

## LAW, JUSTICE, TRUTH, AND FORGIVENESS? A CASE STUDY OF SOUTH AFRICA

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Established in December 1995 in South Africa, the post-apartheid Truth and Reconciliation Committee (TRC) has received both praise and criticism from many legal, historical, philosophical, and political viewpoints. One of the most contentious issues about the TRC is its conditional amnesty provision<sup>1</sup> for the perpetrators of wrongs under the apartheid, which provided amnesty on the condition that they come forward and tell the truth about what they did. Normally, one of the most common (and significant) goals of criminal law is to mete out *retributive* justice, punishing the offenders for the wrongs they have done. However, the conditional amnesty provision, premised on the concepts of truth and forgiveness, turned this notion on its head and pursued *restorative* justice instead. After all, laws are enacted for the good of the nation and the society, and here was one instance where the normal rule of law was bent to, presumably, serve the greater good of the “reconciliation” of the nation. But is the route of restorative justice really the best way to achieve national reconciliation, or would retributive justice have done a better job? This essay seeks to argue that firstly, the route of restorative justice embodied in the conditional amnesty provision was theoretically the best option in light of this aim of reconciliation, and secondly, despite many flaws, the TRC did achieve a somewhat modest reconciliation of the nation.

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<sup>1</sup> Promotion of National Unity and Reconciliation Act, No 34 of 1995, Cap 4.

## TRUTH, FORGIVENESS, JUSTICE AND RECONCILIATION

The TRC is unique in that it directly linked truth to exoneration from responsibility. Amnesty was promised to individuals guilty of politically motivated “gross violation of human rights”<sup>2</sup> who told the whole truth about what they did. From a legal perspective, this intimate link inevitably raises questions about contentious concepts like truth, forgiveness, and justice. With the overarching goal of national reconciliation in mind, this paper argues that the route of truth and forgiveness was theoretically better than prosecution and retributive justice.

According to Asmal et al,<sup>3</sup> reconciliation is the “ending of the divisive cycle of accusation, denial and counter-accusation; not a forgetting of these accusations and counter-accusations, but more a *settling of them through a process of evaluation*”.<sup>4</sup>

One very important criticism against the TRC is that justice should be a pre-requisite of reconciliation, and not an alternative to it.<sup>5</sup> This is the popular view in many legal systems. However, this depends on how we define “justice”. Normally, we tend to associate “justice” with “retributive justice” – the idea that justice requires the criminal to be punished proportionately to the crime he/she has done.<sup>6</sup> Many families who had lived through the apartheid system opposed the TRC precisely because it was not meant to mete out retributive justice.

However, the TRC may well be in right in disassociating justice with retribution. One limit of retributive justice is that it may never be enough. Punishing the apartheid perpetrators cannot bring the victims back, and because of the lack of the death penalty in South Africa, the punishments would never be proportionate to the crimes (many of which were murder). Furthermore, there is always the risk of families of victims taking retributive justice into their own

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<sup>2</sup> Promotion of National Unity and Reconciliation Act, No 34 of 1995, s 1(1).

<sup>3</sup> Kader Asmal, Louise Asmal, Ronald Suresh Roberts, *Reconciliation Through Truth: A Reckoning of Apartheid's Criminal Governance*, (Cape Town: David Philip Publishers, 1996), 46.

<sup>4</sup> Emphasis by author.

<sup>5</sup> Peter Storey, “A Different Kind of Justice: Truth and Reconciliation in South Africa” (1997) *The Christian Century*.

<sup>6</sup> Antony Duff, “Legal Punishment” (2003) *The Stanford Encyclopedia of Philosophy*.

hands if they remain unsatisfied with the punishment meted out by the state. Reconciliation with the past would then be all the more difficult.

Another issue with retributive justice is that in the apartheid conflict where there were human rights abuses on all sides, it was difficult to assign blame and thus punishment to an individual. To quote Miriam Aukerman,<sup>7</sup> “the central premise of individual responsibility portrays defendants as separate people capable of autonomous choice—when the phenomena of mass atrocities render that assumption at best problematic”. Many perpetrators of violence might have believed that they were acting for a just cause – and this was true for both pro-apartheid and anti-apartheid perpetrators. Although this does not mean that their actions were justified, it does show that retributive justice in this case might be too rigid an option. It might even cause uproars and protests from both sides, which would severely damage the reconciliation efforts.

Perhaps the TRC process was exploring justice in a more magnanimous form with reconciliation in mind – restorative justice, which “points beyond conventional retribution into a realm where justice and mercy coalesce”.<sup>8</sup> This is a concept not too often acknowledged in traditional courts of law, but it should be looked at in the context of a freshly wounded nation wanting to start over. This restorative justice was supposed to be brought about by truth and forgiveness. When the victim forgives the perpetrator, the two can reconcile and move on together. Archbishop Desmond Tutu, chairman of the TRC, emphasized the concept of Ubuntu,<sup>9</sup> and called for forgiveness, which would lead to peace and reconciliation. This forgiveness can only be brought about by truth. On a more symbolic level, because the apartheid system was founded on a lie (that blacks were inferior to whites), a truth commission would signify the dawn of a new day. Truth hurts but it also heals, and knowing what happened to their family members might bring a sense of closure to the victims. As Benedict Anderson argues, “The formulation of a shared national past

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<sup>7</sup> Aukerman Miriam J., “Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice” (2002) 15 *Harvard Human Rights Journal* 39-97.

<sup>8</sup> *Supra* note 5.

<sup>9</sup> “A person with Ubuntu is open and available to others, affirming of others, does not feel threatened that others are able and good, based from a proper self-assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed.” (Tutu, Desmond, *No Future Without Forgiveness* (1999)).

is simultaneously the basis of the assertion of a shared national future.”<sup>10</sup> With truth comes understanding, and with understanding comes peace and hope for a new future. Reconciliation would then be achieved, because both sides in the apartheid conflict would be able to move on with their lives, having understood and hopefully made peace with their past.

### EVALUATION OF THE AMNESTY PROVISION

While the idea behind the TRC has been argued to be the best option for national reconciliation, in reality the TRC did not achieve its ideal completely. There were many flaws that meant that the TRC came rather short of what it wanted to achieve. However, overall, it did lead to some kind of modest national reconciliation.

One flaw of the TRC is that it had a very narrow focus. The amnesty is only provided for those who committed “gross violation of human rights”. This results in the perpetrators – more of the “trigger-pullers” rather than the political masterminds – having to bear the collective shame of the apartheid system. At the same time, the TRC also allowed those who committed wrongful acts under the apartheid that affected others socially and economically to get away. This ignores the various ways in which the apartheid system damaged human rights and human dignity, and even allows whites who did not commit murderous acts (but who discriminated blacks in other ways, and otherwise benefited from the apartheid system) to think of themselves as morally untainted by apartheid. This could be seen as a grave failure of the legal system, as certain wrongs went unpunished and moreover even “tolerated” or “glossed over”.

More importantly, the narrow focus meant that the TRC’s goal of documenting a collective history – by collecting “truths” from the perpetrators of violence – fell short. According to Piers, there was much disagreement over whether the whole truth had been told or not.<sup>11</sup> The apartheid

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<sup>10</sup> Wilson Richard A., “The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State” (Cambridge: Cambridge University Press, 2001).

<sup>11</sup> Piers Pigou, “False Promises and Wasted Opportunities? Inside South Africa’s Truth and Reconciliation Commission” in Deborah Posel & Graeme Simpson (eds), *Commissioning the Past: Understanding South Africa’s Truth and Reconciliation Commission* (Johannesburg: Witwatersrand University Press, 2002), 37.

system was not just about physical violation of human rights; it was also about political, social and economic discrimination, and “truth” cannot be attained without these missing pieces. For instance, no senior member of any political party – the “masterminds” – came forward and told their versions of the truth. For those who did apply for amnesty, there was doubt that they only told the version that would fulfil the amnesty requirements.

This partial failure to collect truth made forgiveness and closure difficult. Many victims left the process feeling more bitter and frustrated because they felt that the perpetrators did not provide the whole truth of their accounts, and yet received amnesty. Oftentimes, the opposite of closure happened. For example, Sylvia Dlomo-Jele, the mother of murdered activist Sicelo Dlomo, believed that the perpetrators of her son’s murder disclosed the truths selectively to fulfil the amnesty requirements. She refused to forgive, as did many families who believed that the perpetrators had told half-truths.<sup>12</sup> Coupled with the fact that there was little or no follow-up investigation of the perpetrators’ accounts, there was a justifiable feeling that TRC was not living up to its promises.

The lack of a requirement for remorse also made the goal of forgiveness difficult sometimes. When victims met perpetrators and the perpetrators showed no repentance, the victims had to relive the horrors of the past again without anything to comfort them. Admittedly, there were valid reasons why remorse was not required, because it would have deterred many people or forced people to put on a façade, thus impeding the goal of acquiring truth. Also, if it did, it would have devalued the moments when genuine remorse was present. To quote Peter Storey:<sup>13</sup>

In one case, a police officer who masterminded the butchering of a number of families in an attack on a rural village faced his victims: “I can never undo what I have done,” he said. “I have no right to ask your forgiveness, but I ask that you will allow me to spend my life helping you to rebuild your village and put your lives together.” In such moments, anger at the unrepentant is superseded by a glimpse

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<sup>12</sup> *Ibid.*

<sup>13</sup> *Supra* note 5.

of something more. Out of the horrors of the past, the TRC makes space for grace, and the potential for newness in South Africa shines through.

There were other weaknesses of the TRC as well. One of them is the fact that very few cases that were rejected for amnesty were actually followed up in criminal or civil courts. Effectively, there was not much difference between those who did receive amnesty (i.e. those who had to go through all the public hearings and spectacles), and those who did not (i.e. common criminals). This, again, shows a defect in the implementation, if not the substance, of the amnesty provision.

However, there were indeed things that the TRC did well. One of them is the fact that the TRC did not discriminate between black and white perpetrators – both sides committed acts that violated human rights. Justice and the law should be impartial, and in this respect, they were. The commission considered amnesty applications from all sides, from the apartheid state to the liberation forces, including the African National Congress. Some have decried this as a failure to make a moral distinction between one side which fought for equality and one side which were the oppressors, but such criticism treads dangerously close to the realm of victor's justice. Indeed, this aspect of the TRC went far in the goal of reconciliation precisely because it acknowledged the fact that both sides did play a part in the brokenness of the nation, and this very acknowledgement was necessary for both sides to move on. It also sent out the important message that a morally justified struggle does not justify immoral and indiscriminate violence, which will remind the nation not to repeat its history.

Another more fundamental requirement was that the amnesty was *conditional* upon the perpetrators telling the truth. People were made to realize that their tormentors do not just get away freely – that “there is a difference between impunity, implying escape from accountability, and amnesty, which carries profound inward and social consequences”.<sup>14</sup> These perpetrators will have to bear the shame for the rest of their lives, and will have to face their families, their friends, their communities with a black mark. The shame and the social disgrace may be nothing compared to what they did, but perhaps it was enough to restore the nation – not as harsh as retributive justice, but not too lenient either.

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<sup>14</sup> *Supra* note 5.

For the few perpetrators who truly felt remorseful, the TRC helped in reconciliation in another way: it somewhat cleansed their conscience. At least they came forward, told the truth, and perhaps had the chance to apologise to the victims. Some will live with shame for the rest of their lives, but some will live with grace, not letting their past define them and being able to move forward after “purging” their guilty conscience.

## CONCLUSION

With all the flaws and strengths of the TRC, whether it has achieved its goal of national reconciliation is still debatable. However, with all the public hearings and media surrounding the TRC, perhaps it is fair to say that TRC has achieved its goal to a moderate extent. Many accounts of the truth have been provided in the TRC Report in 1997, allowing many to move on with their lives. This is an interesting instance where the law, by meting out restorative justice instead of retributive justice, might have achieved the greater good. Of course, there is no easy answer to the issue of whether restorative or retributive justice is better in the grand scheme of things, because truth and justice and reconciliation are rather intangible concepts that cannot be easily measured or seen. South Africa is an interesting case study for this question, but it leaves us with more questions than answers, and only time will tell what kind of justice or “mixture” of kinds of justice is required of the legal system in such a scenario.