

THE TRC TWO DECADES ON: REFLECTIONS ON RACIAL ORDERING, SOCIETAL CHANGE AND TRUTH COMMISSIONING

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1. Introduction

South Africa's 2014 international reputation stands in sharp contrast to that of the post-1948 *apartheid* state's crime against humanity marker.¹⁾ Captured in the 1973 adoption of General Assembly Resolution 3068, the United Nations (UN) parties thereto pronounced that "inhuman acts and similar policies and practices of race segregation and discrimination" constitute "a serious threat to international peace and security" (Article II).²⁾ Named and shamed by the UN and its agencies, South Africa was a pariah blighting the face of the international community, both exorcised from its political economy and the sharing of the everyday lived lives of sport and music. By comparison, on 7 May 2014, 20 years after the first ever South African democratic election was held, the fifth free and fair election took place in the light of international recognition and acknowledgement. In the words of Thabo Mbeki, having in 2004 won his second term in office as president and that of the African National Congress's (ANC) third election, the "centre was holding".³⁾ South Africa is without doubt 'another country' whose extraordinary societal transition achievements are recognised and honoured (Sparks 1994). For example, and to mention just two, our quality of life index has progressed significantly since 1994. Access to cleaner and better water and levels of sanitation have improved by eight per cent; adult literacy by 13 per cent; the under-five mortality rate per 1 000 by 25 per cent and secondary school enrolment by 28 per cent. Secondly the ratio of executive and senior black managers⁴⁾ has grown from eight per cent in 1996 to 34 per cent

in 2011; from 10 per cent to 38 percent for middle managers over the same period and from 32 per cent to 52 per cent for junior management and professionals (Calland 2013: 13-15).

However and notwithstanding, all is definitely not as it seems. South Africa is volatile. People are unsettled, anxious and sceptical about their future and that of the country. The ANC's 2014 election 'good story' strategy, gave way to increased questioning and critiquing of the party. Barney Mthombothi (2014) argued that the ANC good story did "not tell the whole truth" and that, "the dream seems to have turned into a nightmare". *City Press* ran the election result as "X was still cast in black and white" (11 May 2014). In comparison to the positivity and joy generated by the 1994 'small miracle' of societal transition — inequality, insecurity and anguish abound in everyday life. A plethora of real problems exist including significant corruption within and of the state; service delivery protest; the fracturing of the labour movement and the Tripartite Alliance; abuse and gerrymandering of the principles of the rule of law; lack of clarity with regard to policy and, ominously, the immense inequality reflected in class and race. Whilst the ANC's centre held again on 7 May 2014, the country's socio-political and economic architecture is dangerously fractured and societal order is precarious — begging the question of where to?

The National Unity and Reconciliation Act was passed in 1995. It was the second piece of substantively driven societal transformation legislation passed by the post-1994 ANC-led democratic state dealing with "loss and restoration" and "restitution" or, the South African struggle 'master narrative' (Walker 2008: 16). The first was the Restitution of Land Rights Act of 1994. Both were taken up in the 1993 Interim Constitution of South Africa and both are inherent to the struggle vision toward building a non-racial democratic state. The Truth and Reconciliation Commission (TRC) act was focussed on restoring the stripping away human and citizenship rights on the basis of race from all South Africans who were not white. Justice was to be done by restoring dignity and respect through individual truth telling and acknowledgement, and restitution through reparations. Reconciliation and national unity was to be the dividend together with TRC bestowed individual amnesty. Hence South Africans, black and white, as well as victims and perpetrators would be reconciled and society transformed into a better life for all, or so it was meant to be.

This article reflects on the ANC's post-1994 non-racial and

democratic passage within the context of South Africa's deeply embedded historical legacy of racism and inequality. Shaped by the underpinning question as to whether truth commissioning has in fact played a role in promoting justice and reconciliation over the past two decades, the article concludes by arguing that it was in fact theoretically unable to do so. The first part of the piece contextualises and engages the theoretical model of truth commissioning applied in South Africa. Secondly, the fracturing of the polity is framed, as well as that of the systemic racially ordered structure of employment in the country. In conclusion the assumption that the TRC has been epistemologically 'inadequate' to have made a meaningful impact with regard to the promotion of reconciliation and justice in South Africa, is assessed.

2. Truth commissioning, reconciliation, justice and privileged individual citizenship

A nation struggling to be born faced a dilemma of laying ghosts of a dark past to rest with neither retributive justice or the promotion of a culture of impunity. (Ramphela 2008: 46).

Violent, brutal and callous societal inter- and intra-group conflict; the question of how to end such conflict and bring about reconciliation and justice; and the many policy strategies and instruments — both backward looking and forward looking — fostered to deal with the aforementioned, are embedded in the mists of time and history (see Elster 2004; Teitel 2000). Notwithstanding however, the theoretical and operational search for answers to the seemingly unrelenting problems of societal conflict, that of repressive states and the persistent violent battles around the political economy of power remains. Indeed, the nature of contemporary South Africa and the role and impact of the TRC as an instrument of justice, transformative nation-building and reconciliation needs to be engaged within historical context as well as that of the socio-economic and political here and now.

The global debate and operationalisation around the innovative notion of truth commissions played a central role in the quest for human rights, reconciliation and justice over the period stretching from the late 1970s to more or less 2005. Emerging in Latin America and rooted within the interregnums of the democratic transitions of former military regimes on the continent, justice was demanded with regard to the

'disappeared' by their kin. The problems of doing this were of course complex and myriad. Securing and sustaining order against the background of societal transition in a changing context from one political milieu to another, resulted in the search for forms of extra-judicial justice without compromising the consolidation of peace and the rule of law. Hence, justice came to be situated in extra-judicial state-sanctioned organisations which were set up for a period of time in order to establish the truth about what had happened to each individual member of the 'disappeared'. Answers to the questions of who was responsible; of why a victim was sought and identified; of what had happened to the person and where their remains were buried constituted the truth. And justice for the kin of the disappeared lay in the truth about what had happened to him or her.

The setting up of truth commissions led to the opening up of sharply contested international debates⁵⁾ amongst those proponents concerned with backward looking universal retributive judicial justice *vis-a-vis* forward looking individual-centred restorative justice. Before briefly unpacking this relatively antagonistic debate, it needs to be noted that conceptual and theoretical changes have taken place around the assumptions underpinning the initial 1970 to more or less 2005 odyssey of truth commissioning. They have led to changes in the epistemology of the pursuit of justice which need to be briefly unpacked first.

The nuts and bolts of the strategic structure and operationalisation of the TRC as set up in 1995 by *The National Unity and Reconciliation Act* (Act No 34 of 1995), arguably became the hook upon which the human rights debate grew rapidly over the following 10 years. As an instrument in pursuit of justice and reconciliation, truth commissioning in South Africa became a first-hand human rights miracle in the view of the world — a 'magic wand solution'. The South African commissioners were invited to workshops and to address many symposia all over the world in order to discuss and debate the ideal truth and justice reconciliation solution of the time. Showered with a significant amount of European funding and a plethora of visits from human rights civil society specialists and non-governmental organisations, scholars, officials and representatives from many countries came to acknowledge the significance of what was regarded by them as the transformation and reconciliation of the new South Africa.⁶⁾ Building on the theory and the operationalisation of the post-1970 to 2005 work on forward and backward looking justice, the literature came to reflect a richer more critical

set of arguments and debates.

In having encompassed the work and debates done by making use of the era of truth commissioning, the field of the pursuit of justice and reconciliation has been re-baptised as one of transitional justice. Cambridge University Press published a three-volume collection titled the *Encyclopedia of Transitional Justice* (Stan and Nadelsky 2013) and Priscilla Hayner published a second edition of her influential book on truth commissioning (Hayner 2002 and 2011). The second edition's sub-title was changed to "transitional justice and the challenge of truth commissions", from "facing the challenge of truth commissions". The notion of transitional justice is, however, not new. By way of example, Teitel's understanding of transitional justice, is historically and contextually rooted in practice in his book titled *Transitional Justice* (2000). It is concerned with the problem of justice in the context of changing political orders and in fact translates into the question of "the role of law in political change" (Teitel 2000: 5). In defining the role of law as being both "constituted by, and constitutive of, the transition" Teitel (2000: 6) builds a powerful contingency based model. Much of the post-2005 work deals with conceptual work, especially the hybridisation thereof as well as the success or failure of the organisations and institutions that have operationalised these approaches. Indeed the notion of transitional justice has caught on and become an umbrella for synthesis: a field bringing together the shifts in debate and literature seeking the pursuit of justice since the high-point of the era of truth commissioning. In so doing the promotion of trans-disciplinary knowledge and strategies in pursuit of justice and peace, such as that of Teitel, who is a legal theorist by training, is lending depth to the field.

Given that the South African TRC falls squarely in the era of truth commissioning, the nuts and bolts of its dominant international debate will be returned to briefly. It may be fruitfully considered by making use of Max Weber's methodological conceptualisation of ideal-type analyses. The latter tool is combined with the use of a continuum at which at each end, two ideal types of justice are discussed.

In the first place, I engage the notion of restorative justice. The latter is a form of forward looking justice concerned with facilitating the process of societal reconciliation and national unity rooted in victim-centred individually focussed approaches and, reparations. Situated at one end of the continuum, the latter conceptualisation is driven by non-adversity and reconciliation. Being forward looking it leans towards

compromise and is therefore concerned operationally with including "all those with a direct stake in the conflict" in having a voice "in how the conflict is resolved" (Stan & Nadelsky 2013: 289). The South African TRC's vision was steered by restorative justice. Logistically the vision consisted of three forward looking tools or elements in the form of statutory committees: the human rights violations committee; the reparation and rehabilitation committee and the amnesty committee. Each of these committees advantaged the concept of the individual citizen in its work. The South African Bill of Rights is rooted in the concept of the individual citizen which is the privileged unit in terms of the rule of law. Hence human rights protection of the individual citizen rather than concessions being made on a group basis is favoured. This principle created significant tensions in the thinking of the commission in the everyday operationalisation of truth commissioning in South Africa around identity (personal observation 1995-1996). The *apartheid* state's crime against humanity was rooted in the structure of race as a legal societal system, and, on the other hand the TRC's work was focussed on individual acts based on race. Mahmood Mamdani (2014: 502-504) argues in this regard that the price of the focus "on individual acts was a failure to understand apartheid as a systematic denial of rights to communities on the basis of race" ending up with an a-contextual and a-historical analysis of *apartheid* and identity. Secondly, and at the other end of the continuum, the rule of law without compromise of universal principles together with proportionate punishment underpins retributive justice. Rooted in the notion of "just desert" this backward looking justice perspective is committed to the universal applicability of the principle aims of retributive justice and, the circumvention of impunity. The comparison between the two end-points bridged by a continuum facilitates the tipping point debate with regard to reconciliation and justice.

3. Post-1994: The interregnum?

The ANC has become legally and behaviourally adept at defeating the ends of justice. Sustained unproven innocence soon transforms into the illusion of innocence. It is this illusion that has, over time, eroded ethical and moral sensibility in the ANC. This condition has become the organisation's dominant mode of perceiving reality. The combination of the culture of unproven innocence and the supremacy of its constitution

over the national Constitution indicates an organisation that has installed itself in the place of the nation. (Ndebele 2014)

Characterised by factions, divisions and cronyism, the ANC's long walk over the past century was not pre-determined in character or context. It shifted from being a mostly black-elite Christian and African nationalist organisation led by tribal chiefs and religious leaders when it was established in 1912, to becoming a more left leaning multiracial gathering interwoven with the unions and the South African Communist Party (SACP) in the "hard years of the Defiance Campaign and the treason trial of the 1950s" (Plaut 2012: 28-29). The debates and the shifts formed fault lines and together with the tensions they generated, they are captured in the contours of the party. Indeed, they reflect in the current factional battles over power within the state of which the key ideological elements and principles have been unstable over the past 20 years.

Being a *de facto* one-party state as from 1948, the political opposition in the 1980s was what had then become known as the mass democratic movement. The latter was led by the ANC and included the party's 1950s actors from its leftist shift, the unions and SACP. By the time of the first ever democratic election to be held in the country the ANC's election strategy, the Reconstruction and Development Plan, was clearly constitutive of the aforementioned elements of what had become known as the Tripartite Alliance. However, this alliance has broken down as has the unwritten social compact it represented. The now split and deteriorating alliance reflects shifting realignments, new trade unions and new divides between the political left and the right in a reconstituting guise in the battle for power and transformation in South Africa (Calland 2013; Plaut & Holden 2012).

Marked by the events that took place in Marikana on 16 August 2012 when 34 Association of Mineworkers and Construction Union (AMCU) strikers were killed on the platinum belt by the South African police, a watershed political economy moment took place. AMCU's harrowing but successful 2014 five-month long strike has brought about very real societal change. The South African economy in fact shrank in the first quarter of 2014 as a result. The AMCU strike was the first non-ANC large action organised by black people. The Cosatu affiliated National Union of Mineworker's (NUM) membership has significantly shrunk in favour of AMCU. The Metal Worker's Union of South Africa (Numsa) moreover effectively completed a month old strike in July of

2014. Whilst as yet still formally affiliated to Cosatu, Numsa has threatened to split the federation. Its December 2013⁷⁾ Special National Congress resolved that the union would not invest resources or person power in the 2014 election campaign in support of the ANC and the alliance as had been its habit since 1994 and, very significantly, that it would explore setting up a socialist movement.

In the light of the aforementioned it is unlikely that the alliance will be able to reconstitute a workable social contract by 2016. This means that the ANC is under enormous stress from the left should it maintain its conservative neo-liberal economic stance. If the party in fact really moves forward with the New Development Plan (NDP) as is threatening once again, its future is at stake. Employment is paramount if the vision of the democratic state is to be realised and the ANC has lost a significant amount of the glue and loyalty that has held the various chunks of its constituency together including the unemployed youth, the working poor and marginalised of the country. Should the Economic Freedom Fighters (EFF) manage to consolidate and hold onto their party election achievement of 2014, the ANC will also have to pay attention to this third force of 1.2 million present voters or 6.35 per cent of the total.

Whilst Vice-President Cyril Ramaphosa has a successful if not impressive historical record especially in the field of the politics of negotiation, his position in the ANC is unclear. How much support does he hold in the factionalised and torn party or in its National Executive Council? Having acted as the vice-chairperson of the National Planning Commission (NPC), Ramaphosa has been assumed to have the support of Zuma and his present advisors — but is that enough? Questions around ANC Secretary-General Gwede Mantashe's powerful role in the running of the party and his aspirations have moreover begun to cast a shadow over Zuma's hold on the strings of power.

Moreover the post-1994 democratic state can, with justification, be viewed as weak. Plaut and Holden (2012) argue that institutions fail to provide the leadership capacity, skills and support required to keep key institutions such as Parliament, the South African Police Services, the Defence and Military Veterans Department, the Intelligence Service, the Departments of Health, Education and Public Works functioning effectively.⁸⁾ Without wishing to be reductionist or to deny in any way the many significant and historic successes introduced and sustained by 'the 1994 democratic project', South Africa's polity is fraught with ten-

sion and contradiction. Societal order is failing all too often. Can the ANC deliver employment and a better life to its marginalised under-classes 20 years on and in so doing address the race and class inequality that stalks the country?

Income inequality has worsened. Our Gini coefficient ... has worsened by 6.6 points ... South Africa now enjoys the dark accolade of being the most unequal society in the world. ... the unemployment rate, which considers both formal and informal employment, has worsened ... The country has failed ... to secure meaningful improvements in access to economically productive activity, both formal and informal. (Calland 2013: 13-15)

Formal unemployment has increased since the mid-1990s and stands at about 26 per cent overall. Thirty nine per cent of black African South Africans compared to 6.6 per cent of white African South Africans were unemployed in 2012 if both Statistics South Africa's formal and informal 'discouraged workseekers' figures are added together and made use of. Whilst the number of discouraged workseekers overall grew by 34 per cent during the period 2001-2012, that of the white African population decreased by 76 per cent; by 53 per cent in the Indian population and by 47 per cent in the coloured population.⁹⁾ In spite of this, the percentage of discouraged workseekers increased by 50 per cent within the black African population. More than half of black Africans earn less than R2 500 per month whilst half of white Africans earn more than R10 000 per month (Calland 2013: 16, 17 & 19).¹⁰⁾ The *SA Reconciliation Barometer Newsletter*¹¹⁾ notes that South Africans aged 15 to 34 make up 58 per cent of the total of the economically active population of which 70 per cent are unemployed. In regard to the question of who are the unemployed, the official rate is highest amongst those of 15 to 24 years at 51.5 per cent (of which 70 per cent are black Africans) and, those who have gone to high school but failed to finish, at 47 per cent. In this light the ANC introduced a range of grants serving both the unemployed and the working poor in an attempt to alleviate the absolute poverty of jobless growth. Some 16 million people are receiving government grants of some sort and there are six million direct tax payers in South Africa. In other words and despite its best of intentions, the ANC has not restored economic justice to the poor of whom the great majority are black. They remain trapped within a cauldron marked by race.

4. Conclusion

As has been suggested, the TRC did not engage the nature of race and its embedded multifaceted contours underpinning the ANC-led democratic state over the past 20 years. In the light of the four-year-long process of negotiation towards societal transition, together with the Mandela reconciliation presidency, a framework and a tone was set which excluded the possibility of exercising retributive justice in South Africa. In fact the TRC negotiation reconciliation framework began to develop some years before 1990 when elements of corporate capital and civil society in the country began to visit the ANC in exile and a process of perhaps unconscious but nevertheless textured contact began to grow. Inside the country Nelson Mandela and a few members of the *apartheid* state's intelligence services, the Afrikaner *Broederbond* think tank, and, a small group of white Afrikaners drawn mainly from the National Party (NP) leadership, were talking. The social capital that was being built would play a significant facilitating role between the NP and the ANC over the four years of on-and-off negotiations and negotiations about negotiations. As Njabulo Ndebele (2000: 150) puts it, "the bonding that took place among the major political negotiators seems to me too remarkable to have had no historical or social grounding ... The South Africans who sat together at the negotiating table were not total strangers to one another". In this context elite-pacting played a major role and the space for truth commissioning as a way of dealing with justice and reconciliation became possible and probable.

This article has suggested an argument in support of the fault line of the significance that race continues to play in the political economy of a fractured and unstable South Africa characterised by massive black structural unemployment and inequality. The ANC has been unable to create decent jobs or to deliver economic justice to the black underclasses of the country. Without having contextualised the history of the nature of systemic dynamics of groups of people defined and excluded on the basis of race from the centre of the country and in the light of the TRC focus on individual acts, the operationalisation and work of the TRC has not lead to significant national reconciliation or unity. Liberal individualism moved the responsibility of justice and reconciliation to individual victims.

Endnotes

1. See for example, perceptions on historical truths such as "apartheid was a crime against humanity" by age and race. Eighty per cent of black African South African youth agreed and 81 per cent of adults whilst, 53 per cent of white African South African youth agreed and 53 per cent of adults (Wale, 2013:37).
2. Article II, International Convention on the Suppression and Punishment of the Crimes of Apartheid. Resolution 3068 — 30 November, 1973. This resolution synthesised numerous earlier attempts to encourage the *apartheid* state to change its evil policy.
3. "The Second Coming". The latter has come to be seen as Mbeki's favourite poem. He has drawn on it in many announcements and addresses. It was written by the famous Irish poet and dramatist, William Butler Yeats (1865-1939).
4. For the purposes of clarity of argument: when black people are referred to coloured, Indian and black African South Africans are incorporated.
5. See for example, Elster 2004; Teitel 2000; Hayner 2002 and 2011; Rotberg and Thompson 2000; Stan and Nadelsky 2013; Kaminski and Nalepa, 2006; Braham 2009; Mamdani 1998; Gibson 2004; Sarkin 2004; Shaw 2005; Metz 2013 and the Truth and Reconciliation Commission of South Africa Reports Vols 1-5 (1998) and Vols 6-7 (2003).
6. Personal experience: I acted as the information manager of the Johannesburg regional office of the TRC over a period of two years (1996 to 1997) on sabbatical from the University of South Africa and participated in a number of international conferences focussing on human rights and truth commissioning in South Africa post the TRC.
7. <http://www.numsa.org.za> (accessed 10 March 2014). Resolutions adopted at the Numsa Special National Congress, 16-20 December 2013.
8. For example, the Auditor General (AG) 2012/2013 report finds that: R30.8 billion was irregularly spent by the departments of the government; that Health, Education and Public Works together spend 80 per cent of the total budget and further, that Minister Blade Nzimande met with the AG's office three times "and these interactions had minimal impact on the audit outcomes". The reasons he offers are as follows: "ineffective leadership, incompetent officials and again, a lack of consequences for the transgressions were pointed to as causes", *Daily Maverick*, (accessed 14 November 2013).
9. Statistics South Africa estimate the 2010 population at 50,725 million people of which 9 per cent are white and 91 per cent black (that is, 2.4 per cent Asian, 9.1 per cent coloured and 79.5 per cent black African).

10. Calland makes use of empirical data sourced and adapted from the 2012 South African Survey (SAIRR).
11. Volume 10, No 3, October 2012.

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