

# Reparations policy in South Africa for the victims of apartheid

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## 1 INTRODUCTION

One of the principal challenges that faced the African National Congress (ANC) after its overwhelming democratic defeat of the apartheid government in 1994 was how to establish confidence in the justice system. During the years of apartheid, public faith in the courts dwindled to the point that the victims of racially discriminatory laws no longer trusted the formal institutions of the law. People started taking the law into their own hands. Equally challenging for the new government was how to cultivate a culture of human rights. To have a Bill of Rights on paper is one thing; to live by it is another.

It soon became clear that respect for the law could not be successfully inculcated without acknowledging the extent to which the human rights of the victims of apartheid had been violated. There was a strong feeling within the previously victimised population that it was not enough merely to acknowledge to past gross violations of human rights; the ANC-led government needed to do something about it, both as regards the perpetrators and the victims. In support of this line of thinking, proponents cited the case of South American democracies which had emerged from repressive military states and who had implemented concrete measures (though with varying degrees of success) to address the question of gross human rights violations perpetrated by officials of the previous regimes.

In consequence of these considerations and expectations, the idea of a Truth and Reconciliation Commission was born, much to the dislike of members and officials of the former government. Their fierce opposition to a Truth Commission was that it amounted to nothing other than a witch hunt or Nuremberg-styled prosecutions. Their argument was that this was the last thing needed in a country which had committed itself to a path of reconciliation and reconstruction. They also pointed out that this would lead to an irreparable breakdown in race relations and to interracial violence. The ANC emphasised that this would not be a witch hunt, though a certain category of gross human rights which did not meet the conditions laid down for the granting of amnesty, would not go unpunished. The new Minister of Justice contended that, on the contrary, a Truth Commission would advance reconciliation as the whole exercise would be mainly victim-driven. In his words: "I could have gone to Parliament and

produced an amnesty law – but this would have been to ignore the victims of violence entirely. We recognised that we could forgive perpetrators unless we attempt also to restore the honour and the dignity of the victims and give effect to reparations” (Omar 1996).

This article studies the legal framework for the granting of reparations and examines the process to see whether or not the needs of the victims of gross human rights violations are being met or have been met.

## 2 WHY REPARATIONS?

Reparation for human rights violations, in the words of Theo van Boven (1993 note 2 para 137 nos 3 and 4), has “the purpose of relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts . . . Reparation should respond to the needs and the wishes of the victim”. Thousands of opponents of the apartheid state were immorally arrested, tortured, maimed, killed, abducted and subjected to various forms of severe and inhumane treatment. This had devastating consequences for the individuals themselves, their families and friends as well as for the communities from which they came. Though it is impossible to attach a monetary value to the various degrees of suffering, the ANC-led government has nevertheless accepted that it is morally obliged to make reparations to the victims of the various apartheid governments. The fact of the matter is that, without providing for some measure of reparation to the victims, healing and reconciliation will not take place. Ironically, as Christian Tomuschat (1999) remarks, “the beneficiaries of these reparation claims would have to pay themselves for the monies granted to them since public money is invariably levied from the tax-payer. After a democratic regime has been established, the distinction between ‘them’ and ‘us’ does not work any more. The debts of the State are debts affecting everyone”.

## 3 THE LEGAL BASIS FOR REPARATIONS

In South Africa, the right to reparations for persons who suffered gross human rights violations is contained in the Promotion of National Unity and Reconciliation Act 34 of 1995 (the TRC Act) (Sarkin 1996; 1997; 1998). Chapter 5 of the Act deals with the entire reparations process. The Act falls short of saying what the reparations should be; all it says is that the committee established to receive the applications for reparations “may make recommendations which may include urgent interim measures . . . as to appropriate measures of reparations to victims”.<sup>1</sup> What the final reparations package will look like is a matter to be decided by Parliament on the recommendation of the President.<sup>2</sup>

The right to reparations is not unique to South Africa. Over the past fifty years, following the atrocities committed by the Nazis, international humanitarian law has witnessed treaties and legal instruments which have

1 Section 25(1).

2 Section 27(1).

firmly established the right of victims of human rights violations to compensation for their losses and suffering. The Universal Declaration of Human Rights stipulates that "Everyone has the right to an *effective remedy* [own emphasis] by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".<sup>3</sup> The International Covenant on Civil and Political Rights (signed by South Africa on 3 October 1994) obliges each party to the Convention to ensure that any person whose rights or freedoms, as recognised by the Convention, shall have an effective remedy despite the fact that the violation was committed by persons acting in their official capacity.<sup>4</sup> Most recently, the Rome Statute of the International Criminal Court<sup>5</sup> has directed the Court to establish principles relating to reparation of victims, including restitution, compensation and rehabilitation.<sup>6</sup>

South African support for the international legal regime on reparations can also be found in a judgment handed down by Didcott J of the Constitutional Court in the case of *Azapo and Others v The President of the Republic of South Africa and Others*.<sup>7</sup> In this particular case, the applicants were challenging a provision of the TRC Act which provides that a person who is granted amnesty in terms of the conditions spelled out in the Act shall not be held criminally or civilly liable in respect of the act for which amnesty was being sought. The Court rejected the contention that the relevant provision was unconstitutional. However, in arriving at the decision, the learned judge held at paragraph 62 as follows: "Reparation is usually payable by states, and there is no reason to doubt that the postscript envisages our own state shouldering the national responsibility for those. It therefore does not contemplate that the state will go scot-free. On the contrary, I believe an actual commitment on the point is implicit in its terms, a commitment in principle to the assumption by the state of the burden."

#### 4 ENTITLEMENT TO REPARATIONS: WHAT ARE GROSS HUMAN RIGHTS VIOLATIONS? WHAT CONSTITUTES A VICTIM?

From both an historical and a socio-political point of view, the entire black population (that is, Africans, Coloureds and Indians) could arguably regard themselves as victims of gross human rights violations from the time apartheid was introduced. The fact of the matter is that each of the racially discriminatory apartheid policies such as the race classification laws, the pass laws, forced removals under the Group Areas Act, and detention without trial had an incisive and devastating impact on the lives of those affected. The victims of these policies could rightly claim that the disastrous

<sup>3</sup> Article 8.

<sup>4</sup> Section 3(a). See also the following: Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (signed by South Africa on 29 January 1993); the Inter-American Convention on Human Rights Report 29/92 (2 October 1992). van Boven 1993.

<sup>5</sup> Statute of 17 July 1998 UN Doc A/CON 183/9.

<sup>6</sup> Article 75.

<sup>7</sup> 1996 (8) BCLR 1015.

degree to which their lives and livelihoods were affected, including those of their families, constitutes a gross violation of human rights.

However, in the debates preceding the enactment of the TRC Act, realism had to prevail. First, South Africa simply does not have the resources to satisfy the claims of all the victims of apartheid. Second, if one had to stretch the period of victimisation from the time the Nationalist Party assumed power in 1948 to the period immediately before the first democratic elections in 1994, it would have been extremely difficult for many to prove their victimisation. In many cases witnesses have died, memories have faded and documents have been lost.

Given these considerations, the legislature had no choice but to limit definitions. Accordingly, "gross violation of human rights" is defined in the TRC Act as:

- "(a) the killing, abduction, torture or severe ill-treatment of any person; or
- (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a).

which emanated from conflicts of the past and which was committed during the period 1 March 1960 to the cut-off date within or outside the Republic, and the commission of which was advised, planned, directed, commanded or ordered by any person acting with a political motive."

In practice this means that if, for example, a person was beaten but did not suffer lasting damage, this may well have been a violation of his or her rights, but in terms of the Act it is not severe ill-treatment (Burton 1998:7). Also, in the case of arson, only if a person's home was burnt down so badly that he or she could not live in it anymore would it be a gross violation of human rights. This is because it would have caused much emotional suffering as well as financial loss. If, however, it was a business, or a vehicle that was burnt, this would not be found to be a gross violation (Burton 1998:7).

As far as "political motive" is concerned, one may well argue that forced removals, pass laws, or racial discrimination were inspired by political motive. However, in terms of the Act, the victims would not qualify for reparation because these measures were not enacted within the rubric of the "political conflict of the past" – in resistance to the policies of the state, in reaction to the resistance, or in support of policies of the state or of the resistance movements. It may also be well remembered that in the run-up to the 1994 democratic elections, an intense wave of violence swept across the territory now known as KwaZulu-Natal. A raging battle was then taking place between supporters of the ANC and those of the Inkatha Freedom Party. Hundreds of people on both sides fell victim to this seemingly endless spiral of violence. Much of the violence and killings which took place were no doubt inspired by political rivalry between the two groups.

The TRC has been criticised for its "gap of knowledge" on the events that took place in KwaZulu-Natal and its failure to take adequate cognisance of

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8 Section 1(1)(ix) of the Promotion of National Unity and Reconciliation Act 34 of 1995.

the plight of the victims of the violence who were killed in this political conflict.

The drafters of the TRC Act limited the definition of 'victims' to include –

- “(a) persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights –
  - (i) as a result of a gross violation of human rights; or
  - (ii) as a result of an act associated with a political objective for which amnesty has been granted;
- (b) persons who individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights, as a result of such person intervening to assist persons contemplated in paragraph (a) who were in distress or to prevent victimisation of such persons; and
- (c) such relatives or dependants victims as may be prescribed.”

In April 1998, the government passed regulations<sup>9</sup> defining “relatives” and “victims”. The relatives of a victim were defined as:

- “(i) A parent of, or somebody who exercises or exercised parental responsibility over a victim;
- (ii) A person married to a victim under any law, custom or belief; and
- (iii) A child of a victim, irrespective of whether such child was born in or out of wedlock or was legally adopted.”<sup>10</sup>

In terms of the regulations, dependants of the victim include “any person to whom the victim has or had a legal or customary duty to support, or any other person who is or was, in the opinion of the Committee, dependent on a victim”.<sup>11</sup>

The cut-off date for statements to be made to the TRC was fixed as 5 December 1995. A principal concern raised by victim support groups during the TRC hearings was that there were a significant number of victims who had never heard about the TRC proceedings, or who, for a host of reasons were not in a position to present themselves before the TRC to make their statements. It should be said however, that the TRC made every effort to spread its hearings across the country, including the towns in outlying rural areas. South Africa is a large country with the majority of the population living in rural areas, some of whom cannot be reached by road. Most of the households in such remote areas have no television sets, radios, or access to newspapers or even effective means of transport. A large number of people living in such areas are illiterate and poor and therefore cannot afford to participate effectively in the broad socio-political dynamics of the country. Yet, despite these deprivations, rural communities played an important role in the struggle against apartheid in the sense that many of their sons and daughters who went to the urban areas to seek work or better educational opportunities became embroiled in politics and were recruited by the resistance movements.

9 Government Gazette No 6154 of 3 April 1998.

10 Government Gazette No 6154 of 3 April 1998 Section 1(2)(a).

11 Government Gazette No 6154 of 3 April 1998 Section 1(2)(b).

Rural communities also played a crucial role in offering shelter to political activists who were being hunted down by the security police, or to combatants from the exiled resistance movements who had crossed the border. As a result, people in rural communities were often arrested, tortured and maimed by the police. Rural communities yielded some of the most prominent political figures in the country such as Nelson Mandela, Albert Luthuli, Govan and Thabo Mbeki, Chris Hani and Steve Biko, to name only a few.

The plea of victim support groups to the TRC was that the deadline set for the end of the hearings should be extended to take the hardships encountered by rural people into account. Given the difficulties facing rural people, it cannot be said the list of victims is complete. The Reparation and Reconciliation Committee (RRC) acknowledged that in view of these considerations it would have to address the needs of “on-going victims”. It therefore decided to create a “window of opportunity” for such people. However, the RRC laid down a fixed timespan within which such victims should come forward to state their cases.

Indeed, in its final month, the Human Rights Violations Committee was still turning away people wanting to make statements because they had missed the deadline. By then, over 20 000 statements had been taken from victims during the life of the Commission (Burton 1998:6).

The fact that a potentially significant constituency of legitimate victims has been excluded from the very process which was established to benefit them has perhaps caused more divisiveness than reconciliation amongst the victim community. Add to this the controversial argument made by some members of Umkhonto we Sizwe (MK), the former military wing of the ANC in exile, that victims do not deserve compensation “because they did not fight”. Yet all members of MK were compensated financially by the ANC-led government on their return to South Africa. (Access 2000:22).

## 5 CATEGORIES OF REPARATION

The development of reparation policy by the RRC took into account the following categories of reparation (Wildschut & Orr 1997:10):

*Redress*, which refers to the right to fair and adequate compensation;

*Restitution*, which is the right to be reinstated, as far as possible, in the situation that existed for the beneficiary prior to the violation (*restitutio in integrum*);

*Rehabilitation*, which is the right to the provision of medical and psychological care and fulfilment of significant personal and community needs;

*Restoration of dignity*, which could include symbolic forms of reparation; and

*Reassurance of non-repetition*, which refers to the enactment of legislative and administrative measures which contribute to the maintenance of a stable society and the prevention of the re-occurrence of human rights violations.

## 6 THE TRC'S REPARATION AND REHABILITATION POLICY

In formulating its policies and recommendations, the RRC engaged in an extensive process of consultation in order to collect information from a variety of sources. The committee held workshops across the country with non-governmental organisations (NGOs), community based organisations (CBOs), faith communities and academic institutions. After this drawn out consultative process, which victims have criticised as being unnecessarily protracted and sluggish, the most important decision facing the RRC was whether reparation should be financial and, if so, how much money should be given (TRC 1998 vol 5 ch 1:5). According to the TRC report,

“the final, and most important factor in favour of an individual monetary grant, was that the analysis of a representative sample of statements revealed that most deponents requested reparation in the form of money or services that money can purchase . . . The highest expectation of the reparation process was for monetary assistance. Compensation, bursaries, shelter, medical care and tombstones occupied third to seventh places respectively in the most frequent requests (the second most commonly requested intervention was for investigation of the violation)” (TRC 1998 vol 5 ch 1:7).

The committee therefore proposed a reparation and rehabilitation policy with five parts:

- urgent interim reparation
- individual reparation grants
- symbolic reparation, (legal and administrative interventions) and community rehabilitation
- community rehabilitation programmes; and
- institutional reform.

### 6.1 Urgent interim reparation (UIR)

This refers to the delivery of reparative measures to victims who are in urgent need of assistance and who cannot wait for the final grant without jeopardising their means of existence. This category of persons entitled to UIR includes victims or their relatives and dependants who have urgent medical, emotional, educational, material and/or symbolic needs (TRC 1998 vol 5 ch 1:7).

The implementation of the UIR was delayed because the government was slow in the promulgation of the regulations. The first payments were made only in July 1998. Of the R300 million (approximately US\$47 million), R20 million had been paid out for UIR by February 2000. The amounts paid out to individuals vary between R2 000 (US\$310) and R5 000 (US\$780). As at February 2000, a total of 7 000 victims had received UIR (*Cape Times* 25 February 2000).

The delay in the payment of UIR has caused a great deal of annoyance and anger amongst the victims. The *Cape Times* of 25 February 2000 reports an interview with a certain victim who was tortured and raped by security police, and who has applied for UIR relief but had not yet received it: “My family and I are still suffering from what happened. I lost my job

because the police told my boss I was a terrorist. I had to keep going to the doctor and there was no money for anything. The perpetrators get amnesty but what do we get? Most people, like me, haven't even received the urgent interim reparations. It seems they have forgotten us". What is particularly distressing is that it is not known how many of the potential UIR recipients in need of urgent medical have died waiting for allocations to be made.

## 6.2 Individual reparation grant (IRG)

This refers to the final reparation grant which is to be made available to each victim, or equally divided amongst relatives and/or dependants who have applied for reparation if the victim is dead. The amount of the grant is based on a formula which takes into account the *suffering* caused by the *gross violation* that took place, an amount to *acknowledge the suffering* caused by the gross violation that took place, an amount to *enable access to services and facilities* and an amount to *subsidise daily living costs*, based on socio-economic circumstances (TRC 1998 vol 5 ch 1:9). Rural people, who in practice access services with difficulty, will receive a premium on their grant which is based on the assumption that services in rural areas are 30 percent more expensive than in urban areas. The annual payments will continue for a period of six years.

According to the final TRC report (1998), the rationale for the IRG is based on the fact that survivors of human rights violations have a right to reparation and rehabilitation. The IRG is aimed at providing victims with resources in an effort to restore their dignity. It will be accompanied by information and advice which would allow the recipient to make the best possible use of these resources. A total of 38 percent of the victims requested financial assistance to improve the quality of their lives. Over 90 percent asked for a range of services which can be purchased if money is available – for example, education, medical care, housing and so on (TRC 1998 vol 5 ch 1:9).

Each victim will receive a maximum individual grant of R23 023 (US\$4 898). This sum is based on a benchmark amount of R21 700, which was the median annual household income in South Africa in 1997. The poverty datum benchmark of R15 600 per annum was rejected as this would condemn victims to a life close to poverty rather than enabling them to live in dignity.

The grants will be administered and funded through the President's Fund, which was established in terms of the TRC Act. The fund has been accruing resources through international and local donations, parliamentary appropriations and earned interests on these funds. With an estimated 22 000 victims, the provisional total cost of implementing the reparations policy is estimated at R2 864 400 000 over six years, which represents 0,5 per cent of the South Africa's national budget.

So much for the theory. The reality looks very different. So far, the government has allocated only R300-million towards reparations, a state of affairs which has been sharply criticised by TRC chairperson Archbishop

Desmond Tutu who recently remarked: "It is very distressing that it appears nothing is been done for the people who sacrificed greatly for our country" (*Cape Times* 25 February 2000).

Although the Minister of Finance announced almost R10-billion in tax breaks in the 2000-2001 budget, he did not set aside any funds for reparations despite the fact that the victims have been waiting since 1998 (when the TRC submitted its report) for the government to allocate the reparations recommended by the Truth and Reconciliation Committee. At present, the buck is being passed from ministry to ministry, with no one being prepared to commit a particular government department to saying when the payments will commence.

The Human Rights Committee, an NGO, has unfairly criticised the media for reporting persistently on the government's apparent disinterest in addressing the monetary aspect of reparations. The argument advanced is that "the media has shown very little interest in any of the other recommendation made by the TRC" (Access 2000:18). With respect, this is a naïve statement for, as pointed out above, research based on the depositions of victims has shown that the highest expectation of the reparation process was for monetary assistance. It is the victims who know best what their immediate priorities are and it is therefore proper for the media to continuously highlight the failure of the government to attend swiftly to this particular expectation. One should not lose sight of the fact that the victims, by virtue of the fact that they have been physically and emotionally traumatised, lack the resources and the political clout to effectively goad the government into action.

### **6.3 Symbolic reparation (legal and administrative interventions) and community rehabilitation**

These measures are aimed at restoring the dignity of victims and survivors of gross human rights violations. These include measures to facilitate the communal process of commemorating the pain and celebrating the victories of the past (TRC 1998 vol 5 ch 1:16). The TRC consequently formulated a number of community rehabilitation programmes which are based on the needs expressed by 90 percent of the victims themselves in their statements.

Death certificates will be issued to people who have not received death certificates for their relatives. Mechanisms to facilitate the declaration of death will be established and implemented in those cases where the family requests an official declaration of death. Exhumations, reburials and solemn ceremonies are envisaged. In a number of cases, the need has become evident for the erection of tombstones and headstones. The costs would be met from the individual reparation grant.

The TRC has recommended that mechanisms be put in place to expunge the criminal records of the victims who received criminal sentences for their political activities. Another recommendation is that mechanisms be implemented to facilitate the resolution of outstanding legal matters which are directly related to reported violations.

For the benefit of the community, streets and community facilities will be renamed to reflect, remember and honour individuals or events in particular communities. The TRC has also proposed the building of monuments and memorials to commemorate the conflicts and/or victories of the past. It recommends that the specific needs of communities regarding remembering and/or celebrating should be honoured through culturally appropriate ceremonies.

National symbolic benefits will include the renaming of public facilities in honour of individuals or past events. The recommendation is that the necessary mechanisms should be put in place by the appropriate government ministries.

## **6.4 Community rehabilitation**

This refers to entire communities that presently suffer the adverse effects of post-traumatic stress disorder as expressed by a wide range of deponents to the TRC. The commission has therefore recommended that rehabilitation programmes be established both at community and national levels. The recommendation is that rehabilitation programmes should form part of a general initiative to transform the way in which services are provided in South Africa. Such programmes can also promote reconciliation within communities. A number of possible rehabilitation programmes have been identified with reference to the needs expressed by deponents in their statements.

### **6.4.1 Health care and social services**

The TRC has recommended that a national demobilisation programme be planned to demilitarise young people and assist them to resolve conflicts without resorting to violence. Many of them are hardened by their past exposure to, and involvement in, political violence. The recommendation is that educational institutions and sporting bodies will have to be drawn into the programme, which should consist of social, therapeutic and political processes and interventions appropriate for the area in which they are being implemented.

The TRC has recommended the implementation of a multi-disciplinary programme to address the stress, trauma and unemployment resulting from the dislocation and displacement of people from their homes because of past political conflicts. The programme calls for the involvement of the relevant Ministries of Health, Housing and Welfare. Equally necessary is the need for multi-disciplinary teams to cater for the emotional and physical needs of victims and survivors of human rights violations. The TRC has recommended that the Department of Health set up easily accessible treatment centres and that it should take into account cultural and personal preferences.

Perpetrators and their families need to be integrated into normal community life. This is essential to create a society in which human rights abuses do not recur. Another recommendation is that family rehabilitative systems be instituted to assist individuals and families to come to terms with their violent past and learn ways of resolving conflict non-violently.

Providing community-based mental health care to victims and their families has been recommended as one of the central features of community rehabilitation. The recommendation is that the public needs to be educated about mental health in order to dispel prevailing negative perceptions of mental therapy. The campaign should include educating the public on the link between mental health and conflicts of the past. However, mental health care should not be regarded in isolation, but should be linked to skills training and socio-economic development projects such as the current Masakhane ("let us build together") project. Also proposed is the establishment of self-sustaining community-based survivor support groups with trained facilitators from the community. The TRC further recommends the setting up of specialised trauma counselling services which could also be used to train health care workers in order to improve their skills in the area of family-based therapy.

In order to compensate for lost educational opportunities as a result of human rights abuses, the TRC has suggested the establishment of community colleges and youth centres which could help to reintegrate the affected youth into society. Rebuilding of schools, particularly in rural and disadvantaged areas, should be prioritised. Remedial and emotional support should be included in mainstream educational programmes. The TRC specifically recommends that educational facilities should provide skill-based training courses to respond to the needs of mature students to help them find employment.

Another proposal is that specific attention needs to be given to the establishment of housing projects in communities where gross violation of human rights led to mass destruction of property and/or displacement. The Ministry of Housing has been suggested as the appropriate authority to put the mechanism in place.

#### **6.4.2 Institutional reform**

In its final report, the TRC has made recommendations around institutional, legislative and administrative measures designed to prevent the recurrence of human rights abuses in the future. Of crucial importance here is the need to establish public confidence in the administration of justice for, under the apartheid era, the majority of South Africans lost faith in the criminal justice system. The courts were regarded with a great deal of suspicion, particularly when deciding political cases. With a few notable exceptions, judges, magistrates, attorneys-general, public prosecutors, court personnel, police officers and correctional services personnel were generally devoid of a human rights ethos. The rule of law was non-existent.

The most formidable challenge, now and in the future, is to reconcile the citizen with the state, which has, in the apartheid era, wronged its subjects and downtrodden their dignity. What is called for now is a justice system that is humane and sensitive to the needs of the marginalised.

In particular, the justice system needs to ensure that people have access to lawyers and to the courts, for access to justice is essential for any legitimate system of justice. It strengthens public respect for the law and

gives people confidence in the justice system. An accused who is unable to afford the services of a lawyer should be assigned legal aid counsel for legal representation helps people to participate more meaningfully in what is normally a complex system of justice. At a practical level, this could be achieved by developing alternatives to state legal aid. More state resources would have to be channelled to university legal aid clinics and to paralegal advice centres.

The courts need to operate on the basis that everyone is equal before the law. Court facilities and services should be available when and where the people need them. Over 95 percent of all civil and criminal cases are dealt with by the magistrates' courts. These courts therefore play a critical role in building the public's trust and confidence in the law and the justice system (Department of Justice 1997:25). In addition, the courts need to meet the special needs of groups such as women, children with disabilities, elderly people and rural communities. It is therefore essential that training programmes be developed that will focus on different social and psychological contexts. This will help to sensitise judges, magistrates and other persons working in the justice system to recognise and appreciate differences, especially in relation to legal disputes (Department of Justice 1997:26).

Furthermore, it is essential that the community be involved in the workings of the justice system. This could take the form of sitting as lay assessors or staffing citizens' advice desks situated in court buildings. This will ensure that the administration of justice stays in touch with actual community experiences, especially insofar as they relate to marginalised and underprivileged groups. This would also help to address the increasing risk of the formal justice system losing touch with reality.

## 7 CONCLUSION

The South African Constitution is filled with the best of intentions. It is widely regarded as being the most progressive Constitution in the world. Its provisions underpin the most salient values of a true democracy: transparent governance; service to the citizenry; accountable structures of government; independence of the judiciary; access to justice; equality before the law; the promotion of a democratic ethos and a culture of human rights, and so on. All this is wonderful, as long as these values are able to materialise. However, the problem with the South African Constitution is that it promises far more than is realistically deliverable. It reminds one of the shepherd who points the way but refuses to follow. The creation of the Truth and Reconciliation Commission is a case in point:

"The principal aim of establishing the Truth Commission was to provide a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence for all South Africans, irrespective of colour, race, class, belief or sex" (Parliament 1995).

This would be achieved by:

"the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective . . . ; affording victims an opportunity to relate the violations they suffered; *the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of*

*the human and civil dignity of victims of violations of human rights [own emphasis]" (Parliament 1995).*

The idea was that the proceedings before the TRC would generate open public discourse around the concepts of reconciliation and national unity. More importantly, this process would help overcome the barrier of silence surrounding the country's past. It is therefore ironic that the TRC, which was intended to erode the conspiracy of silence, has created another wall of silence around what should be a national discourse on reparations. What clearly seems to be eroding, at least from the perspective of the victim constituency, is the commitment on the part of the government to meet the promises it made in 1995.

The victims, by baring themselves, their experiences and their dire plight before the TRC, have contributed enormously to the discovery of historic truth. Leaving aside victims reliving what they have gone through, their appearance before the commission was agonising in itself. One could call it a form of secondary victimisation. They therefore deserve to be rewarded, first for revealing the historic truth; second for what they had to sacrifice physically, materially and emotionally in the struggle against apartheid; and thirdly, because the amnesty provisions in the TRC Act absolve people who receive amnesty for their actions from all civil and criminal liability.

The word "reward" here refers to the restoration of the dignity of victims or the good names of their loved ones who suffered or died in the struggle. The first step in the restoration of the victim's dignity must be the public acknowledgement of the suffering experienced. The second step consists in concerted efforts to compensate them meaningfully and in a way that will make a material difference to their present state of dire deprivation. In sum, the acknowledgement of the suffering of the victims by way of open public debate is a major prerequisite for a promising process of reconciliation. Reparations, be they in the form of money or services, constitute a logical conclusion to the start of that process.

It is hard to understand why the government is reluctant to talk about the question of reparations, let alone having to make the monetary grants available. This is not an issue involving millions of people. The number of victims is small – only 22 000 out of a population of 40 million. Besides, the amount of money they are expected to receive is, by today's standard of living, just over the poverty datum line. Yet, for the victims this would make some material change, no matter how small, to their present economic circumstances. At least it would afford them some opportunity to participate more meaningfully in social and public activities. After all, the present democracy prevailing in South Africa is in no small measure due to their sacrifices. They should therefore be seen as an asset of South African society, not a burden to it.

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