Truth and Reconciliation: Realising the ideals

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One of the biggest dangers facing the Truth and Reconciliation Commission is high expectations. It is crucial that people understand that the Commission is just one mechanism through which to facilitate reconciliation, and that it goes as far as possible in delivering justice and compensation to people who have suffered. If so, the Commission could make an important contribution to building a human rights culture in South Africa.

The signing of the Promotion of National Unity and Reconciliation Bill into an Act during July this year paved the way for the establishment of the much-vaunted Truth and Reconciliation Commission. Burdened with the monumental task of revealing the extent of human rights abuses committed over the past three decades, the Commission is bound to become a highly sensitive political issue.

Under no illusions as to the difficulty of the task facing the Commission, Justice Minister Dullah Omar has announced that it will only start conducting hearings in the latter half of 1996. Although significantly later than expected, the Minister has indicated that the delay is necessary for the careful planning and forethought that needs to go into the process of selecting commissioners and establishing the relevant structures (*Mail and Guardian*, September 2 to 8, 1995).

Considering the tendency for commissions of this type to fall short of what is expected from them, it is commendable that the setting up of the Truth and Reconciliation Commission is not being rushed.

Indeed, the examples of truth commissions in Latin America, from which proponents of South Africa's Commission have liberally cited, have been regarded as "primarily examples of failure rather than success of such a reconciliation process" (Simpson, 1994). South Africa, however, is generally perceived as unique and may avoid the pitfalls that other countries have experienced.
Any discussion of the Commission can lead to a myriad of complex debates and arguments. At this stage, it is impossible to know exactly how it will operate and what strategy will be adopted. These issues will have to be determined by the yet to be appointed truth commissioners.

Although the objectives and powers of the Truth and Reconciliation Commission have been clearly articulated through the Promotion of National Unity and Reconciliation Act, it will find itself operating within certain constraints and having to make difficult choices.

**Punish or pardon?**

Truth commissions can play a critical role in helping a country come to terms with a history of human rights abuse. If successful, commissions may have a cathartic effect on society through the formal acknowledgement of a previously silent past (Hayner, 1994). Several sources have highlighted how the truth recovery process plays an important role in reconciliation.

As all truth commissions are concerned with establishing the facts surrounding past human rights violations, they commonly face a crucial dilemma that impacts heavily on the terms of reference of the specific commission. The decision is whether to punish those implicated in the atrocities that are revealed, or to grant them amnesty.

This decision is contingent on two conflicting imperatives - the need to promote stability and national unity against the need to achieve justice through the prosecution of perpetrators. This choice is never made in a vacuum, but is determined by political constraints within which the truth commission will have to operate.

Where a regime which has committed human rights violations is succeeded by an outright victor, as in the case of Germany after World War II and more recently Ethiopia, there are few limitations and perpetrators generally are punished.

In most of the Latin American cases, however, the perpetrators of the crimes continued to hold significant power in the security forces and threatened to destabilise the emerging democracy if prosecutions were sought. Chile is a prime example: former dictator Augusto Pinochet managed to remain in control of the military and effectively block attempts at prosecution.

In such cases, choices are limited and blanket amnesty is usually granted, often with negative consequences. In Chile, among other countries, human rights abuses have continued and victims' groups have emerged to voice dissatisfaction at what they see as commissions established to serve narrow ruling class interests.

**The middle ground**

South Africa is unique in this crucial aspect, as it has attempted to circumvent the opposing positions of pardon or punish and establish a "middle path". In order to understand how the Commission plans to navigate this path, it is imperative to have insight into the political context within which it arose.
During the multi-party negotiations, it was agreed to insert into the Interim Constitution the provision that "amnesty shall be granted" to those who had committed offences during past conflicts (Interim Constitution 1993). Ostensibly the granting of amnesty was a compromise on the part of the African National Congress, as the National Party had categorically refused to agree to democratic elections unless amnesty was constitutionally agreed.

Nevertheless, it was acknowledged by all parties that because South Africa's past was conflictual and divided, amnesty would promote reconciliation and unity while prosecutions might undermine the stability needed to support the country's fragile democracy (Simpson and van Zyl, 1995).

This highlights how South Africa differs from many of the Latin American countries: the transition was one in which there was a negotiated settlement without one side being able to totally dominate the other.

The negotiated settlement approach demanded compromise and consensus to obtain the loyalty and co-operation of the security forces. That this was done meant that the blanket amnesties which characterised the period before the elections could be repealed, thereby opening the way for a more flexible approach to amnesty.

The final result is that although amnesty will be granted, it will not be automatic. For those implicated in past human rights abuses, it will only be granted with full disclosure to the Commission about the political crimes committed.

In this way, the Government has decided to couple amnesty with the recovery of truth, which in effect brings the perpetrators directly into the process of reconciliation. By doing so, perpetrators can be held accountable for their crimes, thereby contributing a symbolic commitment to a new era based on the rule of law (Simpson and van Zyl, 1995).

**How it will work**

Essentially the Truth and Reconciliation Commission will be the mechanism through which the Government can fulfil its constitutional obligation to grant amnesty. The architects of the Commission have also incorporated the issues of human rights and reparations into the process.

The Commission will be managed and given direction by 11 to 17 broadly respected and impartial commissioners. They will be saddled with the task of achieving the objectives of the Commission, which can be summarised as follows:

- To establish as complete a picture as possible of the causes, nature and extent of gross violations of human rights which occurred between March 1, 1960 and December 6, 1994.
- To grant amnesty to people who disclose in full acts which they have committed which are associated with political objectives.
- To establish the fate or whereabouts or victims of gross violations of human rights and to assist in restoring their human and civil dignity by giving them an opportunity to testify.
as to their experiences, and by recommending various measures aimed at providing reparation and rehabilitation to victims.

- To write a report which publicises the work and findings of the Commission and contains a set of recommendations of measures aimed at preventing future violations of human rights.

In order for the commissions to achieve these objectives they will preside over three sub-committees to be established to deal with the relevant areas:

- **The Committee on Human Rights Violations**

  This committee will have two functions. Firstly, it will conduct open hearings around the country where victims will be afforded the opportunity to testify about the human rights abuses that they have suffered. In providing an official space for victims to tell their stories, this committee hopes to facilitate a process in which victims can confront the past and lay the trauma associated with it to rest.

  Secondly, the committee will conduct research and investigations into political offences that occurred. This will allow the Commission to collect information with which it will compile its final report on the extent and nature of the abuses that took place. Information uncovered may also be used as evidence to facilitate the tasks of the other two committees.

- **The Committee on Amnesty**

  This committee will grant amnesty to people who come forward and make full disclosure about the offences they committed. If the perpetrator discloses the facts surrounding one offence but fails to give information regarding any other offences which he or she may have committed, amnesty will only be given in regard to that which is disclosed. The perpetrator will still be open to prosecution for offences not disclosed.

  Amnesty will also only be granted for offences which meet the definition of political crimes as given in the Act. This means that those liable for particularly heinous human rights violations will not be granted amnesty, and therefore will still be open for prosecution.

- **The Committee on Reparation and Rehabilitation**

  People who were victims of gross human rights violations, or close relatives of people who were killed, may apply for compensation from this committee. Its function will be to come up with a set of recommendations to the Government on how to implement a reparations policy.
Assessment

Given the complexity of the task of the Truth and Reconciliation Commission, it is imperative to establish beforehand the limitations of the endeavour. It must be acknowledged that the concepts of "truth and reconciliation" are ideals which cannot be objectively measured.

It will be almost impossible to uncover all the facts surrounding human rights abuses committed during the 30 year mandate of the Commission. In trying to tread the middle ground on the amnesty issue, many victims will not feel reconciled by seeing those who committed crimes against them going free or escaping the net of the Commission due to lack of evidence.

In many cases, the survivors and relatives of victims of human rights violations are eager to see justice done. Groups such as the Association of Victims of Unsolved Apartheid Atrocities reflect this sentiment clearly (*Sowetan*, June 14, 1995).

Although reconciliation through amnesty may be easier for the ruling elite to accept, for those living in the shadow of economic injustice, the frustration of being denied criminal justice could be severe. Experienced Chilean truth commissioner, Jose Zalaquett, warns:

… leaders should never forget that the lack of political pressure to put these issues on the agenda does not mean they are not boiling underground, waiting to erupt. They will always come back to haunt you. (Boraine et al, 1994).

It is because of the implausibility of establishing whether or not sufficient truth and reconciliation has been achieved, that realisable alternatives have to be envisaged. Simpson and van Zyl (1995) note that most commissions concerned with the public disclosure of human rights abuses attempt to benefit two distinct objectives.

Firstly, they are inspired by a predominantly retrospective consideration which not only entails documenting abuses that occurred under the previous regime, but also providing victims of abuses with some form of rehabilitation or reparation. Secondly, there is a motivation to serve a pro-active function which aims to prevent abuses suffered in the past from happening again.

Depending on the circumstances of the particular commission, these goals can be achieved to a greater or lesser extent. But the objectives do provide the Commission with viable criteria to determine its usefulness to South African society.

Firstly, the Commission has to provide survivors and the relatives of victims of serious human rights abuses suffered during apartheid with some form of compensation. The issues involved in this endeavour are complex and must not be taken lightly.

The Commission will have to negotiate with victims the form of compensation that they may be willing to receive. For reparation to fulfil its reconciliatory function, it cannot be imposed on those who have suffered. Similarly, there should not be a standard form of reparation: it should differ from victim to victim.
Compensation should not only be seen in monetary terms, as experience from other countries shows that victims often feel resentment at what is perceived as the government trying to "buy" their forgiveness.

Willie Hofmeyer, an African National Congress Member of Parliament, has revealed that it is unlikely that reparations will be driven by money for the simple reason that there is not enough money available to adequately compensate all victims of abuse (*Mail and Guardian*, July 28 to August 3, 1995).

It is impossible to quantify the suffering that a victim of human rights abuse experiences, so creative ways will have to be found to facilitate the forgiveness and reconciliation of victims and their families.

Secondly, the Commission should instigate measures that attempt to build a culture of human rights. This should take place in the context of transforming the various institutions and organisations of the state that were involved in abuses.

The nature of South Africa's transition to democracy has meant that many individuals who committed acts of human rights abuse still remain in, or have entered, the state. If they are not held accountable for their past actions, there is little to ensure that they will not be party to similar deeds in the future.

There needs to be a careful and critical evaluation of the organs of the state, particularly the security forces and the judiciary. Identifying people responsible for abuses will not in itself ensure prevention.

The Commission will have to make recommendations as to what structures and mechanisms will need to be put in place to act as checks and balances for the future. In some cases the Commission could provide impetus to already conceptualised designs, such as the Independent Complaints Directorate (ICD) mentioned in the recent Safety and Security Bill.

**Imperatives**

The ability of the Truth and Reconciliation Commission to achieve its objectives will depend on the following two factors.

- **The quality of the final report**

  Once the Commission has terminated its operations it will have to present the State President with a final and comprehensive report which not only documents the nature and extent of human rights abuses that took place in the country during the years in question, but also recommends measures needed to prevent future occurrences.

  One of the inherent weaknesses of commissions of inquiry, however, is the inability to ensure that their recommendations are implemented and publicly known.
Judge Richard Goldstone of the Goldstone Commission, which conducted inquiries into public violence and intimidation, was perturbed that many recommendations forwarded were "ignored", and that diminished the Commission's credibility (Citizen, July 7, 1992). Further analysis has revealed that recommendations that were implemented were "fairly specific or technical in nature with clear parameters" (Shaw, 1993).

For the Truth and Reconciliation Commission to be seen to work, it must be careful to make specific recommendations which are both workable and able to be implemented. But such recommendations can only be made if the Commission has the full and necessary facts at its disposal.

- **The accountability of perpetrators**

Once a perpetrator has made full disclosure before the Amnesty Committee, and the crime is accepted as political, the person concerned will receive full immunity from criminal and civil claims.

The person granted amnesty will also have the deed expunged from official records. The individual's name and circumstances around which they were granted amnesty will, however, be published in the final report of the Commission.

Although this falls far short of prosecution, it may act as a form of punishment as it could limit the possibility or extent of the perpetrator being able to hold public office or a position of social responsibility.

But there is bound to be tension around people who do not come forward and give disclosure. There will be many perpetrators who will adopt a strategic "wait and see" approach to the Commission in the hope that they will escape detection. At the same time there will be people who - because of the culture of impunity that existed - committed criminal acts which will not be considered by the Commission to be political offences, and who will thus be open for prosecution.

Also, many people who will not come forward will be implicated in human rights abuses, and it will be up to the Commission to investigate allegations made against them. In many cases this will entail the person being subpoenaed before the Commission to give evidence and answer questions.

The Commission needs to be able to encourage perpetrators to come forward and disclose. Although amnesty may act as the "carrot" in encouraging people to come forward, in itself it will not be enough. There also needs to be a "stick" to make the offer of amnesty more attractive. The threat of prosecution if amnesty is not applied for will have to act as that incentive.
Investigation units

The capacity of the Commission to establish the facts about the nature and extent of human rights abuses committed during apartheid, and its ability to provide the threat of prosecution for people who do not come forward, will depend on the investigation units of the Commission. Under Sections 28 and 29 of the Promotion of National Unity and Reconciliation Bill, the Commission is able to establish investigation units with extensive powers of search and seizure.

Although the necessary powers are provided for, it is crucial that the Commission takes note of previous attempts by commissions to investigate political violence. The Goldstone Commission provides a valuable example of how investigation teams can enhance the effectiveness of a commission of inquiry, and the weaknesses of the units provide lessons about the planning and structures needed for investigations to be effectively conducted.

The Goldstone investigations allowed a significant amount of information to be uncovered that would have otherwise remained hidden. A notable success was the investigation that led to the trial of Vlakplaas commander Eugene de Kock. On the other hand, by the time the Goldstone Commission terminated its operations, it had only instituted 16 prosecutions (Independent Board of Inquiry, 1994).

It is thus clear from the start that the investigation units of the Truth and Reconciliation Commission need to establish a particular doctrine. Whereas the Goldstone investigation teams were to serve as the "eyes and ears" of the commission - predominantly an intelligence function - the Commission units will need to be geared towards gathering evidence that can be handed to the Attorney General in cases where perpetrators refuse to come forward.

In tandem with the investigation units of the Commission is the provision for a limited witness protection programme. Lessons from the Goldstone Commission highlight the difficulties and expenses involved. So much so that in fact the official final report of the Goldstone Commission highlighted the need for a well-structured national witness protection programme.

It is imperative that the Truth and Reconciliation Commission heeds the lessons of Goldstone, which for all intents and purposes was involved in a similar quest for facts about political violence in South Africa - which led to much of the human rights abuse. Where the Commission is limited by political contingencies, it may be able to strengthen its position through effective structures.

Conclusion

One of the biggest dangers facing the Truth and Reconciliation Commission is high expectations. It is crucial people understand that the Commission is involved in a narrow aspect of apartheid rule. Because apartheid has left the country with gross inequality and widespread poverty, it is important that the Commission goes as far as it can in delivering what justice and compensation it can to those who have suffered.
It must be realised that the Commission is really only one of the mechanisms through which to facilitate reconciliation. Nevertheless, it might make an important contribution to building a culture of human rights in South Africa.

For this reason it is important that the Commission is not merely established by the Government, but includes the co-operation of civil society. To this end the Commission has also stood apart from other initiatives. So far the non-governmental organisation sector has proven itself a bulwark against political compromises attempted during the drafting of the legislation.

Unyielding on the values of transparency and accountability in human rights, NGOs were able to overturn a compromised secrecy clause and ensure that the process of appointing commissioners is open and fair.

NGOs have also been responsible for instigating human rights violations documentation projects, conducting research and helping to form survivor support groups. This will be invaluable to the Commission. It will help ensure the Commission does not become a political football at the expense of human rights, and will help temper unrealistic expectations at grassroots level.

Through careful examination of the virtues and failures of other truth commissions, and of the specific problems facing South Africa, the work done by civil society groups will enhance the ability of the Truth and Reconciliation Commission to provide a realisable truth and reconciliation process.

References


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