

PART 2: RESTORATIVE JUSTICE IN PRACTICE

CHAPTER 6

THE TRUTH AND RECONCILIATION COMMISSION AS A MODEL OF RESTORATIVE JUSTICE

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As a result of decades of conflict in South Africa, parties to the pre-1994 negotiation process agreed that in order to deal with the challenges of the new democracy and face the future with confidence, the violence of the past had to be considered and acknowledged. This gave rise to the idea of a Truth and Reconciliation Commission (TRC), and less than two years after the government of national unity was formed in 1994, the TRC was established.

The TRC's approach is widely considered to be one of restorative justice. This article explores the extent to which the South African Truth and Reconciliation Commission fulfilled its restorative justice mandate. In doing so, it reviews the challenges that the Commission faced and draws both positive and negative lessons from the perspective of the principles of restorative justice.

Structure and functioning of the TRC

The Promotion of National Unity and Reconciliation Act 34 of 1995 formally established the TRC. The Act mandated the Commission to deal with the nature, extent and magnitude of apartheid conflict between 1960 and 1994. An important aspect would be establishing the fate and whereabouts of victims of gross human rights violations,⁵⁹ and granting amnesty to offenders who made full disclosures about violent acts committed for political purposes in the course of the conflict.

To carry out its mammoth task the TRC had three committees: the Human Rights Violation Committee (HRV), the Reparation and Rehabilitation Committee (R&R), and the Amnesty Committee (AC). In investigating abuses that occurred during the years of political conflict, the human rights violations committee was to establish the identity, fate and whereabouts of victims, the

nature and extent of the harm they suffered, and whether violations were the result of deliberate planning by the state or any other organisation. Once identified, victims were referred to the reparation and rehabilitation committee. The committee was to provide psychological, emotional, financial and material support, and ensure that the TRC process restored the civil dignity of victims. This committee could formulate policy proposals and recommendations on rehabilitation and healing of survivors, their families and the community at large.

While the above two committees focused on victims, the amnesty committee dealt with perpetrators. Its primary function was to ensure that amnesty applications complied with the provisions of the Act. According to the Act, perpetrators could apply for amnesty for any act, omission or offence associated with a political objective committed between 1 March 1960 and 11 May 1994. Applicants that were granted amnesty would no longer be liable for prosecution or any civil claim for the actions in question. In order to be considered for amnesty, the following criteria had to be met:

- The act or omission had to be associated with a political objective committed in the course of the conflict of the past.
- The applicant had to make full disclosure of all relevant facts relating to their involvement in the conflict.
- The applicant should have been a member of a publicly known political organisation or liberation movement or an employee of the state acting within the scope of his or her express or implied duties.
- The act or omission should have been committed in furtherance of the political objectives of the party concerned.

The principal ideas behind the establishment of the TRC as a restorative justice enterprise were justified. As a nation with a history of violent conflict, a dedicated consideration of the past was necessary in order to build a positive future. Conceptually, the TRC was in line with virtually all the principles and requirements of restorative justice: it was an attempt to deal with the victims and offenders of the conflict by focusing not only on the settlement, but also on the root causes to ensure non-repetition. The amnesty process was meant to ensure that offenders tell the truth and accept responsibility for their actions. The TRC emphasised in its recommendations that services and redress should be rendered to the victims. However, the implementation of the process by the TRC and since its closure, by government, revealed a noticeable gap between good intentions and actual practice.

The balance between reparation and amnesty

One of the key questions about the TRC's effectiveness relates to the balance it had to strike between the amnesty and reparation processes. The final TRC report made specific recommendations about rehabilitation and reparations for victims of apartheid, some of which are:

- Urgent interim reparations should be made to assist the category of victims who needed urgent access to appropriate facilities and services. Limited financial resources had to be made available to facilitate these reparations.
- Individual grants which recommended that each victim should be given a long term financial grant according to set criteria to last for a period of up to six years.
- Symbolic reparation that encompassed measures to facilitate the communal process of remembrance as well as commemorate the pain and victories of the past. This commemoration would include identifying a national day of remembrance and reconciliation, developing museums, memorial and monuments. Legal and administrative measures had to be taken in order to assist some victims to obtain death certificates, speed up outstanding legal wrangling and expunge some criminal records.
- Community rehabilitation programmes aimed at the promotion of healing and recovery of individuals and communities that have been affected.
- Institutional reform proposals included legal, administrative and institutional measures designed to ensure the non-repetition of human rights abuses.⁶⁰

Although the recommendations recognised the need for long term financial reparation as well as other symbolic forms of reparation, the TRC did not have the authority to hand them out. According to the Act, the TRC could make recommendations to parliament but was not accorded the authority to implement reparations. For this, the Commission would have to rely on the political will of government. This turned out to be one of the most serious weaknesses inherent in the TRC's functioning. Thus while it had the power to grant amnesty to offenders, the Commission had no authority to grant long term reparations to the victims – a necessity for counter-balancing the amnesty process. In this sense, the restorative capacity of the TRC was substantially limited.

One of the reasons for the delays in paying reparations to victims was the lack of consensus about the form such reparations should take. Robust debate on

the issue was often complicated by comments made in leading ANC circles that money was not the fundamental motive for those who joined the liberation struggle, and that because almost all black people were in some way victims of apartheid, individual compensation would be unfair.⁶¹ This was followed by calls for community reparation and symbolic rehabilitation.⁶²

The resultant delays in paying financial reparations, and the lack of clear policy to implement the final reparation grants, was seen by many as a denial of survivors' legal and moral right to reparation. It was also a violation of the constitutional court ruling in the case of *AZAPO and Others v. the President of South Africa and Others (1996 (8) 1025 cc)*. In this case the highest court in the land held that amnesty for perpetrators could only be justified if reparations were made to the victims. The applicant in this case sought an order to declare the amnesty clause unconstitutional. In arriving at the decision that the clause was constitutional, Judge Didcott stated:

Reparation is usually payable by states, and there is no reason to doubt that the postscript envisages our own state shouldering the national responsibility for those [victims]. It therefore does not contemplate that the state shall go Scot-free. On the contrary, I believe an actual commitment on the point is implicit in its terms, a commitment in principle to the assumption by the state of the burden... The Statute does not, it is true, grant any legally enforceable right *in lieu* of those lost by the claimants whom the amnesties hit. It nevertheless offers some *quid pro quo* for the loss and establishes the machinery for determining such alternative redress.

When considering the principles of restorative justice, another problem with the reparation process was the perpetrators' role in making the reparation. In terms of the TRC process, once granted amnesty, offenders are no longer liable for any civil or criminal damages. For restorative justice to work, individual offenders should voluntarily contribute towards reparation. The Home for All Campaign – an initiative by white South Africans to help repair the material and psychological damage done by apartheid – is a practical example of how beneficiaries of the past system can voluntarily contribute to improving the lives of those who suffered.

The plight of victims in the TRC process created a perception that the new government is unwilling to acknowledge the pain and suffering they endured. As a result, there is a sense of resentment among victims that the TRC was biased in favour of the perpetrators.⁶³ This perception was deepened by the

fact that while most amnesty applicants received legal assistance from the state, victims received poor, if any, legal advice. Most victims received little help when making statements, resulting in some being declared ‘non-victims’ by the TRC. This had a profoundly disempowering impact on those affected, most of who struggled to follow the appeals procedure, which had many legal technicalities.

The situation was aggravated by the presidential pardons granted in 2002 to 33 prisoners largely belonging to the ANC and PAC. Most of these prisoners were convicted for serious crimes, and the chairperson of the TRC, Archbishop Desmond Tutu, lamented the pardons because they would...

Make mockery of the TRC and would eviscerate the entire TRC process. If it is true that those pardoned include several who had been refused amnesty by the TRC, then it seems to be the thin edge of the general amnesty wedge. It would be unfortunate and would undermine the work of the TRC.⁶⁴

Despite repeated assurances by government that the releases were not the beginning of general amnesty, many victims felt that the move further denied them their rights and benefits in terms of restorative justice. The extent of the negative impact on victims is evident in the civil society advocacy on the issue. Organisations like the Khulumani Support Group (KSG)⁶⁵ and the Institute for Justice and Reconciliation have been active in lobbying government through various means to resolve the issue of reparations for victims.⁶⁶

As a restorative justice model, the TRC aimed to find a balance between amnesty and reparation. Considering the issues discussed above, it would appear that the TRC process failed to achieve this balance. This can largely be attributed to the mandate given to the TRC: it was insufficient for the Commission to have the power to execute the amnesty process, while the reparation process relied on the goodwill of politicians.

The challenges of restoring victims’ civil dignity

One of the key principles of restorative justice is to restore the civil dignity of victims. In doing this, the TRC was faced with the following challenges that are briefly discussed below:

- how to define a ‘victim’;
- the granting of urgent and long term reparation to victims;

- insufficient capacity of the TRC’s statement takers;
- weak investigative capacity in the TRC;
- poor representation of the business sector at hearings; and
- political tensions.

Definition of a ‘victim’

One of the challenges facing the TRC in restoring the civil dignity of apartheid victims lay in its definition of the word ‘victim’. Victims are defined as direct survivors, relatives or dependants of persons who suffered gross human rights violations as a result of the political conflict of the past. Gross human rights violations included torture, severe ill treatment, murder, abduction, aggravated assault, disappearance, and detention.⁶⁷

This definition excluded victims who suffered other forms of human rights violations such as forced removal, banishment, house arrest, being denied the right to vote as well as all other rights associated with a free and democratic society. These were the violations experienced by the majority of black South Africans. Had apartheid been declared a ‘crime against humanity’ by the United Nations, virtually all black people in the country prior to 1994 would, in terms of international law, be entitled to some form of reparation. The Act governing the TRC went against this widely accepted international practice by limiting the definition of the word victim. At the outset therefore, the TRC’s ability to restore victims’ dignity was limited simply by the fact that it excluded most victims from the process.

Granting of urgent and long term reparation to victims

Over 22,000 victims made submissions to the TRC. Most of those who applied (16,576) qualified to receive urgent interim reparation.⁶⁸ This category of reparation – ranging from R2,000 to R6,000 depending on the criteria set by the TRC – aimed to provide urgent relief for victims in need of medical, material or psychological assistance. By 2002, most of the victims had received the money due to them.

Although most of those who made submissions did receive reparations, there were several problems with the process:

- There were long delays in the issuing of payments. Victims were meant to have received money as early as 1996 but in some cases, grants were distributed only after 1999.
- The individual amounts issued were insufficient for the majority of the recipients.

- Considering that the TRC applied to a period of 34 years of conflict, overall only a small number of apartheid victims benefited.

These last two points are particularly relevant given that government set aside R800 million for urgent interim reparations, only R49 million (6%) of which had been spent by 2002.⁶⁹ This amount is a far cry from the R3 billion recommended by the TRC report for long term reparations.

Aside from the problems relating to the payments themselves, financial reparations *per se* are limited in some respects as far as restorative justice is concerned. Many victims see the payments as concrete forms of assistance rather than symbolic acts that serve to commemorate those who suffered under apartheid (in this case). Although the majority of destitute survivors welcome material reparations,⁷⁰ the loss of life cannot be measured in monetary terms. In this sense, the amount of money granted to victims can never equal the actual costs borne due to the death of a breadwinner. It is also unlikely that these material reparations will dramatically change the lives of victims.

This does not mean that financial reparations should not be made. Instead, it is important to bear in mind that when the vast majority of victims are poor, as was the case in the South African TRC process, any amount of money will be seen as beneficial. Victims may be compelled to place the pragmatic needs of limited short term payments before long term or symbolic reparation. The desperate need for money could stifle victims' criticism of reparation proposals for fear that they will receive little or no money if they voice their concerns publicly.⁷¹

Capacity of the statement takers

The TRC's human rights violations committee was tasked with taking statements from victims and conducting hearings in different parts of the country. Although there was substantial media coverage of the hearings – largely due to the emotions they evoked rather than their value for the healing process – only about 10% of the victims who made statements to the Commission were given the opportunity to tell their stories in public.⁷² The remaining victims felt excluded from the process. Their only interaction with the Commission was with statement takers who were at times found to be insensitive and inappropriate in their work.

As a result, some victims did not qualify for interim reparations because there was insufficient evidence to classify their cases as gross human rights

violations. This is not to suggest that all victims' statements should have received media coverage. Rather, the ill-equipped and often unskilled nature of the statement taking process was experienced by some as 'revictimisation' rather than part of a healing process.

Investigative capacity

The process of corroborating victims' information provided in statements and testimonies in order to facilitate the overall findings of the TRC and distinguish between victims and non-victims was flawed.⁷³ It was virtually impossible for the ten members of the Commission's investigation unit to investigate over 22,000 submissions made by victims. Despite the information provided in some statements, the investigation process was not focused on arriving at the truth. Some of the questions posed by victims that required investigation were not dealt with. As a result many victims still knew little about the plight of their loved ones by the end of the TRC process.

Representation of the business sector at hearings

The TRC Act made no provision for the role of other legal entities. In particular, the business sector stands out as having contributed to human rights violations during apartheid and having benefited from elements of apartheid's legislative framework. Few such institutions attended the TRC's business hearings that were part of a call for various sectors of society to state their complicity through acts of either commission or omission. This denied the TRC the opportunity to create as complete a picture as possible of the atrocities carried out in the past.

Political tensions

One of the greatest limitations to restoring victims' dignity – and which was largely beyond the control of the Commission – was the political tension that prevailed during its operations. This stemmed from the reluctance of the National Party and some extreme right wing groups to see the TRC investigating aspects of the past that might damage their political credibility. These parties accused the TRC of being a 'witch-hunt' rather than a genuine tool for national reconciliation, and frustrated the Commission's work by instituting frequent legal actions against the TRC. The Commission's biggest political blunder was the tendency to pander to these political groupings in an attempt to keep them committed to the process.⁷⁴ Graeme Simpson has succinctly captured the TRC's failure to handle the political climate:

... Once the National Party left the Government of National Unity, it was simply no longer subject to the political constraints ... It is in this wider political context that one needs to understand the eventual angry refusal by the National Party to cooperate with the TRC, as well as the constant attempts to undermine its work through legal filibustering on the basis that the TRC was alleged to have failed to comply with the terms of the National Unity and Reconciliation ... It is perhaps the greatest testimony to the TRC's ultimate failure to act in a sufficiently robust manner in its dealings with the former government and right wing groupings, that the National Party – in the absence of any substantial apology for its own role as architect of apartheid as a crime against humanity – actually demanded that the TRC apologise to it! This was a rather transparent political stroke, which sought to entirely shift the focus of public attention from the National Party's complicity in gross violations of human rights, to the alleged indiscretions of the TRC itself." ⁷⁵

This politically delicate task of the TRC worsened its relations with victims who were justifiably frustrated by the lack proper justice that the position implied. For restorative justice to succeed, victims need to see offenders express remorse. That this was not forthcoming from the political party that governed the country under apartheid, dealt a severe blow to the process.

Lessons for restorative justice

From a restorative justice perspective, there are several lessons, both positive and negative, that can be learnt from the TRC process. The positive lessons include:

- The TRC was a bold model of restorative justice as opposed to retributive justice. It made a substantial contribution towards breaking the culture of silence that characterised the apartheid years. By giving many victims the opportunity to come forward and tell their stories, they could at least find comfort in knowing that they were not alone in their suffering.
- The TRC demonstrated that in the main, punitive criminal justice models are not well suited to addressing the reparative needs of victims. Despite the flaws mentioned above, victims had more to gain from the process of telling their stories and receiving albeit meagre reparations, than they would from following the complex, lengthy and costly criminal justice route.

- The amnesty process succeeded in making some offenders more accountable for their actions and more aware of the harmful effects of their deeds on the victims and the community.

Negative lessons in terms of the aims of restorative justice include:

- Many frustrated victims have made strong statements that there can be no reconciliation without justice. Ultimately, very few perpetrators directly apologised and offered restitution to survivors and their families through the TRC process. This was not an essential part of the process, as reparation was made by government and offenders were not obliged to make direct apologies to families of victims or to victims themselves.
- Enough scope was not provided for individual expressions by victims, and responses by perpetrators. Large scale political violence like that experienced in South Africa requires that space be provided for understanding the individual feelings of victims and why the process of moving forward after substantial loss is not an easy one. Private and public spaces for survivors are required in order for them to work through their individual experiences of the conflict.
- Reparation should be linked to the process of truth recovery. Victims should not be made to feel that reparations are being made in order to substitute the process of truth recovery. Any effort not to link the two will be seen as attempting to simply close the chapter on the past, leaving behind many untold miseries. Victims need to know the individual circumstances surrounding what happened in the past.