

## ANALYSEN UND BERICHTE

### **The TRC's Balancing of Law, Religion and Economics in South Africa –A Model for Alternative Dispute Resolution?**

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#### **1. Introduction**

A lot of books and articles have already been published on the TRC. However, most of them describe the phenomenon TRC from an insiders point of view or were written by someone who was somehow closely related to the actual work of the TRC<sup>2</sup>. Although these books are well written and give a good account about what incidents did happen during the work of the TRC and in which atmosphere the hearings took place, they all represent an individual, subjective view of the TRC's work, blurred by the „heat of the battle“. Moreover, most publications so far seem to be rather emotional or quasi-religious, representing the unsolved dichotomy between pastors and lawyers and Christianity as the hidden backbone of South Africa's society as a whole<sup>3</sup>. Other works focus on a highly academic, abstract approach to the law during the apartheid era comparing it to the notion of „*Rechtsstaat*“ in Nazi Germany<sup>4</sup>.

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<sup>2</sup> See e.g. *Piet Meiring*, *Chronicle of the Truth Commission*, Vanderbijlpark 1999, *Alex Boraine*, *A Country Unmasked*. Inside South Africa's Truth And Reconciliation Commission, Cape Town 2000, *Desmond Tutu*, *No Future Without Forgiveness*, London 1999; *Antjie Krog*, *Country of My Skull*, Johannesburg 1998.

<sup>3</sup> See *Meiring*, *PGJ*, *Pastors or Lawyers? The Role of Religion in the South African Chose and Reconciliation Process*, HTS 58 (1) 2002, p. 328 ff.

<sup>4</sup> See *David Dyzenhaus*, *Truth, Reconciliation and the Apartheid Legal Order*, 1998, and the detailed book review by *Heinz Klug*, in: *The South African Law Journal, Notes and Comments*, 1999, p. 133 ff.

To be sure, there has always been criticism regarding the work of the TRC but most of the criticism was focussed on political issues<sup>5</sup>. Just a few authors have scrutinized the proceedings of the TRC and found a lot of pitfalls<sup>6</sup>.

Most of the criticism was focussed, quite rightly, on areas of fact in the TRC report, including ignoring previous trial and inquest finding and incorrect death numbers etc.<sup>7</sup> What makes a precise analysis of the work of the TRC difficult is the lack of precise information regarding numbers and procedural rules in the TRC's Official Report<sup>8</sup>. The statistical information provided for amnesty applications in the reports, for example, are so fragmented and unreliable that it is impossible to get a realistic picture of how the amnesty committee responded to applications from different perpetrator groups<sup>9</sup>.

In the following, therefore, an outsider's view is presented, focussing mainly on the procedure of the TRC. This may serve as a model for alternative dispute resolution (ADR) in commercial disputes. Although this comparison seems to be strange at first sight, a lesson for ADR might be learned from the TRC's methods in handling cases. As one author pointed out: "... It is about the tensions between truth and justice, about the prevention of future conflicts through two commissions, about reconciliation in post conflict situations, about knowledge as opposed to presumptions, about victims' as well as perpetrator's rights, and about social restoration"<sup>10</sup>. So maybe the cathartic effect of the procedure becomes more important than the actual result of the case – as well for the individual as for third parties.

Despite a different background the goals of ADR and the TRC do not seem to be too far apart in general. Also the TRC had the power to make an impact on South Africa's economy past and present, for those individuals and entities that benefitted and those that

<sup>5</sup> See e.g. *Paul Pereira*, TRC ends its work and business breathes easier, *Finance Week*, 6<sup>th</sup> July 2001, p. 36.

<sup>6</sup> See e.g. *Anthea Jefferey*, The Truth about the Truth Commission, 1999 (*Jefferey's* book is the result of the work for the South African Institute of Race Relations); Book review by *Peter Wilhelm*, in: *Financial Mail*, 30<sup>th</sup> July 1999, p. 34 to 35.

<sup>7</sup> See *Wilhelm*, *Financial Mail*, 30<sup>th</sup> July 1999, p. 34, 35.

<sup>8</sup> *Truth and Reconciliation Commission of South Africa*, Report, 7 volumes (1998 – 2003); vol. 1-5 were published in 1998, while vol. 6 and 7 were published in 2003 (available at [www.doj.gov.za/trc/trc\\_frameset.htm](http://www.doj.gov.za/trc/trc_frameset.htm)).

<sup>9</sup> *Antje Pedain*, Was Amnesty a Lottery? An Empirical Study of the Decision Making of the Reconciliation Commission's Committee on Amnesty, *The South Africa Law Journal*, 121 (vol. 4), 2004, p. 785, 786.

<sup>10</sup> *Robert I. Rotberg/Denis Thompson*, *Truth v. Justice. The morality of truth commissions*, Princeton/Oxford 2000, *Truth Commissions and the Provision of Truth, Justice, and Reconciliation by Rotberg*, 3, p. 6.

were oppressed during the apartheid years. Whether the procedure followed by South Africa's TRC can serve as a "blueprint" for ADR remains to be seen.

## 2. Legal Foundations of the TRC

The 1993 Constitution of South Africa and the Promotion of National Unity and Reconciliation Act no. 34 of 1995 constituted the legal foundations of the TRC:

### a) *The 1993 Constitution*

At the end of the text of the 1993 Constitution is an annex or "epilog" under the heading "National Unity and Reconciliation"<sup>11</sup>. Although strictly speaking this "post scriptum" or "post amble" is not a numbered part of the constitution and also not part of one of the general annexes of the Constitution, there is general political and academic consensus that this epilog has got the same force of law as any other substantial provision of the constitution<sup>12</sup>.

The pursuit of national unity had therefore be sought via reconciliation between the people of South African fostering the principles of understanding not of dividing, reparation not

<sup>11</sup> The text reads as follows: "This Constitution provides a historic bridge the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. The pursuit of national unity, the well-being of all South Africa citizens and peace require reconciliation between the people of South Africa and the reconstruction of society. The adoption of this constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and the legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not victimisation. In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for mechanisms, criteria and procedures, if any, through which such amnesty shall be dealt with at any time after the law has been passed. With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country."

<sup>12</sup> *François Venter*, Die verfassungsmäßige Überprüfung der Rechtsgrundlagen von Südafrikas "Truth and Reconciliation Commission", in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)*, 57/1 (1997), p. 147, 148; *The Azanian People's Organization (AZAPO) v. President of the Republic of South Africa*, CCT 17/96, para 14.

retaliation, *ubuntu* not victimization<sup>13</sup>. The South Africa parliament fulfilled its obligation arising out of the epilog of the Constitution (“National Unity and Reconciliation) by passing the “Promotion of National Unity and Reconciliation Act” No. 34 of 1995 in July 1995.

*b) The 1995 Promotion of National Unity and Reconciliation Act*

The goals and tasks of the TRC were described by the Act as to “promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past”<sup>14</sup>. To achieve the for mentioned goal the TRC was assigned four major tasks:

1. To investigate the sources, nature and extend of the gross violations of human rights which were committed during 1<sup>st</sup> March 1960 to 10<sup>th</sup> May 1994;<sup>15</sup>
2. Granting amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective;
3. Establishing a forum for victims and relatives of victims to make known the fate or whereabouts of victims and to restore the human dignity of such victims;
4. Recommending reparation measures regarding victims and their relatives.<sup>16</sup>

Apart from the above mentioned major tasks the TRC was obliged by Section 3 (1) (d) of the Act to compile a comprehensive report of its activities and findings including recommendations of measures to prevent future violations of human rights in South Africa.

What made the TRC different from similar commissions in other countries, e.g. Argentina, is the power to grant amnesty to individual perpetrators. So far no other state has combined this quasi-judicial power with the investigative tasks of a truth seeking body<sup>17</sup>.

According to Section 20 (7) (a) “no person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence, and nobody or organization orl the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence”.

<sup>13</sup> There is neither a clear legal definition of „ubuntu“ within the Constitution nor outside, as to the still problematic definition of this notion derived from tribal culture and customary law see below no. 33.

<sup>14</sup> Section 3 (1).

<sup>15</sup> This period of jurisdiction for the TRC originally ended on 5<sup>th</sup> December 1993 but was extended to “acts, omissions or offences committed before 11<sup>th</sup> May 1994” by the Constitution of the Republic of South Africa of 1997).

<sup>16</sup> See section 3 (1) (a – c).

<sup>17</sup> See TRC Report, Vol. 1, section 25.

This provision was challenged because it is contrary to the South African Constitution, in particular Section 22 granting the right of access to justice: "Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum."

It was argued 1996 in the AZAPO-case<sup>18</sup> that granting complete indemnity to perpetrators would deprive the victims of their rights to ask for reparation and restitution for suffered damages regarding the civil and criminal liability of the state, other persons or organizations that could have been involved<sup>19</sup>. The Constitutional Court of South Africa nevertheless approved the constitutionality of the Act and its provisions regarding the granting of amnesty to perpetrators. The leading argument was that parliament had chosen this way to reach the objectives of reconciliation and reconstruction in the pursuit of national unity.

The limited civil liability of the state was also approved by the Constitutional Court as the limited national resources required a method of new and individualized reparations.<sup>20</sup> So the highest court of South Africa found that the reconstruction of society and the pursuit of national unity were more important than individual justice and payment of reparations to victims or their relatives/heirs.

By section 4 of the Act the TRC was given a wide range of competence:

- a) To conduct inquiries into (i) gross violations of human rights, including violations which were a part of a systematic pattern of abuse; (ii) the nature, causes and extend of gross violations of human rights, including the antecedents, circumstances, factors, context, motives and perspectives that led to such violations; (iii) the identity of all persons, authorities, institutions and organizations involved in such violations; (iv) the question whether such violations were the result of delivered planning on the part of the State or a former State or any of their organs, or of any political organization, liberation movement or other group or individual; and (v) accountability, political or otherwise, for any such violation.
- b) To gather information and receive evidence from any person, including persons claiming to be victims of such violations or their representatives of such victims, which established the identity of victims of such violations, their fate or present whereabouts and the nature and extend of the harm suffered by such victims;

<sup>18</sup> *The Azanian People's Organization (AZAPO) v. President of the Republic of South Africa*, CCT 17/96. (Judgement of the Constitutional Court of South Africa of 25<sup>th</sup> July 1996).

<sup>19</sup> This was in particular the result of section 7 (c): "No person, organization or state shall be civilly or vicariously liable from act, omission or offence committed between 1<sup>st</sup> March 1960 and to the cut-off date by a person who is deceased, unless amnesty could not have been granted in terms of this Act in respect of such an act, of omission or offence."; see also *Venter*, as above, p. 147, 150.

<sup>20</sup> Vice President *Mahomed*, § 46, AZAPO-case.

- c) To promote the granting of amnesty in respect of acts associated with political objectives, by receiving from persons desiring to make a full disclosure of all the relevant facts relating to such acts, applications for the granting of amnesty in respect of such acts, and transmitting such applications to the committee on amnesty for its decision, and by publishing decisions granting amnesty in the Gazette;
- d) To determine which articles have been destroyed by any person in order to conceal violations of human rights or acts associated with the political objective;
- e) To make recommendations to the President with regard to (i) the policy that should be followed and measures which should be taken with regard to the granting of reparations to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims; (ii) measures which should be taken to grant urgent interim reparations to victims;
- f) To make recommendations to the Minister with the regard to the development of a limited witness protection program for the purposes of this act.

Interestingly enough, the initiative for a TRC originally came from the ANC.<sup>21</sup> The predecessors of the TRC were the *Stuart*, the *Skweyiya*, and the *Motsuenyane* Commissions dealing with internal human rights violations of the ANC in its training camps in Tanzania, Angola and other countries in southern Africa during the apartheid years<sup>22</sup>.

In the process of drafting the bill for the final Act a number of “leading” non-governmental organizations (NGOs) in South Africa were also involved to comment on the draft.<sup>23</sup> Obviously there was a lack of trust towards the government of South Africa as such. But it should be taken into consideration that almost all NGOs are far from being independent but rather have their own goals due to their respective financial resources.<sup>24</sup> The NGO “Justice in Transition” provided in particular for a lot of opportunities for conferences, workshops, discussion, and debate about the TRC. And throughout the life of the TRC, a number of NGOs were even directly involved.<sup>25</sup>

<sup>21</sup> See *Boraine*, as above, p.11.

<sup>22</sup> See *Mark Hay*, *Grappling with the Past: The Truth and Reconciliation Commission of South Africa*, *African Journal on Conflict Resolution*, 2000, Vol. 1, no. 1, p. 29, 32 et seq..

<sup>23</sup> See *Boraine*, as above, p. 49.

<sup>24</sup> See also the criticism of the NGOs’ comments by General *Constand Viljoen* in 1995, quoted after *Boraine*, as above, p. 56-57.

<sup>25</sup> See *Boraine*, as above, p. 265 who praised this as a “democratic process” and that the TRC could not have achieved its work without these NGOs.

Also the Commission received grants from foreign institutions or countries, e.g. Sweden.<sup>26</sup> Some commissioners took even pleasure in refusing an official car and instead using their own old one.<sup>27</sup>

This shows to a certain extent the unusual financial position of the TRC in the beginning: Although it was established by an Act of parliament there was originally no budget for it. Finding office space in Cape Town as its headquarter and in Johannesburg, Durban and East London for the regional offices, equipping them and finding suitable staff was left to the members of the commission who did their best in January 1996.<sup>28</sup>

The real or imagined lack of proper funding and the co-operation with NGOs casts some doubts on the true independence of the TRC. If the task and goal of the TRC was to create a new union amongst the people of South Africa, it is a task of predominant national importance for which independence and sufficient financial and organisational support should have been of prime concern.

Moreover, it was recognized by the TRC that it could not carry out all the task required of it simultaneously. The TRC decided to give attention to the question of restoration of the human and civil dignity of victims of past human rights violations first. It did so by setting up public hearings across South Africa between April 1996 and June 1997 where victims were given the opportunity "to relay their own accounts" of the violations they had suffered by giving testimony.<sup>29</sup>

From approximately the middle of 1997 the TRC shifted its focus from the stories of individual victims to an attempt of understanding the individual and institutional motives and perspectives which gave way to the violations of human rights under examination. For this reason the TRC inquired into the contexts and courses of these violations and attempted to establish the political and moral accountability of individuals, organizations and institutions. This phase was marked by public submissions by, and questioning of, political parties, and arrange of institutional, sectoral and special hearings that focused on the health and business sectors, the legal system, the media and faith communities, prisons, women, children and youth, biological and chemical warfare and compulsory national service. The vast amount of amnesty hearings took place during this period<sup>30</sup>.

<sup>26</sup> See *Boraine*, as above, p. 86.

<sup>27</sup> See *Boraine*, as above, p. 77.

<sup>28</sup> See *Boraine*, p. 83 et seq.

<sup>29</sup> See § 34 TRC Report, Vol. 1, Ch. 4.

<sup>30</sup> See § 35 TRC Report, Vol. 1, Ch. 4.

### 3. Structure of the TRC

The TRC consisted of three sub-committees. Their respective tasks were as follows:

a) *Human Rights Violations Committee (“HRV”)*

The task of the Human Rights Violations Committee was to investigate human rights abuses that took place between 1960 and 1994, based on statements made to the TRC. This Committee established the identity of the victims, their fate or present residence, and the nature and extent of the harm they have suffered; and whether the violations were the result of deliberate planning by the state or any other organization, group or individual. Once victims of gross human rights violations were identified, they were referred to the Reparation and Rehabilitation Committee.

b) *Reparation and Rehabilitation Committee (“R&R”)*

The enabling Act empowered the Reparation and Rehabilitation Committee to provide victim support to ensure that the TRC process restores the victims’ dignity. Moreover, it had to formulate policy proposals and recommendations on rehabilitation and healing of survivors, their families and communities at large. The envisaged overall function of all recommendations is to ensure non repetition, healing and healthy co-existence. A President’s Fund, funded by Parliament and private contributions, has been established to pay urgent interim reparation to victims in terms of the regulations prescribed by the President.

c) *Amnesty Committee („AC“)*

The primary function of the Amnesty Committee was to consider that applications for amnesty were done in accordance with the provisions of the Act. Applicants could apply for amnesty for any act, omission or offence associated with a *political objective* committed between 1<sup>st</sup> March 1960 and 6<sup>th</sup> December 1993. The cut-off date was later extended to 11<sup>th</sup> May 1994. The final date for the submission of applications was 30<sup>th</sup> September 1997. Being granted amnesty for an act, omission or offence means that the perpetrator is free and will remain free from any prosecution for that particular wrongdoing<sup>31</sup>.

Additionally, there was an *Investigative Unit* (sec. 28-35) to conduct such investigations that the TRC found necessary to complete its objectives.

So the Human Rights Violations Committee served as an initial filter for the Reparation and Rehabilitation Committee, whereas the Amnesty Committee was working towards a

<sup>31</sup> See official TRC home page at [www.doj.gov.za/trc/trccom.htm](http://www.doj.gov.za/trc/trccom.htm).



different goal with stricter legal guidelines set out in the Act, derived from substantive and procedural criminal law<sup>32</sup>. As the task of the Amnesty Committee was very different from the other two committees, the focus will lie with the latter ones, working not only closely together but having the common goal to rehabilitate the victims and to heal the divided nation through *ubuntu*<sup>33</sup>.

#### 4. Procedure for Handling Cases

Section 30 of the Promotion of National Unity and Reconciliation Act 34/1995 provided rough guidelines regarding the procedure for handling the cases or conducting the hearings of the TRC as follows:

“Procedure to be followed at investigations and hearings of Commission, committees and subcommittees:

- (1) The Commission and any committee or subcommittee shall in any investigation or hearing follow the prescribed procedure or, if no procedure has been prescribed, the procedure determined by the Commission, or, in the absence of such determination, in the case of a committee or subcommittee, the procedure determined by the committee or subcommittee, as the case may be.
- (2) If during any investigation by or any hearing before the Commission
  - (a) any person is implicated in a manner which may be his or her detriment;
  - (b) the Commission contemplates making a decision which may be to the detriment of a person who has been so implicated;
  - (c) it appears that any person may be a victim, the Commission shall, if such person is available, afford him or her an opportunity to submit representations to the Commission within a specified time with regard to the matter under consideration or to give evidence at a hearing of the Commission.”

<sup>32</sup> But the findings of the TRC in amnesty cases must still not be used as evidence in future criminal proceedings, see *Mervyn E. Bennun*, Some procedural issues relating to post-TRC prosecutions of human rights offenders, *South African Journal of Criminal Justice*, 2003, Vol. 16/1, p. 17, 25 et seq..

<sup>33</sup> As to the many unresolved facets of the transformation of the cultural principle of „ubuntu“ into a clear legal principle derived from customary law see e.g. *Narnia Bohler-Muller*, The story of an African value, (2005) 20 SAPR/PL, p. 266, 271 et seq. who limits her analysis to the black communities, in contrast: *Johan van der Walt*, Vertical sovereignty and horizontal plurality: Normative and existential reflections on the capital punishment jurisprudence articulated in *S v. Makwanyane*, (2005) 20 SAPR/PL, p. 253, 256 et. seq. who criticises the missing definition of “ubuntu” for the use as a legal principle.

Basically, Art. 30 gave the TRC almost unlimited competence to set its own procedural rules. So the provision lead to a number of challenges of TRC decisions in court<sup>34</sup>. The Supreme Court held that Art. 30 is not exhaustive and principles of natural justice in the proceedings had to be observed by the TRC, in particular *audiatur et altera pars*<sup>35</sup>. The court decisions show that the TRC used a very wide discretion to set its own procedural rules not even observing basic principled of natural justice.

Unfortunately, no additional information as to the procedural rules can be found in the Official Report of the TRC relating to any additional set of procedural rules that were followed. Therefore one may presume that the TRC, in particular the HRC Committee , followed no strict procedural rules but preferred spontaneous rule making instead to fit the individual case.

It seems also as if all decisions were taken unanimously following a rather spontaneous procedure as it was seen to be appropriate to accommodate the individual case and the general goal of the TRC. The dissenting opinion of *Wynand Malan*, a lawyer and commissioner, in Vol. 5 of the Official Report shows that the process of decision-making was not shared by everyone. This refers, inter alia, to the way in which the chairman, Archbishop *Desmond Tutu*, took sometimes important decisions on his own instead of referring them to the whole commission.<sup>36</sup> Certainly, there were every time good, rational reasons for Archbishop *Tutu* to take such decisions quickly. From a legal point of view this “individual” decision-making did not follow any foreseeable procedural rules.

Also, dissenting opinions have a long tradition in the highest courts as well in common law as civil law countries. They show not only the integrity and independence of judges but serve also the development of the law as such, showing some short-comings or different views on the same legal basis but not shared by the majority. It comes therefore as a surprise to read the rather emotional reactions of other commissioners describing their “deep dissatisfaction” with a published dissenting opinion as such.<sup>37</sup>

The only exception to the “spontaneous rule making” was, as already mentioned above, the Amnesty Committee that followed roughly criminal procedural law.<sup>38</sup>

<sup>34</sup> E.g. *Nievwoudt v. TRC* (1996) 2 AllSA 660 (SE); *TRC v. Du Preez and another* (1996) 3 AllSA 427 (C) .

<sup>35</sup> *Du Preez and Another v. TRC*, 1997 (4) BCLR 531, 541 et seq. (A).

<sup>36</sup> See *Borraine*, as above, p. 85.

<sup>37</sup> See the comment to *Malan*’s dissenting opinion also in Vol. 5 TRC Report.

<sup>38</sup> See § 16 et seq., TRC Report, Vol. 1, Ch. 10.

## 5. Religious or Quasi-religious Procedural Elements

A central element of the TRC, in particular the HRV Committee, were the liturgical elements, such as beginning the hearings with a common prayer and singing hymns when a victim's statement was too gross and emotionally moving<sup>39</sup>.

This TRC-liturgy developed very early because of and through Archbishop *Tutu*<sup>40</sup>. The chairman was deliberately chosen by President *Nelson Mandela* and not elected by any independent election. So *Tutu*'s mandate was a particular strong one as he as a well-known priest of Christian faith (anglican) was chosen and not a lawyer or businessman<sup>41</sup>. And Archbishop *Tutu* captured immediately the leeway left to his discretion and used it by introducing Christian-inspired liturgy.

This liturgy has a lot to do with the customary principle of *ubuntu* as mentioned in the epilog of the Constitution. *Ubuntu*, despite its verbal origin in the black tribal communities, has also a lot to do with Christian-based concepts in rural communities of (white) Afrikaners. It is a common believe in both communities that e.g. the structure and hierarchy of the community must be observed, the group is more important than the individual, or the rule of *primogenitur*<sup>42</sup>. In the black communities the original sense of the cultural principle of *ubuntu* has been mixed with traditional Christian values.

Therefore *Tutu* was absolutely right in deliberately choosing a certain liturgy based on Christian values. Most of the victims, despite all possible differences as to their race, origin, domicile, profession, felt immediately at ease with the TRC's liturgy. This liturgy created an atmosphere of common believes, values and goals.

To understand the religious or quasi-religious elements mainly in the Human Rights Violation Committee, one has to understand the importance of Christian faith in South Africa in general and within the TRC in particular:

Upon the appointment of the commissioners, the official announcement appeared in the Government Gazette on 15<sup>th</sup> December 1995, a special service of dedication was held in St. George's Cathedral in Cape Town. Although there were readings from sacred texts by members of the Buddhist, Christian, Muslim communities, the general emphasis was on the

<sup>39</sup> See *Meiring*, Pastors or lawyers?, as above, p. 332 et seq.

<sup>40</sup> See *Meiring*, Pastors or lawyers?, as above, p. 329 and 333.

<sup>41</sup> See *Meiring*, Pastors or lawyers?, as above, p. 329.

<sup>42</sup> See *van der Walt*, as above, (2005) 20 SAPR/PL, p. 253, 257.

Christian faith. In particular because of the solemn words of dedication to which the commissioners responded one by one by “I will”<sup>43</sup>.

Still the TRC was not a kind of Christian confessional. Just Archbishop *Tutu* occasionally slipped into the role of the nation’s father confessor. This led to the criticism that justice was sacrificed on the altar of forgiveness and reconciliation<sup>44</sup>, although achieving justice was already not the central concept of the 1995 Promotion of National Unity and Reconciliation Act. And despite criticism even within the TRC that the hearings were too religious, Archbishop *Tutu* set the liturgical standards finally at the first hearing in Johannesburg (29<sup>th</sup> April til 3<sup>rd</sup> May 1996) where he first gave in to *Dr. Fazel Randera* to conduct the hearing in a judicial style, only to interrupt the hearing at the very beginning to say a prayer<sup>45</sup>. From this time onwards the TRC liturgy was a central element of the human rights violation hearings everywhere in the country

So the TRC became a nationwide forum and platform for story-telling, revealing truth, holding perpetrators accountable, reparations, remorse, and forgiveness. The TRC created a space in which victims, perpetrators and benefactors could encounter one another for the sake of personal and national healing<sup>46</sup>. This success of the TRC was to a large extent made possible because of its Christian based liturgy which in itself was uniquely linked to the spiritual and historical background of South Africa.

## 6. Economic Impact of the TRC

„*TRC ends its work and business breathes easier.*“ was a prominent newspaper headline in 2001<sup>47</sup>. It has been well known that certain businesses enjoyed a very profitable time during the apartheid era. This related to all “white” enterprises, not only to those of Afri-

<sup>43</sup> The words of dedication were as follows: “We call upon you who have been appointed as commissioners of the Truth and Reconciliation Commission to acknowledge and recognise as a sacred trust the awesome responsibility that has been given to you. We pledge you our support and give you our blessing in the task that lies before you. And we ask that, in your work for truth and reconciliation, you will be guided by wisdom greater than your own, a wisdom that knows and encompasses all truth. Will you dedicate yourselves to carry out the task that has been entrusted to you with the highest integrity, with impartiality and compassion for all, for the purpose of healing our nation?”, see *Boraine*, as above, p. 266; *Meiring*, Pastors or lawyers?, as above, p. 332.

<sup>44</sup> *John W. de Gruchy*, Reconciliation: Restoring Justice, London 2002, p. 147.

<sup>45</sup> See *Meiring*, Pastors or lawyers?, as above, p. 330.

<sup>46</sup> *De Gruchy*, as above, p. 147.

<sup>47</sup> *Pereira*, as above, Finance Week, 6<sup>th</sup> July 2001, p. 36.

kaners. The apartheid policy created the conditions for the rapid accumulation of capital by white capitalists in all sectors of the economy<sup>48</sup>.

And the Reparation and Rehabilitation Committee was in charge of gathering evidence of the amount of harm done to victims and of developing policy recommendations on reparation and rehabilitation<sup>49</sup>. So it was not only a question of individual reparations pertaining to victims but also of general reparations to be paid by businesses and other organizations, e.g. a "post-apartheid tax" or a fixed amount payable to certain funds.

At a hearing before the TRC, as part of the institutional hearings relating to business, labour, the faith community, the legal community, the health sector, the media, and prisons, the *Afrikaans Handelsinstituut* acknowledged in addition its commitment to "separate development" and its active support for this system as being part of the wider white community. So it had co-operated closely with the government to implement its apartheid policies<sup>50</sup>.

Harsh criticism was also voiced in the statements of the ANC regarding in particular the mining industry that benefited strongly from the migrant labour system and viewing black workers as replaceable labour units rather than human beings<sup>51</sup>. Therefore the mining industry was, inter alia, able to save a lot of money for not having to invest in installing safe work places. The lack of safe work places led to a large number of (predominantly) black miners killed and injured because of workplace related accidents.

Although the TRC found that businesses generally benefited in a racially structured context, it was surprisingly anxious to make recommendations for the role of the private sector in the future instead of dwelling in the shady past.<sup>52</sup> So it recommended a scheme to be put in place to enable those who benefited from apartheid policies towards the alleviation of poverty.<sup>53</sup> Another recommendation of the TRC was that the business community together with other interested parties and in cooperation with the Land Commission shall

<sup>48</sup> Prof. *Sampie Terreblanche*, University of Stellenbosch, in: TRC Report, Vol. 4, p. 32.

<sup>49</sup> See *Bronwyn Leebaw*, Restorative Justice for Political Transitions: Lessons from the South African Truth and Reconciliation Commission, Comparative Justice Review, 2001, Vol. 4, p. 267, 280.

<sup>50</sup> TRC Report, Vol. 4, pp. 8 et seq.; *Boraine*, as above, p. 176.

<sup>51</sup> TRC Report, Vol. 4, pp. 22, 23.

<sup>52</sup> See *Boraine*, as above, p. 178.

<sup>53</sup> TRC Report, Vol. 5, p. 308.

undertake an audit of all unused and underutilised land with a view to making this available to landless people.<sup>54</sup>

This is why the South African business community saw the end of the work of the TRC with relief. There had been quite some fear that the TRC would rather recommend direct compensation payments or even part expropriations of businesses. However, this outcome led to the criticism that the TRC neglected the systematic legal violence of a racist regime by atomizing victims<sup>55</sup>. Still a large amount of South African national debt from the apartheid era is owed to domestic capital<sup>56</sup>.

Then there was the other economic question of financially compensating individual victims<sup>57</sup>:

The TRC was initially viewed as a complement to the ANC's Reconstruction and Development Plan. When the redistributive aspects of this plan were abandoned, the Commissioners recommended R 21,700-23,023 per victim in reparations. Unfortunately, the government has avoided long-term reparations. Instead, Urgent Interim Reparations of R 2,500-3,000 per victim were paid out<sup>58</sup>. This led to deep disappointments relating to the reparation or compensation element of the TRC. Many victims made the submission to the TRC not only for having a forum to tell their individual stories but also to receive financial assistance for their unchanged and ongoing struggle to survive<sup>59</sup>.

So the "symbolic reparations" have left a mark on the face of the TRC because of the gap between symbolic and material reparation for gross human rights violations. Compensation is a very important and sensitive element because it shows the state's commitment beyond mere talk. Paying appropriate compensation to the victims of gross human rights violations is as important for healing a nation as the story-telling in the pursuit of the truth.

<sup>54</sup> TRC Report, Vol. 4, p. 319; moreover, it recommended affirmative action, compensation for black, indian, and coloured business people who lost their businesses during periods of unrest, and the elimination of any child labour.

<sup>55</sup> *John J. Williams*, , Truth and reconciliation – Beyond the TRC process and findings, *Equid Novi*, 2000, Vol. 21/2, p. 207, 211.

<sup>56</sup> See *Williams*, as above, p. 213.

<sup>57</sup> A total of 21,298 victims made statements to the commission; 76% were black, 12,8% white, 8,5% coloured and 2,6% asian; only a small percentage was then selected for public hearings, see *Leebaw*, as above, p. 278.

<sup>58</sup> See *Leebaw*, as above, p. 280.

<sup>59</sup> *Leebaw*, as above, p. 281.

## 7. Common Goals in ADR and TRC Proceedings

Alternative Dispute Resolution (ADR) comprises of different models (e.g. negotiation, conciliation/mediation, arbitration) involving an independent third party (e.g. mediator, arbitrator) that can be used, even combined, to avoid direct confrontation of the parties in a state court with a winner and a loser situation.

Traditionally, the focus in ADR for private or commercial disputes is on its advantages over state court proceedings regarding speed, confidentiality, expenses, and recognition and enforcement abroad, i.e. rational, economic goals. This holds in particular true with arbitration<sup>60</sup>. In the fields of negotiation and mediation the aim is mainly to single out the opponents' true goals and to reconcile them or at least to find a platform for communication, i.e. to open up clogged communication channels. The mediator shall ideally act only as a medium to let the parties find the best compromise to settle the dispute and put then this result into a (new) binding contract. So just three over-arching goals of ADR, in particular mediation<sup>61</sup>, and TRC proceedings can be identified:

- 1) Settling a dispute through sensible compromises – opening the door for future cooperation.
- 2) Creating a non-aggressive atmosphere of mutual trust, a win-win situation.
- 3) Legal flexibility to adapt to the individual case.

But in contrast to the aforementioned common goals, ADR is not interested in finding “the” truth but in a reasonable compromise that suits the parties' (economic or personal) interests best.

Moreover, religious or quasi-religious ceremonies are not present in ADR-proceedings but rather psychological tricks to persuade the parties to settle the dispute through a new agreement, e.g. written statements of the mediator that are presented to the parties individually and/or as a surprise etc.

However, the cases heard and decided by the TRC involving gross violations of human rights have little to do with ordinary mediation. Mediation's central object are disputes between individual or legal entities in private or commercial law. Only exceptionally,

<sup>60</sup> See *Glossner*, 75 Jahre institutionelle Schiedsgerichtsbarkeit in Deutschland („75 Years of Institutional Arbitration in Germany“), *Betriebsberater* 1996, p. 3 et seq.

<sup>61</sup> See *Schlieffen*, in: *Haft/Schlieffen*, *Handbuch Mediation*, p. 7.

reconciliation between victim and perpetrator in the framework of criminal procedural law is the subject of mediation<sup>62</sup>.

Therefore only a few, limited lessons as to how to achieve the above mentioned goals may be learned from the TRC's proceedings to be "transplanted" with great cautiousness to ADR:

- a) Natural justice as an element of basic human rights has to be observed to safeguard fair hearings.
- b) Basic procedural rules should be fixed in advance to create legal certainty.
- c) Flexibility or competence-competence relating to procedural rules must only be used in the individual case to pursue the best reconciliation between the parties.
- d) The best compromise for the parties can only be found by investigating closely their cultural, religious, personal and financial background.

Apart from that, the work of the TRC was not only focussed on gross human rights violations during the apartheid era but also uniquely linked to South Africa's society, culture and religion. These circumstances render transfers of its concepts or ideas beyond South Africa's boundaries for the purposes of ADR in commercial disputes almost impossible.

## 8. Summary

The work of the TRC is uniquely linked to the historical, religious and political background of South Africa.

The idea to heal (!) a society from gross violations of human rights in the past and to form a newly united society through "story telling" combined with a bit of amnesty and compensation was for South Africa a sensible and lucky choice. Already the use of a medical term ("to heal") instead of a judicial, e.g. bringing justice, shows the specific focus of the TRC. The winners of the past-apartheid era could have instead installed Nuremberg-like show trials with the full programme of criminal verdicts for a few prominent figures on the basis of so-called "universal human rights". Instead of punishing individual perpetrators the goal of healing the injured nation was born and followed.

<sup>62</sup> In Germany on the basis of the „Gesetz zur strafverfahrensrechtlichen Verankerung des Täter-Opfer-Ausgleichs vom 20.12.1999“ (1999 act on the incorporation of the perpetrator-victim-reconciliation in criminal procedural law) *Kerner* in *Haft/Schlieffen*, *Handbuch Mediation*, p. 1266 et seq.



The TRC's concept of forgiveness and its liturgy was on the one hand certainly installed because of the Christian background of South Africa's society and its leaders regardless of any race.

On the other hand there was another reason for choosing a truth commission, and that is the lack of absolute power on either side. Nuremberg-style tribunals presuppose the complete defeat of one side in a war or war-like situation. This was not the case in South Africa in 1990 – rather a “negotiated revolution” took place.

So friendly co-operation between the political opponents (ANC, IFP, NP etc.) was the obvious solution for them pursuant to *Macchiavelli's* theories to prevent a civil war. And the political wings of the strictly conservative Afrikaners (AWB, Broederbund etc.) that were against this process of transformation were too weak to play any important role anymore. They were then merely history.

However, the common basis found in Christianity made the work of the TRC easier and, to a great extent, also successful. The setting-up of a TRC with the competence of granting amnesty was for the Republic of South Africa the most reasonable choice in contrast to individual court trials for every single perpetrator or “show-trials” for a few prominent political figures.

The relative efficiency of the TRC in maximizing truth, seeking to promote reconciliation and granting amnesty can additionally rationally analysed by using the economic game theory<sup>63</sup>, proving its overall success.

The balancing of economics was twofold: Material reparations paid to the victims of apartheid violence and the position of the TRC towards businesses favoured by the apartheid regime. The TRC only managed to address the first issue in concrete terms by recommending precise numbers for reparation per victim (R 21,700-23,023). And at least the urgent interim reparations averaging R 2,500-3,000 were paid out<sup>64</sup>.

The business community at large just got into the picture during the institutional hearings. Here the TRC was careful enough to demand neither any precise amount to be paid to suppressed businesses nor to advocate any detailed plan to re-distribute any wealth accumulated by certain businesses because of apartheid laws, in particular the mining industry. Instead, the TRC suggested meetings between the formerly favoured industry and businesses and groups or businesses that were formerly suppressed by the apartheid regime.

<sup>63</sup> See *Jerrob Duffy /Don Ross*, *Bargaining for Truth and Reconciliation in South Africa: A Game-Theoretic Analysis*, *South African Journal of Philosophy*, 2001, Vol. 20/1, p. 66 et seq.

<sup>64</sup> See *Leebaw*, as above, Vol. 4, p. 267, 280.

Thus the TRC avoided an open conflict with the industry and businesses. And a flourishing economy with a sufficient number of workplaces and spread income is always the essential balm for healing any nation.

Perhaps the most useless and at the same time most useful technical feature of the TRC was its time constraint. To be sure, without any time pressure nothing gets achieved and the political and economical situation did not allow to stretch its work towards eternity. Healing successes were quickly needed.

The lack of time, however, fostered also an unnecessary hurry of the TRC and a quick selection of cases to be heard before the three sub-committees. The likelihood of mistakes simply increases under time constraints. It is, in particular, not understandable why the Official Report had to be written somehow over night resulting in a number of inaccuracies.

Moreover, there are no protocols of the deliberations and decision-making within the TRC available. So the Official Report represents the only written source for accountability and any analysis or research. The information contained in the Official Report is often very colourful and moving but not always precise and complete as to statistical figures and proceedings.

But in the end both got it right, the “pastors” and the “lawyers”<sup>65</sup>, and the TRC was certainly the most reasonable choice for paving the road towards a reconciled, newly united nation in South Africa.

Unfortunately, it is almost impossible to transfer the ideas and concepts of the TRC directly to the world of ADR in private or commercial matters. This is due to the TRC’s unique historical, religious and political background, the spontaneous rule-making and its “liturgy” that resulted from a deeply rooted religiousness in South Africa regardless of any race or origin. However, the idea of reconciling hostile parties by having also a look into their individual cultural, political and religious background to find a common ground might be an idea worthwhile considering in the otherwise economically centered ADR in national and international commercial disputes.

<sup>65</sup> See *Meiring*, Pastors or lawyers?, as above, p. 339.

## ABSTRACTS

### **The TRC's Balancing of Law, Religion and Economics in South Africa –A Model for Alternative Dispute Resolution?**

By *Frank Diedrich*, Potchefstroom / Rostock

The idea to heal (!) a society from gross violations of human rights in the past and to form a newly united society through “story telling” combined with amnesty and compensation was for South Africa a sensible and lucky choice. Already the use of a medical term (“to heal”) instead of a judicial, e.g. bringing justice, shows the specific focus of the TRC. The winners of the past-apartheid era could have instead installed Nuremberg-like trials with the full programme of criminal verdicts for a few prominent figures on the basis of so-called “universal human rights”.

The common basis found in Christianity throughout the South African society made the work of the TRC easier and, to a great extent, also successful. The setting-up of a TRC with the competence of granting amnesty was for the Republic of South Africa the most reasonable choice in contrast to individual court trials or “show-trials”.

The economic side of the TRC concerned reparations paid to the victims of apartheid violence and businesses favoured by the apartheid regime. The TRC only managed to address the first issue in concrete terms by recommending precise numbers for reparation per victim but mostly just the urgent interim reparations from the President’s Fund were actually paid out. The business community was addressed during the institutional hearings where the TRC was careful enough to demand neither any precise amount to be paid to suppressed businesses nor to advocate any detailed plan to re-distribute any wealth accumulated by certain businesses because of apartheid laws. Thus the TRC avoided an open conflict with the industry and businesses.

Due to the TRC’s unique historical, religious and political background, the spontaneous rule-making and its “liturgy” resulting from a deeply rooted religiousness in South Africa makes it almost impossible to transfer its methods to the world of ADR. However, the idea of reconciling hostile parties by having also a look into their individual cultural, political and religious background might be an idea worthwhile considering in the otherwise economically centered ADR in national and international commercial disputes.