

THE TRUTH AND RECONCILIATION COMMISSION : LEGISLATION, PROCESS AND EVALUATION OF IMPACT

Paper 12

by Dr Russel Ally

Centre for Human Rights

University of Pretoria

June 1999

What is this animal called the Truth and Reconciliation Commission? (I use "is" deliberately. Although the TRC has submitted a 'final report' to the President, the process still continues through the work of the Amnesty Committee.) The formal aspects of the TRC are easy enough to grasp and explain. The Truth and Reconciliation Commission was established in terms of the Promotion of National Unity and Reconciliation Act. The Act was signed into law by the President on 19 July 1995 and came into effect on 1 December 1995 (a process which coincided with the appointment of the Commissioners). The Promotion of National Unity and Reconciliation Act defined the objectives, functions, powers, and so forth of the Truth and Reconciliation Commission - in short, what is described as the mandate of the Truth and Reconciliation Commission.

This mandate was to:

- establish as complete a picture as possible of the causes, nature and extent of gross violations of human rights;
- facilitate the granting of amnesty to persons who make full disclosure;
- establish and make known the fate or whereabouts of victims and restore the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations and by recommending reparation measures;
- compile a report providing as comprehensive an account as possible of the activities and findings of the Commission.

All of this is done in pursuit of one overriding objective: to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past (we shall return to this point later - is this possible, indeed is it realistic?)

On the surface this is a broad and far-reaching mandate (which in reality it also was) but there were certain important qualifications and provisos:

Firstly, the period of investigation - both for establishing gross violations of human rights and for eligibility for amnesty for committing gross violations of human rights - was fixed - 1 March 1960 (initially to before the elections and later extended to the date of the President's inauguration). This period was not arbitrary. It represented the period during which the conflict changed from a peaceful conflict to an armed conflict until the formal 'birth' of the new South Africa.

Secondly, the focus of the investigation had to be explicitly political. This would prove to be critical. It was the political conflict which - so to speak - was 'on trial'. While this period coincided with the apartheid system, it was not apartheid as such which was on trial.

Thirdly, particularly with regard to the amnesty process - which I will not be able to deal with in any detail - it was not only political in the general sense, but party political (organisational). Applicants had to prove party affiliation (whether from the within the state or from outside the state) and had to prove that they were carrying out political orders (this was the crux of the matter in the refusal of amnesty to Derby-Lewis and Walus in the Chris Hani case).

To carry out its mandate the TRC was structured along the following lines:

- a Human Rights Violations Committee - to investigate gross human rights violations, make findings on gross human rights violations, hold public hearings;
- a Reparations and Rehabilitation Committee - to help restore the dignity of victims of human rights violations and make recommendations on reparation and rehabilitation;
- an Amnesty Committee - to deal with applications for amnesty.

While the first two bodies functioned largely in a 'non-legal' capacity (although within a legislative framework), the latter committee functioned in a quasi-judicial manner.

This then was largely the external appearance of the TRC. But what made it tick and why was it created in the first place?

The reasons for the establishment of the TRC are varied and complex. Broadly the reasons can be divided into two categories:

- international experience and considerations;
- South Africa's own transition from apartheid to democracy.

With regard to international experience and considerations:

South Africa's political conflict became one of the most 'internationalised' conflicts of recent history. The international community 'adopted' the South African conflict as its own.

In the United Nations, resolution after resolution was passed, culminating in apartheid being declared a crime against humanity.

At the time of South Africa's transition to democracy a significant body of international human rights law dealing with situations similar to our own was already in existence. The world had seen war tribunals being held, (Nuremberg and Tokyo) and truth commissions being established (Argentina, Chile).

During the negotiations in South Africa between the former antagonists (erstwhile enemies), it was only to be expected that the world turn its attention to South Africa - waiting to see what path it would follow. Would it go the route of political trials or would it choose the path of a truth commission? In the end the country chose a 'hybrid'. But it had to adopt one or other approach. The international community would not have been satisfied with nothing being done. With everything being swept under the carpet. A business as usual approach. This is not to suggest that a TRC was established because of external pressure. It is to observe

that international experience and considerations were factors which cannot be ignored. Indeed, there is possibly a research topic for one of you here today. How much of a factor were these international considerations? What international experiences did South Africa choose and why?

However significant the international environment was, in the end it was domestic considerations which played the major role in not only determining that there would be a TRC but in determining its shape, content and mandate. The TRC can be considered to have been shaped and influenced by the following factors (how one weights these factors is more difficult):

- the nature of the political compromise eventually agreed to by all the parties involved in the negotiations;
- the politics of transition from a society characterised by conflict and violence to a society where the rule of law prevails;
- the ingredients necessary to establish a constitutional democracy and to build a culture of human rights;
- the need to recognise/acknowledge the contribution made by those who fought for democracy (and as a result were killed, tortured or disappeared);
- the need to understand what the political conflict had been all about and to pass 'judgment' on what had happened;
- the need to move away from the politics of racial division, conflict towards reconciliation and a 'common' (notice, not 'uniform') identity.

These factors are certainly not exhaustive. In my opinion they were the most important and form the background to understanding the legislation enacted, the process embarked upon and help to explain the 'personnel' who staffed the TRC. (This latter point is a topic of discussion in itself. I am one of those who believes that the 'subjective' plays a crucial role in historical events. The 'appointments' to the TRC influenced it in a deep and profound way, often in ways which could not have been predicted at the time).

Let us deal with some of these issues in a little more detail. Firstly, the political compromise.

The legislation setting up the TRC was explicit. The TRC had to establish 'as complete a picture as possible of the political conflict'. Moreover, the TRC could only deal with certain categories of human rights violations: they had to be gross and covered killing, disappearance, torture and severe ill-treatment. In dealing with these cases of gross violations the TRC had to be even-handed. That is, it did not matter the source of the violation (whether from the apartheid state or the liberation movements). All violations had to be examined and findings had to be made on all cases.

This explains to some extent the anger within some circles in the African National Congress at the findings of the TRC. In making findings on gross violations of human rights the TRC did not discriminate. It did not say that because the ANC (or any other organisation opposing the apartheid state) was a liberation movement it could not commit gross violations of human rights or that these violations were 'better' or 'different' to those committed by the apartheid

state. It criminalised all gross violations of human rights. In this way it was not only consistent with international human rights law but was attempting to lay a basis for building a culture of human rights in our own country by ending the culture of impunity.

In short, the TRC was attempting to contribute to the politics of transition from a society characterised by conflict and violence to a society where the rule of law applies.

But while not drawing a distinction between or among gross violations of human rights, the TRC did draw a clear distinction between the motives and perspectives of perpetrators. It did not take sides with regard to gross violations of human rights, but it did take sides when it came to examining the causes, nature and extent of gross violations of human rights. Hence the accusation, particularly from the supporters of the former regime, that the TRC was biased.

This accusation is absolutely correct. In explaining the causes and in characterising the nature of the conflict the TRC took sides. And rightly so. It traced the source of the conflict to the system of racial discrimination and oppression - at the heart of South Africa's history - and laid the blame for the conflict at apartheid's door. Apartheid was a crime against humanity and those who fought against it were involved in a just struggle.

It is important to pause here for a moment and reflect on the above. The TRC did not take sides between the ANC and the nationalist government. In other words, it not take a 'political' side (in the party political sense). It took sides between those who supported apartheid, who defended apartheid, who fought for apartheid's preservation and those who opposed apartheid and fought for its demise. In other words, it took sides in terms of a human rights perspective. There is a huge difference between the two, which unfortunately party politics finds hard (almost impossible) to make. It is the tension between understanding and condemnation. A tension which is never easy to reconcile. As the Italian philosopher Spinoza once remarked, 'You can laugh or you can cry, as long as you understand'.

This brings us to the crux of the matter. If the legislation setting up the TRC and the process followed by the TRC has now become embroiled in such controversy (remember the court cases to either delay or prevent the TRC submitting its Final Report), what basis can there be for achieving the objective of 'national unity and reconciliation'? What hope can there be for promoting 'a spirit of understanding which transcends the conflicts and divisions of the past' when the very instrument established to achieve these ends is itself accused of sowing further division and planting the seeds for further conflict in the future?

This is the issue of evaluating the impact of the TRC. This is not a cop out. But it is too soon to make any definitive judgments.

Perhaps - as an epitaph - it is useful to recall some of the observations in Bernhard Schlink's remarkable novel, *The Reader*, which deals with guilt and accountability during the Nazi period in Germany. The story revolves around a female guard at one of the camps and her trial many years later for complicity in the death of scores of Jewish women. The backdrop is a 'scholarly seminar' (almost like this today) which takes place during the trial, where the law students doing the course discuss and debate the trial (which they are attending and observing). Incidentally the main protagonist is a young man who years ago had a relationship with one of the defendants (unbeknown to him at the time that she had been a female guard at a Nazi prison and a member of the SS).

The story is a personal odyssey. The holocaust is personalised and dealt with through the lens of an intense emotional relationship between someone trying to understand what happened during those years and someone who participated as a perpetrator. The medium for telling the story is literature and history.

A number of issues emerge from *The Reader* which are directly pertinent to how we (and future generations) will evaluate the impact of the TRC.

Firstly, the past cannot be submerged indefinitely. Maybe we have an advantage here. There were trials immediately after the war, but these were war tribunals. The 'real trials' in Germany only took place a generation later.

Secondly, if the generation responsible for what happened (or the generation most closely connected to what happened does not take responsibility), the 'sins' of the parents are visited upon the children. Not all, but a significant part of the generational conflict in Germany in the late 60s and early 70s can be attributed to the failure of the parents to deal with and come to terms with the Nazi past.

Thirdly, and perhaps most importantly, taking responsibility for what happened in the past is the surest way of securing that we take charge of (rather than be victims of or prisoners of) the future. As the author observes in the novel: Doing history means building bridges between the past and the present, observing both banks of the river, taking an active part on both sides (p. 178).

In the Truth and Reconciliation Commission the past and present come together (more strongly, collide) in a single reality. And that reality is about how we intend to embrace our future. In the end then, ironically and paradoxically, the TRC is not about the past (or even the present), but fundamentally about the future. It is the pathway, the stepping stone towards the historic bridge whereby our society can move from a past of a deeply divided society characterised by strife, conflict, untold suffering and injustice towards to a future founded on the recognition of human rights and the respect for all human life. It is about what kind of world we leave behind for our children.