

DISCUSSION PAPER 22

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Fault-Lines in
South African Democracy
Continuing Crises of Inequality
and Injustice

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Preface

South Africa's transition from apartheid to democracy has become something of a paradigm in matters related to post-conflict transition, and to transition from authoritarianism to democracy. In 1994, apartheid gave way to a much more de-mocratic regime with much less bloodshed than was feared. South Africa's reconciliation process was exemplary in more than one respect. The country prides itself on one of the best constitutions, with probably the most progressive bill of rights, anywhere. The Reconstruction and Development Programme (RDP) launched in the wake of the 1994 elections that brought Nelson Mandela and the African National Congress (ANC), at the head of an alliance of parties that was not a technical necessity, given the margin of the victory of the ANC, held the promise of a relatively rapid structural transformation of the post-apartheid economy and society, at least for some time. The personality of Nelson Mandela, whose moral authority is unrivalled, further strengthened this image of an exceptional South Africa.

The real picture is however much more complex than the celebratory accounts of South Africa's transformation process would have it. This paper is precisely about the complexity of the transformation process going on in South Africa. Eight years on, it is still too early for a real assessment of the experiment, but eight years is a long enough period for the tensions, dilemmas, contradictions, paradoxes and some of the changes to begin to manifest themselves. Professor Fred Hendricks's discussion of the fault-lines of South African Democracy gives the full measure of the tensions, dilemmas, and paradoxes involved in the transformation of South Africa. Apartheid was more than formal discrimination along racial lines. It was an extremely oppressive system based on deeply rooted social and economic inequalities. The challenges involved in transforming such a system are enormous, requiring formidable struggles on the part of those fighting for justice, human rights, democracy and better living conditions.

This paper is the text of a keynote address delivered at a conference on "Africa, a Future beyond the Crises and Conflicts", organised by the Nordic Africa Institute under the auspices of its Post-Conflict Transition, the State and Civil Society Programme, in Helsinki in April 2002. The central theme of the conference was the challenges of building democratic governance systems in the post-conflict societies of Sub-Saharan Africa. Governance issues are often among, if not the most important, root causes of conflict, and much of the effort at post-conflict social and political transformation is about establishing and consolidating more inclusive, just and accountable political systems.

We would like to thank the Finnish Government for enabling us to hold this conference in Helsinki in conjunction with its own 'Africa 2002 – People and Development Event', the participants of the conference for their very useful contributions, and Professor Hendricks for revising and expanding the text of his keynote address to the conference.

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INTRODUCTION

The transition from apartheid to democracy in South Africa has raised a whole host of questions about the nature of justice and equality under conditions of political compromise. This paper is concerned with the manner in which political deals affect the administration of justice as well as how they impinge upon the nature of democracy by frustrating efforts to realise social goals in the post-authoritarian phase. Beyond the repugnant current reality that many former apartheid murderers, other criminals and perpetrators of gross human rights violations have gone scot-free, lie broader necessities for the long term survival of democracy in South Africa. There are two crucial exigencies. Firstly the enormous disparities in wealth and poverty and between black and white left in the wake of apartheid need to be addressed. Secondly, a legitimate polity which respects the rule of law needs to be created. The fact that so very many wrongdoers have not been prosecuted cultivates the impression of impunity even if the formal trappings of democracy may be firmly in place in contemporary South Africa. In this respect, it does not help to argue that broad-based, restorative or social justice can replace individual accountability for wrongdoing (Villa-Vicencio, 2000:68). Instead, the two are intimately connected. When the nature of political compromise provides amnesty for perpetrators, or constrains the possibility for prosecutions on the one hand and on the other fails to create conditions for material delivery for the vast majority of the previously disenfranchised masses, then an incoherence is built into the new circumstances.

This paper tries to highlight some of these contradictions by focussing on the difficulties involved in securing democracy in South Africa. It concentrates on the two fault-lines of inequality and injustice as major challenges to the democratic order in the hope that urgent attention can deal with the impending crises. In this regard the paper suggests some preliminary linkages between the amnesty process of the Truth and Reconciliation Commission and the broader problems of material delivery to the previously disenfranchised masses. Its main conclusion is that the long term legitimacy and hence sustainability of democracy in South Africa depends upon a resolution of the problem of black poverty and the creation of a legitimate normative framework. The empirical point of convergence for the paper rests in the manner in which the constitutional court's finding in respect of the legality of the amnesty process affects the victims' right to civil redress. The state's reparations policy was supposed to replace these claims for compensation. But the delay in implementing the policy mirrors the overall poor record of material delivery and in the long term denies the victims appropriate justice. The paper tries to analyse this reality within the context of the relation between political equality

and material inequality. It commences with a discussion of how apartheid has survived in South Africa, goes on to discuss the enduring relation between race and inequality and then relates these to the rhetoric of reconciliation as a hollow attempt to paper over the disparities and indeed as an expression of the intractable difficulties flowing from the negotiated settlement. The paper provides a comparison of the objectives of the Truth and Reconciliation process on the one hand and the criminal justice system on the other. At face value, the objectives of the two are clearly contradictory. While the former seeks a basis for reconciliation in revealing as full a picture of past abuses as possible, the latter is concerned with the daily administration of justice. The former tries to indemnify criminals and the latter tries to prosecute them. This comparison forms an important backdrop for a discussion on the nature of justice in contemporary South Africa. The abiding argument of the paper is that while there has been a dramatic political change in South Africa, very much else has remained the virtually the same. In particular, the growing inequalities represent a formidable challenge to the new democratic state.

THE SURVIVAL OF APARTHEID

Formal apartheid is dead. It was buried in 1994 by the first democratic elections based on universal franchise in South Africa. At a legal level, these swept away centuries of black political exclusion bringing an end to the oppressive apartheid system which systematically disenfranchised the majority of the population. The elections were a milestone in the struggle for citizenship in South Africa and the ANC, the dominant liberation movement against apartheid, won by an overwhelming majority. The second elections, held in 1999, confirmed the dominant party position of the ANC and affirmed the formal trappings of democracy. These elections dramatically altered the political landscape of the country, replacing centuries of racially exclusive colonial and apartheid regimes with an inclusive democratic state. The changes brought about by democracy are apparent in many different spheres. A Bill of Rights is enshrined in the new constitution. Territorial segregation in the shape of the nominally independent states and so-called self-governing reserves has been replaced by a geographic division of the country into nine provinces. Petty segregation has been swept aside. There are virtually no political prisoners and detention without trial is prohibited. It is now possible to openly criticize the state without fear of repression. The constitution of the new government enshrines the basic principles and rights of all democracies. In many ways, these are not merely paper rights. Full franchise, freedom of movement, association, expression, religion, sexual orientation and so on are enjoyed by all South Africans who are now equal before the law. There can be little doubt that sweeping political changes have taken place in the country. Yet, as much as South Africa has changed politically, it has remained virtually the same economically.

The divisions of apartheid did not miraculously disappear with the advent of democracy and the rhetoric of reconciliation was a feeble attempt to paper over

the deep discrepancies. It may even be argued that the TRC process has contributed towards normatively sealing the compromise by avoiding questions about the long term possibilities for systemic reform. From this point of view it has sanctioned the existing divisions in the country in the hope that forgiving wrongdoers will assist in the legitimization of the new polity. Apartheid may be dead and buried, but its legacy lives on in structural inequalities, systemic discrimination and palpable injustices. The disparities are daunting. The limited access to land amongst blacks and even more, the severely constricted freehold ownership of land under title deed, are major indicators of the uneven distribution of wealth in South Africa. Whites own the bulk of the country, and, not surprisingly, very few of them are poor. But land is merely one indicator of the divisions which pervade virtually every aspect of the structures and processes in democratic South Africa. Apartheid lives happily on in the unreformed criminal justice system which struggles to secure convictions against violators of human rights during the apartheid era. It survives in the urban slums and rural degradation, in the workplace, in schools and universities and in the hospitals. There is a thread which links the survival of the inequities of apartheid to the amnesty process of the Truth and Reconciliation Commission and to the apparent inability of the new state to make substantial inroads on the pervasive predicament of black poverty. In South Africa, the political and civil equality accomplished by the democratic changes exists side by side with enormous disparities in wealth and poverty. To make matters worse, the division between rich and poor still coincides very largely with the distinction between black and white and these cleavages constitute the fault-lines of South African democracy.

Problems around the uneven distribution of resources between blacks and whites today pose the most threatening challenge to the sustainability of democracy in the long term. Realizing the social and economic rights of the majority lies at the centre of this discourse. It is thus vital to highlight some of the contradictory challenges facing the South African state and how it has responded to these by way of policy and implementation. In this regard it is also important to problematise the constitutional guarantees of socio-economic rights against the background of an unreformed social structure. The paper argues that structural racism is so firmly embedded in South African society that its reversal requires an all-encompassing state-directed approach. It also tries to analyze the attempt at reconstructing a fractured society through the mechanism of a Truth and Reconciliation Commission in the context of political compromises which left the victims of human rights violations with no recourse to their constitutional rights to claim compensation against both the state and the perpetrators.

One of the intractable problems in all democracies is how to deal with the paradox of political equality alongside economic inequality. All democracies uphold political and civil equality, yet they all maintain material inequality. A host of constitutional rights and liberties makes everybody in a democracy equal in a formal-legal way. Simultaneously, all democracies protect private property. Since property is always unequally distributed it follows that constitutional guarantees of prop-

erty rights constrain efforts to ensure material equality. If, as in South Africa, land is acquired by settlers through colonialism, then constitutional protection provides a legal sanction for colonial land theft. It is clear that the rights of citizenship, bestowed on all members of a community, outlining the relationship between the state and the individual, are equal, but the realisation of those rights is profoundly shaped by the class position which people find themselves in. In other words, the rights may be equal, but this does not mean a great deal since people are not in an equal position to dispose of these rights. So, even if on paper people are equal before the law, the fact of a disproportionate distribution of power as well as wealth hollows out that equality—emptying it of any real meaning. In this sense, citizenship makes class inequalities acceptable and possible under capitalism. The simple dichotomy between the equality of citizenship and the inequality of class fails to capture the manner in which the two operate in tandem, how they interpenetrate each other in a complex system of ensuring acquiescence. In the South African case the structures of the new democratic state are constitutionally enshrined, but the democratic processes of realizing the ideals of equality remain hamstrung by the enormous weight of apartheid's legacy. The lack of material delivery is poignantly reflected in the policy and practice in respect of reparations to victims of human rights violations through the work of the Truth and Reconciliation Commission.

RACE AND INEQUALITY

Thabo Mbeki, then deputy president, made a speech at the opening of the 1998 debate on reconciliation and nation building in the South African National Assembly in Cape Town, which graphically captures the nature of the disparities:

...South Africa is a country of two nations. One of these nations is white, relatively prosperous, regardless of gender or geographical dispersal. It has ready access to a developed economic, physical, educational, communication and other infrastructure... The second and larger nation of South Africa is black and poor, with the worst affected being the women in the rural areas, the black rural population in general and the disabled. This nation lives under conditions of a grossly underdeveloped economic, physical, educational, communication and other infrastructure. (Mbeki, 1999:71–72)

More than a century before, in 1845, Benjamin Disraeli, the Tory leader and British Prime Minister, published a novel, *Sybil, or the Two Nations*, using the very same metaphor. The novel attempts to provide a sympathetic description of the conditions of the working class and a kind of social history of the Chartist movement and revolt when Britain as a whole was undergoing a period of intense social upheaval. Mbeki's words echo the best-known passage from the novel:¹

Two nations between whom there is no intercourse and no sympathy; who are ignorant of each other's habits, thoughts and feelings, as if they were dwellers in different zones or inhabitants of different planets; who are formed by different breeding, are fed by different food, are ordered by different manners, and are not governed by the same laws... the rich and the poor. (Disraeli, 1845)

1. There is no acknowledgement in Mbeki's borrowing of Disraeli's two-nations metaphor.

The two quotes provide vivid descriptions of structural inequalities. Class forms the basis of the differentiation for Disraeli and for Mbeki race lies at the heart of the cleavage. In the South African case eight years after the collapse of apartheid, race and class still coincide in very complex ways, reproducing, sustaining and feeding off each other because of the structural barriers and systemic constraints placed in the way of any genuine redistribution of resources. But we have to be careful to ensure that the discourse of race is used to illuminate rather than mask the continuation of class inequalities. There can be little doubt that structural discrimination on a racial basis under apartheid is the most immediate determinant of black poverty. Irrespective of whether race was merely used as a convenient tool for the super-exploitation of blacks, the consequences of differential racist treatment are palpably obvious in a variety of ways in South Africa. Besides the violence visited upon the mass of the population by grand apartheid, victims of ordinary, everyday racism have to negotiate their way through a myriad of racist assumptions and taken-for-granted ideas about the connection between worthiness and whiteness. Such hierarchies of superiority and domination are reproduced and reinforced in everyday life by manners, postures and ways of speaking. Every mundane human activity was structured in a racialised manner by apartheid—being born, being nurtured in youth, going to school, travelling by bus or train, making love, getting married, eating and drinking, having a haircut, going to parties, greeting, dying and being buried and so on. Grand apartheid was mediated through the racism of everyday life, and these racist habits may have changed but they have not disappeared with the demise of apartheid.

Mbeki's speech makes the point that the rich-poor, black-white dualism is still vitally important in contemporary South Africa. There can be little disagreement with this forceful statement in the metaphor of two separate nations. Yet, this dualism does not fully capture the complex mosaic of social relations in the country. A wide range of identities has emerged both within and outside of this broad racism and class framework. It is important to take cognisance of this diversity for a full picture of the South African reality. However, the problem with focussing on identity only is the tendency to erase the significance of class, producing instead a textured analysis of difference without an explanation for the manner in which that difference is perpetuated.

There are some outward signs that the extreme racial polarisation of apartheid is giving way to class differentiation. More and more blacks are purchasing houses in the formerly elite whites-only suburbs, many now roam around in the expensive malls and drive fancy cars. Class differentiation amongst blacks has sharpened since 1994. The Gini coefficient, second only to that of Brazil, is about the same between blacks themselves as it is between blacks and whites (May, 1998:2; Simkins, 1998:2). On the other hand, white begging is now not uncommon in the larger cities. The racist protection which gave whites better education, health care, social security, employment opportunities, easy credit terms combined to make the sight of whites begging an impossibility under apartheid. While there are a few blacks (like Cyril Ramaphosa and Marcel Golding) who have managed to get their

pieces of the South African economic pie, the vast majority of blacks remain excluded from the benefits of black empowerment, and marginalized in the ownership structure of the society. Race still intersects with class in very real ways in South Africa. And the overwhelming preponderance of black poverty alongside relative white prosperity still represents the single most important aspect of social stratification facing democratic South Africa.

The legacies of colonialism, slavery and apartheid have left deep imprints on the political, social, economic and cultural landscapes of contemporary South Africa. The new democratic government has inherited a problem of monumental proportions. It needs to unravel centuries of dispossession and exclusion in order to create in its stead, a legitimate, democratic and inclusive state. Few people are still so suffused with the euphoria of democracy that they are not sanguine about the enormity of the task at hand. The majority realise that it will not be easy. Despite a few well-known cases of black affluence since 1994, and greater inequality amongst blacks as a result of the benefits of holding power, the major class and other cleavages in South Africa still take on a racial form. Yet the policy responses of the new government have been woefully inadequate in dealing with these divisions between rich and poor and between black and white.

The social reality of racial inequality is reflected in a wide range of areas depicting a growing contrast between fulfilment and deprivation. All whites benefited materially from apartheid. Their life chances facilitated a realisation of their potential and even promotion beyond their capabilities as the apartheid state intervened on their behalf with a policy of affirmative action in order to solve the poor-white problem. It was a massive protectionist scam and its dividend is that many whites have acquired positions of power and wealth and very few of them are poor.

A report prepared for the deputy president and for the Inter-Ministerial Committee for Poverty and Inequality found that 61% of all Africans and only 1% of whites could be regarded as living in poverty (May, 1998:5).¹ According to Mokate (2001:2) the mean annual income for African-headed households is R23,000 while it is R103,000 for whites.² Maharaj (1999:3–11) provides a detailed account of how gender has become entwined with race and class, pushing rural African women to the very bottom of the economic pile. Besides the fact that whites dominate virtually all aspects of higher education and specifically the area of knowledge production, the structure of separate education systems for different apartheid defined race groups has resulted in manifest inequalities. For example, at the end of apartheid rule, the per capita expenditure on pupils at white schools was R5,400 and about R1,000 for black pupils (May, 1998:15).³

The South African Human Rights Commission recently released its annual Economic and Social Rights Report covering the period from April 1999 to March

1. The report defined poverty as the "...inability to attain a minimal standard of living, measured in terms of basic consumption needs or the income required to satisfy them" (May, 1998:4). <http://www.polity.org.za/govdocs/reports/poverty.html>.

2. Exchange rate 2001:100R = 12 USD.

3. Exchange rate 1998: 100R = 16 USD.

2000. One of the most depressing findings of the report is that about 20 million people, or 50 per cent of the population, live below the poverty datum line, measured as a monthly income of R390 (about \$40). While everybody has a constitutional right to receive social security, government efforts driven by the Department of Social Development have reached only 3 million people.¹ There are any number of other indications of racial disparities—the dual labour market and the legacy of job reservation, the fact that blacks are far more likely to be unemployed than whites, the fact that blacks are far less likely to use the internet than whites, blacks tend to have a shorter lifespan than whites, blacks are far more likely to be living with HIV/AIDS than whites, far more blacks will not have access to clean water than whites, far more blacks are likely to be in prison than whites and so on. Yet, the widest gap lies in access to land.

Unlike Tanzania, where white settlers seized less than 1% of the land area of the entire country, or Malawi where they took 5%, or Namibia where they grabbed 43%, or Zimbabwe where they acquired about 50%, in South Africa, settlers appropriated more than 90% of the land area (Mbuende, 1986:91; Yudelman, 1964:19). The effect of this dispossession is a grossly unequal distribution of access to and ownership of land between blacks and whites. The mean amount of land held per person is slightly more than one hectare for blacks and 1,570 for whites (Hendricks, 2001:289). White privilege, born out of colonial land theft, has become firmly entrenched and enjoys the sanction of the new democratic constitution. Fundamental land redistribution which shifts substantial ownership of land from whites to previously dispossessed blacks is virtually impossible under the present constitutional framework because of the contradictory objectives of safeguarding the existing property holders in their land rights on the one hand and redistributing land to blacks on the other. Given this pervading context, it is not surprising that the land reform policies of the new government have been dismal failures. The Reconstruction and Development Programme promised to redistribute 30% of agricultural land within the first five years of democratic rule. In reality, after seven years of democracy less than 1% has been redistributed. The problems of urban land occupations, violence, murders and land invasions in some rural areas have to be seen against the background of the majority of the population continuing to be squeezed into tiny allotments in the rural areas and small hovels in the urban townships.

It is clear that the level of inequality in so very many spheres requires urgent and drastic measures. To be sure, there have been some successes in the provision of electricity and extending access to clean water, but these dwarf the monumental problems of unemployment, illiteracy, ill-health and homelessness which together embrace the grinding poverty of the mass of the population. Apartheid left behind these legacies and the new black elite has stepped into the positions of the old white rulers while marginally disturbing class relations in their own narrow inter-

1. See South African Human Rights Commission, Report on Social and Economic Rights http://www.sahrc.org.za/main_frameset.html.

ests. The transitional process required specific compromises to the rule of law since the apartheid rulers refused to relinquish power without guarantees of personal indemnity and protection from prosecution for the crimes they had committed. The form of amnesty eventually agreed upon relied on the exchange of truth telling for justice. Put crudely, if a perpetrator could reveal the full truth about his or her role in the crimes committed then amnesty would be granted on the proviso that these crimes were committed with a political objective. The real problem of amnesty in so far as the victims are concerned is that the perpetrators are absolved at both civil and criminal levels. It is as if the crime was never committed at all. If perpetrators are granted amnesty it expunges the right of victims to claim for damages from them. The victims suffer a double burden. Not only do they have to endure the harm done itself, they now have no legal recourse to appropriate compensation.

THE RHETORIC OF RECONCILIATION

The Truth and Reconciliation Commission (TRC) was established in 1995. It emerged out of the compromises of the negotiated settlement which ultimately filtered down into three main issues. Firstly, an amnesty process would be set in motion for the perpetrators of gross violations of human rights and other crimes. Secondly, victims and survivors of these violations would have the opportunity to publicly recount their stories of abuse and thirdly the state would accept responsibility for the payment of reparations to the victims because amnesty expunges the right to civil redress.

Three committees were set up to deal with each of these broad issues: the Amnesty Committee which enjoyed autonomy in its functioning as a quasi-judicial process, the Human Rights Violations Committee and the Reparations and Rehabilitation Committee. In addition, the commission established an investigative unit as well as a research division. The purpose of the TRC was to promote reconciliation by revealing as much of the truth about past abuses as possible. While the National Party and other apartheid functionaries called for a blanket amnesty, the negotiated process agreed on individual accountability in the sense that amnesty would only be granted on the basis of a full disclosure of all the facts surrounding the wrongdoing.

Extensive state inspired violence had undermined the very basis of a democratic order. The apartheid state had a monopoly over the use of force and its instruments of repression were systematically used against the mass of the population so as to perpetuate their disfranchisement. This is not to suggest that apartheid was distinguished by violence only. There were a variety of other mechanisms of subjection which allowed a white minority to rule over a subordinate black majority.¹ Yet, despite the very broad precincts of apartheid rule, crimes of vio-

1. See Therborn (1985) for a perspicuous typology of such mechanisms in a discussion on the complexity of the relation between force and consent.

lence were committed by its functionaries. Over and above the 'violence of normal times' (Moore, 1966) apartheid also spawned a security system which acted with impunity against the mass of the population. Hidden in the wide variety of responses of the victims and survivors are broader concerns about how to forge a normative framework with respect for human rights and, at the same time, deal with the perpetrators of crimes both in defence of apartheid as well as in the struggle against it. There are always difficulties when an authoritarian regime makes way for a democratic order based on universal franchise with a bill of rights. One of the gravest of these in South Africa is how to initiate respect for the legislative process, the rule of law and the institutions responsible for implementing these laws. Simultaneously, we have to guard against the temptation of relinquishing these democratic processes for political ends. Sickening as it is for many South Africans to be footing the exorbitant legal bills of apartheid criminals, there is no alternative to due process and proper prosecutions in a democratic society. Thus far, the prosecutorial authority has fared very badly in trying to bring apartheid operatives to book for their wrongdoing. The disaster of the Magnus Malan trial, the fiasco of the judgement in the case of the Bisho massacre¹ and the failure of the Wouter Basson (Dr Death) trial have not given the criminal justice system the kind of reputation needed for genuine respect for the rule of law. Furthermore, the very many unsolved murders, especially in KwaZulu-Natal, suggest that partial impunity is the order of the day.

The TRC's mandate covered crimes and other violations of human rights between 1960 and 1994. In the decade leading up to the first democratic elections in South Africa in 1994, more than twenty thousand people died through political violence. About seven thousand applications for amnesty were received in total and about one thousand were granted. The overwhelming majority of cases remain unsolved. Reconciliation was supposed to emerge from the truth. However, when the truth lies hidden under so very many crimes, and the vast majority of the foot soldiers, let alone the ideologues and senior perpetrators of apartheid violence, have not been held accountable for their wrongdoing, then it is difficult to envisage a lasting peace. More importantly, when the levels of material inequality remain so desperately high, then reconciliation becomes part of the ideological balm designed to create the impression of change where there is none. The really big question is whether there can be reconciliation between unequal partners. The formerly disenfranchised masses remain excluded from the economic mainstream of South African society and marginalised from its ownership structure. They are expected to reconcile themselves to their own poverty in the midst of white wealth. In this respect, reconciliation sanctions the existing inequalities without a programme for transformation and without a solution to the problem of black poverty.

1. Twenty-eight people participating in a peaceful demonstration for the removal of homeland military leader Brigadier Oupa Gqozo were killed by members of the Ciskei defence force. The court found that they had acted in self-defence against an unarmed mass of people.

COURTS OR COMMISSIONS

The relationship between an unreformed criminal justice system and the process of granting amnesty to the perpetrators of violence both in defence of apartheid and in the struggle against it remains one of the abiding debates about the nature of democracy in South Africa. This paper highlights the various dimensions of these separate processes and examines where they overlap, how they strain at each other and what efforts have been made to resolve the tensions.

Both the criminal justice system and the truth and reconciliation commission are ostensibly engaged in a search for the truth.¹ Their ways part immediately beyond this superficially common objective. While the TRC tries to reach the truth by promising the perpetrators amnesty in exchange for a public (or private) admission of their guilt, the criminal justice system seeks truth through the forensic mechanism of the courts, receiving evidence by means of investigation and cross-examination and passing sentences on the wrongdoers. The aim is clearly retributive rather than reconciliatory. Criminals have to be prosecuted for their offences in the hope that their punishment will somehow act as a deterrent and prevent future wrongdoing by both offenders in particular cases as well as other prospective offenders. Prosecution and punishment are legal processes. Amnesty, on the other hand, is an administrative procedure following a set of criteria as laid down by law, although the amnesty process may display all the trappings of a juristic process with incumbent judges to interpret the act. The legal process on the other hand is contested by a wide variety of actors, including police investigators, prosecutors, defence lawyers, magistrates and judges. In contrast, the Amnesty Committee takes weighty decisions on the basis of the evidence presented without the benefit of cross-examination and contestation, certainly not of the sort that would be needed to prosecute wrongdoers in a court of law. While these decisions may be legally challenged in a court of law, this only marginally affects the overall working of the Amnesty Committee.

In an adversarial legal system, such as we have in South Africa, a court case can be conducted without a word from the accused, as the defence may attempt to protect the suspect by invoking the right to silence. Yet, in amnesty applications the perpetrator is obliged to talk about the offences in as frank and open a manner as possible. While the amnesty applicant exposes criminal behaviour, the suspect in a court case may try to conceal guilt in order to lessen the sentence when it is imposed. Amnesty is only awarded to those who implicate themselves in the crimes of the past. If, in the opinion of the Amnesty Committee, an applicant does not provide a full disclosure of the particular episode of human rights abuse outlining his/her specific involvement in it, amnesty will be denied. The truth, on the other hand, may be extremely harmful to an accused since the court's knowledge of the full nature of the crime may determine more severe sentences. The court has

1. The different ways in which the concept of truth is employed by the Truth and Reconciliation Commission and the criminal justice system in relation to the manner in which the concept has been treated philosophically is the subject of another paper.

the obligation to piece together the evidence in an effort to reconstruct the past as accurately as possible. The Amnesty Committee relies on the applicant to do this for them, with the help of some prompting from the committee members and some corroborating evidence emerging from research and investigation into the crime. This has resulted in widely divergent accounts presented by witnesses in court and before the Amnesty Committee.

There are other complicating factors in the contrast between the criminal justice system and the Amnesty Committee in contemporary South Africa. For one, we have to bear in mind that the legal system has been directly inherited from the previous regime. According to Varney and Sarkin (1997:142) there is a fundamental crisis in the criminal justice system, stemming from the lack of perceived legitimacy of the system and its role in maintaining authoritarianism. State prosecutors, investigators and even judges tolerated the manifestly unjust institutions of apartheid. Many also actively colluded in the maintenance of the system, disregarding human rights abuses and implementing apartheid laws. Krish Govender of the National Association of Democratic Lawyers (NADEL) expressed this complicity in the following terms: “It was common knowledge among progressive lawyers that specific judges were selected to deal with political cases. Other judges that were at best neutral or could not be manipulated were conveniently bypassed.”¹ At the very least, Attorneys General lack the experience for securing prosecutions now that they do not have on their side a security establishment which could, under duress and torture, force confessions out of offenders.² Some judges implicitly condoned the underhand methods of the security police by allowing evidence extracted on this basis and by covering up cases of police brutality. In contrasting Attorneys General and the judiciary with truth commissioners and Amnesty Committee members, it is thus instructive to remember the role of the former during apartheid.

The ideal-typical contrast between the criminal justice system and the process of granting amnesty to perpetrators of violence must be seen against the background of complicity and in the context of the compromises which brought about a democratic South Africa.³ As may be expected, while there have been some crucial institutional changes in South Africa in relation to human rights—the establishment of the constitutional court and the bill of rights—the judiciary itself has not changed in any fundamental way since 1994. The case of Brian Mitchell encapsulates the mechanisms of the criminal justice system and the workings of the Truth and Reconciliation Commission.

1. *Weekly Mail and Guardian*, 9 May 1996.

2. Commenting on why McNally lost the Malan trial, *The Weekly Mail and Guardian*, October 18, 1996 suggests that: “It is far more likely that his failure to secure any convictions in the Malan trial resulted more from a lack of competence in the hard work of prosecution—digging for evidence, finding the proper witnesses, covering all elements of the offence and ensuring no gaps, and diligent and searching cross-examination.”

3. See Dugard (1978:280) for a sustained analysis of the role of the judiciary during apartheid. He questions the independence of the judiciary, especially after 1955 when the Appellate Division was expanded to reflect Afrikaner nationalist interests, and argues that the judges preferred interpreting legislation in such a way that it would facilitate the task of the executive rather than defend the freedoms (such as there were) of the individual and uphold the rule of law.

On 30 April 1992 Brian Mitchell was sentenced to death on eleven counts of murder¹ and to imprisonment for three years on each of two counts of attempted murder. At the time of the offences he was the commander of the police station at New Hanover in the Natal province in South Africa. He was also secretary of the Joint Management Committee in Pietermaritzburg and appropriately trained in counter-insurgency methods. These committees had been set up throughout the country as part of the government's 'total strategy' to combat opposition to apartheid. They were responsible for the counter-revolutionary strategy of the apartheid government, part of which included training 'special constables' who could be deployed in their own communities. Mitchell was involved in a security force operation against the United Democratic Front in which he had instructed a group of 'special constables' to attack a house in an area under his jurisdiction known as Trust Feeds. Shortly after the incident it surfaced that they had attacked the wrong house killing eleven people who had absolutely nothing to do with the ongoing battles. They were not the intended victims at all.² Despite frenetic attempts by Mitchell's superiors to cover up the blunder, he was eventually brought to justice together with the four 'special constables'. His death sentences were commuted to thirty-three years imprisonment on 24 April 1994 merely four days before the first national elections based on universal franchise in South Africa. In the second week of December 1996, he was granted amnesty in terms of the provisions of the Promotion of National Unity and Reconciliation Act No. 34 of 1995 and pardoned for his crimes at both civil and criminal levels. He had not then served five years of his sentence.

The Trust Feeds massacre, Mitchell's involvement in it and his subsequent amnesty raise critical questions about the nature of South Africa's political transition in relation to the administration of justice, the pursuance of reconciliation and the quest for unravelling the truth about the ugliness of South Africa's past. The massacre unambiguously demonstrated the collusion of the police in acts of heinous violence against opponents in the dying days of apartheid. Mitchell's amnesty highlights the enormous power of the Amnesty Committee—to decide whether a perpetrator will be pardoned or remain punished. It has the authority to undo the work of the criminal justice system by supposedly replacing retribution with reconciliation based on the truth³ of full disclosure.

Pardoning Mitchell for his crimes was significant for the amnesty process in a variety of ways. It showed other similar criminals that amnesty might work for them as well. It is a moot point whether the result of Mitchell's amnesty was intended or not by the committee. Circumstantially though it could be argued that committee members were aware of the fact that the (then) closing date for amnesty applications was merely days away and that hardly any employees of the former state had applied for amnesty. The process had to appear to be working in order to

1. The following are the names of the murdered: Mseleni Ntuli, Dudu Shangase, Zetha Shangase, Nkoyeni Shangase, Muzi Shangase, Filda Ntuli, Fukile Zondi, Maritz Xaba, Sara Nyoka, Alfred Zita and Sisedewu Sithole.

2. The blunder also reveals the monumental ineptitude of the security forces, but this is not central to our analysis.

3. The advertising slogan of the TRC is "reconciliation through truth".

attract other prospective applicants and so reveal the truth about other abuses. Mitchell was the first member the security forces of the apartheid government to be granted amnesty for crimes committed in the course of his duties. It represented a turning point for many policeman and other state operatives who had been reluctant to apply for amnesty because they were uncertain about the way in which amnesty would be interpreted by the committee. Former commissioner of police, General Johan van der Merwe expressed this apprehension in the following terms:

You take a big risk if you ask for amnesty now, and then you are charged. After that you can hardly exercise your rights in terms of the Criminal Procedure Act ...to exercise your right of silence, or to plead not guilty, or to wait and see the evidence.

THE POLITICS OF PROPORTIONALITY

The evidence before the Amnesty Committee is not admissible in future prosecutions¹ in the event of amnesty being refused. It would, however, be extremely difficult for a perpetrator to plead not guilty after having incriminated himself in his evidence before the Amnesty Committee or the Investigative Unit of the TRC. Perpetrators were especially unsure about how the Amnesty Committee would apply the 'proportionality principle' of the Act according to which the seriousness of the crime has to be related to the nature of the political objective pursued. As van der Merwe outlined above, they were also troubled by the possibility that full disclosure of their crimes, as required for amnesty, would ruin their chances in the courts of law if their amnesty applications did not succeed. Indeed, even human rights lawyers, like Brian Currin, were advising their clients (many of whom are perpetrators) not to apply for amnesty.² KwaZulu-Natal Attorney General Tim McNally indicted Dirk Coetzee and several of his colleagues in the former security police despite the fact that they had lodged amnesty applications. Ironically, Tim McNally had earlier discredited Coetzee as an unreliable witness in his internal investigation and before the Harms Commission into police death squads. Coetzee was indicted for something that he had already admitted he had done.³ The legal process of prosecutions and the administrative procedure of granting amnesty crossed paths at a number of different points with varying consequences for the accused and the victims. The acquittal of former Minister of Defence, Magnus Malan, and others accused of the brutal massacre of 13 people at the home of United Democratic Front (UDF) activist Victor Ntuli at KwaMakhutu in KwaZulu-Natal, acted as a disincentive to perpetrators, especially those in the military, to apply for amnesty (Varney and Sarkin, 1997:141). Mitchell's amnesty had the directly opposite effect. It certainly sped up the process encouraging other state criminals to apply for amnesty. Effectively, it meant that the 'proportionality prin-

1. Promotion of National Unity and Reconciliation Act No.34 of 1995, Chapter 6, Clause 31 (3).

2. *Weekly Mail and Guardian*, 26 July 1996.

3. See Pauw (1991:142) for a detailed account of police death squads and the complicity of the political and legal establishment in cover-ups.

ciple' of the Act would be very leniently applied or not applied at all. After all, how were the Amnesty Committee members to decide on questions of proportionality? If a mass murderer, like Mitchell, was merely carrying out orders how were they to establish the various levels of culpability? No doubt, the work of the Amnesty Committee is complicated by the fact that responsibility for human rights abuses was so thoroughly diffused through the entire system, and dispersed over a wide range of state functionaries. Also, there are no objective measurements for proportionality—it depends very largely on moral intuition. It is thus unsurprising that there is very little evidence that proportionality or proximity are being considered at all as important factors in the granting of amnesty.¹ In considering the amnesty applications of three APLA operatives responsible for the brutal attack on the Heidelberg Tavern, a favourite spot for local Cape Town students, the Amnesty Committee found that the applicants complied with the requirements of the Act in that: (i) they were acting on the explicit orders of a publicly known political organisation, (ii) they did not act for personal gain and (iii) they had no personal knowledge of the victims. The decision does not mention the condition of proportionality at all.²

EVIDENCE, TRUTH AND JUSTICE

In his judgement in the case of *AZAPO and Others vs The President of the Republic of South Africa and Others*, deputy president of the Constitutional Court, Justice Mahomed made the following statement:³

Central to the justification of amnesty in respect of criminal prosecution for offences committed during the prescribed period with political objectives, is the appreciation that truth will not effectively be revealed by the wrongdoers if they are to be prosecuted for such acts. That justification must necessarily and unavoidably apply to the need to indemnify such wrongdoers against civil claims for payment of damages. Without that incentive the wrongdoer cannot be encouraged to reveal the whole truth which might inherently be against his or her material or proprietary interests.

The decisions of the committee do not involve a great deal of detailed evidence at all—certainly not of the sort that usually accompanies criminal prosecution in a court of law. This is not surprising. Amnesty has been used as an incentive for the perpetrators to tell the truth, to reveal the full horror of past violations of human rights. It does not make much sense to offer such an inducement to political criminals only to remove it if they do not meet the further requirements of the Act. This would defeat the initial purpose of the incentive. It is far more expedient to simply apply amnesty by the line of least resistance, and in so doing, deviate from the Act

1. If I may allow my own subjectivity to creep in here. The APLA (military wing of the PAC) operatives who were responsible for the St James Church massacre in Cape Town were recently granted amnesty. Even if, by some obscure logic, killing people attending Sunday mass could be construed as a political act, the question remains, what proportionality exists between this massacre and the objective of political emancipation?

2. TRC-list@www.truth.org.za, 16 July 1998.

3. Constitutional Court of South Africa, case CCT 17/96.

itself.¹ Amnesty has to appear to be working, if it is to act as an incentive to perpetrators. The only sure way in which it would appear to be working is if state criminals and other perpetrators are actually allowed to (literally) get away with murder. Cynically stated, since we are incapable of administering justice, of prosecuting the criminals, we should rather attempt to lure them into revealing their crimes and exposing what their roles were in the violence of the past. These very same perpetrators may then walk free without even showing remorse for their actions. Bishop Desmond Tutu (1996) thus appealed to perpetrators to apply for amnesty: "(T)he law doesn't require that they should express remorse: they can come to the Amnesty Committee and say, for example, that they fought a noble struggle for liberation, but that because they opened themselves to prosecution or civil actions as a result, they are asking for amnesty." This is cynical because remorse is supposedly one of the imperatives for genuine reconciliation. If remorse is jettisoned, what manner of reconciliation can be accomplished?

Those perpetrators who were not persuaded by Mitchell's amnesty to approach the TRC voluntarily were compelled to do so by the threat of subpoena to appear before the TRC. There were two further catalysts encouraging eligible applicants to apply for amnesty. Firstly, the cut-off point covered by the amnesty provisions was extended to 10 May 1994. Secondly, the fact that the Constitutional Court ruled in favour of the Truth and Reconciliation Commission and against AZAPO and others on the constitutionality of granting of amnesty. However, as the process gained momentum, the Truth and Reconciliation Commission came into direct conflict with Attorneys General who were in the process of investigating criminal cases against the applicants. In some cases like that of Hechter, Cronje, van Vuuren and Mentz, the Transvaal Attorney General, Dr J. D'Oliviera, had already issued warrants of arrest for their roles in 27 cases of murder, attempted murder and malicious damage to property, when they approached the Amnesty Committee with their applications. They have appeared before both the Supreme Court as well as the Amnesty Committee. In terms of the Act, the matter has been postponed by the Supreme Court pending the outcome of their amnesty application.²

The cases of Hechter, Cronje, Van Vuuren and Mentz bear testimony to the tensions between the offices of the Attorneys General and the Truth and Reconciliation Commission. After extensive investigations, in fact at about the time that the investigations against them were finalised, Dr D'Oliviera,³ claims that he was on the verge of prosecuting these men when they "...like skelms ran to the TRC to save their own skins". The Act recommends that the Committee on Amnesty may request a prosecutorial authority to suspend proceedings against a suspect pending the outcome of the amnesty application.⁴ The vague wording of the legislation has allowed Attorneys General considerable discretionary powers. It is also the

1. Head of the Investigative Unit, Dumisa Ntsebeza, is of the opinion that nobody would be granted amnesty if the law is interpreted in the strictest sense. Interview, 12 June 1998.

2. Interview with Dr J. D'Oliviera, 10 June 1998.

3. Interview with Dr J. D'Oliviera, 10 June 1998.

4. Promotion of National Unity and Reconciliation Act No. 34 of 1995, 19 (7).

source of much friction between the TRC and the criminal justice system as they struggle over the various interpretations of the Act. Attorneys General complain that the TRC process undermines their work in a variety of ways. The Truth Commission has the power to subpoena any witness and to get access to any document which may be necessary in its investigation of a particular case. The disclosure of such information may hinder the case of the state if defence lawyers are alerted by the premature exposure of evidence when witnesses appear before the Amnesty Committees. Prosecutions under such circumstances are deleteriously affected.¹ Yet are we in a position to prosecute? What evidence exists against the perpetrators?²

In his judgement against AZAPO and Others Justice Mahomed makes a sweeping statement about a lack of evidence in respect of all cases: “(A)ll that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law.”³ Amnesty Committee member, Wynand Malan, argues however that the police were on the verge of prosecutions in many of the cases anyway and that the amnesty applications have not revealed a great deal about the atrocities of the past.⁴ In reality the situation is more uneven for the courts and for the Amnesty Committee. There have been some spectacular convictions (De Kock, Barnard) and some dismal failures (Malan, Nkabinde).⁵ Similarly, there have been some dramatic revelations (the PEBCO three) in the amnesty applications and some responses from perpetrators designed to obscure or conceal their roles in the killings. While the TRC made some inroads in getting police to apply for amnesty, they were singularly ineffective with the defence force. The army was a much harder nut to crack and with the limited investigative powers of the TRC this was a failure even if their sinister experiments in chemical and biological warfare and some aspects of the role of the Civil Cooperation Bureau (CCB) have now been exposed. Yet, the narratives remain contested as the memories of perpetrators fade and as they try to retain some sense of moral worth by not disclosing the full horror of their deeds. There are still many unanswered questions relating mostly to the link between the politicians and the security operatives, between those who made the policies and those who pulled the triggers.

1. Interview with Dr J. D’Oliviera, 10 June 1998.

2. There is compelling evidence to suggest that many official records, especially those of the security establishment guilty of direct human rights abuses, have been destroyed in order to conceal the truth. In their submission to the Department of Justice on the draft bill for the Promotion of National Unity and Reconciliation, the South African Society of Archivists suggested the establishment of a Committee on Official and Confiscated Records. It was felt that the lack of evidence would severely undermine the work of the Truth and Reconciliation Commission and thus it was necessary for the Commission to investigate as precisely as possible, who was responsible for the shredding of documents who authorised this practice and how widespread it was. Unfortunately, this recommendation was not incorporated into the Act. Apparently, this critical issue has been removed from the operational side of the work of the TRC and despatched to its research division.

3. Constitutional Court of South Africa, case CCT 17/96.

4. Interview with Wynand Malan.

5. It may not be entirely incidental that the failures have been in KwaZulu-Natal where violence is on the upsurge and the convictions have been in Gauteng where political violence has declined, but this is the subject for another paper.

While the Attorneys General complained about interference in their work, the gripe of the Investigative Unit of the TRC on the other hand, is that their work of reconciliation was hampered when Attorneys General refused to hand over witnesses or documents.¹ The equivalent to amnesty in the course of the administration of justice is an indemnity offered in terms of section 204 of the Criminal Procedure Act. This involves suspects who are prepared to become state witnesses against their accomplices in exchange for not being prosecuted in specific cases. Indemnity, however, differs from amnesty in one extremely important respect. While amnesty pardons the perpetrator at both civil and criminal levels, indemnity only pardons the perpetrator at a criminal level. The human right of the victims and survivors to launch civil claims against the perpetrator remains intact. The notorious askari² Joe Mamasela is one such state witness. He has not applied for amnesty but has given evidence against other members of the security establishment. In a case like this the TRC may petition the relevant prosecutorial authority for the release of the state witness in order that he/she may testify in an amnesty application. Upon completion of the hearing, the state witness is returned to the prosecutorial authority. This is especially required when it is considered that the evidence of the state witness may differ fundamentally from that of the amnesty applicants.

The Attorney General for the Transvaal, Dr Jan D'Oliviera, released Joe Mamasela to give evidence before the Amnesty Committee in the case of five former security policemen.³ They had applied for amnesty for the murder of the PEBCO three.⁴ Mamasela's version of events has contradicted their version in a number of important respects. While admitting that they killed the three civic activists, the policemen deny having tortured them. In contrast, Mamasela insists that they were severely tortured, going into the most gruesome details of their suffering before they were killed. One may ask why these security policemen would risk prosecution by not providing a full disclosure of their abuses. Would it not be in their interests to simply bare all and get freedom in exchange for the truth? There are a variety of ways in which we may speculate about their reasons for emerging with a polished 'story' which they have obviously rehearsed over and over again. This ploy may have worked if there had been a balance of probability in their favour. However with an eye witness contradicting their version of the violations their story appears improbable and certainly not a full disclosure. Not surprisingly, they were denied amnesty. While the Committee on Amnesty may have decided to abandon the principles of proportionality and proximity, they appear to have applied the requirement of full disclosure very consistently. Amnesty has

1. Interview with Commissioner Dumisa Ntsebeza, 12 June 1998.

2. Askari is a Swahili word meaning black soldier. It has taken on a rather different meaning in South Africa, where it now refers to ex-guerillas of the liberation movement who had, for a variety of reasons, abandoned their fellow combatants and the struggle generally to join the security forces of the state.

3. Niewoudt, Du Plessis, Lotz, van Zyl and Snyman.

4. Qaqawali Godolozzi, Siphon Hashe and Champion Galela were respectively the president, secretary-general and organiser of the Port Elizabeth Black Civic Organisation (PEBCO). They were murdered after being lured by the security police to the Port Elizabeth airport under the pretext that they were to meet a British diplomat.

been refused if there is even a hint that part of the story has been distorted or hidden.

The clash between the justice system and the TRC process does not only involve criminal cases, it includes civil cases as well. Craig Williamson, spy for the former regime who penetrated the ANC hierarchy in exile, admitted that he and his colleagues killed Jeanette and Katherine Schoon with a parcel bomb in Southern Angola. Soon after this admission was published in the popular media in 1995, Marius Schoon, the bereaved husband and father, launched civil proceedings against Williamson. In response, the latter applied for amnesty in order to dodge the civil suit against him. These instances prompted the Transvaal Attorney General to assert: “(O)bviously, the Truth Commission already interferes with our work, so any extensions will have far-reaching implications.”¹ In contrast to this interpretation, Minister of Justice, Dullah Omar, argues, that: “(T)he role of South Africa’s courts of law and prosecutorial authority remains firmly in place...The role of the criminal justice system is unaffected by the bill.”²

The workings of the criminal justice system side by side with the TRC are poignantly reflected in the case of Gideon Niewoudt, the security policeman who was found guilty of murder in the Motherwell bombing in which three policeman and an informer were killed. Notorious Niewoudt, as he was appropriately nicknamed, was released on bail of R50,000 pending his appeal. He then applied for amnesty for his role in the murders of Steve Biko, the PEBCO three, the Motherwell four and Siphwe Mtimkulu.³ He was refused amnesty in the first three instances but granted amnesty for killing wheel-chair bound Mtimkulu. The irony of this case is that Niewoudt has admitted killing the Motherwell four before the Amnesty Committee and although he was denied amnesty the case is still on appeal and he is still a free man.

Besides the obvious acrimony involved when the work of these two institutions so clearly clashes, there were instances of sound cooperation as well. The Attorneys General could call on the TRC not to exercise its powers in cases where prosecutions were imminent and the TRC could likewise request the Attorneys General to refrain from proceeding with prosecutions while they disposed of an amnesty application. For example, Dr D’Oliviera did not execute the warrant of arrest for Katisa Cebekulu to allow him to enter the country from England in order to testify in the TRC hearing regarding the human rights violations of the Mandela United Football team.⁴

The institutional conflict between the criminal justice system and the Truth and Reconciliation Commission raises broader questions about the nature of democracy and the possibilities for establishing the rule of law in South Africa. The episodes outlined above suggest that there were ample opportunities for perpetrators

1. Interview with Dr J. D’Oliviera, 10 June 1998.

2. Hansard Second Reading debate of The Promotion of National Unity and Reconciliation Bill, 17 May 1995 pg 1341.

3. Interview with Ntsikilelo Sandi, 15 February 2002.

4. Interview with Dr J. D’Oliviera, 10 June 1998.

to avoid civil or criminal prosecution by simply applying for amnesty. On the face of it, the deal appears ludicrous. Criminals simply need to tell the truth before the

Amnesty Committee in order for justice not take its course.¹ The wider social implications of not prosecuting criminals needs to be seriously considered in relation to the impact of impunity on the fragile democratic order in South Africa. Amnesty sends a message to future state criminals that there is the chance that they may be exonerated especially if they remain in power long enough to ensure that they are not easily dislodged, or that some compromise may be necessary to remove them from power. Needless to say, it is a message with grave consequences for democracy.²

According to Nino (1996:146–147), there are a number of advantages of the criminal justice system over truth commissions. I would like to list these and then try to assess their relevance to the South African situation. Firstly, truth commissions cannot replicate the “quality of narration” of an adversarial trial. I would argue that this would depend on the quality of cross-examination in court or the depth of the confession before the Amnesty Committee. I do not think that our narratives of the past will necessarily be enriched by criminal tribunals in the South African case where Attorneys General and state prosecutors are usually no match for sophisticated defence lawyers. Secondly, trials further the rule of law, especially when the meticulous attention to court detail and procedure is counterposed with the lawlessness of the authoritarian predecessors who may now be suspects, accused or defendants. Yet, the assumption here is that the courts are impartial. Where we have a criminal justice system inherited so entirely from the previous regime, this is not the case. Instead, hidden agendas, the political history of some Attorneys General and judges, their cosy existence with the authoritarianism of apartheid do make this point stick in contemporary South Africa. Thirdly, trials replace the impulse towards private revenge, since there is a public perception that justice is being done. Finally, trials assist victims to recover their self-worth and respect as the story of their suffering is given public exposure and official sanction. In South Africa, I would argue that the statements before the Committee on Human Rights Violations have gone a long way towards realising this aim. However, they are blighted by the absence of perpetrators at the hearings. Altogether 7,124 amnesty applications have been received by the Committee on Amnesty. As at December 2000 only 849 amnesties were granted while 5,392 were refused.³

Cynics may ask whether it is worth all the trouble —the enormous public interest, the media exposure, the state expenditure, the endless debates—for fewer than

1. In an earlier paper I argued that amnesty amounted to justice being jettisoned, because criminals are not prosecuted but, more importantly, also because the constitutionally guaranteed human right of the victims to launch civil suits against the perpetrators has been annulled by the provisions for amnesty (Hendricks, 1997).

2. It is not clear whether this applies to other criminals as well—not only those who are employed by the state. It would make a fascinating sociological study to investigate whether there is any significant association between absolving state criminals and the level of violent crime in South Africa.

3. www.doj.gov.za/trc2000.

one thousand amnesties. According to the Human Rights Commission's submission to the Truth and Reconciliation Commission, about 15,000 people died in politically-inspired violence between 1990 and 1994—hardly a peaceful transition. Nyanisile Jack, a former TRC researcher, takes this argument somewhat further in suggesting that the underlying reason for the conception of a peaceful transition is the fact that relatively few whites died in the conflict. On this perspective, it is quite easy to erase these deaths as irrelevant to the democratization of the country, in order to arrive at the blithe conclusion that the transition was "...relatively peaceful ... and miraculous" (Verwoerd, 1997:1).

In KwaZulu-Natal alone, Ari Sitas, points out that nearly 1,700 people lost their lives in political violence. If so very few people have been officially pardoned for these murders does this imply that the rest have been prosecuted? Sadly not. Especially in KwaZulu-Natal, the TRC has been spectacularly unsuccessful¹ in getting people to come forward to testify before the Committee on Human Rights Violations or to apply for amnesty. Similarly, the criminal justice system has left thousands of cases unsolved. How is democracy to survive in a situation of such monumental impunity? There is no respect for the rule of law and the three agencies of the criminal justice system, the police, the courts and the prisons, are simply incapable of coping with the crisis, themselves fraught with problems of legitimacy, being so firmly rooted in the past. Needless to say, there is no respect there for the TRC process of reconciliation either. Neither justice nor reconciliation is on the immediate political agenda of this province. A whole host of questions and challenges are posed by this situation. These revolve around the main issue of exceptionalism. Is KwaZulu-Natal a special case worthy of a special amnesty? If a special peace is brokered in the province it would mean the most severe test for the TRC process and, of course, it will have far-reaching consequences for the administration of justice as truth commissioner Richard Lyster comments: "(I)t sends a completely wrong message about what happens when you kill people. It sends a fundamentally bad message about the notion of justice in this province when you have police, magistrates and judges who are pushed aside, and politicians essentially decide whom to prosecute and whom to give amnesty to."² Exceptionalism is anathema to the notion of the rule of law, one of the cornerstones of any democratic order. Indeed, the constitution guarantees that everybody should be treated equally before the law. Thus, if a separate peace or special amnesty is brokered in KwaZulu-Natal there would be nothing stopping anyone else from demanding the same blanket pardon. The result would turn the entire TRC process into a fiasco. It is thus far more likely that inertia will simply set in and that the least possible will be done about the situation.

There are other challenges and crises to the legitimacy of the TRC process. Not least of these relates to the partiality of the committee in granting amnesty to 37 ANC members, including Thabo Mbeki. Although the applications were individ-

1. No doubt part of the reason for this is the fact that the Inkhata Freedom Party (IFP) has adopted a policy of non-co-operation with the TRC.

2. *Weekly Mail and Guardian*, 14 January 1997.

ual in the sense that each member submitted a separate application form, they did not conform to the requirement of the act for full disclosure of specific acts or omissions for which amnesty was being sought. Instead, the applications provided no detail on the identity of those involved nor the particular offences. Mr Wally Serote, for example had been granted amnesty for "...acts unknown to me unless stated otherwise by individual amnesty applicants". Peter Mokaba asked for and was granted amnesty for offences "...as detailed by individual applicants who may implicate me".¹ The successful challenge to the legality of these amnesties came from the TRC itself, the Democratic Party and the National Party. Since the Committee on Amnesty is autonomous, the TRC had no option but to challenge the amnesties in court. Although the ANC initially opposed the TRC's application to have the amnesties overturned, it withdrew its opposition a short time before the matter was to be heard at the High Court in Cape Town.

CONCLUSION: DELIVERY, REPARATIONS AND EQUALITY

This paper was concerned with the constraints and possibilities of the negotiated settlement in South Africa in relation to questions of justice and equality. The most serious legal challenge to the amnesty process came from the case brought before the constitutional court in 1996 by AZAPO, and the families of well-known anti-apartheid notables, Biko, Mxenge and Ribiero. The case was premised on the constitutional rights of redress in case of harm or injury. If amnesty is granted, the pardon is valid at both criminal and civil levels. It is as if the crime was not committed at all, since the perpetrator will not have a criminal record. The TRC was supposed to reveal the truth. In fact, the truth was supposed to be traded for justice. However, the truth is clearly being compromised by pretending that criminals do not have criminal records. The granting of amnesty expunges the constitutionally-enshrined rights of the victim to claim compensation for damages against wrongdoers.

The constitutional court rejected the case of the applicants and re-affirmed the constitutionality of amnesty on the proviso that the state assumes responsibility for reparations for the victims and survivors. The TRC's Committee on Reparations and Rehabilitation was charged with the responsibility of making recommendations in this regard. In effect, the main thrust of the committee's work revolved around how to define various categories of victims and how to decide on appropriate reparations.² The committee proposed five different classes of reparations: interim reparations, individual reparation grants, symbolic reparation, community rehabilitation programmes and institutional reform. The committee also identified 22,000 victims and proposed that each be paid a sum of R17,000 to R23,000 annually for six years. The total reparations budget proposed by the

1. [Http://www.woza.co.za/dp90.htm](http://www.woza.co.za/dp90.htm), 4 December 1997.

2. TRC (1998) A Summary of Reparation and Rehabilitation Policy. Cape Town: Truth and Reconciliation Commission.

TRC was R3 billion.¹ In response, the government promised R800 million for reparations in the February 2001 budget.² Since then there has been little movement on how the government intends implementing the recommendations of the TRC.³ Irrespective of the fact that all blacks were victims of apartheid dispossession, disenfranchisement and exclusion, the TRC arrived at a narrow definition of a victim. Yet, despite this truncated view, the delays in payment of reparations to assist victims in overcoming the harm they suffered, appear to parallel the overall lack of material delivery to the previously disenfranchised.

The repression of pre-1994 South Africa is still fresh in very many people's memories and in this sense there has been fundamental transformation of the country. It is a moot point whether this opening up of the society and especially the accomplishment of the franchise without substantial improvements in the material level of living of the majority is sufficient to safeguard democracy in the long run. My contention is that it is not. Moreover, the evidence suggests that the present government lacks the political will to make the kind of changes that would be necessary to allow society to become as materially inclusive as possible so that all can share equally in its wealth.

The gravest threat to the process of reconciliation in South Africa remains the cleavages between the wealthy and the poor and the fact that these coincide, by and large, with the distinction between black and white. As long as the society is fractured by these same inequalities the chances for reconciliation are, indeed, very slim. Democracy has to mean something materially for the mass of people, mainly through a recognition of their second generation rights. This does not imply a certain entitlement, but that the opportunity for success should be equalised. This is the surest manner to broaden the basis of consent and to protect the democratic order.

1. [Http://www.doj.gov.za/trc/reparations/index.htm](http://www.doj.gov.za/trc/reparations/index.htm).

2. Exchange rate 2001: 100R = 12 USD.

3. Piers Pigou in *Mail and Guardian*, 28 March to 4 April 2002.

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