

# The challenges of reconciliation in South Africa and the poverty connection

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Some time ago, in 2008, my friends and I walked into an elevator in a block of flats in Johannesburg only to be met with a fierce exchange between two men, an old white man who may have been in his 60s and a black youth, who may have been in his mid-twenties, judging each by their general appearance. We are not sure what sparked their debate, but we got the gist when the old man exclaimed loudly to the youth that if they (read white people) knew long ago that all that black people wanted was political power, as opposed to economic power, they (read white people) would have given it to them a long time ago.

## 1 Background

South Africa comes from a very dark and painful past that was characterised by gross human rights violations. These gross human rights violations were primarily committed by the then government of the National Party, aided by those who identified with its goals. These violations took the form of the unequal distribution of economic opportunities in favour of white people, and the gross denial of human rights to those who opposed the draconian policies. It must be borne in mind that these policies were not just *ad hoc* or inferred; rather, they were entrenched in the legal system and enforced by the law.<sup>1</sup> An important consequence of this was that black people were denied such human rights as equal citizenship, equal economic opportunities and the right to participate in all governmental decisions. However, various liberation movements and others also had a hand in the commission of gross human rights violations, as was found by the Truth and Reconciliation

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<sup>1</sup>Such as the Abolition of Passes and Co-ordination of Documents Act 67 of 1952 (commonly called 'Pass Laws'), Group Areas Act 36 of 1966, Natives Land Act 13 of 1927, Reservation of Separate Amenities Act 49 of 1953, Natives (Urban Areas) Act of 1923 amongst other legislation. For a comprehensive look at the battery of apartheid policies and legislation and their link to poverty, see: Terreblanche *The history of inequality in South Africa: 1652-2002* (2003).

Commission ('the TRC').<sup>2</sup> These violations of human rights emanated from the resistance to the apartheid machinery that stripped the majority of people, mainly black people, of their human dignity, equality, and freedom in all aspects of life.

At the dawn of democracy, following protracted multi-party political negotiations, agreements were concluded about the future of South Africa,<sup>3</sup> and one of these agreements concerned how South Africa was going to move forward as a country emerging from a dark past. These agreements were soon followed by a further agreement concerning the establishment of a TRC to deal with the perpetrators of past human rights violations.<sup>4</sup> Despite the TRC's recommendations<sup>5</sup> and other measures adopted by the current government, South Africa is still battling with many problems, such as the challenges associated with land redistribution, reconciliation between racial groups, poverty, homelessness, the HIV/AIDS pandemic, massive unemployment, economic recession and extreme economic inequalities. Further challenges include corruption, an ailing health care system, the poor state of the public school system, high levels of crime and high youth unemployment, to name a few.

This paper focuses on the challenges associated with the lack of reconciliation and escalating poverty.<sup>6</sup> This is because the parties that have to

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<sup>2</sup>See *Reconciliation Commission of South Africa Report* (2003) 614-720 ('TRC Report').

<sup>3</sup>See United Nations Commission on Human Rights Report *Situation of human rights in South Africa* (1994).

<sup>4</sup>Rantele and Giliomee 'Transition to democracy through transaction? Bilateral negotiations between the ANC and NP in South Africa' (1992) 91 *African Affairs* 515-542; Liebenberg 'Pathway to democracy? The case of the South African Truth and Reconciliation process' (1992) 4 *Journal for the Study of Race, Nation and Culture* 541-558; Armingeon 'The effects of negotiating democracy: A comparative analysis' (2002) 41 *European Journal of Political Research* 81-105. See also Conway 'Truth and Reconciliation: The road not taken in Namibia' (2003) 5/1 *The Online Journal of Peace and Conflict Resolution* 66-76, available online at [http://www.trinstitute.org/ojpcr/5\\_1conway.htm](http://www.trinstitute.org/ojpcr/5_1conway.htm) (accessed 2010-10-11) for an account of the results of suppressing proposals to hold a Truth and Reconciliation Commission in Namibia. The TRC in South Africa was constituted in terms of an Act of Parliament, namely, the Promotion of Unity and Reconciliation Act 34 of 1995 ('the Reconciliation Act').

<sup>5</sup>TRC Final Report (n 2) 726-732. It is noteworthy that some of the socio-economic problems that plague South Africa today could have been partially addressed had all the TRC's recommendations been implemented by the current government of the African National Congress. These recommendations included a once-off wealth tax, comprehensive individual reparations, community reparations, and the setting up of education programmes.

<sup>6</sup>The Presidency of the Republic of South Africa *Development indicators* (2009) 22-29 available at <http://www.thepresidency.gov.za> (accessed 2010-02-04) ('Presidency development indicators'); Leibbrandt *et al Trends in South African income and poverty since the fall of apartheid* (2010) OECD Social Employment and Migration Working Papers no 101 available online at [http://www/irinnews.org/pdf/saincome.pdf](http://www.irinnews.org/pdf/saincome.pdf) (accessed 2010-06-18) 1-90 at 13-68. The Presidency indicators show that the number of people living in poverty has decreased over the period between 1999 and 2007. The study indicates that in year 1999, the number of households surviving on R388 per month accounted for 52% of the total population and 41% in 2007. It is noteworthy though that this decrease largely represents the contribution by the social grant system, which has been reasonably

reconcile are seated at opposite ends of the economic continuum. At the one end, we have the affluent (mainly white people) and at the other end we have the poverty stricken (mainly black people).<sup>7</sup> One need not look further than the demographics of the informal settlements and inadequate buildings across the country to see that they are inhabited in the main by poor black people.

Unequal income levels and the resultant income gap between different racial groups have increased in the period from 1993 to 2008.<sup>8</sup> Black people or Africans represented the hardest hit by these income inequality levels, so much so that the average annual per capita personal income of white people stood at R75 297, compared to R9 790 for Africans (black people) in 2008.<sup>9</sup> This wide income gap between white people and black people and the resulting poverty levels among black people make a mockery of the founding values and spirit of the Constitution of the Republic of South Africa, 1996 ('the Constitution').<sup>10</sup> This widening inequality between black and white people highlights the failure of the TRC driven reconciliation mechanism, and contradicts its claim that reconciliation was achieved through its processes.

In unravelling the problem identified above, the paper will first highlight the brief history of truth and reconciliation commissions and of the South African Truth and Reconciliation Commission (TRC). Secondly, the author will highlight the theoretical framework of the TRC and compare it to the processes that the

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improved, especially child income grant. This decrease has been steady as inequality remains pervasive and a challenge. Leibbrandt reports that more people are increasingly becoming unemployed and do not have access to basic necessities with the result that the poorest of the poor are getting worse off with everyday inequality becoming the order of the day.

<sup>7</sup>See Plaatje *Native life in South Africa* (1916). Plaatje was the first author to eloquently capture the effects of apartheid and colonialism on black South Africans by documenting the humiliating manner in which black people were forcibly removed from their own land, and properties. See also: Schoombee 'Group areas legislation: The political control of ownership and occupation of land' (1985) *Acta Juridica* 77-118; Maylam 'Explaining the apartheid city: 20 years of South African urban historiography' (1995) 21 *Journal of Southern African Studies* 19-38 at 19, 27-34; Bundy 'Land, law and power: Forced removals in the historical context' in Murray and O'Regan (eds) *No place to rest: Forced removals history in South Africa* (1990) 3-11 at 3-5; Marcus 'Section 5 of the Black Administration Act: The case of the Bakwena ba Mogopa' in Murray and O'Regan (eds) *No place to rest: Forced removals history in South Africa* (1990) 12-26; see Terreblanche (n 1) for a comprehensive treatment of the impact of colonialism and apartheid on creating the current inequalities on South Africa's population, especially amongst the black population of South Africa. It is also well documented that this vast economic and social inequality has more than doubled since 1994; in this regard see *The Presidency development indicators* and Leibbrandt (n 6).

<sup>8</sup>Leibbrandt (n 6) 4, 9 and 15.

<sup>9</sup>*Id* 13.

<sup>10</sup>See Preamble to the Constitution which provides that the Constitution was adopted in order to:  
 Heal the divisions of the past and establish a society based on democratic values, social justice, and fundamental human rights;  
 Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;  
 Improve the quality of life of all citizens and free the potential of each person; ...

South African TRC followed with a view to determining whether it was properly carried out or not. The paper will then attempt to establish a nexus between reconciliation endeavours in South Africa and escalating poverty. Finally, the author will make recommendations and conclude.

## 2 Brief history of truth and reconciliation commissions and of the South African TRC

'Truth commissions' are set up to probe human rights violations that took place in the past, but they also serve many aims.<sup>11</sup> The most obvious is that of mandated 'fact finding' in order to establish an accurate account of a country's history and to prevent the history from being lost or written afresh.<sup>12</sup> In addition, truth commissions also allow a country emerging from a period of gross human rights violations the space within which to learn from its past in order not to repeat the human rights violations.<sup>13</sup> Furthermore, truth commissions also serve as a platform for the achievement of reconciliation and nation building.<sup>14</sup>

The first truth commission in Africa was held in Uganda in 1974 by the government to inquire into the 'disappearances of people in Uganda since the 25th of January, 1971, under the Idi Amin Dada government's first years'.<sup>15</sup> Truth commissions around the world, however, did not take centre stage until the mid-1980s in Latin America when the Argentinean government set up the National Commission on the Disappeared during 1983 to investigate the mass murders and abductions that took place under the previous military regime.<sup>16</sup> Since then, the world has followed suit with truth commissions to deal with gross violations of human rights.<sup>17</sup>

Not surprisingly, definitions and understandings of the meaning of 'reconciliation' vary because of the different political and historical contexts involved. Many definitions of reconciliation have emerged in Latin America and

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<sup>11</sup>Hayner 'Fifteen truth commissions: 1974 to 1994: A comparative study' (1994) 16 *Human Rights Quarterly* 598-655 at 611-614.

<sup>12</sup>*Ibid* 607-611.

<sup>13</sup>*Ibid*; Ntsebenza 'Can truth Commissions deliver justice' in Bösl and Diescho (eds) *Human rights in Africa: Legal perspectives on their protection and promotion* (2009) 315-388 at 378-382. See also International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted and opened for signature under United Nations General Assembly Resolution 3068 (XXVIII) of 1973-11-30, entered into force on 1976-07-18). Articles I and II of this Convention declares apartheid a crime against humanity. A lot of literature exists on the TRC, making it unnecessary to discuss its history in detail.

<sup>14</sup>See, eg, the Preamble to the Constitution of the Republic of South Africa Act 200 of 1993; s 3 of the Reconciliation Act.

<sup>15</sup>Hayner (n 11) 611-614; Ntsebeza (n 13) at 375.

<sup>16</sup>Hayner (n 11) 613-616.

<sup>17</sup>*Ibid*.

other countries as well as in South Africa. Thus, in 1990, Chile's newly-inaugurated president established an official body to investigate the atrocities committed during General Augusto Pinochet's seventeen-year rule, and he called it a 'truth and reconciliation commission'.<sup>18</sup> By including the concept of communal reconciliation in the Commission's name, Chile's civilian authorities sent an incomparable public message. Seeking to neutralise right-wing opposition to the government's effort to document the military's record of torture, killings and disappearances, they were implicitly promising that when the commission's work was done, the country would move on.<sup>19</sup>

In Chile, the victims' families sought justice and for the perpetrators to be brought to book and this was their understanding of reconciliation. Mariner points out the different understandings of reconciliation in Chile which are that while the government understood reconciliation as the production of a report on the human rights violations, which was not going to be followed by any consequences, the victims had quite another understanding, namely, that there would be consequences for the perpetrators.<sup>20</sup> In Chile, as in several other countries that have experimented with large-scale amnesties, the formula of truth over justice has failed.<sup>21</sup>

In the Philippines, a truth commission was also established to look into the past violations of human rights. Its mandate was, however, limited to investigations concerning past abuses committed by government officers or their agents, or by persons acting on their orders,<sup>22</sup> while abuses by guerrilla forces were left to the courts, to be dealt with as common crimes. These were not adequately dealt with in the courts because of the nature of crimes involved and the difficulties involved in establishing the elements of the crimes concerned.<sup>23</sup> Judging by the large numbers of complaints that were filed in the Philippines, it is arguable that the victims or their families obtained justice for the gross human rights violations that were committed since 1972.<sup>24</sup> Sadly, this was not to be, as the truth commission was quickly overtaken by events, such as the passing of the Commission chairperson, violent clashes, and further developments at government level.<sup>25</sup>

Unlike the Philippines and Chile, Argentina is a country that seemed to share a common understanding of reconciliation. This is so because the Argentinean truth commission was one of the most inclusive in terms of representing members

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<sup>18</sup>Mariner *Truth, justice and reconciliation in Latin America* (2003) available online at <http://www.counterpunch.org/mariner09042003.html> (accessed 2010-01-17); Hayner (n 11) 621-622.

<sup>19</sup>Mariner (n 18) *ibid*.

<sup>20</sup>*Ibid*.

<sup>21</sup>*Ibid*.

<sup>22</sup>Hayner (n 11) 620-621.

<sup>23</sup>*Ibid*.

<sup>24</sup>*Ibid*.

<sup>25</sup>*Ibid*. The South African TRC was also affected by certain events, such as the failure of the government to fully implement its recommendations

of the public from different walks of life, non-governmental organisations, victims and their families.<sup>26</sup> In addition, it was one of the few truth commissions that led to the perpetrators of gross human rights abuses being brought to book for their crimes.<sup>27</sup> The Argentine truth commission drew wide international interest and was hailed as a shining example for countries searching for truth and justice during transition to democratic rule.<sup>28</sup> This praise was due to its holding accountable those who perpetrated gross human rights violations through joint efforts with the families of the disappeared.<sup>29</sup> The Argentine model combined accountability, responsibility and reparation in the truth commission processes.<sup>30</sup> The families of the disappeared and other victims of gross human rights violations received monetary reparations from subsequent governments. However, others preferred retributive justice over reparations because they felt the government was buying itself out of responsibility with the monetary reparations.<sup>31</sup>

In contrast to the Argentinean truth commission, the Philippines truth commission represented the opposite. This is because the Philippines truth commission achieved nothing of note, owing to a lack of political will and support.<sup>32</sup> The result has been a lack of accountability on the part of the alleged perpetrators of past atrocities, and no justice or social justice for the survivors and the families of the victims of past human rights violations.<sup>33</sup>

The Chilean truth commission was relatively successful compared to the Philippines truth commission, despite the limitation of its mandate to exclude those human rights abuses which did not result in death or disappearance, like torture.<sup>34</sup> This is because the past human rights abuses were fully investigated and a report produced at the end of the process. In addition, many recommendations contained in the report, such as those relating to reparations and recommendations, were implemented.<sup>35</sup>

In South Africa, the TRC was a quasi-judicial body established at the end of apartheid.<sup>36</sup> Anybody who felt they had been a victim of violence during the time periods specified could come forward and be heard by the TRC. Perpetrators of

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<sup>26</sup>Hayner (n 11) 614-615.

<sup>27</sup>*Ibid.*

<sup>28</sup>*Id* 614.

<sup>29</sup>*Id* 614-615.

<sup>30</sup>Garro and Dahl 'Legal accountability for human rights violations in Argentina: One step forward and two steps backwards' (1987) 38 *Human Rights LJ* 283-344 at 311; Bonner, James and Matt 'Three R's of seeking transitional justice: Reparation, responsibility, and framing in Canada and Argentina' (2011) *The International Indigenous Policy Journal* 8-31 at 4-11.

<sup>31</sup>Bonner, James and Matt (n 30) 5-7.

<sup>32</sup>Hayner (n 11) 620-21.

<sup>33</sup>*Ibid.*

<sup>34</sup>*Id* 621.

<sup>35</sup>*Id* 622-623.

<sup>36</sup>See Preamble to the Reconciliation Act and ss 2-5 of the same Act.

violence could also give testimony and request amnesty from prosecution.<sup>37</sup> The TRC was a necessity, particularly in paving a platform for some closure and forgiveness, and seeking to map a way forward for a democratic South Africa. The TRC was praised for its contribution to transition, which many thought would derail into civil war.<sup>38</sup> What model of reconciliation was adopted by the South African TRC?

### 3 Model of reconciliation adopted by the South African TRC

The TRC derived its mandate from the Reconciliation Act. Its main goal was to achieve national unity and reconciliation.<sup>39</sup> This was to be achieved through a variety of ways, which included fact-finding missions, through investigating past violations of human rights, collection of testimony from victims and perpetrators of past human rights violations, compilation of a report to the nation on its findings and making recommendations.<sup>40</sup> In addition, this was also going to be achieved through granting amnesty to those perpetrators who made a full disclosure of all the relevant facts about the past violation of human rights committed during the specified period.<sup>41</sup> This process of 'truth-telling' was a necessary condition to the granting of amnesty and peace in South Africa, and was widely viewed as a step towards healing and reconciliation.<sup>42</sup>

The minor successes and big failures of the TRC to achieve national unity and reconciliation are well recorded by academic writers.<sup>43</sup> The TRC process has

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<sup>37</sup>Hayner (n 9) 632-634 and 635; *Truth and Reconciliation Commission: On the road to democracy* available online at <http://www.sahistory.org.za/pages/governance-projects/TRC/index.htm> (accessed 2010-08-25); Bundy 'The beast of the past: History and the TRC' in James and Van der Vijver (eds) *After the TRC: Reflections on truth and reconciliation in South Africa* (2000) 9-20. The TRC was broadly speaking empowered to investigate the gross human rights violations that took place within the periods specified, deal with matters pertaining to amnesty, reparation and compile a comprehensive report on all of these matters. However, certain of these powers, such as those found in ss 5(a), (b), (c), (d), (l), 10(1), and 29 (1) were subject to s 45, subject to a proviso that the Minister had to be consulted if the TRC intended exercising these powers outside of the Republic.

<sup>38</sup>Valji *Race and reconciliation in a post-TRC South Africa* (2004).

<sup>39</sup>See Preamble to the Reconciliation Act.

<sup>40</sup>*Ibid.*

<sup>41</sup>*Ibid.*

<sup>42</sup>Hamber 'What is this thing called reconciliation' (1998) 1 *Reconciliation in Review* 3-6 ('Hamber 1998'); Hamber "'Ere their story die": Truth, justice and reconciliation in South Africa' (2002) 44 *Race and Class* 61-79 ('Hamber 2002'); Laker 'The effectiveness of Truth and Reconciliation Commission in achieving and promoting reconciliation: Lessons from South Africa's TRC to develop a model for Uganda's TRC' (2009) 1 *The Pathfinder: A Journal of Peace and Conflict Studies* 42-66 at 45-47.

<sup>43</sup>See: Savage *et al* 'Truth commissions and transitional justice: A select bibliography of the South African Truth and Reconciliation Commission debate' (2001) 16 *Journal of Law and Religion* 69; Mamdani 'Reconciliation without justice' (1996) 46 *Southern Review Books* 1-8; Hamber 1998 (n

received mixed reactions from a variety of quarters, some praising the TRC, and some criticising the TRC for different reasons.<sup>44</sup> The TRC has been praised mainly for holding public hearing processes and for the establishment of some facts about the past violations of human rights, including creating an appropriate space for victims to be heard, and contextualising past violations of human rights as a denial of social justice and other rights.<sup>45</sup> This is so because hidden truth which were going to remain hidden were laid bare for South Africans and the world to see.<sup>46</sup> In addition, the TRC has been praised for educating the public about the past violation of human rights through its televised public hearings.<sup>47</sup> This educational exercise ensured that few people could claim that apartheid did not exist, and that the gross human rights abuses were never committed.<sup>48</sup>

The critics on the other hand have chastised the TRC for promising too much and achieving less. In particular, victims have complained that the TRC processes did not bring about the truth as initially promised.<sup>49</sup> Chapman and van der Merwe argue that the TRC was doomed to fail because of the many challenges it faced. These challenges included lack of consensus on the meaning of reconciliation,<sup>50</sup> lack of support from the white people and political parties,<sup>51</sup> the destruction of records by the previous government of the National Party,<sup>52</sup> insufficient time and resources allocated to the Commission to fulfil its mandate,<sup>53</sup> an imprecise and overly expansive mandate,<sup>54</sup> 'limited investigative ability'<sup>55</sup> and a lack of coordination between its units.<sup>56</sup>

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42); Hamber 2002 (n 42); Madlingozi 'Good victim, bad victim: Apartheid beneficiaries, victims, and the struggle for social justice' in Le Roux and Van Marle (eds) *Law, memory, and the legacy of Apartheid: Ten years after AZAPO v President of the Republic of South Africa* (2007) 107-126; Ntsebeza 2009 (n 13); Chapman and Van der Merwe 'Did the TRC deliver?' in Chapman and Van der Merwe (eds) *Truth and reconciliation in South Africa: Did the TRC deliver?* (2008) 241-279.

<sup>44</sup>See, eg, Hamber 2002 (n 42); Laker (n 42); Madlingozi (n 43); Mamdani 1998 (n 43) and Chapman and Van der Merwe (n 43). There is no consensus on the successes and failures of the TRC. I explore some of these differences in the sections below.

<sup>45</sup>Hamber 2002 (n 42) 64-65; Ntsebeza (n 13).

<sup>46</sup>*Ibid.* However, there are divergent views on this point, some authors argue that the TRC did not uncover any new information about the past human rights abuses, owing to many challenges. See in this regard Chapman and Van der Merwe (n 43) 248-249 and 275.

<sup>47</sup>Chapman and Van der Merwe (n 43) 242.

<sup>48</sup>*Ibid.*

<sup>49</sup>Hamber 2002 (n 27) 65; Chapman and Van der Merwe (n 43).

<sup>50</sup>Chapman and Van der Merwe (n 43) 254-255 and 255-263.

<sup>51</sup>*Id* 245-246.

<sup>52</sup>*Id* 246-247.

<sup>53</sup>*Id* 247.

<sup>54</sup>*Id* 275-278.

<sup>55</sup>*Id* 247-248.

<sup>56</sup>*Id* 243-245. This lack of coordination resulted in the different units of the TRC using different approaches and methods to go about their work. This in turn resulted in fragmented and unsupported truths.



The TRC has also been criticised for its failure to achieve national unity and reconciliation through its assumption that the nation has a 'collective psyche'.<sup>57</sup> This means that the TRC wrongly assumed through its compass of national unity and reconciliation that the healing of the nation meant the instant healing of individuals who were wronged by past racist laws, policies, practices and lived experiences. This further resulted in the sacrifice of the long-term individual healing process and of the demand for justice from survivors or the families who had lost their loved ones.

Furthermore, the TRC has been criticised for its failure to adopt a victim-centred approach to reconciliation<sup>58</sup> and for the inadequate or absent reparation that would have helped to some degree to redress the wrongs of the past and to help to achieve reconciliation.<sup>59</sup> This is compounded by the failure of its committees to cooperate by 'sharing research and investigative information, assign criminal responsibilities, and grant amnesty'.<sup>60</sup> Laker also criticises the South African TRC for its failure to achieve national, communal, and interpersonal reconciliation.<sup>61</sup> There is some truth to this, and it has been captured by various sporting events that have graced South Africa recently, such as the Rugby World Cup, the Soccer World Cup and the playing of rugby matches in the townships created by apartheid. These events collectively gave an impression that different racial groups in South Africa have reconciled and are all marching behind a common goal. This is farther from reality because at the end of these sporting circuses, the rich and wealthy (mainly white people) go back to their plush lifestyles and the poor (mainly black people) return to their apartheid built houses and squalid living conditions in the townships and other inadequate housing.<sup>62</sup>

Moreover, the TRC has been criticised for its narrow interpretation of its mandate with regard to the past violations of human rights in the form of killings, abductions, torture or severe ill-treatment.<sup>63</sup> This resulted in few victims being

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<sup>57</sup>Hamber 2002 (n 42) 66.

<sup>58</sup>Laker (n 42) 47. The victim-centred or restorative justice approaches require the focus to be on the victims of gross human rights violations at all stages of the inquiry into these acts, and restoring the victims to the positions they were in before the gross human rights violations. Restorative justice in this sense would also mean the payment of reparations for the gross human rights violations. Retributive justice on the other hand focuses more on the perpetrator of the crime or gross human rights violations in terms of what punishment should be meted. It has been expressed in maxims such as an eye for an eye. For more on these concepts of justice, see Ntsebeza (n 13) 379-382.

<sup>59</sup>Laker (n 42) 47. It is noteworthy though that this was due to lack of political will from the state, and enthusiasm from the beneficiaries of the apartheid system, not due to the TRC's fault because its recommendations were very comprehensive.

<sup>60</sup>Laker (n 42) 47.

<sup>61</sup>*Ibid.*

<sup>62</sup>For similar arguments, see Laker (n 42) 47-50.

<sup>63</sup>Madlingozi (n 43) 109-119; Chapman and Van der Merwe (n 43) 275-278. The TRC regarded the past human rights violations as flowing from a few individual 'bad apples'. This led to its failure to deal with the past structural effects of apartheid as a concerted political system intentionally

classified as victims within this narrow definition, similarly with regards to perpetrators. This resulted in the failure to deal with the socio-economic effects of the racist policies, laws and practices of the past.<sup>64</sup> Although the TRC contributed to South Africa's transition into a democracy and to the creation of an inclusive and responsive government, it is doubtful that any meaningful national unity and reconciliation was achieved by the TRC in light of facts mentioned above, and in light of the prevailing attitudes of many South Africans,<sup>65</sup> beneficiaries<sup>66</sup> and perpetrators.<sup>67</sup> What are the different understandings of reconciliation, and what bearing do they have on reconciliation?

## 4 Theoretical framework of TRC

Reconciliation is a very complex concept both theoretically and practically. This may be the reason why there are different understandings of the concept of reconciliation. Academic writers<sup>68</sup> and courts<sup>69</sup> have attempted to define the concept of reconciliation in the quest to offer some understanding of this concept. The Reconciliation Act does not define the meaning of reconciliation and no consensus exists about the concept of reconciliation. The TRC has, however, offered what may be regarded as a definition or understanding of the concept of

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designed to entrench economic inequalities in favour of white people, through the creation of a welfare state, and through violence. The TRC therefore entrenched a culture of immunity, and simultaneously absolved white people of any guilt and responsibility for the violence committed in their names, and for the economic benefits engineered for their benefit.

<sup>64</sup>Madlingozi (n 43) 109-113.

<sup>65</sup>Valji *Race and reconciliation in a post-TRC South Africa* (2004). Valji records how the black youth have internalised their poverty as 'something natural and inherent to those experiencing it, while many white people mistakenly believe that their success and economic power is the result of hard work, and sheer luck, not deliberate racist policies of the past that ensured their economic benefits, and the maintenance of these economic inequalities through laws, policies and violence against other races, mainly black people'. See also Chapman and Van der Merwe (n 43) 277-278.

<sup>66</sup>Valji (n 65). Valji records how young white people believe their success to be the result of hard work and success, as opposed to the structural effects of apartheid.

<sup>67</sup>The former Prime Minister of South Africa, PW Botha, refused to appear before the TRC, even after he was subpoenaed. Instead, he called the TRC a 'circus' and challenged its decisions against him in the courts. In addition, it is well recorded that the government under FW de Klerk destroyed all documents for the period leading up to the negotiations in order to obscure the truth about past violations of human rights.

<sup>68</sup>Mamdani 1998 (n 43); Hamber 1998 (n 42); Hamber 2002 (n 42); Langa 'Transformative constitutionalism' (2006) 17 *Stell LR* 351-360; Madlingozi (n 43); Laker (n 42).

<sup>69</sup>*Azania Peoples Organisation (AZAPO) v President of the Republic of South Africa* [1996] ZACC 16; 1996 8 BCLR 1015 (CC) ('AZAPO'); *Nkadimeng v The National Director of Public Prosecutions* (case no 32709/07) (2008-12-12) ('Nkadimeng'), unreported; *Du Toit v Minister for Safety and Security* [2009] ZACC 22; 2009 12 BCLR 1171 (CC) ('Du Toit'); *Minister of Justice and Constitutional Development v Chonco* [2009] 25; 2010 2 BCLR 140 (CC) ('Chonco'); *Albutt v Centre for the Study of Violence and Reconciliation* [2009] ZACC 4; 2010 3 SA 293 (CC) ('Albutt'); *The Citizen 1978 (Pty) Ltd v McBride* [2011] ZACC 11; 2011 (4) SA 191 (CC) ('McBride').

reconciliation.<sup>70</sup> The Chairperson of the TRC, Archbishop Desmond Tutu, has remarked on what the reconciliation was not. He said that 'reconciliation is not about being cosy; it is not about pretending that things were other than they were. Reconciliation based on falsehoods, on not facing up to reality, is not reconciliation and will not last.'<sup>71</sup>

The then President of the Republic of South Africa, Thabo Mbeki, also put forward government's understanding of reconciliation. He defined reconciliation as the peaceful co-existence of a healed nation, from past injustices of apartheid in a society that upholds human rights, including quality livelihood.<sup>72</sup> This definition embraces social justice and makes it a vital component of reconciliation. However, Thabo Mbeki contradicted himself and government's position on the meaning of reconciliation when he remarked that:

Surely all of us must agree that reparations will be offered to those who fought for freedom by ensuring that monuments are built to pay tribute to those to whom we owe our liberty ... We must however also make the point that no genuine fighter for the liberation of our people ever engaged in struggle for personal gain ... We must not insult and demean the heroic contribution they made to our emancipation by turning them into mercenaries whose sacrifices we can compensate with money.<sup>73</sup>

The understandings of reconciliation put forward by Archbishop Tutu, President Thabo Mbeki and Dullah Omar reveal inconsistencies and a lack of consensus in the definition of the concept of reconciliation. The definition offered by Tutu does not say anything about social justice, and is very vague in many respects. For instance, what would constitute not being cosy, and facing up to reality? The definitions of reconciliation proffered by the government on the other hand are also inconsistent. In particular, they first embraced social justice as an essential component of reconciliation, and then backtracked from this conception by embracing a definition and understanding of reconciliation that does not include social justice. Instead, they embraced one that established two classes of victims, those that are genuine and those that are not genuine.<sup>74</sup> The government's position was further contradicted by the former ANC Spokesperson, Smuts Ngonyama, who after being linked to a multi-million rand contract with

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<sup>70</sup>Tutu 'Chairperson foreword' (1998) 1 *Truth and Reconciliation Commission of South Africa* 17.

<sup>71</sup>*Ibid.* The TRC also noted that reconciliation required a commitment, especially from those who have benefited and continue to benefit from past violations of human rights 'in order to transform the unjust inequalities and dehumanising poverty'.

<sup>72</sup>Laker (n 42) 44.

<sup>73</sup>As cited in Madlingozi (n 43) 113. This position is repeated and confirmed by former Minister of Justice and Constitutional Development, Dullah Omar, see Madlingozi (n 43) 112.

<sup>74</sup>Madlingozi (n 43) 119-124. Madlingozi calls this classification 'bad victims, good victims'. Those that continue to demand social justice, like the Khulumani Support Group are branded as bad victims, and those that are content with not receiving social justice are called good victims.

Telkom, a telecommunications entity partly owned by the state, responded by saying that he did not join the struggle to be poor.<sup>75</sup>

The victims' understanding of reconciliation also differs markedly from that of the TRC, and the government. Victims understood reconciliation as conditional in the sense that the perpetrators would tell the truth and apologise for their involvement in the commission of gross human rights violations, then they would be forgiven by the victims, and there would be reparations for these gross human rights violations.<sup>76</sup>

Research conducted by Gibson on the success of the TRC in South Africa revealed that South Africans from all walks of life understood reconciliation to mean the '...extension of dignity and esteem for those of other races and cultures, through understanding of reconciliation, trust and respect'.<sup>77</sup> This definition and understanding also says nothing about social justice as an essential part of reconciliation. It gravitates towards an empty recognition of the other, and is suspect regarding whether it includes the views of those victims of past atrocities who survived and the families of the victims.

Academic writers have also defined and understood reconciliation in different ways. Mamdani has argued that for reconciliation to be 'durable', it must be aimed at beneficiaries and victims, and not only at perpetrators and victims.<sup>78</sup> Seeing reconciliation in this light means there would be a shift from focusing on perpetrators and the need to punish them in criminal law, to beneficiaries and the need for social justice.<sup>79</sup> This represents an understanding of the broader human rights violations which denied the majority people their socio-economic rights or social justice, and is likely to ignite talk of reparations as well. However, Hamber disagrees with Mamdani and by extension with Madlingozi since Madlingozi endorses and elaborates on Mamdani's conception of reconciliation.<sup>80</sup> Hamber argues that a distinction must be drawn between the manner in which the TRC conducted its public profile and the conclusions contained in its final report so as to get the bigger picture.<sup>81</sup> For instance, the TRC noted the inequalities brought about by apartheid policies, and the need for commitment and contribution to the process of reconciliation from those who benefited and continue to benefit from the past violations of human rights.<sup>82</sup>

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<sup>75</sup>Madlingozi (n 43) 112.

<sup>76</sup>Laker (n 42) 49.

<sup>77</sup>See Gibson cited in Laker (n 42) 44.

<sup>78</sup>Mamdani (n 43) 3-5. According to Mamdani, the TRC failed to focus on social justice in its conception of reconciliation, choosing to focus on the political elites instead (ie perpetrators and victims) instead of focusing on the beneficiaries and victims. See also Langa (n 68) 359, where a similar point is made to the effect that 'reconciliation cannot be divorced from the reconstruction of the socio-economic conditions of the country ...'.

<sup>79</sup>*Ibid.*

<sup>80</sup>Hamber 2002 (n 42) 69-72.

<sup>81</sup>*Id* 69.

<sup>82</sup>*Ibid.*

In addition, the TRC further noted in its final report that reconciliation required a commitment, in particular from those who benefited and continued to benefit from the policies of the past, to transform the unjust inequalities and 'dehumanising poverty'.<sup>83</sup> This approach of the TRC was useful because it acknowledged the broader context of human rights violations, and assisted in establishing a complete picture about the past violations of human rights.<sup>84</sup>

Five more definitions and understandings of reconciliation are offered. The first one is the 'non racial ideology of reconciliation.' This conception of reconciliation sees reconciliation as dissolving the racial constructions established by the policies of the past, and requiring the TRC to achieve racial integration.<sup>85</sup> The second one is 'an intercommunal ideology of reconciliation,' and reconciliation in this context is about bridging the cultural and historical divides of the past through improved communication and co-operation, without admitting the guilt or apportioning blame.<sup>86</sup> Thirdly, the religious conception of reconciliation focuses on forgiveness and repentance.<sup>87</sup> Fourthly, the human rights conception of reconciliation focuses on discovering the truth about the past violations of human rights, condemning them or prosecuting them where appropriate.<sup>88</sup> Finally, there is the conception of reconciliation based on community building. This conception focuses on mending broken interpersonal relations between individuals and communities.<sup>89</sup>

The courts have also elaborated on the definition and understandings of reconciliation.<sup>90</sup> The court in *Du Toit* reasoned that:

The process of reconciliation is an ongoing one which requires give and take from all sides. The victim or family is able to hear the truth about the motives of the act and the circumstances surrounding their suffering, and in return must accept that no criminal sanction will be forthcoming. At the same time, the perpetrator comes face to face with his or her conscience, and the victim, and has to make full disclosure. In return, the weight of the commission of the offence is lifted from the perpetrator's shoulders with the guarantee of immunity from prosecution, a clean criminal record, and an assurance that never again can the conviction be counted against him or her.<sup>91</sup>

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<sup>83</sup> *Ibid.*

<sup>84</sup> *Id* 70.

<sup>85</sup> *Id* 66. This is mainly focused on perpetrators, but may also include beneficiaries in the quest to achieve transformation.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Id* 67.

<sup>89</sup> *Ibid* 67.

<sup>90</sup> See: *Du Toit* (n 69) para 28. Compare *Du Toit* with *AZAPO* (n 69), the *AZAPO* case not only took away the right of victims or their families to sue in criminal law, but also in civil proceedings. This had the effect of leaving them in limbo, since the TRC recommendations on reparation and prosecutions were not fully implemented, and they cannot access courts to claim any relief. Herein lies one of the contradictions of the rule of law which manifests itself in the protection of rights guaranteed in the Constitution but which at the same time entrenches a culture of impunity.

<sup>91</sup> *Du Toit* (n 69) para 28.

The definition and understanding of reconciliation provided by the court in the *Du Toit* case is conveniently silent on the urgent need to address the socio-economic effect that apartheid policies and laws had on victims or their families, and which continue to affect them to this day.<sup>92</sup> In addition, the court uses curious wording when talking about the parts that the victim and the perpetrators have to play in the reconciliation process. Victims ‘...must accept...’ while the perpetrator ‘...has to make full disclosure’, in other words, the victim is obliged to accept, while the perpetrator is given a choice.<sup>93</sup> It is telling words like these and similar practices that have led victims or their families to rightfully rebuke the TRC process and post-TRC reconciliation efforts as instituting a culture of impunity and it has to a certain extent legitimised the human rights violations committed during the apartheid era.

The present author defines and understands reconciliation to mean a process of coming together as a country to honestly acknowledge the past gross violations of human rights, through the clear identification of all victims, all perpetrators and all beneficiaries with the view to building a country based not only on political freedom but also on economic freedom,<sup>94</sup> equality and the spirit of *ubuntu*.<sup>95</sup> This would entail an honest dialogue by all perpetrators, all beneficiaries of policies and laws of the past regarding ways in which these were

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<sup>92</sup>Madlingozi (n 42) 109-109. Madlingozi notes that the minimalist definition of victims by the TRC as those who were tortured, kidnapped, killed or severely ill-treated resulted in the failure of the TRC to deal with the socio-economic harm that resulted from laws and policies of apartheid. This is because the racist laws and policies of apartheid were intentionally designed to result in gross economic inequalities between racial groups in favour of white people.

<sup>93</sup>This also lends credence to the complaints voiced by some victims that the TRC put pressure on them to forgive involuntarily. In this regard, see Laker (n 42) 49.

<sup>94</sup>By economic freedom, I mean that we have to address the socio-economic results of past human rights violations. The starting point in this process would be to implement the recommendation of the TRC. The long-term goal should be to ensure that those that were excluded and marginalised from free and full participation in the economy, and as a result continue to be prevented must be made equal partners in the economy if South Africa’s democracy is to mean anything at all.

<sup>95</sup>*Ubuntu* is the way of living common to the indigenous people of Africa. It comprises emphasis on community and mutual existence and sharing as opposed to crass individualism. For more on *ubuntu*, see English ‘Ubuntu: The quest for an indigenous jurisprudence’ (1996) 12 *SAJHR* 641-648; Mokgoro ‘Ubuntu and the law in South Africa’ (1998) 4 *Buffalo Human Rights LR* 15-24; Mokgoro ‘Ubuntu, the Constitution and the rights of non-citizens’ (2010) 21 *Stell LR* 221-229; Cornell and van Marle ‘Exploring ubuntu: Tentative reflections’ (2005) 5 *African Human Rights LJ* 195-220; Metz ‘Towards an African moral theory’ (2007) 15 *Journal of Political Philosophy* 321-341; Roederer and Moellendorf *Jurisprudence* (2007) 1-653 at 441-462; Keevy ‘Ubuntu versus the core values of the South African Constitution’ (2009) 34 *Journal of Juridical Science* 19-58; Tshoose ‘The emerging role of the constitutional value of ubuntu for informal social security in South Africa’ (2009) 3 *African Journal of Legal Studies* 12-19; *S v Makwanyane* 1995 6 BCLR 665 (CC) paras 223, 263 & 307-308; *Hoffmann v South African Airways* 2001 1 SA 1 (CC) para 38; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37; *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) paras 45, 163; *City of Johannesburg v Rand Properties (Pty) Ltd* [2006] 2 All SA 240 (W) paras 62-3; *Dikoko v Mokhatla* 2006 6 SA 235 (CC) paras 68-69 and 113-121.

committed, and how they can be reversed. In addition, the law would have to take its course against those beneficiaries and perpetrators that do not tell the truth in this process.<sup>96</sup> The law could make provision for the victims or their families to pursue criminal and civil proceedings. What then is the connection between this failed reconciliation project and poverty?

## 5 The connection between reconciliation and poverty

There are vast economic disparities that exist between the rich and the poor in South Africa today.<sup>97</sup> These have become the order of the day and have more than doubled since the year 1994,<sup>98</sup> so much so that South Africa has been ranked as one of the most unequal societies in the world, followed by Brazil.<sup>99</sup> These vast economic disparities are not something new, but can be traced back to colonialism and the battery of racist policies and laws of the former government of the National Party.<sup>100</sup> The main design of these policies and laws were to reserve the lion's share of land, economic opportunities, access to economically viable areas, and other opportunities to white people, at the expense of other racial groups who were essentially relegated to positions of slavery and treated as pariahs.<sup>101</sup>

The past economic inequalities become part of a democratic South Africa, so much so that the United Nations Development Programme recorded that ten years into democracy, saw 61% of black South Africans living in poverty, as compared to 1% of white South Africans. In addition, white South Africans

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<sup>96</sup>See generally, Madlingozi (n 43); Hamber 2002 (n 27)

<sup>97</sup>*The Presidency Development Indicators* (n 6) and Leibbrandt (n 6).

<sup>98</sup>*Ibid.*

<sup>99</sup>Mannak *Report: South Africa: Most unequal society* (2009) available online at <http://www.digitaljournal.com/articles/279796> (accessed 2010-10-11).

<sup>100</sup>See Terreblanche (n 1).

<sup>101</sup>Plaatje (n 7). See also: Bundy (n 7) 3-5; Marcus (n 7) 12-26; Terreblanche (n 1). It is also well documented that this vast economic and social inequality have more than doubled since 1994, in this regard see *The Presidency development indicators* (n 6) and Leibbrandt (n 6); Richards *et al* 'Measuring quality of life in informal settlements in South Africa' (2007) 81 *Social Indicators Research Journal* 375-388; See also Misselhorn 'A new response to informal settlements' (2010) available online at <http://www.ngopulse.org/node/13699> (accessed 2010-03-30). The Constitution requires a reversal of the housing injustices and other economic inequalities of the past and a restoration of the human rights that were taken away by old order legislation and conduct. This is implicit in the 'transformative' character of our Constitution; see also *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17; 1997 12 BCLR 1696 (CC) para 8; *The Government of the Republic of South Africa v Grootboom* [2000] ZACC 14; 2000 11 BCLR 1169 (CC) paras 24-25 and 82-83; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* [2008] ZACC 1; 2008 5 BCLR 475 (CC) paras 10 and 14. This case dealt with 400 people who resided in an unsafe and unhealthy building in the inner city of Johannesburg and who were facing an eviction.

enjoyed the quality of life of Spain, while black South Africans enjoyed the quality of life of the Democratic Republic of Congo. This has been partly blamed on the TRC for its failure to interrogate the apartheid system as a system that deliberately created economic injustices between various racial groups, and its failure to bring the beneficiaries of the apartheid system to book.<sup>102</sup> However, Chapman and van der Merwe argue that 'to be fair, the TRC was not set up to directly address the economic injustices of the past. It was mandated to deal with a narrow set of offences. Its mandate for truth was, however, one of locating the various incidents in a context that would explain the past ...'<sup>103</sup>

The TRC would have been able to deal with or contribute to overcoming the economic inequalities of the past had the definition of justice, and gross human rights abuses been expanded to include economic inequalities and distributive justice.<sup>104</sup> The TRC instead defined its mandate as pre-occupied with the gross human rights abuses in the form of torture, murder and other violent action committed in the past.<sup>105</sup> This moved the spotlight away from the economic structural effects of the apartheid system into the realm of evils committed by particular individuals.<sup>106</sup>

The negotiated settlement was the starting point for a democratic South Africa, but left these economic disparities unaltered, because there was no agreement about how they were going to be addressed. The new government of the ANC inherited these disparities and had to make a plan about how best to address them. To that end, a great deal has been done to address them, through various measures adopted from 1994 onwards.<sup>107</sup> However, to date, the government is still trying to eradicate poverty in South Africa, and the situation is fast becoming an emergency. As evidenced by various cases that have come before our courts, in particular the housing cases involving poor people from disadvantaged backgrounds facing evictions.<sup>108</sup> What is most striking about all these cases is that the Court in each one of them traces the root causes of the

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<sup>102</sup>Mamdani 1998 (n 43); Hamber 2002 (n 43); Madlingozi (n 43).

<sup>103</sup>Chapman and Van der Merwe (n 43) 272.

<sup>104</sup>*Ibid.*

<sup>105</sup>*Id* 272-273.

<sup>106</sup>*Id* 272-273.

<sup>107</sup>See Studies in Poverty and Inequality Institute *Can government policies be said to be pro-poor? An exploration of policy* (2009), where it is noted that 'the policies under review have individual unique hindrances when it comes down to the nitty-gritty of implementation, but there are basic measures that can apply to all, such as capacity building, improved availability of resources and improved communication within departments and better inter-governmental relations. The generic solutions can be used as a starting point to achieve efficient and effective delivery of services and the progressive realisation of the rights to education, health care, adequate housing and social security, and the achievement of human development'. See Leibbrandt (n 6) 13-68.

<sup>108</sup>See, eg, *Grootboom* (n 101) paras 24-25, in which the court stressed the historical account of evictions and their connections to poverty. See also *Port-Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2004 12 BCLR 1268 (CC) para 41.



problem to apartheid policies and laws.<sup>109</sup> In particular, the way in which these policies and laws created an unequal society along racial lines by denying others, especially black people, the social and economic benefits that were accorded to others (read white people).<sup>110</sup>

The government should shoulder some of the blame because it has made the past and present economic inequalities worse through its adoption of neo-liberal policies.<sup>111</sup> Firstly, the economic structural effects of the past were not as a result of a 'free-market system' but were as a result of deliberate policies aimed at economically empowering one race (white people) to the exclusion of others. Secondly, these economic inequalities cannot be reversed by free-market policies because the free-market system creates superficial bubbles and illusions that everyone can participate in the economy on an equal footing, and requires little or no interference by the state. The government of the ANC has therefore maintained the structural effects of past human rights abuses through its adoption of neo-liberal policies.

The failures of the TRC and the maintenance of past and current economic inequalities by the government of the ANC are compounded by the concerted effort from some sections of the white community to deny that they ever benefited directly or indirectly from the policies of the past, and continue to benefit even today.<sup>112</sup> This usually manifests itself in playing the victim and pretending to be powerless, and is connected to the well known lie that they did not know and did not consent to what the previous government of the National Party was doing, yet

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<sup>109</sup>It is striking because the court has brought back the focus upon the structural inequalities created by apartheid, which the TRC had completely overlooked.

<sup>110</sup>See *Grootboom* (n 101) paras 2 and 6; *PE Municipality* (n 108) paras 8-10 and *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 2 SA 415 (CC) paras 45-46. The poverty challenges also manifest themselves in the nation-wide service delivery protests in various parts of the country and in the severity of youth unemployment, among other things.

<sup>111</sup>Kingsworth *Globalization made them do it: The once radical African National Congress (ANC) is now toeing the free-market line* (2003); Vale and Ruiters 'The right way up? South Africa ten years on' (2004) 41 *International Politics* 375-393. The neo-liberal paradigm concerns itself with legalism and political rights, to the exclusion of economic and cultural rights.

<sup>112</sup>See, for instance, Employment Equity Act 55 of 1998. Section 15 of this Act deals with affirmative action measures applicable to designated groups. Designated groups are defined in s 1 of this Act as black people, women and people with disabilities. 'Women' means all women, including white women, who were not disadvantaged at all by the previous dispensation. See also Wambugu 'When tables turn: Discursive constructions of whites as victims of affirmative action in a post-apartheid South Africa' (2005) 31 *PINS* 57-70. It has also been shown recently that white university graduates still enjoy preference in employment opportunities based solely on their skin pigmentation; see in this regard Business Leadership South Africa Report *Graduate unemployment in post-apartheid South Africa: Nature and possible policy responses* (2005) at 17-19; *TimesLive report* (2011-02-01), which points out that Whites earn 7.7 times more than blacks, available at: <http://www.timeslive.co.za/local/article885751.ece/Whites-earn-7.7-times-more-than-blacks> (accessed 2011-07-27).

they voted for it every now and then. According to a survey conducted by the Centre for the Study of Violence and Reconciliation, 40% of white South Africans deny the abuses that took place under apartheid, and also hold the view that apartheid was a good thing, badly implemented.<sup>113</sup> The implications of these prevailing attitudes are many, such as the fact that people with such views are highly likely to be resistant to any transformation of the economy, so that opportunities are also distributed to those that were previously denied these opportunities. This denial and playing the victim is not helpful to genuine reconciliation, but may serve as a recipe for further division, and in the long run this is undesirable for a young democracy such as South Africa.

There are other factors at play, though, such as government corruption and service delivery failures in certain municipalities.<sup>114</sup> The corruption in government may be one of the factors exacerbating the inherited economic inequalities, but cannot be said to be the only cause because the vast economic disparities already existed when the current government ascended to power.<sup>115</sup>

In addition, the effects of past racist policies and laws have left a terrible legacy of inequality, which has been perpetuated by the failure of the current government to follow various recommendations made by the TRC, especially those relating to the 'imposition of a once-off wealth tax,' 'special arrangement for education,' 'set up of reparation trust fund and contribution by beneficiaries of apartheid to this trust fund'.<sup>116</sup> The Draft Regulations on the Reconciliation Act dealing with reparations have been criticised by the Khulumani Support Group for their failure to include all victims of apartheid economic atrocities.<sup>117</sup> The Khulumani Support Group claims to be in possession of a list of some 65 000 such victims, and argues that their exclusion will only lead to more anger and hatred among these victims.<sup>118</sup>

The other criticism that can be levelled at these Draft Regulations is that they stop short of excoriating the full sting of the recommendations of the TRC as found in its final report. This is because the beneficiaries of apartheid do not

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<sup>113</sup>Theissen and Hamber 'A state of denial: White South Africans' attitudes to the Truth and Reconciliation Commission' (1998) 15 *Indicator South Africa* 5-8.

<sup>114</sup>Valji (n 65). Valji notes that the white youth believe that their success is the product of hard work and luck and nothing else.

<sup>115</sup>*Soobramoney* (n 101) paras 8-9.

<sup>116</sup>For recommendations of the TRC regarding reparations, see TRC Final Report (n 2) paras 2-16 at 726-728. However, there seems to be some light at the end of the tunnel since the state has taken some steps towards addressing reparations, see in this regard the Draft Regulations in terms of the Reconciliation Act, GG no 34279, 2011-05-11, GN no 282, which invites comments on Regulations relating to assistance of victims in respect of basic education; assistance of victims in respect of higher education and training; and Regulations relating to medical benefits for victims. Comments can be forwarded until 2011-06-08.

<sup>117</sup>See <http://www.timeslive.co.za/local/article1067588.ece/Victims-of-apartheid-to-get-TRC-payouts> (accessed 2011-05-19).

<sup>118</sup>*Ibid.*

feature anywhere in this matrix. Furthermore, the other recommendations like the 'once-off wealth tax,' 'reparations trust fund' and 'contribution to the reparations trust fund' have to date been conveniently ignored by successive governments of the ANC. This serves as further evidence of the charge put forward by Madlingozi, Mamdani and others, that the social justice part of reconciliation has been sacrificed at the altar of political expediency by the TRC and the current government of the ANC.<sup>119</sup>

Mamdani argues that if reconciliation is to be 'durable' and meaningful, it would have to focus on beneficiaries and victims, as opposed to the political elites (perpetrators and victims), this is because doing so has the potential to move the focus to one of the most important effects of apartheid, denial of social justice by the system of apartheid, since the truth alone does not address all the effects of apartheid.<sup>120</sup> The implications of this would be a gradual remedying of the unequal economic structures left by the apartheid system, which might in turn go a long way to addressing the economic inequality that adversely affects the majority people in South Africa.

There is therefore a nexus between apartheid and poverty. This is because the structural effects of past policies and laws have not been addressed, but have been allowed to fester. In addition, this was compounded by the failure of the TRC to interrogate these structural effects of apartheid, and by the current government of the ANC with its adoption of the neo-liberal policies. Furthermore, the widespread corruption in the ANC government has served to cement poverty and other economic inequalities. There is therefore an urgent need to deal with the project of reconciliation together with poverty alleviation, as the two are intertwined, since economic power remains largely dominated by those that were previously preferred through legislative and other measures.<sup>121</sup> This is so despite the various measures adopted by the democratic government to reverse this odious position. Seen in this light, the reconciliation project needs to move away from the symbolic and superficial reconciliation characterised by 'feel good' sporting events such as the recent World Cup or major rugby games to the realm of social justice if South Africa's democracy is to mean anything to the majority people. Besides addressing the economic inequalities through the focus on social justice, what other alternatives are available for the achievement of meaningful reconciliation?

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<sup>119</sup>Madlingozi 1998 (n 43) 119; Mamdani 1998 (n 43).

<sup>120</sup>Mamdani 1998 (n 43).

<sup>121</sup>Ntingi and Hlatshwayo 'Blacks own less than 2% of JSE' *City Press Newspaper* (2010-03-28) available at <http://www.citypress.co.za/business/News/blacks-own-less-than-2-of-JSE-20100327> (accessed 2010-03-30). In addition, a recent study into income earnings amongst racial groups shows that in the year 2008, white workers in South Africa earned 450% more than their black counterparts. See the report at <http://www.fin24.com/Economy/Whites-earn-450-more-20080508> (accessed 2010-06-30).

## 6 Reconciliation as a continuous project

The TRC made many recommendations and tentative suggestions about further measures that needed to be adopted in order to continue the reconciliation project.<sup>122</sup> Among the suggestions made are the establishment of a Secretariat in the Presidency to monitor the implementation of the recommendations in the TRC's final report. The functions of this Secretariat would be to:

- (a) ... [be] responsible for reporting on and publishing an annual report on the status of victims for a period of six years following the publication of this Codicil to the Commission's Final Report;
- (b) establish a particular presence and visibility in rural areas;
- (c) establish a Presidential Award for innovative and inclusive projects aimed at 'keeping the memory of the past alive' in schools, research centres and institutions of higher learning;
- (d) focus on reparations and democracy-related capacity-building through the specialised training of development workers.<sup>123</sup>

In addition, the TRC has recommended the adoption of a 'national programme of action' by the government in partnership with civil society groups, the Human Rights Commission, to work towards a society free of racism, xenophobia and related matters, especially one that will also involve the youth.<sup>124</sup> Furthermore, the TRC recommended an annual reporting mechanism by ministers during the adoption of budgets for a period of six years following the adoption of the TRC's final report, in order to report on the 'status and circumstances of the surviving victims.'<sup>125</sup>

Moreover, the TRC recommended that the past be kept alive through the South African Human Rights Commission National Centre curriculum, through the inclusion of 'projects aimed at encouraging children to keep the past alive.'<sup>126</sup> It

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<sup>122</sup>See TRC Final Report (n 2) paras 1-16 at 726-728. See also Aronson 'The strength and limitations of South Africa's search for apartheid-era missing persons' (2011) 5 *International Journal of Transitional Justice* 262-282. Some of the TRC recommendations were followed because after the TRC was formally dissolved in 2002, a TRC Unit was established with the Department of Justice and Constitutional Development in 2005 to 'monitor, coordinate, and audit the implementation of the TRC recommendations'. The TRC Unit oversaw the payment of the once-off R30 000 as reparation to those individuals identified as victims by the TRC; the erection of symbols and monuments to commemorate the past; the provision of social assistance such as medical assistance and education to assist those identified as victims; the community rehabilitation programmes to communities adversely affected by the past violations of human rights; the exhumations, reburials and symbolic reburials.

<sup>123</sup>TRC Final Report (n 2) para 2 at 726.

<sup>124</sup>*Id* paras 8-9 at 727. These recommendations were implemented through the establishment of Chapter 9 institutions; see s 181(1) of the Constitution.

<sup>125</sup>TRC Final Report (n 2) para 10 at 727.

<sup>126</sup>*Id* para 12 at 728.

also recommended that there be a conference aimed at healing the memory, and a conference aimed at honouring those that passed away during the struggle for freedom.<sup>127</sup> Despite the encouraging achievement of these post-TRC processes, there are still many challenges to deal with. In particular, the continued subtle racism, institutional racism, poverty, continued unequal distribution of economic opportunities in favour of white people, and the unwillingness of white people to truly commit to reconciliation.<sup>128</sup> This is further fortified by Stan Winer,<sup>129</sup> who observes that:

Large sections of the South African public and the world at large continue to laud the 'miraculous achievement' of the TRC in bringing about reconciliation in South Africa. However, such praise speaks more about the role of expectations in influencing perceptions than it does of objective reality. It is striking how often people preserve some images in the face of what is clear evidence to the contrary, ignoring that which does not fit, and not contradict popularly held but groundless beliefs. The success of the TRC is thus largely a matter of value judgement rather than the objective outcome of any principled quest for historical truth. South Africans have accordingly ended up with two histories; an official TRC type history inducing a false sense of complacency, and a hidden history, buried and unmarked, providing an ideal breeding ground for organisations such as the Boeremag.<sup>130</sup>

The implications of this are that there seems to be an effort in some quarters, such as those in government, to sweep all the differences and issues connected with past divisions which still affect us today under the carpet. This pushing aside embraces the artificial conception of reconciliation and non-racialism. This may also be one way of explaining the slow and almost non-existent implementation of the TRC's recommendations. These efforts are misplaced in light of the dire consequences that they might have for the future of South Africa, if the Boeremag and other right-wing organisations, and poverty levels among black people and other groups are anything to go by. This is also captured by a recent survey which involved interviews of about 4 000 men and women of all races from urban and rural areas which shows that 'on an ordinary weekday, a quarter of South Africans do not talk to a person of another colour, while 46% never mingle with other racial groups. In addition, racial segregation was found to be a huge factor'.<sup>131</sup>

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<sup>127</sup>*Id* paras 14-15 at 728. This was partly addressed by the TRC Unit through community rehabilitation and the erection of symbols and monuments to commemorate the past, such as the apartheid museum and the Freedom Park monument, and by renaming streets and airports after heroes of the struggle.

<sup>128</sup>For similar views, see Valji 'Race and reconciliation in a post-TRC South Africa' (2004) available online at <http://www.csvr.org.za/wits/papers/papnv3.htm> (accessed 2011-05-11).

<sup>129</sup>Winer 'Ghosts of the past' available at <http://www.sahistory.org.za/pages/library-resources/articles-papers/TRC-ghosts-wine> (accessed 2009-11-11).

<sup>130</sup>*Ibid.*

<sup>131</sup>Hartley *Half of SA doesn't mix with other races* (2009-12-10) available at <http://www.iol.co.za/news/politics/half-of-sa-doesn't-mix-with-other-races-1.467336> (accessed 2009-12-15).

It is therefore evident that reconciliation is a complex project, which is yet to be achieved in the South African context. This is because of many factors, such as the failures of the TRC to comprehensively consult all parties, the failure of the government to implement all the recommendations of the TRC, the connection between poverty and reconciliation, and the failure of the government to work on reconciliation as a continuous project in its quest for true nation building and reconciliation.

## 7 Recommendations and conclusion

A lot of work still needs to be done in order for reconciliation to be achieved in South Africa, similarly with poverty alleviation. Without reconciliation, our democracy remains shrouded in endless controversies, and may end up losing meaning. This was echoed by President Zuma, in his speech on 16 December 2009. He noted that we still have a long way to go towards reconciliation in South Africa, to get rid of racism, xenophobia and other social ills.<sup>132</sup>

I would therefore recommend that the government implement all the recommendations of the TRC. These recommendations include the creation of a reparations trust fund; the imposition of a once-off wealth tax on big businesses and industry; contribution to the reparations trust fund by all beneficiaries of apartheid; special educational arrangements to secondary schools and universities for those whose studies were interrupted during the struggle against apartheid.<sup>133</sup> Attending to these recommendations would make a huge contribution to poverty alleviation, especially since many families lost breadwinners during the struggle against apartheid, people interrupted their studies for the struggle, and now cannot afford to go back. Moreover, many people who were involved in the struggle against apartheid are still nursing the physical and psychological scars suffered during the wave of violence that was perpetrated by the previous government of the National Party and others, rendering them unable to support themselves.

Finally, I would recommend that the government devise further concrete measures aimed at dealing with the project of reconciliation comprehensively, as a continuous project. This would include measures aimed at reversing the economic conditions created by the policies and laws of the past, the failure of the reconciliation project, and measures aimed at encouraging the beneficiaries of these policies and laws to be part of this project.<sup>134</sup>

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<sup>132</sup>Presidential Speech available at <http://www.mg.co.za/article/2009-12-16-reconciliation-sa-has-along-way-to-go-says-Zuma> (accessed 2010-01-16). President Zuma was speaking at the reconciliation celebration at Freedom Park, Pretoria in 2009.

<sup>133</sup>TRC Final Report (n 2) 726-727 (vol 6, s 5, ch 7).

<sup>134</sup>Langa 'Transformative constitutionalism' (2006) 17 *Stell LR* 351-360 at 358-360.