

Why a Truth and Reconciliation Commission? Some comments on the South African model and possible lessons for Australia*.

The past is an argument and the functions of truth commissions, like the function of honest historians, is simply to purify the argument, to narrow the range of permissible lies.

Michael Ignatief.

Background

Racial segregation policies and practices had their roots far back in South Africa's colonial past. Building on an inherited social practice, apartheid in its official, legislated form, imposed a legal form of oppression with devastating effects on the majority of South Africans. As a result, South Africa became one of the most rigidly divided societies in the world – a society in which existing linguistic, ethnic and other divisions were deliberately manipulated and exaggerated in order to further divide and separate people. It was a society which was almost destroyed by its desperation to separate its citizens from each other.

Rebuilding Society

The first free democratic elections ever to be held in South Africa were held in 1994. Following the elections, the new government was faced with the enormous problems of rebuilding a country and a society that had been devastated by years of apartheid. The government moved rapidly to create institutions to deal with the economic and social inequality of the past. It created Courts and Commissions to deal with the issue of land dispossession, it put huge resources into primary health care and education, it struck down hundreds of laws and regulations which guaranteed racial privilege, and it passed laws to ensure that people's basic needs were met, and to make South African society more democratic.

Confronting the Truth

Aside from the socio-economic legacies of apartheid, the new government was also faced with the critical question of what to do about the past, of how to come to terms with the truth about gross human rights violations, how to deal with victims of such violations and the perpetrators. It faced basically three options. The first was to do nothing, to forget the past, and to focus on the building of a new society. The second option was to follow the route of Nuremberg, and to convict and punish selected former regime perpetrators. The third route was that of uncovering and confronting the truth, through the process of a Truth Commission. In choosing this route the Commission was founded on the belief that the uncovering of the truth about past gross violations of human rights was necessary for the promotion of reconciliation and national unity. The Commission believed that the telling of the truth about violations of human rights from different perspectives, would facilitate the process of understanding the divided pasts of the people of South Africa. Furthermore, the

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Commission believed that the public acknowledgement of suffering and injustice of victims would help to restore the dignity of victims, and would give to perpetrators the opportunity to come to terms with their own past. The process of the Truth and Reconciliation Commission involves South Africans, divided from one another by years of oppression and resistance, engaging in the difficult task of telling and listening to one another's stories. It has to do with what the Chileans called *reconvivencia* - a period of getting used to living with each other again. For this to happen, there has to be a diagnosis of what transpired, why it transpired and ultimately who was responsible. Central to this process is the possibility of amnesty for the perpetrators who make a full disclosure of their involvement in past gross human rights violations.

Structure of the Commission

The Commission was comprised of 17 Commissioners, chosen by a transparent and democratic public process. It consisted of people from the white right wing, left wing activists, human rights lawyers, liberation theologians, social workers and psychologists. The Commissioners were divided into three Committees: a Committee on Human Rights Violations, a Committee on Reparation and Rehabilitation of victims, and a Committee on Amnesty. There was also an Investigation Unit, which supported the Human Rights Violations Committee and the Amnesty Committee. The country was divided into four regions, and the Commissioners were placed in those regions, where they opened offices and employed staff. Each region had an Investigation Unit, consisting of policemen and former non-governmental organization activists. The primary job in each region was to hold public hearings to allow victims of human rights violations to tell their stories, to investigate human rights violations, to receive applications for amnesty from perpetrators and to hold public Amnesty hearings. Over 30,000 people who claimed to have suffered gross human rights violations made statements to the Truth Commissions. In most of these cases, after corroboration by the Investigation Unit, the people were found to be victims, and accordingly are now eligible to receive financial reparation from the government. The vast majority of people who applied for amnesty for politically motivated crimes, received amnesty i.e. from civil and criminal liability.

Comparison with Other Commissions?

The purposes of the Truth Commission are six (6) fold:

1. To generate a detailed record of the nature, extent and causes of human rights violations that occurred in South Africa during the period 1960 –1994, and to document the context in which those violations occurred.
2. To name the people, institutions, organizations, political parties etc. responsible for gross violations of human rights.
3. To provide the victims of gross human rights violations a public platform to express themselves in order to allow them to regain their human dignity.
4. To make recommendations to the government to prevent the future commission of human rights violations.
5. To make reparations to victims of human rights violations.
6. To facilitate the granting of amnesty to individual perpetrators of human rights violations, conditional upon them making full disclosure of their involvement in such violations.

It is this last feature of the South African Truth and Reconciliation Commission which distinguishes it from other commissions that have been held, particularly in South America. It was the first Commission to be given the power to grant amnesty to individual perpetrators. No other state had combined this quasi-judicial power with the investigative tasks of a truth-seeking body. In other commissions, where amnesty was introduced to protect perpetrators from being prosecuted for the crimes of the past, the provision was broad and unconditional, with no requirement for individual application or confession of particular crimes. The South African format had the advantage that it elicited detailed accounts from perpetrators and institutions, unlike commissions elsewhere which have received very little co-operation from those responsible for past abuses. The South African Truth Commission has been criticised for denying justice to the victims of human rights violations. Some say that a moral compromise was reached, which has forever, and irrevocably undermined the position of victims.

Why then has the government taken this far reaching and radical step of allowing the perpetrators of gross human rights violations not only to escape prosecution, but those few who have been convicted and imprisoned - to walk free?

a) The very real difficulty of securing successful prosecutions was a primary factor in opting for the amnesty option.

b) The lengthy delays and the high costs of litigation were also important factors. This difficulty is also evidenced by the War Crimes Tribunal in the Hague, which after many years and many millions of dollars, has made very little headway in its work.

c) Thirdly, there is very little evidence that retributive criminal justice - the imprisonment of perpetrators, will achieve anything more than a short term religiously inspired need for revenge. The failure of the Nuremberg Trials in Germany in dealing adequately with Germany's past, suggests that even if such trials were possible in South Africa, they would not have served the national reconciliation process in South Africa. Does capital punishment and retributive prison sentences contribute to respect for human dignity, or do they vindicate those who promote revenge and violence as the answer to human conflict?

d) Furthermore, the long term imprisonment of political criminals, most often elevates them to a romantic and heroic status, which clearly does not serve the reconciliation process. As Jorge Correa said, writing on Chile, 'ideological fanaticism cannot be ameliorated or countered through a prison sentence.' If anything, it motivates the person involved to pursue his or her aims on release from prison.

There is much more that one can say about the demerits of retributive justice - such as the financial burden on the state, the need to rehabilitate and restore perpetrators, but we do not have time for that.

It is in this context that it is argued that amnesty, on the basis of full disclosure, has been to the benefit of a large number of victims and their relatives, whose most fundamental need is to know who was responsible for the death, torture or disappearance of their relatives, why they did it, and finally, an enduring acknowledgement that it was wrong.

Another significant difference between the South African Commission and other Truth Commissions can be found in the Commission's powers of *subpoena*, search and seizure, which are much stronger than those of other truth commissions. This has led to more thorough internal investigation and direct questioning of witnesses, including those who were implicated in violations and did not apply for amnesty. None of the Latin American

commissions, for example, was granted the power to compel witnesses or perpetrators to come forward with evidence, and these commissions have had great difficulty in obtaining official written records from the government and the armed forces.

The very public process of the South African Commission also distinguishes it from other commissions. The Latin American truth commissions heard testimony only in private, and information only emerged with the release of the final reports. The proceedings of the South African Commission were broadcasted daily on public television and radio, and reached millions of people. The issues that emerged as a consequence helped the nation to focus on values that are central to a healthy democracy: transparency, public debate, public participation and criticism.

The South African hearings also included aspects of enquiry not seen elsewhere, for example, the institutional and special hearings. For example, the legal and medical professions were called to account for the role that they had played in promoting and supporting apartheid. These hearings allowed for direct contributions by NGOs and those who were involved in specific areas of activism, policy proposals and monitoring in the past. No other truth commissions have included such interaction with 'non-victim' public actors.

The Importance of Reparations

However, the granting of amnesty to individuals, most of them members of the former state, does not remove from the state the burden of responsibility for state reparations. The Commission recognized that while the process gave victims an opportunity to try to regain their human dignity by expressing their stories, their loss and suffering, and being publicly affirmed and acknowledged, yet this was not sufficient. During the course of the Commission's hearings, victims were asked what they would like the Commission to do for them. Many said that they wished the Commission to find the bodies of their husbands or children, or to erect a memorial for the members of their communities who had died in the struggle against apartheid. However, large numbers of people also asked the Commission to compensate them financially for their losses. The Commission felt that it was appropriate, and in accordance with the principles of national and international law and practice, that financial compensation should be granted to people whom the Commission found to be victims of gross human rights violations. The right of victims of human rights abuse to fair and adequate compensation is well established in international law.

International Legal Framework

In the past three years, South Africa has signed a number of important international instruments which place it under an obligation to provide victims of human rights abuse with fair and adequate compensation. The provisions of these instruments, together with the rulings of those bodies established to ensure compliance, indicate that it is not sufficient to award 'token' or nominal compensation to victims. The amount of reparation awarded must be sufficient to make a meaningful and substantial impact on their lives. In terms of United Nations Conventions, there is well established right of victims of human rights abuse to compensation for their losses and suffering.

These international human rights instruments place the South African government under at least a moral obligation to provide victims of human rights abuse with fair and adequate compensation. It could be argued that it was not this (present) state that was the perpetrator of such human rights abuse, and therefore no obligation exists to compensate victims. However, in its recommendations, the Commission focussed strongly on the position of the victims and the need for them to be rehabilitated for the mutual good of South African society. The Commission therefore recommended that the South African government does not take a narrow, legalistic approach to the question of compensation, but that the reparation policy adopted by the government is in accordance with South Africa's international obligations. These obligations are set out in:

- Article 8 of the Universal Declaration of Human Rights, which emphasises the right of people to an 'effective remedy' arising out of violations of fundamental rights.
- Section 3 of the International Covenant of Civil and Political Rights also emphasizes the right to an effective remedy for people who have had their rights or freedoms violated.
- The Committee against Torture which was established to ensure compliance with the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment said that in order to comply with the spirit of the Convention, victims of torture should receive adequate compensation.
- The Inter-American Convention on Human Rights contains provision that grant victims of human rights abuse a right to compensation, and these provisions have been given effect in the Velasquez-Rodriguez case and others involving Uruguay and Argentina.

The Commission has recommended, and the government has tentatively accepted, that there can be no healing and reconciliation without adequate reparation and rehabilitation measures, either at an individual or at a community level.

Accordingly, in principle, the South African government has accepted that it is morally obliged to carry the debts of its predecessor and that it is therefore equally responsible for the implementation of a policy of reparation to victims, and that the amount of financial reparation awarded should be sufficient to make a meaningful and substantial impact on the lives of the victims.

State's Policy of Reparation and Rehabilitation

Accordingly one of the statutory functions of the Truth Commission is to make recommendations to the Minister regarding a policy for the granting of reparation to victims, and the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims.

The statute defines reparation as including: 'any form of compensation, ex gratia payment, restitution, rehabilitation or recognition.'

The reparation and rehabilitation policy which the Truth Commission has recommended to the government has five components:

Urgent Interim Reparation

This is assistance for people in urgent need, to provide them with access to appropriate services and facilities. It is recommended that limited financial resources be made available to facilitate this access.

Individual Reparation Grants

This is an individual financial grant scheme. It is recommended that each victim of a gross human rights violation receive a financial grant, according to various criteria, paid over a period of six years.

Symbolic reparation legal and administrative measures

Symbolic reparation encompasses measures to facilitate the communal process of remembering and commemorating the pain and victories of the past. Amongst other measures, symbolic reparation should entail identifying a national day of remembrance and reconciliation, erection of memorials and monuments, and the development of museums. Legal and administrative measures will also be proposed to assist individuals to obtain death certificates, expedite outstanding legal matters and expunge criminal records.

Community rehabilitation programmes

The Commission consulted with relevant government ministries in preparing its proposals for the establishment of community-based services and activities, aimed at promoting the healing and recovery of individuals and communities that have been affected by human rights violations.

Institutional reform

These proposals include legal, administrative and institutional measures designed to prevent the recurrence of human rights

The Relationship Between Truth and Reconciliation

When talking about truth, the Commission did not consider only factual, objective information or subjective opinions. There is also 'healing' truth, the kind of truth that places facts and what they mean within the context of human relationships - both amongst citizens and between the state and its citizens. This kind of truth was central to the Commission.

The Statute required that the Commission look back to the past and forward to the future. In this sense, it was required to help establish a truth that would contribute to the reparation of the damage inflicted in the past and to the prevention of the recurrence of serious abuses in the future. It was not enough simply to determine what had happened. Truth as factual, objective information cannot be divorced from the way in which this information is acquired, nor can such information be separated from the purposes it is required to serve.

It is in this context that the role of 'acknowledgement' must be emphasised. Acknowledgement refers to placing information that is (or becomes) known on public, national record. It is not merely the actual knowledge about past human rights violations that counted; often the basic facts about what happened were already known, at least by those who were affected. What is critical is that these facts be fully and publicly acknowledged. Acknowledgement is an affirmation that a person's pain is real and worthy of attention. It is thus central to the restoration of the dignity of victims.

Many people felt threatened by the anger of victims. It is, however, unrealistic to expect forgiveness too quickly, without providing victims with the necessary space to air their grievances and give voice to previously denied feelings. Relationships can only be healed over time and once feelings of hurt and anger have been acknowledged. The resistance and hostility of some victims, directed at times at the Commission itself, required understanding and respect.

At the same time, many of those who had suffered gross violations of their human rights showed a remarkable magnanimity and generosity of spirit, not only through their willingness to display their pain to the world, but also in their willingness to forgive. Such forgiveness should never be taken for granted, nor should it be confused with forgetting. Forgiveness is not about forgetting. It is about seeking to forego bitterness, renouncing resentment, moving past old hurt, and becoming a survivor rather than a passive victim.

The Commission sought to uncover the truth about past abuses. This was part of 'the struggle of memory against forgetting' referred to by Milan Kundera. But it was, at the same time, part of the struggle to overcome the temptation to remember in a partisan, selective way. It was to recognise that narrow memories of past conflicts could too easily provide the basis for mobilisation towards further conflicts, as in the case of the former Yugoslavia and elsewhere. An inclusive remembering of painful truths about the past is crucial to the creation of national unity and transcending the divisions of the past.

The Importance of a Public Record

The legislation which created the South African Truth and Reconciliation Commission is called the Promotion of National Unity and Reconciliation Act. The statute is premised on the belief that a mutual or common understanding of our society's divided past and public acknowledgement of that divided history, will bring about reconciliation. The Truth Commission in South Africa has produced a new written record of the apartheid years. It is vitally important that the nation is not left where it was prior to the work of the Commission - with a number of contradictory versions of our history. It is contradictory versions of history that serve narrow and regional nationalisms, factional interests and which legitimate the ideologies of those who wish to wage civil war. It is of vital importance that a publicly sanctioned record is established, against which past human rights abuses can be judged. It is against this record, or this history that those who suffered human rights abuses can be vindicated, and it is against this history that those responsible for gross human rights violations can be censured.

If there is to be any prospect of a divided society coming together as a nation, there must be a mutually acceptable and collective understanding of the truth about the past. This has to endure, and be passed on to those whose task it will be to ensure that never again do the citizens of the same country torture and kill each other.

Accordingly, it was the final task of the South African Truth Commission to provide the government with a report which gives as complete a picture as possible of the nature and extent of gross human rights violations committed in the years 1960 - 1994. The report indicates the identity of the victims, the identity of the perpetrators, whether the violations occurred as part of a strategy or plan by the former state or former liberation movements, the motives and perspectives of perpetrators.

The Limits of a Truth Commission

In the words of historian Michael Ignatief: 'All that a truth commission can achieve is to reduce the number of lies that can be circulated unchallenged in public discourse'.

In South Africa, it is no longer possible to assert that the security police did not abduct, torture, murder and secretly bury political activists.

A Truth Commission cannot overcome society's divisions, but it can present history from the victim's perspective. It can acknowledge and affirm this version of history, and at the same time, diminish and treat with disdain the version of the former regime, thereby purging the members of that regime of their arrogance.

The motto of the South African Truth Commission, which appeared on posters and banners at every hearing was - *The truth shall set you free*. In the South African experience, knowledge of the circumstances of and the reasons for a family member's death has been a liberating experience for thousands of victims, as it has been for perpetrators, to enable them to lift the burden of guilt and shame.

A Truth Commission for Australia?

Modern Australian history is a short unromantic tale of dispossession and genocide. The life expectancy of Aborigines, says the Australian Bureau of Statistics, is lower than that of most countries in the world and is matched only by India and Central Africa. Aboriginal infant mortality is three times higher than that of white children, higher in Western Australia than in Bangladesh. The health of Aboriginal women has so deteriorated that the death rate is now up to six times that of white women.

In 1997, the Federal Health Minister, Michael Wooldridge, made the following admission. 'In my area of health,' he said, 'there is no evidence of any improvement whatsoever in the last decade ... the gap (between Aboriginal and white health) has actually widened.'

'Much of the poverty and disease in Aboriginal communities', said the President of the Australian Medical Association, Dr Keith Woollard, 'is a result of the dispossession of their lands.'

This was also the view of expert witnesses giving evidence to a Royal Commission into Aboriginal deaths in custody in the late 1980s. The Commission heard that Aborigines were sixty times more likely to be arrested than whites in Western Australia, and Aboriginal children made up 2.7 per cent of the state's youth but 58 per cent of the juveniles in detention. There was evidence of beatings and torture; neglect was established as standard police procedure. After sitting for two years at a cost of \$A30 million the Commission made 339 recommendations. Not one of them called for criminal charges against police or prison officer and not a single one alleged foul play. The Royal Commission recommended the obvious, that Aborigines should be imprisoned as a last resort. Since then, Aborigines have been sent to prison at a rate higher than ever before and the number dying behind bars has doubled.

The former chief psychiatrist at Baragwanath Hospital in Soweto wrote to the *Sydney Morning Herald* in 1996, to point out that the rate of black deaths in custody in Australia was thirteen times higher than in South Africa. And yet, Australians persist in calling this the 'lucky country', the 'fair-go society'. It needs to be asked what sort of society is this that treats its original, indigenous citizens in this manner.

Where do we go from here? I believe that despite the brave and pioneering work done by the Human Rights and Equal Opportunity Commission in the 'stolen generations' report, there has only been piecemeal treatment of the fate, the plight and the destiny of Aborigines in this country. What is needed is a holistic and robust approach that pulls together the diverse elements that constitute this national scandal, and I hope that I am not being presumptuous in suggesting that something along the lines of the South African Truth

Commission would serve this country very well. There is a huge need for formal, public acknowledgment of the terrible wrongs suffered by black people in this country. There is the need for a victim's perspective of history. There is a need for financial and symbolic reparation. There is a need for formal channels of expressions of apology and regret, and there is, from my contact with many decent people in this country, a powerful need and willingness to do so.

Richard Lyster

Former Commissioner on the South African Truth and Reconciliation Commission, currently an assessor on the Land Claims Court established under the Land Rights Restitution Act.

No specific references are quoted in this paper. In compiling it, reference was made to the following:

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