Vermaak.

fault.[6]

Few can reasonably doubt that the killings at Marikana were unlawful. Even if it is accepted that the police genuinely thought that they were under attack at scene 1 (it should not be), their response – a volley of semi-automatic fire at head and chest height - was grossly disproportionate. The killings at scene two - mostly at close quarters, of miners who circumstances suggest were trying to surrender at the time – were murderous, pure and simple. The responsible officers should be prosecuted, as almost all of the parties to the Commission – including, crucially, the evidence leaders – urge.

Harder to explain or characterise is the political environment that made the killings possible. What accounts for the panic, the confusion and, ultimately, the violent crackdown, on what was essentially a small group of disgruntled miners trying to express a labour grievance? Some point to platinum's strategic importance as an export. Others call attention to just how well-connected this particular platinum producer was. Soon to be Deputy President Cyril Ramaphosa was on its board.

While these facts are surely part of the explanation, I want to suggest that a fundamental reason for the reaction to the Marikana strike is the way in which it called out sensitive and important features of the post-apartheid political settlement. Briefly, these features are: a particularly strong version of corporatism, an emphasis on the importance of political "participation", and the condonation of massive economic inequality. The Commission itself – the way in which it has worked and its likely findings – also exposes the limitations of juridical forms political activity. I will address each of these in turn, below.

Corporatism, as a political system, relies on institutional co-operation between the state, business and organized labour. This tripartite relationship sets the terms of economic inclusion, and, at least in theory, results in an economic and

[6]The police's opening statement to the Commission does acknowledge that some of the force they deployed may have been disproportionate. Their closing statement, however, appears to retract this concession.

social pact that ensures predictability for business, while at the same time ensuring that workers have a say in macroeconomic and labour policy. South Africa has many key features of a corporatist economic settlement – strong labour laws, a range of political institutions aimed the resolution of economic disputes (NEDLAC for example), and a web of legal arrangements which require negotiation and alternative forms of dispute resolution, while recognising and protecting strike action when these fail. Organised labour is one third of the ruling "triparitate alliance" of the ANC, the South African Communist Party (SACP) and the Congress of South African Trade Unions (COSATU).

The lynchpin of corporatist politics is adequate representation. Individuals and groups that are not organized, or whose forms of organisation lack official recognition, are not represented as part of the corporatist pact, and are excluded. In South Africa, organized labour is the province of the formally employed. More than this, however, organized labour has, over the 20 years since the end of apartheid come to represent an ever more privileged segment of the labour force. South African unemployment runs somewhere between 28% and 40%, depending on the definition one adopts. Many more people work in casual employment, or in un-unionised industries. The South African workforce is more "casualised" now than it has ever been. Accordingly, the extent to which ordinary workers can realistically be said to be represented in corporatist institutions has always been limited, and is diminishing.

At Lonmin, the strikers, were not, of course, wholly without union representation. Many were members of the National Union of Mineworkers (NUM), whose status as the "majority" union at Lonmin gave it privileged negotiating rights. Some had joined AMCU, which had far fewer such rights. Others had no union membership at all. However, it was the strikers' election to press their claims outside the unions that was significant. They formed what they called a strike committee, which they mandated to conduct negotiations with Lonmin. Relying on what it saw as the inviolability of the existing collective bargaining framework, and the privileged status of the NUM within that framework, Lonmin ultimately refused

to recognize the strike committee, or to negotiate with it.[7]

In this way, what might have been an unremarkable labour dispute, perhaps easily resolved, became a far wider conflict about the nature of the industrial relations regime at Lonmin, the structures of representation it relied on, and, by extension, the efficacy of post-Apartheid corporatist arrangements. The state's response was to side with Lonmin, and its alliance partner NUM, which is a COSATU affiliate. It denounced the strike as "illegal"[8] and invoked a police-based response to what it openly characterized, in public and in private, as a criminal act. This stance enabled the build-up of heavily-armed police which was a necessary precondition of the massacre.

All of this calls into question both the efficacy and legitimacy of post-apartheid corporatist arrangements. If to reject these arrangements, and to seek to organize and engage outside them, is to make oneself vulnerable to criminalization, and police violence, then hard questions need to be asked about whether they are morally acceptable, broadly consistent with political rights enshrined in the Constitution, or politically efficacious.

Some authors are alive to this problem, but not quite in the way that I have put it. Patrick Bond bemoans the "elite transition", and what he considers as the illegitimacy of the economic retrenchment that came with it.[9] Adam Habib accepts that there an "elite pact" of a broadly corporatist nature, and that it is inadequate. His answer is to seek to renegotiate the pact on better terms for the poor.[10] However, none of this would address the fundamental issue thrown up by the striking miners on the hill. What they did was more than simply ask for a new set of negotiating institutions or a new pact within them: they questioned the very

[7]Although Lonmin had, in the past, recognised and struck agreements with informal workers' structures. [Reference to Commission Record].

[8]There is no such thing in South African law. Either strikes are "protected" or they are not. Participants in a "protected" cannot generally be dismissed for striking. Participants in an "unprotected" strike generally can. But there is nothing illegal about participating in an "unprotected" strike.

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legitimacy of political representation itself. The question they raised was whether the post-apartheid political settlement required them to channel their grievances through elite representatives who would speak for them, or was capable of enabling them to speak for themselves.

A separate but related problem is the nature of political "participation". Although often celebrated, without qualification, as a political good, the emphasis on participatory democracy in post-Apartheid politics and law has its limitations. To emphasise participation is necessarily to foreclose rejection of, dissent against, or strong challenges to, political institutions. To the striking miners at Marikana, to participate in the existing structures of collective bargaining and labour dispute resolution was to acquiesce in a system in which they had lost faith. This rejection of "participation" took them beyond the mechanisms through which their political agency could be assimilated and dispersed, which is why Lonmin and the state were so threatened by it.

"Participation" presupposes an existing network of processes and institutions in which to participate. This entails accepting a set of power relationships which can be influenced, sometimes transformed, through participation, but will always tend towards a particular set of interests – usually the interests of those who set the system of participation up in the first place. Outside labour relations, ward committees – local level statutorily recognised instruments of local government – are often held up as the key mechanism of participation in the decisions taken by local government – decisions about who gets public works programme jobs, housing, access to water, sanitation and electricity, and who has the right to stay in a particular informal settlement.

The problem with this is that ward committees are dominated by a ward councilor, who not only has a political party affiliation, but who is embedded in a particular set of local power relationships, kinship groups and social networks. Participation in a ward committee and its meetings – if it is even available to those beyond these networks, depends on accepting a subordinate position within them.

Not surprisingly, attempts to organize outside ward committees often meet

with violent reprisals. Abahlali baseMjondolo, a shackdwellers movement based in Durban and Cape Town, has found itself subjected to a progamme of political assassinations, police violence, and violent eviction – not only, or even primarily, because it calls out the state's abject failure to respond adequately to the needs of people living in informal settlements, but also because it does so outside the processes and institutions of "participation" through which dissent can be channeled and dissipated.

One example of this is Abahlali's work in Cato Crest in Durban. Taking up what it saw as unfairness in the allocation of housing in the Cato Crest Informal settlement, Abahlali responded to a series of evictions from the settlement to make way for the construction of housing, by setting up what it called the "Marikana" informal settlement at the edge of Cato Crest. The Marikana Informal Settlement has been bulldozed – often on the instructions of the local ward committee – on at least 7 occasions. One of Abahlali's organisers in the area has been shot dead by unknown assailants. Another of its members – a fifteen year-old girl - was shot dead by the police in the midst of a peaceful protest. For Abahlali, the price of dissenting, rather than "participating," has been high indeed. So it was for the Marikana strikers, and this relationship was obviously not lost on Abahlali, when it renamed its part of the Cato Crest informal settlement "Marikana".

It is therefore necessary to ask whether post-Apartheid politics really permits extra-institutional dissent at all. If it does not (and I would argue that Marikana reveals that the costs of dissent are very high indeed), then the value of participation is itself questionable, because participation is only meaningful if it is an active choice to shape the terms of social and political engagement, rather than a reluctant obeisance to the existing distribution of political power.

These fissures in the political system might not be so serious were it not for South Africa's worsening and deep-seated structural inequality. Although absolute poverty has been reduced since 1994, inequality has increased.[11] In any case, about

[11]Natrass and Seekings.

half of the population is living at or below the poverty line. Many have been quick to point out that the striking miners at Marikana are not "the poorest of the poor". Certainly their wages before the strike (about R4000 per month), and the wages they were demanding (R12500 per month), placed them at a real economic advantage when compared with most South Africans.

However, it is hard to see how or why this matters much. The social conditions endured by most platinum miners are appalling by any standard. Lonmin, having failed to fulfill its Social and Labour Plan commitments to build housing for its employees, relies on a workforce that lives, for the most part, in poorly-serviced shacks with insecure tenure. Each wage supports a large extended family, mostly in the Eastern Cape, one of South Africa's most deprived provinces, with a notoriously fragile physical and social infrastructure.

At the core of inequality is the state's failure to imagine, much less implement, an economic alternative that is capable of making any dent in it. As Hein Marias has argued,[12] and as Brazil, India, Korea and Indonesia have all shown, economic alternatives that protect and grow labour-intensive secondary and tertiary industries are possible. However, South Africa remains a model of economic orthodoxy – a low growth, low inflation, high interest rate, high unemployment economy, which is over-reliant on agriculture and extractive industry.

Marikana is a warning. If South Africa continues along its current economic path, then dissent against, rather than participation in, current political and social arrangements will only become more frequent, and probably much less benign than the Marikana strike actually was. If the response to that dissent is violent political repression, then Marikana may not be the last we see of state-sponsored killing at scale. Either our attitude to inequality, or our attitude to dissent, has to change. The continuation of both may ultimately be incompatible with the constitutional settlement so hard won, and delicately negotiated, 20 years ago, and which was designed both to foster political participation and to accommodate political dissent.

[12] Limits to Change / Pushed to the Limit.

Hopefully, however, both the way we deal with inequality and dissent can and will change, but reliance on juridical forms such as the Commission will not achieve this on its own. What the Commission's report will look like is anybody's guess. It is unlikely, though not impossible, that the police will be exonerated, at least on paper. But the Commission is unlikely to say everything that needs to be said about the Marikana massacre. This is partly because it dawdled for over a year – spending precious months hearing evidence of questionable value. A month was spent on the National Commissioner of Police, whose evidence was a model of evasion, and who in any event simply was not there when the shots were fired. Another week or so was spent watching a Powerpoint presentation prepared by the police. Even witnesses of some value were given far too much time (often taking about a month to give evidence), at the expense of the real eyewitnesses – the police who fired the shots, and the mineworkers who managed to avoid being killed by them. In the end, only five workers and two policemen who actually fired a shot were heard. The 36 families of the deceased were given two days in which to make victim impact statements.

In addition, the Commission has been astonishingly expensive. SERI represented the families of 36 of the deceased miners and AMCU. Its legal bill, funded by the South African Legal Aid Board, the Ford Foundation, the Bertha Foundation, HIVOS, the Open Society Foundation, and Raith (a South African domestic funder), was the better part of R10 million, or $900 000. This bill is small by comparison to the money expended by the police, Lonmin and the Department of Justice, which set the Commission up. Although this is not the place for a thorough discussion of the cost of legal services, there is much to be said about the potential folly of a society as poor as South Africa relying on juridical forms as expensive as the Commission to resolve its political problems.

However, the information unearthed by the Commission is invaluable. Many of the (largely undisputed and completely undisputable) facts set out at the start of this paper stand as starkly as they do because of evidence unearthed at the Commission. There can be no serious suggestion that the construction of this body

of evidence was not worthwhile. Whatever the report ultimately says, many of the facts speak for themselves.

A critical component of the role of civil society in the context outlined above is to expand and protect the spaces in which the poor can act for themselves – spaces like that so brutally shut down at Marikana. NGOs will often be tempted to act on behalf of the poor. But the real task must surely be to enable the poor to act for themselves. NGOs – especially public interest legal NGOs – will seldom be effective in "co-ordinating" social justice work, or devising programmes of action to tackle poverty, at least not without usurping a representative function that is not properly theirs.

Dissent, in the form of political action initiated outside formal institutions by formations of the poor themselves, is the most promising source of social transformation in contemporary South Africa. It cannot, and should not, be co-ordinated, mediated or represented. It must be protected and nourished, sometimes through defending evictions which threaten to destroy the social networks on which it relies, at other times through participation in Commissions of Inquiry in a manner that amplifies the voices of those whose exclusion it proclaims. Poor peoples' movements do not need to be interpreted, represented or mobilized. They can do that on their own. What they do need is strategic support to amplify their voices – through public advocacy and strategic litigation - in a way that disrupts the complacency which has settled over the post-apartheid political class. Marikana teaches us that to "represent" the poor; or to encourage them to "participate" on terms other than those chosen for themselves, is often to replicate the kind of political deficits that have led to their exclusion from so many of the benefits of post-Apartheid constitutional democracy.