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RECONCILIATION AND RECONFILIATION IN SOUTH AFRICA

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Abstract

The bookkeeping and theological models of reconciliation continue to dominate thought and action in the quest for nation-building in South Africa. Despite their dominance, these models tend towards deepening the polarization of the South African society on the basis of the poverty and wealth divide. The emerging voluntary reconfiliation—without any legal backing—appears to be a better substitute for the over used and somewhat barren bookkeeping and theological models of reconciliation. The thesis defended in this essay, from the standpoint of African philosophy, is that reconciliation as a legislative Act was a still born because of its objective reinforcement of the poverty and wealth divide. Reconfiliation is more suitable for the advancement of nation-building in South Africa.
– Keywords: reconciliation, reconfiliation, sovereignty, democracy, justice, ubuntu

Introduction

There is no question that conflict and, ultimately violent conflict in some cases, ensued between colonizer and the colonized in Africa. The resolution of this conflict through the concession to grant political independence did not include in the case of Ghana and most countries of the formerly colonized countries of Africa the duty to make law aimed specifically at "reconciliation." It is therefore pertinent to ask why is it that "reconciliation" was deemed to be so necessary that the "new" South Africa was legally obliged to enact legislation for the purpose of advancing "national unity" and "reconciliation." In compliance with this obligation, the government of the new South Africa enacted a specific law by the name, the Promotion of National Unity and Reconciliation Act 34 of 1995. This law established the well-known Truth and Reconciliation Commission (TRC) of South Africa. It is curious that the formal wording of the Act does not contain the term "truth" and, yet the "Truth" is the first concept in the popular name, Truth and Reconciliation Commission. One answer to this curious twist is that the Act provides that "full disclosure," that is, the whole truth is obligatory if one must be granted amnesty. So, the truth shall liberate those who tell it from the prospect of being charged, prosecuted and perhaps even landing in goal. From

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another angle, Soyinka argues that the fact that the reconstruction of the "truth" was done within the framework of law with specific objectives was itself a restraint on the liberation of "truth." He considers the point that in criminal law there is a prohibition on retroactive punishment for acts committed in the past when they were at that time not legally punishable. By contrast, he argues against the TRC law that once there is "full disclosure" the law grants advance exemption from punishment. "The problem with the South African choice is therefore its implicit, *a priori* exclusion of criminality and, thus, responsibility. Justice assigns responsibility, and few will deny that justice is an essential ingredient of social cohesion" (Soyinka 1999, 31).

Mindful of the fact that church bodies like the South African Council of Churches (Hope and Young 1981, 94-97) did, in the past, have a Commission of Justice and Reconciliation (RP74 1983:75), it is pertinent to ask why justice is now omitted in the name, Truth and Reconciliation Commission. This question assumes special significance because in terms of the history of South Africa since colonization justice was the core of the struggle for liberation. The omission of justice despite its presence and linkage to reconciliation in the past calls into question the memory of the South African Council of Churches in particular and other church bodies in general, in South Africa. More fundamentally, however, the omission of justice virtually abolishes justice—specifically in the substantive form of sovereign title to territory; the land—as the vital issue of the liberation struggle. Perhaps inadvertently, the omission attempts to erase in advance the quest for justice in the very process of the reconciliation itself. The abolition of justice as the vital issue of the struggle for liberation is tantamount to the continuation of the enslavement of the formerly colonized by their own consent. The attempt to erase justice in advance from the very process of reconciliation is equal to an appeal to tyranny as the means to build the "new" South Africa. The omission of justice and the attempt, be it inadvertent or mere cunning, to erase it in advance from the very process of reconciliation are an impermissible travesty of natural and historical justice.

Justice consists of both the internal and the external dimensions joined together by truthfulness (Kung 1968, 36). These two dimensions must live together in harmony in one person. Truthfulness obliges one to recognize and accept that it is impossible to jump one's own shadow. This is the internal dimension of justice. It demands the promise to oneself in the first place, to be truthful and honest in the quest for justice to the extent of placing one's own survival, one's life at risk. The point is that this dimension ought to be extended to one's relations with others. This is the external dimension of justice. The practice of "justice demands everything of the subject, everything without exception. In its concrete historical form the practice of justice demands not only that we give our abilities and talents but also that we give of our life and even give that life itself; it demands a readiness to die in the interests of giving life" (Sobrino 1984, 58). According to Jon Sobrino, this is political love (1988:82), a love that defines the domain of politics as the theater from which political saints may emerge. This is consistent with the ethics of many indigenous African philosophies. In South Africa, for example, the pertinent ethical maxim from the Northern Sotho language is that: *bakgori ba moriti gase badudi ba wona*. Seen from this perspective, politics is a "dirty game" as conventional wisdom holds but for as long as the fundamental economic paradigm around which it revolves remains unchanged. The ethical imperative for the change of the economic and political paradigm has already seen many political martyrs and this is already the affirmation that the domain of politics has the potential to produce political saints. No doubt, the saints have emerged before the manifest realization of an alternative economic and political paradigm.

In the light of the fact that both the Chairperson and the Deputy Chairperson of the Commission were clergymen and, for that matter, a Black and a White clergyman respectively, the symbolism pertaining to the appointment of clergymen to their respective positions will be explored later.

I propose to deal first with the question why this law was deemed to be necessary. The investigation of this question will include additional ones such as why "reconciliation" especially for South Africa since it was not a legal requirement at political independence in Ghana, Namibia, Tanzania, Nigeria or Zimbabwe, for example. In terms of the constitutional history of South Africa, the transition to the "new" South Africa was merely the inclusion of the indigenous Bantu-speaking peoples of the land into an already existing democracy. The effect of the inclusion was a skin color blind franchise without discrimination on the grounds of sex and religion. The inclusion of the Bantu-speaking into an already existing democracy was deemed to necessitate the abandonment of the principle of Parliamentary sovereignty and its substitution with the principle of constitutional sovereignty. A Bill of Rights (Dugard 1990b, 461; Dugard 1990a, 378; Dugard 1987, 271-280) was introduced to the constitutional history of South Africa for the first time. It is one of the special features of the accession to constitutional sovereignty. I have argued elsewhere that this change of constitutional principle was neither innocent of racism (Motha 2009, 310-314) nor free from the intention to preserve and perpetuate the gains of the questionable "right of conquest" (Ramose 2003, 463-500).

I will conduct a critical inquiry into the bookkeeping and christian (theological models of reconciliation Soyinka 1999, 32). The aim of the inquiry is to establish clarity on the matter, underline the strategic significance of these models and assess whether or not they have achieved their aim. All the investigation in this essay shall be conducted from the standpoint of African philosophy; precisely the paradigm under contestation in all spheres of life in South Africa. I recognize the need to critique the term "African" and I have done so elsewhere. (Ramose 2003, 114-118) Suffice it to state then that the term is infelicitous and is used here under protest.

On the basis of the overall answer to the above questions, I will argue that reconciliation as a legislative Act in South Africa was still born. The Congress for a Democratic South Africa (CODESA) talks leading to the "new" South Africa are responsible for the still birth (Maphai 1990, 87). Instead of achieving "national unity," the still birth inadvertently promotes social tension and polarization. To illustrate this I will focus on the unfolding struggle to define the meaning of philosophy within in the wider context of education in South Africa. This will be one among the few examples I will give. The third part of this essay is the introduction of "reconfiliation"—a term yet to appear in English dictionaries—as an observed and living experience promoting nation building in South Africa.

The Necessity of Reconciliation

Reconciliation presupposes the reality of a conflict. What then is the nature of the conflict in South Africa? It is vital to emphasize the point that apartheid was just the immediate but certainly not the fundamental point of conflict between the conquered, oppressed and economically exploited peoples on the one hand and the conqueror oppressor—the successors in title to the questionable "right of conquest"—in South Africa. Contrary to the claims of interested historiography

in the history of South Africa, it is submitted that the fundamental problem is that between the colonizer and the colonized in South Africa. It is the conflict over the land or sovereign title to territory (Sebidi 1986, 6-7). The conflict subsists despite the establishment and passage of the Union of South Africa, the Republic of South Africa in 1961 and the abolition of the 1983 constitutional dispensation leading to the rise of the new South Africa since 1994. The question of sovereign title to territory arose from the moment the indigenous peoples of South Africa were defeated in the unjust wars of colonization (Troup 1972, 53). The victorious colonizer claimed sovereign title to territory by appeal to the ethically untenable "right of conquest" (Ramose 2002, 486-488). Considered from the point of view of the conqueror's legal philosophy, this putative "right" is questionable since it contradicts the legal maxim that a right does not arise out of an injury: *ex injuria ius non oritur.*

The unjust wars of colonization are unjustifiable in terms of the just war doctrine (Aquinas, *Summa Theologiae*, 2a2ae. 40, 1, Russell 1975, 258-291). Accordingly, the victorious colonizer may not subjugate the vanquished colonized by appeal to the untenable "right of conquest." The British philosopher, John Locke, underlines this point in Chapter XVI under the title, "Of Conquest" in his famous *Two Treatises of Government*. His argument was not deliberately intended for the benefit of the colonized indigenous peoples, heirs to the territory of their forebears from time immemorial. He argued:

> That the aggressor, who puts himself into the state of war with another, and unjustly invades another man's right, can, by such unjust war, never come to have a right over the conquered, will be easily agreed by all men, who will not think that robbers and pirates have a right of empire over whomsoever they have force enough to master, or that men are bound by promises which unlawful force extorts from them. ... From whence it is plain that he that conquers in an unjust war can thereby have no title to the subjection and obedience of the conquered.

The indigenous peoples of South Africa, conquered in the unjust wars of colonization continue to remember this fundamental injustice depriving them of their sovereign title to territory. The ancestry of the title is from time immemorial. They continue to regard themselves as the rightful heirs of the land of their forebears despite the 1994 transition to the "new" South Africa. The more than three centuries long history of subjugation, exploitation and oppression in the exercise of the questionable "right of conquest" cannot be erased from the memory of the conquered peoples merely by the prospect of a new constitutional dispensation intent upon the obliteration of such a memory. The memory cannot be buried because the conquered peoples philosophy of law upholds the principle that *molato ga o bole*. This means that the passage of time does not cancel an injustice nor does it change it into justice. An injustice may not be buried. It may not be "covered by the dust of defeat—or so the conquerors believed. But there is nothing that can be hidden from the mind. Nothing that memory cannot reach or touch or call back. Memory is a weapon" (Mattera 2009, 152).

Conquest in the unjust wars of colonization divided South Africa into the conquered and conqueror. It became the seedbed for the germination of the growth of African nationalism in its multiple varieties and Afrikaner nationalism as well. English nationalism existed and endures but was muted by the subjection of South Africa to the British Crown and the dominance of the English language and culture in South Africa. No doubt other communities existed and continue to exist.

Nothing prevented them from appealing to their language or culture, for example, as the basis for their own concept of a nation. The point I am making by these observations is that conquest in the unjust wars of colonization initiated the growth of two vocal and contending nationalisms in South Africa, namely, African (Leatt, Kneifel & Nurnberger 1986, 89-104; Hope and Young 1981, 36-44) and Afrikaner (Marks and Trapido 1987, 1-70; Moodie 1975, 39-51) nationalisms. The historical conflict ensuing between these two nationalisms—here all the communities that belonged to and enjoyed the benefits deriving from the conqueror status are included—is the reason for the recognition that South African nationhood is to be built. It is the basis for the quest for "national unity" inscribed in "The Promotion of National Unity and Reconciliation Act." According to the progenitors of the Act, "national unity" cannot be achieved without "reconciliation." Precisely what issues are to be reconciled is the basic question. The inescapable general answer to this question is that issues of fundamental natural and historical justice are to be reconciled. From this perspective, the inclusion or exclusion of some issues from the "negotiations" table is necessarily a question of justice. It is necessary to keep this in mind in order to follow the argument I am pursuing.

For three and a half centuries, the conqueror and, in the current situation the successors in title to the ethically untenable "right of conquest," constructed a South Africa that catered for their interests at the expense of the indigenous peoples conquered in the unjust wars of colonization (Elphick and Giliomee 1989, 521-566). In the course of time the group of the exploited and oppressed included what in South African terminology are called Coloreds. It is curious that we are not informed about the specific color used by the imaginary water painter to color the Coloreds into what particular color. By this I wish to underline the point that this naming is a poor excuse to avoid recognizing the people so designated as full, complete and authentic human beings second to none. The name Colored is just a subterfuge. The time is long overdue to abolish this name and simply call individuals by their name in recognition of their full, complete and authentic humanity. Furthermore, the group of the oppressed and exploited included the Indian community from 1860. The Malay community also belonged to the later included group. I will, henceforth, refer to all these groups that shared—to varying degrees and, in different ways—a common oppression and exploitation in South Africa, as the conquered peoples (Ramose 2007, 319-321). The history of oppressive and exploitative inequality in South Africa is well documented and well known (Terreblanche 2002, 3-22, 371-415). It would therefore serve no useful purpose to restate it here in elaborate detail. Suffice it to state that it is precisely this history, inclusive of the fundamental conflict over title to territory, that constitutes the necessity for "national unity" and "reconciliation" in South Africa.

The Legal Imposition of "National Unity and Reconciliation" in South Africa

The experience of colonialism in Africa does not warrant the granting of an exceptional special status to South Africa to the extent that it is the only one in need of reconciliation. At decolonization, the independent countries of Africa were, in general, not burdened with the legal imposition to institute a mechanism for national unity and reconciliation. The question of the decolonization of South Africa is indeed delicate and quite ambiguous. This is because the republican status

attained by conqueror South Africa in 1961 excluded the voice of the conquered peoples. Even if South Africa might have been technically decolonized at that point, it was not politically decolonized from the point of view of the conquered peoples. One may argue to contradict this point by beginning with the ethically and politically untenable premise that the conquered peoples had no justification in pursuing their struggle by peaceful means and, ultimately, deliberately resorted to the use of armed force. The birth of the "new" South Africa, however defective, is proof that the preceding premise is by every test untenable. Accordingly, for the conquered people, the defective decolonization of South Africa was at the expense of the birth of the "new" South Africa.

It could be argued that the decolonization experience of Africa does point the other way, namely, that if the conquered peoples of South Africa had learnt from those who attained political independence before them in Africa, then they should have, at least, doubted the necessity for reconciliation imposed by legal fiat. The African experience of political freedom without economic independence should have been the subject of vital ethical and political deliberation much more than the imposed necessity for legal reconciliation.

Reconciliation without Justice

The omission of "justice" through the mechanism of amnesty attracted resistance. The high point of this resistance was the Constitutional Court case of The Azanian Peoples Organization (AZAPO) versus The President of the Republic of South Africa (Case CCT 17/96). It was held in this case that the CODESA "negotiations" culminated in an interim Constitution, Act 200 of 1993,

> committed to a transition towards a more just, defensible and democratic political order based on the protection of fundamental human rights. It was wisely appreciated by those involved in the preceding negotiations that the task of building such a new democratic order was a very difficult task because of the previous history and the deep emotions and indefensible inequities it had generated; and that this could not be achieved without a firm and generous commitment to reconciliation and national unity. It was realized that much of the unjust consequences of the past could not ever be fully reversed. It might be necessary in crucial areas to close the book on that past (CCT 17/96, 2).

I wish to make the following points with regard to this citation from Justice Mahomed's judgment.

First. It is problematical to describe the CODESA talks as "negotiations." One of the features of these "negotiations" is that they were conducted inside South Africa instead of on neutral ground outside of South Africa. The conduct of negotiations among parties with unequal power inside the domain of the more powerful party objectively restricts the freedom of expression and diminishes the power of the weaker party to pursue specific demands. In such a situation there cannot be negotiations in the proper sense because no prudent person will make all the necessary demands once the person is already inside the mouth of the ready to devour lion. It was in view of this situation that the Pan African Congress of South Africa withdrew its participation from the CODESA talks, "accusing its Patriotic Front partner of colluding with the forces of apartheid" (Sparks 2003, 101). The walkout of the Pan Africanist Congress did not deter those who regarded themselves as the major parties to the negotiations from continuing. Nor would they in the future

be deterred by any other walkout, "once the two major players had agreed, the process went ahead" (Sparks 2003, 101).

The ultimate outcome of the "negotiations," being the final Constitution of the Republic of South Africa, Act 108 of 1996, leaves no doubt that deliberation over natural and historical justice did not attain finality satisfactory to all the constituencies of the parties to the "negotiations"; let alone those who were not consulted at all about the "negotiations." At the outset, the process was elitist, if not undemocratic. Neither the government, nor the ANC had a mandate to engage in the negotiation process. If anything, the Nationalists won the 1989 elections on the explicit slogan that the government would never negotiate with "terrorists" or "communists." De Klerk only legitimized his participation in the negotiation process after the 1992 Referendum. The white electorate was asked, specifically, whether or not it approved of the negotiation process which began in 1990. The ANC's decision was ratified, though grudgingly, at its Policy Conference in July 1991. Although Whites were consulted as a group, Blacks, as a collective, had still to express their view on the negotiation process. If any consultation of Blacks took place at all, it was largely through opinion polls" (Maphai 1994, 68). Reduced to plain language, this citation states that De Klerk consulted Whites about the negotiations only after the process had begun and the ANC did the same but its scope was limited only to its members. Whereas De Klerk took the trouble to consult Whites as a group, Blacks did not have the honor of such consultation from even the ANC. In these circumstances, dissatisfaction, even among those belatedly consulted, may be expected. This may be illustrated by the apparent postponement of an answer to the original fundamental conflict of sovereign title to territory and, the vital question of economic justice. These two questions were in effect transferred to future generations for resolution. With regard to the ethical exigency of economic justice, it is also not surprising that the call for "economic freedom in our lifetime" is increasingly louder and widespread, especially among the youth of the conquered peoples.

The voice of the youth clamoring for "economic freedom in our lifetime" by focusing on the giant monopoly industries in South Africa is more than an echo of the powerful voice of Nelson Mandela who addressed, during the Rivonia trial, the question of the relationship between the African National Congress and the Communist Party of South Africa in these words:

> The ideological creed of the ANC is, and always has been, the creed of African Nationalism. It is not the concept of African Nationalism expressed in the cry, 'Drive the White man into the sea'. The African Nationalism for which the ANC stands is the concept of freedom and fulfillment for the African people in their own land. The most important political document ever adopted by the ANC is the "Freedom Charter." It is by no means a blueprint for a socialist state. It calls for redistribution, but not nationalization, of land; it provides for nationalization of mines, banks, and monopoly industry, because big monopolies are owned by one race only, and without such nationalization racial domination would be perpetuated despite the spread of political power. It would be a hollow gesture to repeal the Gold Law prohibitions against Africans when all gold mines are owned by European companies. ... Under the Freedom Charter, nationalization would take place in an economy based on private enterprise. The realization of the Freedom Charter would open up fresh fields for a prosperous African population of all classes, including the middle class. The ANC has never at any period of its history advocated a revolutionary

> change in the economic structure of the country, nor has it, to the best of my recollection, ever condemned capitalist society (Mandela 1965, 178-179).

Walshe's interpretation of the "African Claims" in the light of the Freedom Charter is as follows,

> This re-asserted established goals of equality before the law for all South Africans and 'one man, one vote.' No one was to be 'imprisoned, deported or restricted without a fair trial.' On economic matters a further clarification occurred: the old somewhat naïve trust in the simple formula of 'equal opportunity' was seen to be simplistic. Vast disparities of wealth would hardly be redressed in this way. A deliberate redistribution of wealth and resources would have to be countenanced, particularly in land holdings. The growth of state responsibility for key industries was also accepted (Walshe 1973, 32).

As if to prophesy the final destiny of "African Nationalism" in 1994, Walshe noted that amidst the changing political struggle for liberation "there has remained an element of continuity. Although constantly frustrated, African nationalism in South Africa has persistently sought to establish equality before the law as an alternative to the official policies of successive governments. This remains a heritage of great importance and a source of some hope for the future. The ultimate tragedy will be if the idealism of this long search should finally be eroded by persistent and ruthless white privilege" (Walshe 1973, 40). The "future" hope has been realized with the adoption of the new constitution, the Republic of South Africa Act 108, 1996. The constitutional protection of the historically, unjustly acquired wealth by the conqueror and the successors in title thereto speaks to the manifest success of "persistent and ruthless white privilege" to preserve and perpetuate itself even under the new constitutional dispensation. This has opened even wider the wound of the historical injustice of unjust enrichment prompting the conquered peoples, especially their youth, to campaign for "economic freedom in our life time." To delay justice in this regard is to invite the "tragedy" that Walshe contemplates.

Two years after Walshe, R. P. Ngcobo interprets Mandela by reference to an earlier writing ascribed to Mandela in a 1956 publication, *Liberation*. According to Ngcobo, nine years before the publication of the above citation, Mandela interpreted the Freedom Charter clause, "The people shall share in the country's wealth" in these terms:

> It is true that in demanding the nationalization of the banks the gold mines and the land the Charter strikes a fatal blow at the financial and gold-mining monopolies and farming interests that have for centuries plundered the country.... But such a step is absolutely imperative and necessary because the realisation of the Charter is inconceivable, in fact impossible, unless and until these monopolies are first smashed up and the national wealth of the country turned over to the people" (Ngcobo 1975, 47).

If Ngcobo cites Mandela correctly, then there is a problem since in the first citation Mandela is quite explicit that the Charter "calls for redistribution, but not nationalization, of land..." The problem is that this statement, being also an interpretation of the same clause of the Charter, does not quite agree with the one that the Charter demands "the nationalisation of the banks the gold mines and the land." Ngcobo's interpretation of Mandela is also problematical. First, he endorses Mandela's statement as the rejection of the idea that all that is needed is "to put a black face on the

operation of the state-monopoly capitalist system in South Africa" (Ngcobo:1975:48). This is still in order. It is, however, the second interpretation that raises a problem. The interpretation is that: "At the same time it is important for socialists and others to realise that this is not a socialist program. To take into the hands of the organs of popular power the mines, banks and monopoly industry, and to seek to regulate the conditions in which all other industry and commerce will operate, is indeed an ambitious and far-reaching aim; but it will not eliminate private ownership, not the operation of the profit motive, nor all sources and accumulations of private wealth." Ngcobo's interpretation of the Charter on this clause is consistent with Mandela's with regard to three counts: (i) it is not "a blueprint for a socialist state"; (ii) the "private enterprise" economic system shall be retained; (iii) the ANC has never advocated "a revolutionary change in the economic structure of the country, nor has, [it] ever condemned the capitalist society." The question is, why is it that the "land" is omitted and only "the mines, banks and monopoly industry" are mentioned expressly? It is elliptical to argue that the land is subsumed under "all sources and accumulations of private wealth." The other three mentioned expressly could also fall under this rubric. So, why mention them specifically?

Six years after the interpretation of Ngcobo, Tambo offered an interpretation of the same clause in his address on the occasion of the 60th anniversary of the South African Communist Party. He stated that:

> The objective of our struggle in South Africa, as set out in the Freedom Charter, encompasses economic emancipation. It is inconceivable for liberation to have meaning without a return of the wealth of the country to the people as a whole. To allow the existing economic forces to retain their interests intact is to feed the roots of racial supremacy and exploitation, and does not represent even the shadow of liberation. It is therefore a fundamental feature of our strategy that victory must embrace more than formal political democracy; and our drive towards national emancipation must include economic emancipation" (Tambo 1987, 206).

Here Tambo refers to "existing economic forces" and their "interests" without identifying any by name. As a result he neither problematizes nor clarifies the question of nationalization in general and, the nationalization or otherwise of land in particular. The merit of his interpretation is that it is explicit, like Mandela's, on the necessity for economic emancipation. Thus, like Mandela, Tambo may be regarded as the authoritative precursor of the "economic freedom in our lifetime" demand for which the youth are currently campaigning. But it is here that declaration policy ultimately became weak when it came to action. In other words,

> ..., what is increasingly universal in the progressive literature on South Africa (not just books but the many discussion documents, academic papers and popular articles) is concern about the new government's deviation from the liberation movement mandate.... Sometimes, such as in the ANC's 1999 campaign literature, it is argued that the process has been slow, but that there is progress nevertheless—yet as I argue below, the steps backward taken by neoliberalism in development policy and economic management throw this assertion into question (Bond 2005, 3).

Archer's interpretation of the same clause, "The people shall share in the country's wealth" was published in the same year as Tambo's. It stated that:

> Redistribution is to be effected in two ways: first, by nationalization, that is, by transferring to the public domain ('to the ownership of the people as a whole') assets held by foreigners, together with individually and corporately owned resources (in mining, banking, and 'monopoly industry'); and second, by control of remaining economic activity in the social interest ('to assist the well-being of the people'). ... In all likelihood, adaptation to a post-apartheid situation will require an amalgam of and balance between ownership forms and innovative regulation and deregulation for which specific precedents for the overall system may be rare but separate components are not" (Archer:1987:336).

Archer's "individually and corporately owned resources" includes land even though the term land is completely absent in the citation. This strengthens the point made with regard to Ngcobo's omission to mention land but make express reference to, "all sources and accumulations of private wealth." Whatever the dissatisfaction and the legitimate criticism of the ANC government with regard to development policy and economic management in the context of neoliberalism, it must be remembered that at the "negotiations" the ANC remained true to Mandela's recollection that the ANC has never "condemned capitalist society."

Second. The transition to "a more just" political dispensation does not by necessity warrant the closure of the book on the past in a manner that preserves its unjust consequences. The price to be paid for this is "generous commitment to reconciliation and national unity" as the judgment upholds. It is problematical, to put it mildly, to invite anyone to extend and exercise generosity to the other to the detriment of the invitee's individual survival. An invitation such as this is tantamount to a demand to forego the exigencies of natural and historical justice. It is virtually a command to renounce the just demand for reparations. Here it is pertinent to recall that at the end of World War II, the German Chancellor Konrad Adenauer, acted out of moral sensitivity and rectitude to bind even the unborn German, to pay reparations to Israel (Honig 1954, 567). Instead of addressing such an invitation to the conquered peoples, the learned Judge would have done better to invite the successors in title to conquest to act like Chancellor Konrad Adenauer.

Furthermore, the Judge's invitation to the conquered peoples is tantamount to the demand to relinquish the just claim for the restoration of unencumbered sovereign title to territory as at conquest. To honor such an invitation is to condone and legitimize the ethically untenable "right of conquest." And honoring such an invitation is precisely what has happened. On this premise, the transition to "a more just" political order could not be just at all since it was the renunciation of the exigencies of natural and historical justice in the form of reparations, restitution and restoration of sovereign title to territory. This cannot be a "generous commitment to reconciliation and national unity." On the contrary, it is the very negation of reconciliation, even according to the bookkeeping model, because only the credit side of the books is completed with figures whereas the debit side contains figures which simply do not add up to the same grand total on both sides.

Democracy is a Means and, Not an End

Third. The prospective establishment of a "democratic political order" may not override the right to life of the conquered peoples of South Africa (Ramcharan 1983, 297-329). This underlines the fact that democracy is only a means. It is not, contrary to Mancini, an end by and in itself

(Mancini 1998: 41). On this point, Weiler, argues plausibly against Mancini in these terms: "Democracy, dear friend, is not the end. Democracy, too, is a means, even if an indispensable means. The end is to try, and try again, to live a life of decency, to honor our creation in the image of God, or the secular equivalent. A democracy, when all is said and done, is as good or bad as the people who belong to it. A democracy of vile persons will be vile" (Weiler 1998: [97]).

On the basis of Weiler's criticism, it is submitted that talk about "democratic values" is at best elusive to the extent that it creates the impression that such "values" are self-evident, immutable and permanent. The citizen must be educated about democracy in order to benefit from it. Education about democracy must enlighten the citizen about its principles which are far from self-evident, let alone immutable and eternal. Without such education the quest for the establishment of a "democratic political order" may not—ethically and politically—trump the right to life of anyone,

> ...since the domestic household is anterior both in idea and in fact to the gathering of men into a commonwealth, the former must necessarily have rights and duties which are prior to those of the latter, and which rest more immediately on nature. If the citizens of a State—on entering into association and fellowship, experienced at the hands of the State hindrance instead of help, and found their rights attacked instead of being protected, such associations were rather to be repudiated than sought after" (*Rerum Novarum* par. 10).

Ignorance about democracy is a deadly serious defect since in practice it may lead to the violation of the citizens' right to life. This is because,

> [T]he defects of democracy are most largely due to the ignorance of democracy; and to strike at that ignorance is to attack the foundation upon which those defects are built. In the presence of that ignorance it is inevitable that those who can afford the luxury of knowledge will alone be likely, or even able, to make their desires effective. A State which fails to offer an equal level of educational opportunity to its citizens is penalizing the poor for the benefit of the rich. There cannot be a responsible State until there is an educated electorate" (Laski 1938, 78).

Given the past history of South Africa and the prevailing widespread illiteracy, it is not difficult to appreciate, though with apprehension, the relevance of this citation to contemporary South Africa. Ignorance or defective knowledge about democracy turns elections into a ritual manipulated by the able few to protect and advance their interests to the detriment of the many. The silent takeover of democracy (Hertz:2002:13-15) and the resurrection of timocracy, that is, money-based rule (Ramose 2010, 291-303), in our time affirms this observation. Evidence abounds to show that ours is the season of business managed democracies (Beder 2010, 496-518). The learned Judge should have alerted the conquered people of South Africa to the deadly reality of timocracy instead of inviting them to the adoration of bygone democracy.

The Status of Ubuntu in South African Law

Fourth. The AZAPO judgment cites the epilogue of the interim Constitution wherein *Ubuntu* is invoked. Having briefly referred to some of the causes of social strife and conflict in South Africa, the preamble urges the people of South Africa to recognize the need to approach the resolution of this conflict with "understanding" and not "vengeance." It calls upon them to acknowledge "a need for reparation but not for retaliation, a need for Ubuntu but not for victimization." It is ethically and politically significant that *Ubuntu* appears at all in the interim Constitution. It is equally significant that it is paired with the rejection of "victimization". Why this pairing? Is it supposed that the Ubuntu communities already harbor the intention to victimize the non-ubuntu communities of South Africa? If the answer is in the negative then the pairing is unnecessary and must be ignored and excised. To reject the proposed excision is to suggest that even though the Ubuntu communities do not harbor the intention to victimize the non-ubuntu communities, the communities themselves entertain the fear that they will be victimized. It is tempting to dismiss the fear as irrational. However, it is pertinent to suggest that in view of the history of disseizin, dispossession, expropriation, economic exploitation and political oppression that the Ubuntu communities have suffered at the hands of the successors in title to the ethically unjustified "right of conquest" in South Africa, there is ground for the fear of victimization. But why should the Ubuntu communities be singled out since the other communities of the conquered people also suffered expropriation, economic exploitation and political oppression? The omission of these other communities renders the invocation of Ubuntu, at best, suspect and, at worst racist.

The appeal to Ubuntu in the epilogue of the interim constitution must be seen in the light of the law of the conqueror in South African. According to this law, the content of either the preamble or the epilogue of the constitution has no legal force and effect. Such content is, without any intention to ridicule, ornamental. Any reference to it in any judgment is equally an adornment, a kind of aside or *obiter dictum* without any significance or impact on the judgment. The judgment is neither enriched nor impoverished by the inclusion or exclusion of Ubuntu. The fact that Ubuntu is totally excluded from the 1996, Act 108 constitution may be construed as affirmation of its futility for purposes of jurisprudence. After her critical study of the judgments which referred to Ubuntu in the Makunyane case in the Constitutional Court and, in answer to her question on the relationship between the politics of form and South African interpretation regarding Ubuntu, Kroeze concludes that "Ubuntu was rendered ineffective as a constitutional value because it did not fit within the discourse of traditional legal thinking. By trying to force it into the mould required, the court has effectively destroyed its uniqueness and, as a result its usefulness" (Kroeze 2002, 261). Despite this conclusion, the Constitutional Court has continued to appeal to Ubuntu in some of its judgments. This practice is a veritable enigma of jurisprudence in South Africa.

The ongoing invocation of Ubuntu in some judgments, for example, in Port Elizabeth Municipality v Various Occupiers, Judge Sachs declared that: "In a society founded on human dignity, equality and freedom, it cannot be presupposed that the greatest good for many can be achieved at the cost of intolerable hardships for the few.... The spirit of Ubuntu, part of the deep cultural heritage of the majority of the population suffuses the whole constitutional order" (http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/x/0/0/5/0#op). It deepens the enigma of jurisprudence in South Africa. First it must be emphasizes that Ubuntu is totally excluded from Act 108 of 1996 superseding the previous 1993 interim constitution. It is more than doubtful that the exclusion of

Ubuntu is simply the result of collective amnesia on the part of the participants to the "negotiations." More fundamental is the recognition that the exclusion of Ubuntu is not merely forgetting about the word. It is, ethically the questionable exclusion of "the majority of the population" as Judge Sachs prefers the expression, from participation in constitution making despite the physical presence and activity of this majority in the "negotiations." For this reason it is philosophically and politically contentious precisely because it is the silencing of the epistemological paradigm of "the majority of the population." The dominant and exclusive voice of the "constitutional order" of South Africa is the epistemological paradigm of the successors in title to the questionable "right of conquest." The silenced epistemological paradigm of "the majority of the population" is recognized merely as "customary law" expressly subordinated to the constitution as the "supreme law of the country." On what basis then may "the majority population" refer to the constitution as "our constitution"? Furthermore, it remains a mystery how Judge Sachs sees the philosophy and epistemology of an excluded people nonetheless suffusing "the whole constitutional order" of South Africa. This mystery could perhaps be penetrated by reference to some of the arguments against the incorporation of a Bill of Rights to the unwritten constitution of the United Kingdom.

In his argument against the incorporation of a Bill of Rights to the unwritten constitution of the United Kingdom, Lord Boston quoted with approval the following argument of Lord Diplock, "It is inevitable in a modern society, in which judges have to interpret social legislation about which strong political views are held on either side, that this tends to bring judges into the political arena.... If we are to pass a Bill of Rights in the form of the European Convention, it is inevitable that that tendency will increase, because a Bill of Rights in that form compels the Judiciary to make political decisions" (Boston 1980, 26). It is significant that Lord Boston prefaced his approval of Lord Diplock's argument with his own focused on the "serious disadvantages" which would ensure were such incorporation to be allowed. He argued that "it would be quite undesirable for Parliament partly to legislate and then to hand over the matter to the judges and require them to legislate as to the remainder" (Boston 1980, 26). It seems fair to surmise that the Bill of Rights in the constitution of South Africa has inevitably hurled judges "into the political arena" compelling "the Judiciary to make political decisions" even by superfluous appeal to Ubuntu. It is, however, well known that the argument against the incorporation of a Bill of Rights in the United Kingdom did not succeed. The British Human Rights Act, 1998 and the United Kingdom Supreme Court now exist though not without continuing contention (Malleson 2011, 754).

On the Necessity of a Legally Imposed National Unity and Reconciliation

The question here is whether or not a legally binding process of national unity and reconciliation is necessary. The answer is that such reconciliation is unnecessary. The demand for a legally binding process of reconciliation is equal to a forced marriage in which the partners were ill-prepared to love each other. The substitution of justice with truth remains a fundamental flaw of the TRC. In his comprehensive and critical evaluation of the TRC Report, Mamdani argues that: "The Act defined the overall objective of the Commission as promoting national unity and reconciliation. In limiting the definition of victims to political activists whose rights had been grossly violated, the Commission narrowed its overall objective to promoting unity and reconciliation within

South Africa's fractured political elite. From the quest of social reconciliation, it narrowed its mandate to that of political reconciliation. In an attempt to reinforce the political compromise achieved at Kempton Park, it crafted a moral and intellectual compromise. Whereas the morality of the political compromise may be defended, that of the moral and intellectual compromise-the diminished truth as told by the Commission-is difficult to defend" (Mamdani 2002, 57). It follows that the TRC polarized instead of promoting social cohesion in South Africa. I now turn to a consideration of the bookkeeping and theological models of reconciliation.

The Bookkeeping Model of Reconciliation

Bookkeeping involves the periodic submission of reconciliation statements. The core requirement here is that in balancing the books, the end result should be that the final total amount on the debit side must be exactly the same as that on the credit side. If this is not the case then the reason for the difference must be found otherwise the books do not balance and there is thus no reconciliation. Once the required final result is achieved then the matter is closed.

This model of reconciliation was at play with regard to the manner in which some of the major activities of the Truth and Reconciliation Commission were conducted. First, the life of the Commission was fixed beforehand. This corresponds to the bookkeeping period at the end of which a reconciliation statement must be submitted. Second, the figures in the financial transactions would be substituted by real live persons appearing to the hearings of the TRC. Such appearances were the opportunity to engage in the figurative balancing of the books. Third, it seems it was assumed, legally, that legal reconciliation would have been achieved at the end of the life of the TRC. Following upon this the necessity for legal reconciliation would cease.

Indeed, the Truth and Reconciliation Commission has come and it is gone. Yet, independent or university attached centers and institutes for reconciliation continue to exist and function. This development cannot be the continuation of legal reconciliation since it is not the creature of a Parliamentary legal fiat. It is the recognition that the quest for reconciliation is worth pursuing even without the backing of the law as it was the case with the Truth and Reconciliation Commission.

The Christian Theological Model of Reconciliation

The Christian theological model of reconciliation takes its inspiration from Jesus Christ. After the "fall" of the parents of humanity, Adam and Eve, it is said that the triune god of Jesus Christ decided out of kenotic love to restore the broken relationship with Adam and Eve. This, god did by sending Jesus who reaffirmed through the resurrection, the restoration of the relationship between god and Adam and Eve. This is the essence of reconciliation from this perspective. It is the Christian model of reconciliation. According to this, the resurrection reopens the gates of heaven only for those human beings who choose to live according to the commandments of god. Thus, the door is left open for those who prefer to turn their back on god and march towards eternal damnation in hell together with Lucifer, a former fallen angel.

The above brings me to the symbolism of the appointment of a Black and White clergyman as Chairperson and, Deputy Chairperson respectively of the Truth and Reconciliation Commission. It is to be noted that both are male. Yet, Christian feminist theology has argued and, in some cases with success, against the tradition of denying women ordination to the priesthood. The question thus arises why is it that a woman was not appointed either Chairperson or Deputy Chairper-

son? Also, the appointment of a Black and White member of the South African community creates the impression—rightly or wrongly— that it is these two communities which matter most. Is this because the principle of equality, one of the cornerstones of the South African constitution, is indeed an empty concept to be filled in according to the needs of time and place? Even if this may be so, it is unlikely to eliminate the sense of being discriminated against on the part of women and other communities comprising the South African society.

It is also curious that with regard to the Truth and Reconciliation Commission, the appointment of the Chairperson and the Deputy departed from the long standing tradition of identifying a member of the judiciary, usually a Judge, to act as Chairperson. Clerics are believed to be the representatives of god here on Earth, at least if one must take the Petrine Commission seriously; "Thou art Peter and upon this rock I shall build my church..." As intermediaries between god and human beings clerics command great respect. They are believed to preach, act and promote the good that god will for all human beings. Once this reasoning is taken seriously, it should be clear that the appointment of the clerics was symbolic. It was a subtle statement that the clerics could not associate themselves with the TRC unless they were satisfied that it was in accordance with god's will. "The selection of Archbishop Tutu to head the TRC with Alex Boraine as his co-chairman is a prime example. The TRC's creditability among all sectors of South African society was given an immediate boost. Significantly, many whites who had supported apartheid began to believe that the formal truth-telling concerning South Africa's past would not be a one-sided witch hunt" (Daye 2004, 9). It is significant that the author writes of "selection" and not appointment. Furthermore, the claim that "all sectors of South African society..." are embraced is rather exaggerated since neither Archbishop Tutu nor Reverend Alex Boraine necessarily represent the Coloured or Indian communities, for example.

The symbolism underlying their appointment is the subtle challenge to those who might object over the establishment of the TRC. Their objection must be judged to be unsustainable because as creatures they have the obligation to abide by the wish of god. God is depicted as willing to have the TRC by virtue of his—or shall I address the god as a she, in deference to the legitimate feminist sensitivity?—representatives' association with it. It is thus a matter of "god is willing, so who are you, a mere creature of god to thwart and disregard his will?" In view of the arguments above against the legal imposition of the TRC, it is unlikely that god's will could condone the manifest injustices identified in those arguments. It follows then that I disagree with Daye's rejection of retributive justice and his untenable assumption that restorative justice is the best option South Africa could have made through the TRC. According to him, "Restorative justice involves attempts to compensate victims or repair communities and institutions that were damaged by unjust action or a time of strife" (Daye 2004, 10).

Finally, if the kenotic love of the Christian god is most perfect why is it that to date it did not spill over to Lucifer and the angels that supported him? Like Adam and Eve, Lucifer fell but only the former were given a second chance through reconciliation. Such divine discrimination reveal defective and not superlatively perfect love. For those Africans whose religion does not include the prospect of hell as the destination, the Christian theological model of reconciliation can hardly be convincing. Apart from the absence of such a prospect in some African religions, eternal bliss in heaven and condemnation in hell surely offend against the principle of proportionality since it remains a mystery as to what exact proportion of eternity is any given temporal human life.

Reconfiliation

I borrow the term reconfiliation from Anthony J. V. Obinna. He reasons thus about it: "The word 'reconfiliatory' which the computer mistakes for 'reconciliation' may be unfamiliar, but it is not totally strange. 'Re-con' the first part in the word 'reconfiliation' means to bring together. 'Filiation' the second part has a relationship with the words 'filial' and 'affiliate' both of which evoke a sense of belonging that approximates that of son or daughter in a family. 'Filius' and 'Filia' are the Latin for son and daughter respectively. Much more directly and, as I will use it in my talk, the word 'reconfiliation' with verb forms refiliate, confiliate and reconfiliate describes and defines the fact of granting , effecting, regaining, and reclaiming the right of sonship and daughtership in a family fellowship with other sons and daughters of the family. Though reconfiliation is closely related to reconciliation it adds an absolute dimension to the peace-making and harmonizing thrust of reconciliation by emphasizing the equal dignity of all persons who need to be reconciled" (Obinna 2003, 2). Obinna's reasoning on this term has got three virtues. One is that it captures the necessity for the restoration of fellowship or community. Another is that it endorses the equal dignity of all human beings. The third is that it is gender sensitive and can thus avoid the wrath of feminism.

Thus conceived reconfiliation is intimately connected to the African ethical dimension of community (Bujo 1998, 29-32). It is inconceivable how one can be granted fellowship or reclaim one's right to being a son or a daughter without first acknowledging that he or she is born into a family. It is insufficient to recognize the family bond merely by verbal declaration. Recognition demands continual active participation and engagement intended to promote the well-being of everyone in the family, including oneself. This kind of participation demands the deliberate and constant removal of all obstacles to the promotion of the well-being of everyone including oneself. A filial engagement of this nature is indispensable for conflict resolution and the construction of harmonious human relations.

The Living Experience of Reconfiliation

In this section, I am writing contrary to the "scientific" convention that cold hard facts must be presented and, even better in abstract mathematical terms. The hollow, lifeless facts of "science" are subject to multiple manipulations with neither empathy nor desire to understand the life world context from which the facts are distilled. Instead of this mode of writing, I will present the living face plunged into preventable suffering only if humans were to decide to live and act Ubuntu. I am presenting the living face with due empathy because there is no reason to conclude that Emmanuel Levinas' "epiphany of the face" is a scientific aberration.

There are multiple causes of the everyday living reality of reconfiliation in South Africa. Poverty which has become manifestly skin color blind since 1994 in South Africa is one of the causes. It is teaching the destitute and the despondent to learn to live together as brother and sister. I am writing of those men and women and children in South Africa whose earthly belongings are often rugged dirty clothes that can hardly fill up an ordinary plastic garbage bag. I am writing of unwashed Indian, White, Colored and Black women and children whose luxury bedroom is often the street pavement or the hard soil under the tree. I write of brothers and sisters in the open field.

They smell of soil from mother earth and smoke from firewood because they have not the luxury to own even the cheapest bed in the market. Succumbing to Foucault's "sting of desire," some of them pair as male and female satisfying their sexual urge like birds who have no need of their right to privacy.

I write of men who live in mirthful oblivion of the woman's menstrual cycle and, of women condemned to invent sanitary pads. I am writing of human beings who have no toilets and attract no one to make no toilets an election issue. Despite their no toilets existence, these human beings respond to their biological need for bowel action. I write of us who waste and throw away food into our garbage bins without the slightest recognition that in doing so, we share it with our sisters and brothers turned into scavengers by deadly structural, systemic, systematic and historical poverty. Their digestive system has developed a solid immune defense to shield them against disease arising from their desperate consumption of our garbage waste food.

I write of men and women who have lost consciousness of their skin color and live in the townships, travel in unmetered taxis together with the township dwellers and even do ask for salt, a cigarette and money from them. This is the living experience of reconfiliation in South Africa. It is the face that has come into being not by legal fiat but born out of the existential necessity to recognize the other as a brother or a sister and promote their well-being instead of killing them softly or instantly. It is the face that can never remember the Truth and Reconciliation Commission because it did not know about it, in the first place. It is the face oblivious of death but cherishes the hope to be buried. This is the face that is actively but indifferently engaged in building the new society of South Africa: a society that shall live the principle of equality in our humanity and practice no discrimination on the basis of class, skin color, religion or sex. This is the living experience of sharing without regard for artificially constructed boundaries arising from biology or geography. It is reconfiliation as the living experience of social cohesion in the making.

It is ironical that for many this "epiphany of the face" seems invisible. On the rare occasions when it is seen, it is glimpsed at with studied indifference. This questions and even undermines Levinas' thesis that "the epiphany of the face" ought to evoke moral responsibility for the other. Also, it calls into question Enrique Dussel's thesis that philosophy is about the non-philosophical. (Dussel 1985, 3) According to this liberation philosopher—coincidentally supported by Kwame Nkrumah on this point (Nkrumah 1964, 54-55)—the written philosophical text may not be construed as the primary, sole and absolute source of philosophy. Rather, it should be understood as a readily available means to inspire the critical reader to write her or his own philosophical text. The face of the living reality of reconfiliation is the marginalized domain of the non-philosophical. It is the already written and continually being written philosophical text. As such it is a challenge demanding a philosophical critique of the already lived written text and the continually being written text. A philosopher cannot deal with the latter without recognizing change as the principle of being. Such recognition imposes upon the philosopher the double edged task of interpreting and changing the world. Seen from this perspective, "disturbance" is the hallmark of philosophy, as Maurice Merleau-Ponty has argued. As "disturbance" philosophy is unsettling because of its acute and insightful sensitivity to change as the principle of be-ing. Ultimately, philosophy proper is philosophy of liberation because it must treat human conflict as an appeal to the reconfiliation of human beings.

Conclusion

I have argued that reconciliation as a legal imposition in the form of the Truth and Reconciliation Commission of South Africa was ethically and politically flawed. As a result it deepened the polarization of South African communities instead of promoting social cohesion in the country. I have shown that both the bookkeeping and the theological models closely connected to the TRC process were problematical. The appeal to Ubuntu, especially in South African jurisprudence, smacks of racism precisely because of the arbitrary singling out of the Ubuntu communities of South Africa. Such an appeal is, in terms of jurisprudence, vacuous at best and provocative at worst. It is in the light of such a critique that I have proposed the option for reconfiliation in part because it is the lived and living experience of those in the margin of South African society.

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