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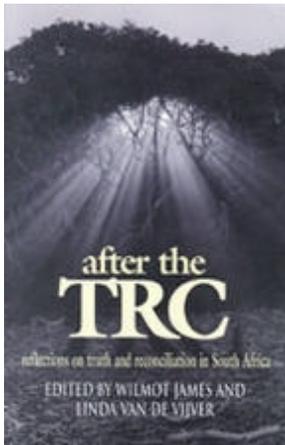


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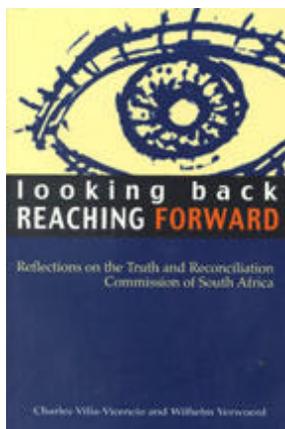


Publish Not Punish: The Contested Truth of the South African Truth and Reconciliation Commission

By Todd Landman

A review of *After the TRC: Reflections on Truth and Reconciliation in South Africa*, Wilmot James and Linda van de Vijver, Editors. Athens: Ohio University Press and Cape Town: David Philip Publishers, 2000. 228pp.

and



Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa, Charles Villa-Vicencio and Wilhelm Verwoerd, Editors. Cape Town: University of Cape Town Press and London: Zed Books, 2000. 322pp.

One of the most enduring images of the late 20th Century was the 1990 release of Nelson Mandela from prison in South Africa. Former President F. W. De Klerk's decision represented a symbolic end to Apartheid, a form of governance based on racial exclusion and minority rule enforced by the coercive apparatus of the South African state. More formally, the release of Mandela ushered in a period of rapid democratic transition that saw the establishment of a multi-racial Parliament, a new constitution, elections for all political offices, and the assumption of Mandela himself to the Presidency. This rapid set of events should be seen as a significant part of a much larger process of democratic transformation in South Africa, which includes large scale structural changes, a prolonged and inclusive political struggle, a moment of transition, and a period of democratic "habituation" during which the new democratic political institutions have begun to function and the necessary supportive values and democratic political culture have begun to develop. Most accounts of democratic transition focus on a limited and discrete moment of time during which a political system changes from democratic to non-democratic rule, but as Rustow (1970) reminds us, such a moment of transition represents only a small part of the struggle for democracy over the *longue durée*.

In the South African case, as well as many other transitional countries, the Truth and Reconciliation Commission (TRC) should be seen as an important element within this larger process of democratic transformation for three reasons. First, the TRC is an outcome of political negotiation and strategy of accommodation between opposing political forces that characterized the moment of transition. Second, it is a window on the past practices of both the regime and opposition groups that seeks to establish a permanent record of truth about gross human rights violations. Third, through its promise of reconciliation, it is a door on the future that allows a nation and a people to move forward.

Despite these three positive aspects, however, the TRC is inherently problematic for a deeper set of philosophical and epistemological reasons, since the whole process of truth telling, amnesty, and reconciliation involves larger questions of the nature of “truth, causality, evidence, and explanation” (After the TRC, p. 10). The TRC sought to answer a series of important questions: What happened? When did it happen? Who did it? Why was it done? More importantly, however, is the question about the status of the truth that is uncovered: how will the TRC know if its account is correct or not? These deep problems of knowledge, facts, and explanation mean that the TRC’s existence, official role, and eventual impact will remain highly political and contested by different elements in South African society. Indeed, the many voices of dissent since the publication of its official findings lend support to this notion of contestation. F. W. de Klerk sought to prevent the Commission from publishing its findings, and the former National Intelligence Service (NIS) chief, Dr. Neil Barnard is contesting virtually every finding of the TRC Report (Looking Back, Reaching Forward, p. 9).

These positive and problematic aspects of the TRC provide the content for the two books under review, which include historical accounts, essays, and reflective pieces by key actors who took part in the TRC, human rights activists and practitioners, academics, and other contributors. Looking Back and Reaching Forward has 28 chapters divided into four parts: the historical context of the TRC, its philosophical framework, its main aims and objectives, and its lessons for South Africa. After the TRC has 22 chapters and is similarly divided into five parts: historical and comparative perspectives, reflections on the nature of the TRC, unfinished business, lessons learned, and challenges for the future. The contributors in each book include government ministers, representatives from NGOs, former Commissioners of the TRC, members of the South African Parliament, judges, lawyers, journalists, religious leaders, medical doctors, and academics. The academic contributions come from a diverse set of disciplines, including history, economics, law, business, psychology, physiotherapy, and theology. There is a mild overlap in the contributors, including essays in each book from Richard Goldstone, Justice of the Constitutional Court of South Africa, Charles Villa-Vicencio, Executive Director of the Institute for Justice and Reconciliation and former Director of Research at the TRC, and Mary Burton, former Commissioner of the TRC.

These books thus present a diverse set of views and arguments about the nature and impact of the South African TRC. This review brings together the important contributions that these two books make, and is organized into the following four sections: (1) technical aspects of the TRC, (2) key themes of debate, (3) comparative inferences, and (4) implications and challenges of the TRC for South Africa.

Technical Aspects of the TRC

The TRC was set up by the Promotion of National Unity and Reconciliation Act (No 34) in 1995 as part of the Interim Constitution and therefore had a legal basis for its existence, while its authority, legitimacy, and power were derived more through its practices. Its task was to establish an official record of gross violations of human rights for the period between March 1960 and May 1994, identify the perpetrators responsible for committing them, and to prevent their recurrence in the future (*Looking Back, Reaching Forward*, p. xix). Three main committees carried out the activities of the TRC: the Amnesty Committee, The Human Rights Violations (HRV) Committee, and the Reparations and Rehabilitations Committee. In addition, the Investigative Unit, in collaboration with the Research Department, conducted investigative inquiries. The HRV Committee was the predominant committee and received over 21,000 statements from victims, 80 percent of which were considered legitimate.

The Amnesty Committee (the second most important) effectively traded amnesty for truth. Perpetrators confessed to their past actions and implicated themselves, but avoided direct punishment. These two main components—human rights and amnesty—thus served as the collective and complementary backbone of the TRC. But as Johnny De Lange, ANC Member of Parliament observes, “the amnesty component derives its authority from the constitution, whereas the human rights component claims its authority from our morality, from our humanity. The latter is victim-driven, the former perpetrator-driven” (*Looking Back, Reaching Forward*, p. 24).

Key Themes of Debate

This division and tension between the two components of the TRC serve to frame different sets of key debates surrounding the meaning, practices, and impact of the TRC that reverberate through the essays presented in the two books. These debates are expressed as unresolved antagonisms between principles, practices, or ideas. While not exhaustive, the list includes truth vs. reconciliation, retribution vs. restoration, gross violations vs. politically motivated offences, just war vs. just means, and the politics of memory vs. the politics of transition. Each of these antagonisms is considered in turn.

Truth vs. Reconciliation

The strength of establishing a truth commission during a process of transition lies in advancing reconciliation on a national or political level. As Priscilla Hayner observes, “By speaking openly and publicly about past, silenced events, and by allowing an independent commission to clear up high profile cases, a commission can ease some of the strains that may otherwise be present in national, legislative, or other bodies” (*Reaching Back, Looking Forward*, p. 39). But establishing the truth may not necessarily forge reconciliation as old and perhaps repressed memories are reinvigorated through testimony. Political divisions and strong antagonisms can be re-ignited through the publication of past abuses. Moreover, it is difficult for a national level institution such as the TRC to bring about reconciliation at the individual level. In the South African case, the role of Archbishop Desmond

Tutu, who opened each session of the TRC with a prayer, was to imbue the proceedings with a religious tone that in many ways made individual reconciliation at least conceivable (*Ibid.*, pp. 40-41).

Retribution vs. Restoration

A difficult area for any process of transition concerns the appropriate response to past injustices and abusive practices. A gut instinct is to seek punishment for those responsible for wrongdoing. This is the principle of retribution, and in the context of the history of human rights was carried out most notably by the International Military Tribunal (IMT) in Nuremberg and more recently in the International Criminal Tribunals for Rwanda and the Former Yugoslavia. For many reasons, the TRC opted not to punish, but to publish. Since it was not a court of law, it did not determine individual criminal liability nor did it order criminal sanctions against perpetrators. Even if it did, the massive set of unresolved human rights abuses that had occurred over a period of 34 years would have slowed the process significantly. Moreover, rules of evidence typically employed in criminal courts tend to exclude information, while the TRC was keen to uncover as much information as possible. In contrast to Nuremberg, the TRC was not established as the result of war, but democratic transition. After the moment of transition, former agents of Apartheid were eligible for electoral competition and formed part of the new human rights culture. Finally, in comparative perspective, it is more the exception than the rule for such bodies to punish perpetrators (*Looking Back, Reaching Forward*, pp. 28-31). Thus, the TRC was committed to a process of restoration through truth, which precluded retributive justice. In this way, perpetrators confessed to the Amnesty Committee, and victims gave testimony to the Human Rights Violation Committee, but the two communities were not brought together, which leaves the question of restoration open.

Gross Violations vs. Politically Motivated Offences

Pinpointing the meaning of gross human rights violations presented the TRC with a serious challenge, since many argued that the whole system of Apartheid was by its very nature a gross violation, while others claimed the regime was simply one giant crime against humanity. The legislation that created the TRC referred to killing, abduction, torture, and severe ill treatment. Within the last category there were doubts as to the equal status of such violations as rape, solitary confinement, mutilation, and poisoning on the one hand, and detention without trial, banning and banishment, and the destruction of people's houses on the other hand (*Ibid.*, pp. 81-82). In the end, the TRC took the view that all such practices constituted gross violations. But the issue was further confused between those persons found by the HRV Committee to be victims of gross violations, and those found by the Amnesty Committee to be victims of "politically motivated offences." Making such a distinction between gross violations and politically motivated offences had significant ramifications for those who felt eligible for reparations (*Looking Back, Reaching Forward*, pp. 78-79; *After the TRC*, pp. 137-138).

Just War vs. Just Means

The political struggle between the agents of Apartheid and the forces of opposition highlights the problem of the distinction between just war, on the one hand, and just means within warfare on the other. While agents of the Apartheid regime rationalised and justified their actions by claiming to

be defending themselves against the forces of subversion, those opposed to the regime claimed a moral position in their fight against an immoral regime. The TRC concluded that the forces of opposition were clearly fighting for a just cause, and simply could not be equated morally with those who sought to support and uphold the regime. Publicly, both sides of the conflict (broadly speaking) spoke of upholding the principle *jus in bello* (just means), but in practice, the amnesty process and truth telling illustrated that both sides privately believed virtually any means were legitimate. Indeed, the TRC heard testimony from supporters of the regime as well as the ANC, who offered accounts of detention, interrogation, torture, and execution within their own camps (Looking Back, Reaching Forward, pp. 82-83).

Politics of Memory vs. Politics of Transition

The final theme that emerges in these two books is the tension between the politics of memory and the politics of transition. The politics of memory involves the search for truth, but that very truth is politically contested by agents on all sides of the conflict. Ebrihim Moosa observes, “The truth was not measured but manufactured. To be charitable, we could say that the truth was negotiated” (Looking Back, Reaching Forward, p. 116). Janet Cherry argues, “As a historian, I hold that there is one reality, and that truth is not relative, it can be known. This does not make it easy to find, nor does it mean that all will agree with the way it is interpreted or written by a particular individual” (Ibid., p. 143). These two points of view demonstrate fundamental paradigmatic differences, since Moosa argues that truth and memory are not universal or essential, but constructed, while Cherry holds that one objective truth exists and can be known. The politics of transition, on the other hand, requires all parties, in a sense, to forget the quest for truth in order to move forward. At some point, to create the political compromises necessary for founding new democratic institutions, parties should abandon the search for total truth, acknowledge the wrongs of the past, and look toward the future. Taken together, the politics of memory shows that truth can be subject to political manipulation, while the politics of transition shows how truth, however defined, is part of a strategy of political accommodation.

Comparative Inferences

How do the experiences of the TRC compare to those in other parts of the world, and more importantly, what are the important inferences that can be drawn from such comparisons? The TRC in South Africa followed those that had been set up in Latin America, most notably Chile and Uruguay. The TRC had a different mandate than those in Latin America, and the peculiar mix of truth telling, amnesty, and reparations reflected a different philosophy about the purpose and function of such a body. In Chile, for instance, the Rettig Commission merely identified as many victims as possible, and published its report. All but a handful of military personnel escaped formal prosecution. Moreover, in Latin America, no such amnesty for truth deals were available for the perpetrators, although in the case of Argentina, some former officers of the military regime eventually confessed to horrid practices that they committed while in power. In addition to these technical and functional differences, there is a different nature to the political conflict under authoritarianism in both these regions. In Latin America, the conflict was an ideological struggle between left and right, while in South Africa, the conflict was defined in racial terms. As a

consequence, Latin American authoritarian regimes targeted individuals for their subversive activities, while Apartheid targeted whole communities.

Implications and Challenges

What was the final outcome of the TRC? Were its main objectives met? In *After the TRC*, the positive assessments claim that the TRC's investigations led toward approximations of truth and built reconciliation. Less optimistic assessments argue that the TRC provided some truth but not reconciliation. The more critical assessments argue that only a court of law can establish the truth, while the policy of granting amnesty went too far. As Mandami argues, it freed whites and dominant elites of the old regime of any responsibility for Apartheid, the structure and practices of which went far beyond human rights violations (*After the TRC*, pp. 58-61). The key lesson thus far from the experiences of the TRC in South Africa is that the full truth will never be established, only a recognition and acknowledgement of past abuses. Both books argue that in order to move forward, South African society must develop values of responsibility, accountability, and fairness. It must develop respect for constitutionalism and the rule of law, abolish corruption, and establish a moral culture. Most importantly, it must remain vigilant for any evidence of "sliding back" into previous practices.

In order to realise such a challenging project of national reconstruction, restoration and renovation, however, South Africa must address problems of extreme poverty and inequality that persist to this day. Indeed, both books see direct links between poverty and participation. Poverty excludes people, it denies them access to justice, and limits their ability for democratic participation. Only through investment in education will the cycle of poverty be broken and real participation be created. Both books see inexorable links between race, inequality, and the quality of democracy. Unless all groups are provided with the economic opportunities of the new South Africa, the quality of its democracy will always be subject to criticism. In the comprehensive treatment of many facets of the overall process of truth and reconciliation, both books are clear in demonstrating that the TRC was a bold experience that held a nation to account for past practices. And by being bold about the truth, as Jeffrey Lever and Wilmot James observe, the TRC "provides us with the memories of the unjust, and the values of the just ... [which lay] ... the foundations of the moral character of the new South African" (*After the TRC*, p. 200).

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