

# Grappling with the Past: The Truth and Reconciliation Commission of South Africa

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## **ABSTRACT**

South Africa's past has to be grappled with, courageously and penetratingly. Especially its recent decades of human rights violations inflicted by the injustice of apartheid, have to be confronted frankly and constructively. In the light of what other countries have done, South Africa opted for a Commission that would do its utmost to uncover the truth and to contribute towards reconciliation. Using as a frame of reference the demanding objectives that had been set for this Commission, this article presents a brief discussion of the functioning of the Commission and an initial assessment of its achievements. The overwhelming and almost impossible task, further complicated by practical and psychological limitations, is taken into consideration. What has nevertheless been accomplished, is duly recognised and appraised. Preliminary conclusions are given for the ongoing responsibilities of respect, reparation and reconciliation. These do not only apply to South Africa's road ahead, but also to all situations where truth has to be revealed and people have to be reconciled.

*No healing is possible without reconciliation,  
and no reconciliation is possible without justice,  
and no justice is possible without some form of genuine restitution.*

*Beyers Naud*

The President [Mandela] believes — and many of us support him in this belief — that the truth concerning human rights violations in our country cannot be suppressed or simply forgotten. They ought to be investigated, recorded and made known. Therefore the President supports the setting up of a Commission of Truth and Reconciliation. The democratic government is committed to the building up of a human rights culture in our land.

There is a commitment to break from the past, to heal the wounds of the past, to forgive but not to forget and to build a future based on respect for human rights. This new reality of the human rights situation in South Africa places a great responsibility upon all of us. Human rights is not a gift handed down as a favour by government or state to loyal citizens. It is the right of each and every citizen. Part of our joint responsibility is to help illuminate the way, chart the road forward and provide South Africa with beacons or guidelines based on international experiences as we traverse the transition. We must embark upon the journey from the past, through our transition and into a new future.

(Omar 1998)

In introducing the Truth and Reconciliation Commission (TRC), the Minister of Justice, Dullah Omar, laid out the path that South Africa would follow to deal with the legacy of the past. It is a path that has been characterised by controversy and difficulties. There were a number of options available to the government with respect to dealing with the past, the most politically expedient being amnesty for all perpetrators, but it was rejected in favour of concern for victims.

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 not forgive perpetrators unless we attempt also to restore the honour and dignity of the victims and give effect to reparation.

(Omar 1998)

## 1. PRECEDENTS

International experience has shown that addressing past human rights violations is a necessary step in the process of reconciliation and nation-building (Wong 1996:1). According to Hayner the purpose of such action, often at the moment of political change or transition, is to demonstrate or underscore a break with a past record of human rights abuses, to promote national reconciliation, and/or to obtain or sustain political legitimacy (Wong 1996:3). Many countries set up official investigations to deal with human rights abuses, particularly since 1991, the year when the Chilean Commission on Truth and Reconciliation published its report. The Chilean Commission marked a turning point in that it became a model for future commissions. Its final report is a comprehensive two volume work which documents abuses and murders in the period of ex-president Pinochet (Truth and Reconciliation Commission 1993). The changes in Third World countries and the Eastern block countries have resulted in more such commissions. Countries such as Israel, Guinea, Uganda and Argentina<sup>2</sup> established commissions to deal with past human rights abuses. Since 1991, there have been about 30 commissions (Bronkhorst 1995:10) in countries such as Chad, El Salvador, Honduras, Sri Lanka and Thailand. Each of these has met with limited success (Bronkhorst 1995:69-77).

In the Eastern European countries, due to their particular circumstances, the commissions developed differently in that there were no truth and reconciliation commissions established, but rather procedures were established to clear or denounce individuals by investigating the material in the files of the former security regimes. This is known as lustration (Bronkhorst 1995:77).<sup>3</sup> Former East Germany, the Czech Republic (while still part of Czechoslovakia), Bulgaria, Latvia and Estonia are some of the countries that have entered this process, with the Czech Republic carrying out the most lustration (Bronkhorst 1995:78-82).

All of the commissions and lustration processes above were not conducted without difficulty or controversy. For example, the truth commissions were not able to recover all the facts of the disappeared or the dead, and there was no full justice rendered with regard to perpetrators. Victims and their families felt cheated by the compromises that were made without their consent.

One such case was in Chile, when President Aylwin set up the commission after sixteen years of military dictatorship. He was convinced that for there to be national reconciliation, there had to be a process of truth and justice for the country. But, he said, we were well aware that full justice is not always achievable and that both

justice and prudence must be harmonised (P. Aylwin in Boraine & Levy 1995:39). As president, and on behalf of the nation, he publicly apologised and requested forgiveness from the families of victims. People felt cheated by this, for they knew that he himself was not responsible for the human rights abuses, and that he was letting perpetrators off the hook (Boraine & Levy 1995:42).

The lustration process can also be very risky as documents and files can be altered (by the previous regime before losing power, or by members of the previous regime employed in the new dispensation) and innocent people could be condemned unjustly. A journalist in Poland noted that he would prefer to see a few bastards go unpunished to punishing huge numbers of innocents (Bronkhorst 1995:78).

It is from this background of international experience that South Africa attempts to deal with the past. It is a brave attempt in uncharted territory of a national process of reconciliation.

## **2. THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA**

Nevertheless, [reconciliation] as a product of negotiated revolution, the newly elected democratic government understood that there was no certainty that it could succeed in imposing victors justice, even had it wished to do so. It faced the risk that to test the limits of the political balance of forces in order to punish individuals would result in what has been called justice with ashes .

(Asmal, Asmal & Roberts 1996:18)

There have been some forerunners to the Truth and Reconciliation Commission in South Africa. A legal commission was set up under Richard Goldstone, a judge in the court of appeals, to investigate the causes of violence in the country. *The Goldstone Commission of Enquiry* identified, among other things, death squad activity within the police force in KwaZulu-Natal. A number of ancillary reports and investigations were released, and some were strongly criticised for not allocating responsibility for the causes of the violence (Asmal et al 1996:82).

The African National Congress (ANC) set up a number of internal commissions to deal with allegations concerning those who had been imprisoned by the ANC (the *Skweyiya Commission*, 1992), and the human rights abuses committed by ANC

cadres in exile in the 1980s (*Motsuenyane Commission*, 1993). The reports found certain allegations to be true and it revealed the identities of those suspected, but the ANC failed to discipline the perpetrators or remove them from leadership positions (Asmal et al 1996:82).<sup>4</sup> The ANC then called for a commission which would investigate all human rights abuses by all parties.

### **Background to the Truth and Reconciliation Commission**

There has been no argument about South Africa's need to make a new start and the need for healing as a nation. The question centres on the how of the process. Two conferences, organised by Justice in Transition, were held in 1994, both in Cape Town, to explore how to deal with the past. The first conference, in February, had its proceedings recorded in a publication, *Dealing with the Past* (Boraine, Levy & Scheffer 1994). Invited participants from Eastern Europe and South America shared their insights with the conference, raising pertinent questions and issues. A second conference was held in July, this time focussing on gathering a broad section of South African participants and organisations. Most political organisations (from both sides of the political spectrum) opposed the idea of a truth<sup>5</sup> commission, and did not send delegates (Boraine & Levy 1995:xxii-xxiii). The proceedings of the conference were recorded in *The Healing of a Nation?* (Boraine & Levy 1995). The Justice Portfolio Committee<sup>6</sup> developed and wrote up the bill which eventually became law.<sup>7</sup> Initially promulgated to cover the period from 1 March 1960 (the month of the Sharpeville massacre) to 5 December 1993,<sup>8</sup> the stated purpose of the Act is

... to bring about unity and reconciliation by providing for the investigation and full disclosure of gross violation of human rights committed in the past.

It is based on the principle that reconciliation depends on forgiveness and that forgiveness can only take place if gross violations of human rights are fully disclosed. What is, therefore, envisaged is reconciliation through a process of national healing.

(Truth and Reconciliation Commission 1998a)

It hoped further to ... find a balance between the process of national healing and forgiveness, as well as the granting of amnesty as required by the Interim Constitution (Truth and Reconciliation Commission 1998a). The Act is a compromise which resulted from the agreements of the negotiation process at Kempton Park between particularly the ANC and the regime. It was in both their interests to see that there would be provision for amnesty for themselves. The Act is, in many

ways, the result of political manoeuvring.

Some from the liberation movement hoped that dealing with the past would enable some concrete outcomes, as noted by Asmal et al (1996:10):

- 1 it will enable us to achieve a measure of justice for the victims of our horrific past by acknowledging the atrocities that they suffered;
- 1 it will provide a basis for a collective acknowledgment of the illegitimacy of apartheid;
- 1 it will facilitate the building of a culture of public ethics for the first time in South Africa and it will make room for genuine reconciliation;
- 1 it will provide a basis for the necessary decriminalisation of the anti-apartheid resistance;
- 1 it will ensure a sound basis for corrective action in dismantling the apartheid legacy;
- 1 it will lay bare the roots of the violence that still plagues parts of the country;
- 1 it will illuminate the longstanding humane values of the anti-apartheid resistance, for so long distorted by apartheid propagandists;
- 1 it will demonstrate the morality of the armed struggle against apartheid;
- 1 it will establish and underpin a new equality of all citizens before the law;
- 1 it will place property rights in a secure and legitimate footing for the first time in our nation's history;
- 1 it will enable privileged South Africans to face up to collective understanding of, and therefore, responsibility for a past in which only they had voting rights;
- 1 it will offer an acknowledgement of the wrongs done to the countries of southern Africa in the name of our country;
- 1 it will clarify the important international implications of apartheid in the past and present, as well as acknowledging the correctness of international mobilisation against apartheid; and finally,
- 1 it will allow for a necessary process of historical catharsis as the previously excluded speak at last for themselves, and the privileged caste joins the South African family for the first time.

### **3. OBJECTIVES AND FUNCTIONING OF THE COMMISSION**

In order to promote the objectives of the Commission there were three committees

which were to pursue its objectives in a complementary manner. Each had its own area of focus:

- 1 Committee on Human Rights Violations (SA Act 34/1995:<sup>9</sup> sections 12-15);
- 1 Committee on Amnesty (SA Act 34/1995:sections 16-22);
- 1 Committee on Reparation and Rehabilitation (SA Act 34/1995: sections 23-27).

There was also an investigative unit (SA Act 34/1995:sections 28-35) whose task was to conduct investigations necessary to complete the objectives of the Commission.

The objectives of the Commission shall be to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past .

(SA Act 34/1995:section 3(1))

The objectives are focused on national unity and reconciliation as opposed to the conflict and division of the past. Neither of the two terms, national unity or reconciliation , is defined by the Act. Their meanings are not self-evident, particularly the latter. National unity would imply the opposite to the conflict and divisions of the past . It would, therefore, be possible to measure to a limited degree its success through gauging levels of conflict and co-operation.

Reconciliation is a much more elusive concept to capture. Since the Act does not define what it means by reconciliation, it would be difficult to evaluate whether the TRC has achieved its goal. This is probably one of the most serious defects of the Act. It is possible, however, to extrapolate from the four main objectives of the Commission what reconciliation would imply.

### **First objective**

Establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period ... including antecedents, circumstances, factors and context of such violations, as well as perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations, by conducting investigations and holding hearings ...

(SA Act 34/1995:section 3(1)(a))

This first objective has as its goal a comprehensive investigation of the past *gross violations of human rights*<sup>10</sup> with a view to gaining complete record for history. This is important, for it establishes a common memory of the past, for:

A society cannot reconcile itself on the grounds of a divided memory. Since memory is identity, this would result in a divided identity. In South African society, for example, there may not be a shared opinion as to how deaths in custody took place. It would be thus important to reveal the truth so as to build a moral order.

Clearly, key aspects of the historical and ethical past must be put on the public record in such a manner that no one can in good faith deny the past. Without truth and acknowledgement, reconciliation is not possible.

(J. Zalaquett in Boraine, Levy & Scheffer 1994:13)<sup>11</sup>

This history of the past is also gained by investigations and hearings for both victims and perpetrators. This bringing forth the truth of the past is important, for:

The objective of regimes that persecuted and assassinated thousands of people was to silence the opposition. Impunity for the authors of those crimes is a renewed form of silence and secrecy directed towards the survivors, the families of the victims and the memory of those who died.

(P. Tappat de Valdez in Boraine & Levy 1995:77)

One dare not forget nor silence the past, for this too easily allows the future to repeat the horrors of the past. Therefore, ... rather than forgetting, we need to intensify the process of remembering — not to undermine the process of reconciliation, but to encourage it and give substance to democracy (A. Odendaal in Boraine & Levy 1995:17). It is out of the experience of the past, then, that the future is to be built.

## **Second objective**

The second objective is achieved by:

Facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective and comply with the requirement of this Act .

(SA Act 34/1995:section 3(1)(b))



This is probably the most controversial clause of the whole Act. A compromise is reached where, in return for the complete truth about the past, perpetrators will be granted amnesty.<sup>12</sup> Full disclosure would achieve a number of goals:

Firstly, it is psychologically vital for the families of the victims of human rights abuses to come to grips with the circumstances under which their loved ones were abducted, tortured and assassinated. In addition to the cathartic effect of such knowledge, the families and surviving victims must be entitled to suitable compensation for their hardships, anguish and deprivation.

Secondly, it is essential that the perpetrators be identified and isolated, not necessarily for the purpose of retribution and punishment, but more importantly to ensure that they are never again placed in a position of power to repeat their inhuman acts.

Thirdly, the enormity of the crime of apartheid as a system of social engineering must be revealed in all its nakedness, including the distortions wrought upon some of those who, in their fight against this evil, lost their way and engaged the very human rights violations so systematically practised by their oppressors.

(Human Rights Commission 1993)

One argument against the Commission is that it does not have the power to prosecute, but can only make recommendations to the appropriate legal authorities. This is made even worse when the search for the truth of the past is separated from justice. Juan Mendez, an Argentinean lawyer, learnt that truth is not always easy to establish.

The truth does not necessarily emerge from a commission or an exercise in truth telling. In fact, I would argue that it is misguided to separate truth and justice because prosecutions provide a measure of truth that is more complete and more undeniable than that which is achievable through a truth commission.

(J. Mendez in Boraine et al 1994:89)

On the other hand, Asmal et al (1996:19) note that —

The particular kind of credibility that derives from criminal trials may be inappropriate for historical verdicts. The necessity to prove the minutiae of individual cases beyond a reasonable doubt in an elaborate and formal

process can establish an uneven playing-field in favour of the perpetrators; and it can constipate historical debates. Moreover it is common knowledge that there is often a difference between a criminal verdict of not guilty and an affirmative finding of innocence. Thus history suffers if viewed through a judicial lens.

In order to overcome this problem South Africa has no current blanket amnesty law, unlike many South American countries. The granting of amnesty is intrinsically linked to the TRC process, where there is a strict and individualised application particularly around what constitutes political objectives and full disclosure (Wilson 1995:45). Amnesty can be refused.

Probably the greatest difficulty with the granting of amnesty is the less publicised procedure of indemnifying the state itself from civil claims.

The Commission will remove citizens rights to civil claims for damages: if a former government agent is granted amnesty by the amnesty committee, then the state will be automatically indemnified for damages.

The State becomes a silent partner, shadowing each perpetrator who comes forward and whose amnesty request is successful. To achieve amnesty, the perpetrator does not even need to express remorse, only to convince the amnesty committee that the acts were associated with a political objective and that a full disclosure has been made.

(Wilson 1995:44)

Brandon Hamber, of the Centre for the Study of Violence and Reconciliation, expressed concern about a lack of remorse on the part of perpetrators. The spirit of forgiveness, which has characterised the evidence of many victims, could be endangered as the horrific details of human rights abuses emerge from the amnesty hearings. It is going to evoke a different type of response. It will make talking of forgiveness more difficult particularly if people are just there to get amnesty and not to show remorse.<sup>13</sup> It may, therefore, be necessary to have a combination of forgiveness and justice if there is no repentance (Zalaquett in Boraine et al 1994:47). This combination needs to be tempered by reality. Part of this reality is that in the compromise of the Act there is a certain reciprocity.

Reciprocity in South Africa lies in the balancing of remuneration and amnesty in the functions of the commission. Survivors tell their story in

public, have it officially recorded, and they may receive reparation. Perpetrators also construct their narrative and may receive amnesty from civilian and state prosecution.

In the balanced exchange of receiving compensation and renouncing vengeance, this reciprocity parallels and reinforces the exchange inherent in a revitalised social contract, where the individual gives up his or her right to retribution for the past in return for protection and stability in the future.

(Zalaquett in Boraine et al 1994:47)

The question is whether the common good (in this case, future stability and peace) overrides the individual's right to justice in the rule of law, as in the case of the Biko and Mxenge families (Zalaquett in Boraine et al 1994:53-54). The Constitutional Court ruled in favour of the common good. This meant that for the sake of the stability of the future of the country, amnesty would be offered to the perpetrators. This meant that there is no punishment, for example, imprisonment, of the perpetrators, and that the victims have to suffer because they cannot ensure that justice is served. The appearance is given that the victims are once again further victimised and undergo additional suffering for the sake of national reconciliation.

The difficulty of the amnesty clause rests in the fact that it lacks reparative or restorative justice on the part of the perpetrator. The state takes responsibility for reparations, and effectively cuts the perpetrator out of being obligated to participate in restorative justice. The state takes over the responsibility of the perpetrator. Victims seem to want the perpetrator not simply to be granted amnesty, but to participate in some form of restorative justice.<sup>14</sup>

One other consideration is that the state would not be able to prosecute even a small number of the human rights abuses committed since 1960, for it would tie up the courts for years (Wilson 1995:42). Yet, should any *crimes against humanity* be identified, then they would be prosecuted, without any possibility of amnesty or pardon. There are duties that are laid down by international law. However, international law imposes on governments the duty to always investigate and punish certain particularly serious crimes (Zalaquett in Truth and Reconciliation Commission 1993:xxxi). Bronkhorst (1995:152) argues that ... no true reconciliation is possible unless there has at the very least been the chance to bring the worst offenders to justice.... Amnesty International states this position even more forcibly: amnesty is only acceptable after the due process of law has been properly completed .

### Third objective

The third objective is achieved by:

Establishing or making known the fate or whereabouts of victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims, and by recommending reparation measures in respect of them .  
(SA Act 34/1995:section 3(1)(c))

It is very important to listen to victims<sup>15</sup> and their families. First and foremost, the victims are to receive the utmost respect and attention.

The Chilean commission interviewed thousands of relatives of people who were killed or who disappeared after arrest. It is very important to listen to relatives respectfully and to let their voices be heard. We decided to include a whole chapter with selected excerpts from their testimony, particularly those illustrating different aspects of the process of repression, the personal loss they suffered, their feelings, their struggle to find out the truth.... They developed a trust in the commission and most of them let out, for the first time, feelings and emotions they had never expressed before.  
(Zalaquett in Boraine & Levy 1995:53-54)

Judith Lewis Herman, in *Trauma and Recovery*, notes the unfortunate situation that often people take the side of the perpetrator rather than the victim.

It is very tempting to take the side of the perpetrator. All the perpetrator asks is that the bystander do nothing. He appeals to the universal desire to see, hear and speak no evil. The victim, on the contrary, asks the bystander to share the burden of pain. The victim demands action, engagement and remembering.

(Herman 1992:7-8)

The victim always forces the bystander to make a choice, not to be neutral, because of the very human nature of the narrative. Where in the past the victim was shunted away, ignored or not taken seriously, there is now a conscious shift to respect the victim's dignity and honour. The worth and dignity of those victimised need to be re-established. Part of this is the right to a full investigation and redress (Bronkhorst 1995:100<sup>16</sup>).

A word of caution has been raised about victims identifying perpetrators by name. As the Commission is not a court of law, it refrains from officially naming perpetrators, as the due process of law would not be observed according to the rule of law or internationally accepted human rights principles. It would hand over names of alleged perpetrators and evidence from its investigations to the courts.

Presumption of innocence and guarantees for alleged perpetrators must be meticulously observed, taking every precaution to avoid even the appearance of disrespect for such principles. Otherwise an incorrect message will be sent to the people — that in the name of doing justice one may incur an injustice.

(Zalaquett in Boraine & Levy 1995:54)

Reconciliation, according to clause (c), is about the restoring of the human and civil dignity of the victim, as well as their chance to tell their story and receive reparation.<sup>17</sup> Many victims, interviewed by Bronkhorst in South America, agreed that

... social, political and psychological rehabilitation was much more important than material compensation. In Chile, for example, there is a huge monument in Santiago Central Cemetery which lists the names of all those who have disappeared or been killed; parks and streets in a number of cities have also been named after the victims.

(Bronkhorst 1995:116)

At a consultation meeting of the members of the Committee on Reparation and Rehabilitation with NGOs, faith communities, and others, it was made clear that the committee only makes recommendations to the President. They dispelled a common perception that there would be great pecuniary (monetary) handouts and material help. State resources are such that there may possibly be some symbolic actions, but not much beyond this.<sup>18</sup> The Interim report of June 1996 of the TRC to the President identified urgent interim needs such as subsistence needs of people who have lost a breadwinner, trauma counselling, medical attention, access to social welfare, access to civil documents, such as death certificates (Truth and Reconciliation Commission 1996:section 4). The final report of the Commission lists their complete recommendations to the President.

Reparation is important for it does acknowledge the victim's dignity (Zalaquett in Boraine et al 1994:13). At the same time, reparations cannot be imposed on victims or cannot just be pecuniary or monetary, for there can be the appearance of trying to

buy forgiveness and reconciliation. Compensation should not only be seen in monetary terms, as experience from other countries shows that victims often feel resentment as to what is perceived as trying to buy their forgiveness (Newham 1995:10). In any case, how does one appropriately calculate and make restitution for physical or emotional suffering, let alone suffering caused through the death of breadwinners or by poor education, for millions of South Africans. Creative means will have to be found to enable reparation, forgiveness and reconciliation.

#### **Fourth objective**

The fourth objective is achieved by:

Compiling a report providing as comprehensive an account as possible of the activities and findings of the Commission contemplated in paragraphs (a), (b) and (c), and which contains recommendations of measures to prevent the future violations of human rights.

(SA Act 34/1995, section 3(1)(d))

It is mandated that the final report of the Commission affirm the worth and dignity of those victimised, show the establishing and upholding of the rule of law, and make recommendations for the deterring of future human rights abuses. The truth of the past, as far as can be established, will be recorded. There would be little room for deniability of the past injustices and human rights abuses. There will be the following: acknowledgement of victims, particularly those who died; recommendations for reparations; recommendations about whether to follow or not a certain lustration process, or advice to the president on the future role of identified perpetrators in government or leadership positions. Recommendations will probably be made as regards the legal system. Those granted amnesty will have their names recorded. The accountability of perpetrators will be recorded. There will be recommendations around reparation principles to be followed, the agents of implementation, as well as a time line to be adhered to. Such recommendations will cover areas such as emotional support, medical help, educational assistance, material assistance, community rehabilitation programmes and symbolic reparations. It was the policy of the ANC not to implement a witch-hunt of apartheid perpetrators.

There could be no summary trials and execution of torturers as there were in the German concentration camps; no Nuremberg trials. There have been no purges, no vindictive lustration laws on the recent Czech model, which

disqualify certain persons, allegedly from the old order, from holding categories of public or private office — without a semblance of judicial process. There has been no blacklisting of collaborators, as in post-war France and Belgium; nor any dismissals of apartheid social engineers or university academics as in today's unified Germany or yesterday's de-Nazification measures. Such approaches were rejected by South African negotiators and legislators for practical as well as principled reasons.

(Asmal et al 1996:18)

The Act envisages that the Commission will make a contribution to building a human rights culture, through the recommending of certain changes and reforms in government institutions and transformation of structures. It is hoped that the Commission will promote stability and national unity, along with the beginnings of reconciliation. Along with this, it will create legitimacy for the legal institution and the judiciary (Wilson 1995:41). It will help in rooting a national democratic culture more deeply.<sup>19</sup> Moral reconstruction will be shown to have been practised in the very life and functioning of the Commission.

Yet, after noting all of this, the initiatives of the Commission are only part of a larger process of national healing and reconciliation. It is but one mechanism, albeit an important and key one. The Commission begins in a ritual manner the process of national reconciliation. It will close the door to the past, although the reconciling process will continue for many decades. The closure of past horrors and injustice is important, so long as the procedure of closing (the Commission itself) has been comprehensive and effective.

#### **4. AN INITIAL ASSESSMENT OF THE COMMISSION**

It became clear in the Commission's first year of operation that the mandate of the Act was too broad and ambitious. The spectrum of the Act's objectives was too great for the resources allowed and the time frame established. Clearly the Commission was severely restricted and limited by the Act itself, and as a result, came under sometimes unfair public criticism.

Certainly the TRC is in uncharted waters. A fair number of countries have attempted, through commissions of one sort or another, to investigate events and deeds that have taken place in times of political injustice and strife; but none of these commissions has had quite the same terms of

reference, both for seeking and hearing evidence and for granting amnesty, as our TRC. The TRC has, then, no precise precedents to fall back on: it finds itself engaged in a continuous legal, social and moral experiment.

(Gardner 1997)

In spite of this, and of the opposition to the Commission from many quarters, it can be argued that the positive effects of the Commission outweigh its limitations. We cannot underestimate the tremendous effects of the Commission's work in healing the social psyche of the nation, through its public hearings, taking of statements and its use of the media, particularly radio and television. The very fact of people having the secrets and horrors of the apartheid past paraded in public provided a moment for plural reflexivity and confrontation with our shameful history. For victims it is vindication and affirmation of dignity and personhood, for bystanders it is an opportunity to become involved, and for perpetrators an opportunity for telling truth, change of heart and reparation. It will only be in the years and decades to come that a satisfactory assessment of the Act and the Commission will be possible.

Only a very small portion of human rights abuses and applications for amnesty were brought to the public hearings. Proportionally few statements of victims were recorded (21 000). The possibility of comprehensive investigations is no longer realistically feasible. Public expectations, particularly of victims, will not be met. Victims told their story, but how many found out the truth? For many, the telling of their story did provide a moment of healing, but was this sufficient? Many continue to call for justice to be exercised. Interestingly, though, there was no call for revenge; there was great willingness in many instances to forgive. About perpetrators the same cannot be said (Green-Thompson & O Leary 1998:13). Perpetrators will receive amnesty and walk free, giving the impression that justice has not been done. There will be tremendous controversy and anger over the issue of those who qualify for reparations (that is, those who gave their statements to the Commission), while others who maybe wanted to, but didn't or couldn't, will receive nothing directly in reparation. Meanwhile, government indicated that due to fiscal restraints there would be no comprehensive financial reparations for victims.

Yet, in spite of the danger of high expectations, the process so far does show potential for healing the nation. A linked concern in some circles to the question of amnesty is whether the granting of amnesty will promote a greater level of national lawlessness and violence, as there could be the perception that justice is not adequately exercised, and that criminal acts can be committed with impunity. Yet, it



is to be noted that not all applications for amnesty have been granted. By the end of August 1997, 6 944 applications for amnesty were registered. As of that date, only a small number of applications had been granted (fifty in all), while 1 665 applications for amnesty were refused.<sup>20</sup> It will be important to see, for the sake of justice being seen to be done, whether some key perpetrators, who have not applied for amnesty and who have been identified, are prosecuted in the courts.

The Catholic Bishops Conference of Southern Africa expressed a further concern on the question of amnesty.

The Catholic Church from the inception of the TRC has been worried about the amnesty provisions. It is a major flaw that perpetrators do not have to ask for forgiveness nor make some form of restitution. At the same time it must be acknowledged that contrition cannot be forced. One is either contrite or one is not.

Justice should not be sacrificed in favour of political expediency. Perhaps the nation could take a step further in the journey towards national unity by creating some form of trust where civil society could show restitution. There are millions of people and thousands of businesses that profited from apartheid. Should they not be willing to show some form of restitution? In this regard, the Catholic Church would be willing to consider supporting what is termed a shame tax which could be used to help survivors and their families.

(Green-Thompson & O Leary 1998:3)

The Commission's publicity and communication efforts are to be lauded, as these were critical in drawing the people of the country into the process of reconciliation. The use of the media to keep the work of the Commission in the news is proving to be a painful, but healing, process. The Catholic bishops indicated a further concern of national apathy and scape-goating in their submission to the TRC.

When one assesses to date the work of the TRC, it is apparent from the amnesty hearings in particular and to a lesser extent from the human rights hearings, that society has been marginalised to some extent from the process. Civil society can now point a finger at those bad people who committed such awful atrocities, putting the blame squarely on their shoulders and exonerating themselves from any complicity. This presents a major problem before we begin to talk of healing the nation. They and not

us need healing is the perception. The lack of awareness verging on apathy by the majority of people of this country to what happened in the past will prove to be the greatest obstacle to the attempt to articulate a vibrant and practical process of healing.

(Southern African Catholic Bishops Conference 1997)

Some of the Commission staff continued to work out of the same petty bureaucratic mind as the apartheid regime did, forgetting that they were to serve the citizens of the country. Establishing new structures does not guarantee new approaches to public service. The Commission has also struggled to develop new attitudes appropriate to a human rights and democratic culture.<sup>21</sup>

As the Commission is scheduled to be disbanded in the middle of 1999, it will need to work hard to include as many people as possible, including NGOs and religious faiths — particularly the churches — in the process of reconciliation. Its mandate will only succeed insofar as it has motivated and been inclusive of others in its work, as well as in the ongoing process of national reconciliation.

The five volume *Truth and Reconciliation Commission of South Africa Report* (Truth and Reconciliation Commission 1998b) and recommendations to the president and parliament place the final responsibility with government to ensure that the process which it started will continue to have the support of the same political will which initiated the national reconciliation and the TRC. The success of the TRC must not only be evaluated by its own work, but also by the reception and adoption of its proposals by government. As the project of government, it must be government who in the end must take responsibility for the success or failure of the Commission.

The Report captures generally one acceptable and credible history of South Africa, even though it was severely criticised and opposed by political parties. In fact, this might be seen as a positive sign of the success of the work done. Generally civil society, the NGOs and the faith communities favourably received the report. In spite of its length (2 500 pages) the Report only paints a very general picture and lacks in detail, particularly at the local level. It also, being the result of the work of a number of committees and researchers, overlaps in content. Of course this might be another sign of credibility of the Commission.

Ritual expression at key moments and in the daily hearings of the Commission occurred and were good models to be emulated, but these ritual moments often

were, probably unavoidably, far from the nation at large. The Commission could have given greater attention to this dimension of public ritual and use of symbol. It is an impetus for the nation to pursue the ritual dimension of reconciliation.

A danger for the Commission was that it portrayed itself too much as a Christian initiative. This occurred at the beginning of the human rights abuses hearings with the sometimes inappropriate comments of a Christian nature by some of the commissioners. The Commission's brief was to be inclusive and respectful of all who appear in its hearings, no matter their personal, religious or political beliefs.

Lastly, the issues of prosecution, amnesty and reparations have been thorns in the flesh for the Commission's workings. It is to be remembered that the Commission itself did not write the Act and its conditions, and is dependent on government's decisions. The Act itself was a result of political compromise and bargaining. It would be unfair to attribute blame to the Commission for the limits of the Act. At the same time the Commission can recommend amendments to the Act.

Given the fact that ... the concepts of truth and reconciliation are ideals which cannot be objectively measured (Newham 1995:9), the Commission will have to be judged on its achieving the four objectives listed by the Act, as well as on its proposals to the President. Once again, though, it is not contingent on the Commission whether these proposals are accepted and implemented, but this responsibility rests with the President and government.

## **5. SOME PRELIMINARY CONCLUSIONS**

Reconciliation in South Africa would include ensuring the honour and dignity of victims through establishing a common memory of the past. There would be a recognition and respect for human rights and allowance for structures to be established so that the human rights abuses of the past will never be repeated.

Victims need to be acknowledged, particularly those who stood for justice and what was right. The suffering and alienation of the past needs to be reversed through reparation and repairing the past. This is done through establishing a solid rule of law, economic and political justice, along with the addressing of bread and water issues, such as employment, housing, health and social services and education. It could be argued that the heart of reconciliation in South Africa is not impressive words or concepts, but such concrete national actions.

Greater respect and recognition of cultural and religious traditions, along with people's history, has to be addressed in order for there to be meaningful reconciliation. The building of a moral order will be required for a stable future. Justice and prudence will have to be harmonised as the past is faced, so that there is a future of peace which can be embraced.

In order that there be the possibility of lasting reconciliation, perpetrators will have to admit guilt and make amends, express remorse and manifest collective contrition. Responsibility and accountability for past actions are to be addressed.

Healing of memories, dealing with the trauma and sickness of the past, remembering the dead, dealing with the hard question of forgiveness and developing new democratic attitudes and respect for human rights, are all issues that are on the agenda of social reconciliation. Women and children demand special attention, for they are often the ones who suffer the most and whose voices are least heard.

Clearly the above conclusions speak of the ideal, but they are stars by which South Africa needs to chart its course. Anything less would be a betrayal and insult to the many who laid down their lives for the dignity and justice of all South Africans. The night is over and the dawn is just beginning.

The South African experience presents a challenge, not only for South Africans themselves, but also for other nations on earth to journey down their road of reconciliation as well. Could it be that the survival of humanity rests on our attention and action towards reconciliation?

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## NOTES

- 1 Dr Mark Hay currently is head of department and lectures in systematic theology at St. Joseph's Theological Institute, Cedara, KwaZulu-Natal, South Africa. He holds a licentiate in dogmatic theology from the Gregorian University, Rome, and a Doctor of Ministry from Catholic Theological Union at Chicago. He recently published *Ukubuyisana: Reconciliation in South Africa* (Pietermaritzburg: Cluster Publications, 1998).
- 2 Argentina's National Commission of the Disappeared has been described as the most successful commission in the last decade. The report of the commission was published (entitled *Nunca m s* — Never again) and became a national best seller. It documented the disappearance of over 9 000 people. The wide publicity surrounding Argentina's truth commission, including the wide distribution of the commission's final report, the televising of testimony given before the commission and regular press briefings by the commission, functioned as a kind of social catharsis, bringing an end to a long-silenced history of past abuses. This was unlike Zimbabwe where, in the 1985 Commission of Enquiry, the final report was submitted to

- the president and was never published or made public. Thousands of civilians who were killed in the war of independence are unnamed and unacknowledged, and perpetrators not held accountable (Truth and Reconciliation Commission 1993:4).
- 3 The term is derived from the Latin *lustrare*, to purify by fire, or to make things clear by bringing them to light.
  - 4 See the very strong criticism given by the Human Rights Commission (1993).
  - 5 The limits of this article do not allow for a discussion on the philosophical foundations of truth. What needs to be noted, however, is that there are different views on the matter of truth. Helpful to this discussion would be viewing truth from different perspectives, such as the legal, ethical, historical, personal and religious. See the discussion of Bronkhorst on truth (1995:145-146). See also Braude 1996. She seeks, borrowing the terms of the historian Raul Hilberg, to see the differences of the truth for victims, bystanders and perpetrators. Antjie Krog raises some theoretical and philosophical questions about truth in Boraine & Levy 1995:116-117.
  - 6 Interview with Ela Gandhi, Durban, 23 July 1996. She is a granddaughter of Mahatma Gandhi, a member of Parliament and was a member of the Justice Portfolio Committee which developed the bill. I am grateful to her for providing the background to the development of the bill and its major points. She notes that the bill was strongly influenced by the compromises made during the negotiations which happened at Kempton Park, particularly around the issue of amnesty.
  - 7 Promotion of National Unity and Reconciliation Act, No. 34 of 1995 (19 July 1995), as amended by Promotion of National Unity and Reconciliation Amendment Act, No. 87 of 1995.
  - 8 The TRC proposed the cut-off date to be moved up to the inauguration of the state president on 10 May 1994. President Mandela was not in favour of changing the date, as he considered that it would send the wrong message to a country already riddled with lawlessness and crime. See SAPA, Mandela rejects extended amnesty cut-off date, Pretoria, 22 October 1996; SAPA, Cabinet to discuss extending amnesty cut-off, Cape Town, 25 October 1996. Mandela finally acceded to the request to extend the date.
  - 9 National Unity and Reconciliation Act
  - 10 Gross violation of human rights as defined by the Act (SA Act 34/1995), means the violation of human rights through —
    - (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), and
 which emanates 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 (SA Act 34/1995:section 1).
  - 11 Jos Zalaquett is a Chilean lawyer and activist and was a member of the Chilean National Commission for Truth and Reconciliation. He is a member of the International Commission of Jurists, and served for ten years on the governing board of Amnesty International (See Boraine et al 1994:158).

- 12 An amnesty is the act of grace or forgetting [sic], according to the dictionary. More precisely, in judicial terminology it is often used to distinguish between an amnesty and a pardon. The first is intended to obliterate all legal memory of the offence, while the pardon only relieves from punishment. Practice differs: pardons have been used to foreclose prosecutions, and amnesties have covered persons who were already serving prison terms. Amnesty International's position on pardons and amnesties is that impunity negates the values of truth and justice and leads to the occurrence of further violations (Bronkhorst 1995:100).
- 13 SAPA, Closing the door on SA's dark past, 11 May 1996.
- 14 I am grateful to Dr K. Mgojo, Truth Commissioner, for this insight.
- 15 Victims as defined by the Act (SA Act 34/1995), includes —
- (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 persons 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 of victims as may be prescribed.
- 16 Letter to President Mandela from Amnesty International.
- 17 According to the Act (SA Act 34/1995) Reparation includes any form of compensation, ex gratia payment, restitution, rehabilitation or recognition.
- 18 Notes taken by the author at Natalia, Pietermaritzburg, 11 July 1996.
- 19 Admittedly, this would be controversial. What is intended here is not western liberal democracy, but a democracy appropriate to South Africa, and the African context. See Maluleke 1994:254.
- 20 Statement by Dr. Alex Boraine, Acting Chairperson, TRC, 22 August 1997.
- 21 This challenge — to act with impartiality and not to be a lackey or puppet of the African National Congress — comes particularly from the Nationalist Party, other right-wing parties and organisations, and the Inkatha Freedom Party. So far, however, the Commission has shown great impartiality and regard for human rights irrespective of party politics.