

Ahmedul Kabir**THE SOUTH AFRICAN TRUTH AND RECONCILIATION COMMISSION:
STRATEGIC IMPLICATIONS****Abstract**

This paper presents the strategic importance and implications of a truth commission in the context of South Africa. The limitations of a transitional democracy throw into relief the transitional circumstances of justice. A politically negotiated truth commission is a preferred mechanism, if not the most, for dealing with politically motivated crimes and human rights abuses. A truth commission builds on the concepts of transitional justice and transitional amnesty, thereby meshes with the concept of the rule of law. A truth commission, in its simultaneous and complementary role to retributive justice, can contribute in settling profound political and social conflicts in a country's history. The paper argues that a truth commission satisfies political, legal and ethical requirements simultaneously in a transitional setting. A truth commission can, to a great extent, resolve tensions between truth, justice and reconciliation and play an emancipator role towards democracy, although it can never guarantee truth, justice or reconciliation as they come up with a mixed package that includes a clear objective of ending violence, attending to social inequalities and individual and social readiness. This paper lays out many positive and negative aspects of a truth commission and suggests why a truth commission has increasing appeal. A truth commission may help to render truth, justice and reconciliation and can serve the causes of democracy as well.

1. Introduction

In recent decades, societies from Latin America to Eastern Europe, from the former Soviet Union to Africa, have overthrown military dictatorships and totalitarian regimes in favour of democracy, in the wake of the fall of former Soviet Union and the end of the Cold War. By 1999, at least twenty comparable truth commissions have functioned in many of these post-authoritarian states.¹ The concept and practice of truth commission seem to be one of the preferred mechanisms, if not the most preferred one, for countries dealing with the legacy

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¹ Charles S. Maier, "Doing History, Doing Justice: The Narrative of the Historian and of the Truth Commission", in R.I. Rotberg and D. Thompson (eds.), *Truth v. Justice: The Morality of Truth Commission*, Princeton: Princeton University Press, 2000, p. 261.

of the past atrocities in times of transition from an autocratic or totalitarian regime to a democratic one.

A truth commission has both positive and negative aspects and there are ways of limiting the negative areas so as to maximise its benefits. The positive and negative facets of truth commissions are best captured in the exploration of the tension between truth and justice in the context of moral, legal and political perspectives and in answering pressing questions like: whether a truth commission is proposed as an alternative to criminal prosecution or as a concrete step in the direction towards accountability; whether they are in conformity with the concept of uninterrupted continuation of the rule of law; whether they can achieve the objective of vindicating truth and subsequent reconciliation; what type of political situation warrants the use of truth commission and finally, whether the truth commission is the second best alternative to criminal justice system to deal with past atrocities after transition.

This paper presents a case study of the Truth and Reconciliation Commission (TRC) of South Africa in analysing various arguments for and against truth commissions. The reason for choosing the South African Truth Commission is that it captured the imagination of the whole world. It was established basing upon the tumultuous experiences of some previous truth commissions as well as other forms of transitional justice in some other countries and it has proven to be the best model for truth commissions to date.² The paper also refers to some other truth commissions or other forms of justice in other countries where appropriate, in order to articulate the points of discussion in a fulfilling way.

There are five sections. Section one is the introduction. Section two depicts the structure and tasks of a truth commission in the context of political, legal and ethical issues. Section three discusses the contribution of truth commissions to an ever evolving discussion of the concepts of truth, justice and reconciliation. It also explores the question of transitional justice and transitional amnesty from the rule of law and human rights perspectives. The case study of the South African Truth and Reconciliation Commission is presented in section four. Section five is the conclusion.

2. Truth Commission: Structure and Tasks

A truth commission is an officially sanctioned panel that endeavours to establish the facts of human rights violations or a pattern of government abuses under a past regime, but abstains from prosecuting the perpetrators. A truth commission emerges from the tension between the desire to forget the past and not to invite the ire of the powerful wrongdoers and the ethical and political demands to confront the crimes of the earlier regime. A truth commission emerges when a

² Priscilla B. Hayner, *Truth: Confronting State Terror and Atrocity*, New York: Routledge, 2001, p. 5.

settlement is negotiated, not imposed.³ Truth commission is a mechanism, whereby a new government seeks to establish the legitimacy of its various institutions while simultaneously stating that it is different from the prior regime and is committed to upholding the human rights of the citizens.⁴

A truth commission is a transitory statutory body which is neither legal, nor political nor religious. It stands somewhere between the three main branches of a government; namely, the executive, the judiciary and the legislative, but draws strengths from all three of them.⁵ As a general rule, a truth commission should be established as soon as possible after a political transition in order to capitalise on the political momentum and wide public support. A commission's mandate should be limited for sometime between nine months to two years, in order to again utilise the sustaining public interest, or its aim may lose relevance. A strong civil society can advance the cause of a truth commission.⁶ A truth commission has at least five basic aims: namely, to find out, clarify and officially acknowledge past abuses; to answer to the needs of victims; to contribute to justice and accountability; to delineate institutional responsibility and recommend reforms and reduce conflict over the past.⁷ A truth commission can investigate abuses both by state forces and by the armed opposition.⁸

A truth commission completes its task by presenting the country with a written and well documented record of facts. It can hold its hearing in public or private. Most commissions are directed to forward their records to prosecutors or courts where they feel that there is evidence. A truth commission and trials can operate at the same time, as is evident from the South African truth commission model.⁹

A truth commission can be established by a presidential decree as in Haiti, Sri Lanka, Chad and Uganda, with little public debate on their terms. Less commonly, but more preferably, the national legislature may create a truth commission like that of the South African model, with stronger powers such as the power of subpoena or search and seizure. Who is selected as a commissioner to run the truth commission is also one of the most important factors in determining the success of the commission. The chair has to have significant personal authority and networks to be able to run the commission effectively. A truth commission can consist of a mix of national and international members, as the commission of Sierra Leone exemplifies.¹⁰

³ Maier, *op. cit.*, p. 262.

⁴ Richard A. Wilson, "Justice and Legitimacy in the South African Transition", in A. B. De Brito and C. G. Enriquez, (eds.), *The Politics of Memory: Transitional Justice in Democratizing Society*, Oxford: Oxford University Press, 2001, p. 200.

⁵ *Ibid.*, p. 205.

⁶ Hayner, *op. cit.*, p. 221.

⁷ *Ibid.*, p. 24.

⁸ *Ibid.*, p. 74.

⁹ *Ibid.*, pp. 10-29.

¹⁰ *Ibid.*, pp. 214-218.

3. The Conceptual Underpinnings of Truth Commission

This section delineates the concepts of truth, justice and reconciliation that are keys to an understanding of a truth commission in its various aspects. There are four sub-sections, namely, transitional justice; truth vs. justice; truth and reconciliation and transitional amnesty. It is argued that the innovative concept of transitional justice and transitional amnesty advances the causes of truth, justice and reconciliation in a transitional democracy. It further suggests that transitional justice and transitional amnesty completely conform to the rule of law and human rights principles.

3.1 *Transitional Justice*

Transitional justice refers to an extraordinary situation where a newly installed democratic country tries to rebuild its political, legal and economic system after emerging from long periods of gross violations of human rights and atrocities under an autocratic regime. The meaning of transitional justice hinges on the crucial question of how to deal with gross violations of human rights of a past autocratic regime in a transitional setting, so that it opens up the future for a democratic society from where there is no turning back. For this, the conception of justice has to be transformative and transitional, thus marking a paradigm shift from the ordinary conception of retributive justice.¹¹

The concept of transitional justice provides for a framework where a truth commission that emerges out of political expediency is seen to be consistent with the rule of law. The value of legal continuity or the rule of law is severely tested during transition. In Germany at the end of the Second World War, the rule of law meant breaking away from the Nazi legal regime through the retrospective justice of the Nuremberg trial in order to restore respect for law and justice. In a post War era, the obvious question is to what extent the rule of law necessitates legal continuity. The continuation of the rule of law is justified in terms of distinctive conceptions of the nature of injustice of the prior regime. The continuity with the prior legal regime is required to restore the belief in the procedural regularity that was missing in the earlier regime. The transitional justice juxtaposes the idealised conception of the rule of law with the extraordinary political context.¹²

3.2 *Truth vs. Justice*

Both the truth commission and the criminal justice system play complementary and integral roles in the pursuit of truth and justice. The tension between truth and justice revolves around the question as to whether a truth commission can achieve the objective of justice as trials do. Truth commissions are not equivalent to any judicial

¹¹ Ruti G. Teitel, *Transitional Justice*, Oxford: Oxford University Press, 2000, p. 11.

¹² *Ibid.*, pp. 10-17.

body or court and should not be deemed a replacement for trials. A truth commission and a trial court operate with fundamentally different goals in mind. A commission does not interfere with or replicate any task of courts.¹³

Truth commissions should not be seen as a substitute for prosecution or as a second best option even when justice in court is not viable. In many cases truth commissions rather serve as a complement to a very weak judicial system, helping to fill the void created by the system's inaction, incompetence and inability to handle thousands of cases. The purpose of the truth commission seems to strengthen or contribute to justice in courts.¹⁴

The goals of truth commissions can range from national reconciliation to advancing healing for individual victims, from ending impunity to building up protection to prevent the temptation to repeat the abuses. These needs born out of transitional circumstances cannot be addressed by court proceedings even if the courts function well and there are no limiting factors on the prosecution of wrongdoers, which is rare.¹⁵ The main task of the courts is to decide upon the individual responsibility for criminal conducts. They cannot contribute to settling profound political or social conflict in a country's history as truth commissions can do.¹⁶ Although a commission enjoys limited powers compared to courts, it has a broader mandate to investigate patterns of events in order to enable them to reach conclusions about the society itself which is not possible through trials. The truth commissions are able to outline the full responsibility of the state and its various organs like the military, the police and the judiciary itself. No other state body has the mandate to review the record or the deficiencies of the judiciary.¹⁷

The main argument for trials seems to be that they can provide strong retributive justice in terms of reinstating a balance of pain, albeit imperfectly. It may also be argued that a truth commission can render at least a weak retributive justice by changing the equilibrium of power and status in favour of the victims through public acknowledgment of their pain and by invoking public shame on the perpetrators. A public acknowledgment of suffering can be described as a contemporary form of justice in its own right, whereas strong retributive justice is only relatively strong because nothing can really compensate for murders, deprivation of liberty, torture and other forms of abuses.¹⁸

There is a suggestion that a trial can not only provide retributive justice, but also help deter any repetition of abuses in the future. Then a question that inevitably

¹³ *Ibid.*

¹⁴ *Ibid.*, pp. 87-90.

¹⁵ *Ibid.*, pp. 10-16.

¹⁶ Juan E. Mendez, "In Defense of Transitional Justice", in A. J. McAdams (ed.), *Transitional Justice and the Rule of Law in New Democracies*, Notre Dame: University of Notre Dame Press, 1997, pp. 4-21.

¹⁷ Hayner, *op. cit.*, pp. 10-16.

¹⁸ Maier, *op. cit.*, p. 268.

comes up is whether it is morally and legally imperative for a new democratic regime to pursue trials in order to address the gross human rights violations. This question brings the temptation to equate reconciliation initiatives with forgiveness. It also tends to ignore that a truth commission provides restorative justice by focusing on a victim-centred approach through reparations and at the same time it is also an effective apparatus to prevent a new democratic government from falling back into the old cycle of rights abuses. The answer to the question above lies in another question: whether it is morally right to risk the existence of a fledgling democracy by preventing the possibility of genuine reconciliation between old enemies. If the objective of trials is deterrence, then under the right circumstances of time and place, a truth commission can be an ethical choice.¹⁹

It seems that there is a mutually exclusive political logic and ethical logic at play when it comes to decision-making about whether to pursue criminal justice or establish a truth commission in order to address the human rights violations of a previous government. In fact, both the criminal justice system and the truth commission are part of the same process: they complement and contradict each other but are never autonomous or independent from one another in their implications.²⁰

To turn to more practical aspects, there is no guarantee that the trials are the best means for redressing the wrongs and they cannot be appropriated in all circumstances. Political motivations can pervert the course of law.²¹ The lack of political will and the resistance shown by the prosecutors and judges in taking up politically sensitive cases are common features in a transitional setting.²² The inherited judiciary from the past regime also lacks independence and has a long tradition of ineptitude and corruption and is usually bereft of material or human resources to handle momentous trials. In these circumstances, the truth commissions can give the courts the precious time that they need to rebuild.²³ The successor trial also raises the difficult question of who is the proper subject for trial, considering the involvement of the security forces, the military and the police alongside the politicians in the perpetration of gross human rights violations. The failure of successor trial programmes in Argentina shows how practically the whole army was exposed to potential prosecution, subsequently resulting in a broad pardon and amnesty process.²⁴ However, it is important to explore the issues of truth and reconciliation against the background of transitional democracy.

¹⁹ Mendez, *op. cit.*, pp. 1-9.

²⁰ Wilson, *op. cit.*, p. 200.

²¹ Teitel, *op. cit.*, p. 44.

²² Hayner, *op. cit.*, p. 89.

²³ Mendez, *op. cit.*, pp. 4-21.

²⁴ Teitel, *op. cit.*, p. 44.

3.3 *Truth and Reconciliation*

There is always a suggestive question as to whether a truth commission can uncover the truth and whether truth leads to reconciliation. It also raises a subsidiary question: whether truth and reconciliation can advance democratisation and liberalisation. Moreover, there is a suggestion that pursuing truth can traumatise individuals rather than help those who give testimony in front of the commission to be reconciled.

Firstly, if a truth commission cannot discover the whole truth, it at least succeeds in narrowing the range of tolerable lies. What a commission at least does for victims is give them a compelling public voice. It entails an official admission that the state has committed gross human rights violations in the past and it removes any distant possibility of continued denial of such violations. This official acknowledgement is very important in the context of official denials of deceptive abuses by previous regimes and it could be the first step towards individual healing. A commission may help contribute in making perpetrators accountable without replacing justice in courts.²⁵

The pursuit of truth by a truth commission can be more dangerous and destabilising than that of trials for individuals as well as for communities that have recently returned to peace. Truth inquiries demand an active involvement and emotional engagement from victims as well as from the broader society. It also demands concentration of substantial resources at a point of transition where many urgent priorities may call for attention. None of these could be convincing reasons for not having a truth commission, but they could be reasons for questioning the worth of the truth being told.²⁶ Individuals may have their own responses on how to deal with the gross human rights violations in the past, but a society through its institutional framework has the liberty to go down the path of retributive justice or a truth commission.²⁷ In a sense, it is not a choice between a truth commission and justice but between a truth commission and silence, the silence over the atrocities of a prior autocratic regime. However, it would be fair to say that a truth commission may help to render justice and can play an emancipator role towards democracy, but it can never guarantee either justice or democracy; it can only provide the possibility for them to exist.²⁸

Many argue that trials are preferable to truth commissions, not only because they impart justice but also because they reveal the truth. The fact is that the purpose of trials is not to expose the truth but to make sure that the criminal standard of

²⁵ Hayner, *op. cit.*, p. 29.

²⁶ *Ibid.*, pp. 183-185.

²⁷ Martha Minow, "The Hope for Healing: What Can Truth Commissions Do", in R. I. Rotberg and D. Thompson (eds.), *op. cit.*, p. 253.

²⁸ Maier, *op. cit.*, pp. 269-273.

proof has been satisfied on a specific charge. A measure of truth may come out in the process, but as will be shown later, the South Africans have seen the limitations of the judicial process in finding out the truth, for example in the case of General Magnus Malan.²⁹

Secondly, to put it simply, an official account and conclusion about the facts allow opposing parties to sit and govern together without conflict and acrimony over the past lies.³⁰ The word reconciliation is so closely associated with the South African Truth and Reconciliation Commission that one sometimes assumes reconciliation to be an integral or primary purpose of any truth commission.³¹ It ignores the fact that true reconciliation rather comes from a mix of packages that may include a clear end to the threat of further violence, a reparation programme, attending to structural inequalities, mechanisms in a society that bring together formerly opposing parties, social and individual readiness, or maybe the passage of time.³² Establishing truth about the rights abuses, offering an apology and respecting the memory of victims through memorials and other forms of acknowledgement are aspects of reparation and thus the work of a truth commission can be an important part of a full reparation programme.³³ However, no truth commission can fully achieve the aim of accountability and reparation.³⁴

3.4 *Transitional Amnesty*

This section presents the justification for transitional amnesty. The dilemma of whether to grant amnesty or impose criminal justice does not arise in a vacuum but in a transitional context where during negotiation, criminal justice becomes a bargaining chip, with a subsequent agreement to amnesty to pave way for liberalising the political order. The invocation of punishment seems to be the only resort to show forcefully that a regime change has taken place, putting an end to impunity for past atrocities. It suggests that punishment is necessary to restore the rule of law and consolidate democracy. However, it can additionally be argued that restraint in exercising punishment can also signal a return to the rule of law.³⁵ Moreover, it is not certain either that retributive justice makes a stronger foundation for democracy.³⁶

In ordinary times as well, the rule of law does not necessitate full enforcement of law and the reason for granting clemency that includes amnesty and pardon is usually political as well. As such clemency in ordinary times shares common ground

²⁹ Hayner, *op. cit.*, p. 100.

³⁰ *Ibid.*, p. 155.

³¹ *Ibid.*, p. 29.

³² *Ibid.*, p. 6.

³³ Hayner, *op. cit.*, pp. 170-171.

³⁴ Minow, *op. cit.*, p. 252.

³⁵ Teitel, *op. cit.*, pp. 55-57.

³⁶ Maier, *op. cit.*, p. 274.

with transitional justice in its political aspect. Amnesty, on the other hand, like punishment can show where the political power lies. The waiver of punishment, like its exercise, can define transition. In transitional as in ordinary times, the prerogative to pardon lies in the executive, not in the judiciary. Therefore, although justice is in the realm of judiciary, mercy is in the province of political branches to be exercised freely in furtherance of political aims.³⁷

On a more practical note, a successor regime's exercise of power is usually associated with the legacy of the judiciary from the prior autocratic regime that undermines its authority. The exceptional circumstances of successor trials and absence of any legitimate institutions for judgement throw into relief the compromised circumstances of justice in the transitional period.³⁸ The following case study on South Africa's Truth and Reconciliation Commission superbly embodies the tension between the issues of truth, justice, reconciliation, transitional justice and transitional amnesty in a localised and contextualised transitional democratic setting.³⁹

4. Case Study on South African Truth and Reconciliation Commission

4.1 Birth of the Commission

South Africa made a transition towards democracy through a negotiated agreement at the end of forty-five years of apartheid in South Africa and thirty years of armed struggle by the African National Congress (ANC) and others. The most contentious issue during the negotiation toward an interim constitution was whether the wrongdoers would be granted amnesty, which the military and the government were asking for. In the final hours of negotiation, the parties involved agreed to a post-amble to the Constitution that allowed amnesty for politically motivated crimes. The South African Parliament passed the Promotion of National Unity and Reconciliation Act in 1995 after hundreds of hours of hearing that gave birth to the Truth and Reconciliation Commission. The mandate of the commission was to investigate the gross violations of human rights like killing, abduction, torture and severe ill treatment, but it did not include all the abusive practices of the apartheid. It investigated politically motivated crimes committed by both the prior autocratic regime and the opposing political parties.⁴⁰

The legislation creating the South African Truth Commission prescribed a consultative process for the selection of its members. A selection committee was formed which called for nominations from the public. The selection committee

³⁷ Teitel, *op. cit.*, pp. 51-55.

³⁸ *Ibid.*, p.57.

³⁹ Rebecca Saunders, "Lost in Translation: Expression of Human Suffering, the Language of Human Rights, and the South African Truth and Reconciliation Commission", *International Journal on Human Rights*, Vol. 5, No. 9, 2008, p. 51.

⁴⁰ Hayner, *op. cit.*, pp. 40-44.

narrowed down the thousands of nominations to twenty five and then sent them to President Nelson Mandela to select seventeen commissioners finally. President Mandela added two persons who did not go through the selection process in order to provide geographic and political balance.⁴¹ This kind of transparent and accountable process resulted in the inclusion of some members of the apartheid regime in the commission itself. It was a political decision by President Nelson Mandela that won the hearts of millions.⁴² Archbishop Desmond Tutu, the charismatic Nobel laureate, was the chair of the commission made up of the seventeen commissioners. The commission itself also set a high standard by recruiting members of the military and the police into the commission to take advantage of their knowledge of the inside working of the forces under investigation in spite of the fact that they were the main instruments for human rights abuses during the apartheid.⁴³

4.2 *Salient Features of the Commission*

The greatest innovation of the South African Truth Commission was its authority to grant amnesty for politically motivated crimes committed between 1960 and April 1994.⁴⁴ It is the most controversial power of the commission as well although only 568 people were granted amnesty and 5,287 were denied it out of over 7,000 applications.⁴⁵ An amnesty was predicated on the condition that the perpetrators had made a full disclosure of their crimes. There was no requirement to ask for an apology, in order to be granted amnesty which implies that truth is not the price for forgiveness.⁴⁶ In fact, trials and the truth commission in South Africa operated simultaneously and played complementary roles. For example, the trial of General Magnus Malan, Army Chief and later Defence Minister persuaded many perpetrators to come forward and apply for amnesty. In 1996, he was found not guilty despite the continuous airing of allegations against him. Malan volunteered to testify before the commission although he did not ask for amnesty, apparently. At the truth commission, he shared some of his stories whereby some truth has come out that would not have come out without the existence of the truth commission.⁴⁷

The commission usually held a public hearing and it was open to television and radio broadcasting to keep the whole process transparent. The commission showed respect by making it clear to the victims that it was their choice whether to give testimony in public or private.⁴⁸ The public hearing has achieved one thing in South Africa that few people will now try to defend or justify the widespread repression and

⁴¹ *Ibid.*, pp. 216-218.

⁴² Mendez, *op. cit.*, p. 283.

⁴³ Hayner, *op. cit.*, pp. 216-218.

⁴⁴ *Ibid.*, pp. 40-44.

⁴⁵ Wilson, *op. cit.*, p. 209.

⁴⁶ Hayner, *op. cit.*, pp. 40-44.

⁴⁷ Minow, *op. cit.*, p. 251.

⁴⁸ *Ibid.*, p. 243.

torture that were in practice to keep the apartheid in place.⁴⁹ However, it is relevant to mention that the South African Truth Commission hired the help of a mental healer professional and provided some training to statement takers to help the victims cope with the process of testimony. The commission also provided regular briefing and debriefing sessions to victims before and after giving testimony respectively.⁵⁰

The South African commission also named the perpetrators of the wrong doing. It had to follow the due process as it was binding upon the truth commission resulting from a court decision to notify those in advance who were going to be named, so that they could defend themselves before it became public.⁵¹ The South African Commission is the only one that went so far as to call for a hearing to analyse the role of judiciary. When the judges declined to participate in the hearing with the exception of one judge, the commission considered issuing subpoenas to bring them to court, but then decided against it. Subsequently, the commission included a narrative on the judiciary.⁵² In South Africa, a small number of cases of sexual assault were reported to the commission compared to the widespread practice of rape at the hands of security forces that were known to have taken place. The commission was well aware of this limitation and mentioned it in its report. The South African Commission dedicated a whole chapter of its report to describing its battle to obtain access to files that were either destroyed or withheld.⁵³

The South African Truth Commission forwarded detailed recommendations for reparation programmes, including financial, symbolic and community development programmes. The commission made cash payments to the accounts of the victims or their survivors. The reparation was open only to those who testified before the truth commission, but there is a suggestion that it should be open to all victims irrespective of whether they testified or not. The commission made it very clear to the testifiers from its inception that it was cash strapped and that it would be impossible for it to make significant monetary reparation. Therefore, although most of the testifiers were very poor as a result of apartheid, in many cases they requested a small amount of money, only for tombs or some memorials.⁵⁴

4.3 Retrospective Justice in South African Model

This section explains why the issue of amnesty was given priority over the question of retrospective justice. In South Africa, apartheid was legal. Endless injustices were perpetrated by successive apartheid regimes between 1948 and 1990 under the aegis of law. South Africa was a pariah state because of its human rights

⁴⁹ Hayner, *op. cit.*, pp. 1-7.

⁵⁰ *Ibid.*, pp. 139-153.

⁵¹ *Ibid.*, pp. 40-107.

⁵² *Ibid.*, p. 104.

⁵³ *Ibid.*, pp. 40-107.

⁵⁴ Hayner, *op. cit.*, pp. 170-172.

records. In spite of the fact that apartheid was an international crime, there was no initiative from the United Nations to bring the perpetrators to justice. By 1994, there was no justification to establish an international tribunal, because by then South Africa was perceived to be no longer a threat to international peace. There were two convincing factors for keeping the injustices of the apartheid itself out of the mandate of the truth commission. First, the South African government wanted to show that they were not engaged in a victor's justice. Second, the government was determined to maintain the rule of law without dealing with the offensive laws retrospectively.⁵⁵

The South African Commission was challenged by the survivors and the families of the victims, who demanded justice in the form of prosecution or civil actions. In fact, the constitutionality of amnesty was challenged in the post-apartheid constitutional court in 1996. The court held that the post-amble to the 1993 Constitution stipulating for amnesty took precedence over the specific clause on Bill of Rights. The truth commission inherited this limitation of amnesty as built-in but nevertheless, it advanced causes of truth and justice within these limitations in good faith.⁵⁶

4.4 *Limitations*

This section points out some more limitations that may have implications for reformation of future truth commissions. South Africa's Truth and Reconciliation Commission found it very difficult to document and represent the truth in the course of its short existence. It was also very demanding on them to carry out intensive investigations into very sensitive issues of the day when the commission had to fairly represent the stories of thousands of victims.⁵⁷ Due to the great numbers of testimonies taken and the limited time and resources available, the truth commission could only delve into serious investigations in a very small number of cases. Most of the thousands of testimonies were recorded exactly as reported by the deponent but never had been looked into in-depth.⁵⁸ However, there are suggestions that during data processing and also due to legalistic language, it was sometimes difficult to translate individual expressions, traumas and stories into words.⁵⁹ Despite these limitations, there are strong suggestions that South Africa's Truth and Reconciliation Commission was unequivocally successful in fulfilling its mandate of incorporating the nature and scale of human rights abuses into national history.⁶⁰

⁵⁵ John Dugard, "Retrospective Model: International Law and the South African Model", in A. J. McAdams (eds.), *op. cit.*, pp. 270-279.

⁵⁶ Mendez, *op. cit.*, p. 11.

⁵⁷ *Ibid.*

⁵⁸ Hayner, *op. cit.*, pp. 7-26.

⁵⁹ Saunders, *op. cit.*, p. 53.

⁶⁰ Paul van Zyl, "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission", *Journal of International Affairs*, Vol. 52, No. 2, 1999, p. 648.

There are suggestions that the psychological or therapeutic support given to the testifiers before or after testimony as arranged by the commission was inadequate.⁶¹ There is an argument that the inadequacy, if any, has to be measured against the then general existing poor mental health system across the country.⁶² Moreover, any individual trauma has to be contextualised with the “extreme chronic stress” associated with the apartheid era.⁶³ Besides, the nature and scale of memory of trauma is highly dependable on both individual characteristics of testifiers and different cultural nuances.⁶⁴ Therefore, the right perspective is to see a truth commission as a part of, rather than a substitute for any comprehensive and ongoing therapeutic intervention for individual survivors.⁶⁵ As Minow rightly contends that by identifying individual suffering in the social context rather than depicting it as private experience, a commission rather can help individual survivors understand their trauma better in some cases.⁶⁶ Finally, for transnational transfer of practices and institutions in creative ways, the deeply contextual circumstances of South Africa’s Truth and Reconciliation Commission has to be taken into account.

5. Conclusion

A truth commission is a politically expedient mechanism for transitional countries moving from an autocratic or totalitarian regime to a liberal democratic one through a negotiated compromise. A truth commission marks a decisive break between the prior abusive regime and the new democratic government. A truth commission gives an official acknowledgement by the state that it committed gross violations of human rights earlier and issues an official apology; it also expresses the new government’s commitment to promote human rights of its people in the future and offers hope for a stable democracy, although it cannot guarantee so. It also achieves some form of justice and accountability for the atrocities committed in the past to some extent, though it can never fully achieve either of them.

A truth commission proceedings and a report may help individuals and the society at large to comprehend to some extent the abusive pattern of past atrocities. A truth commission is never intended to be an alternative to the criminal justice system; rather it complements and contradicts the other while they are not autonomous from each other. A truth commission is in its own right offers a very suitable option for dealing with past rights abuses in transitional circumstances and it explains why there is a growing trend for adopting a truth commission in a transitional period. The theory

⁶¹ Saunders, *op. cit.*, p. 55.

⁶² Debra Kaminer, Dan J. Stein, Irene Mbanga and Nompumelelo Zungu-Dirwayi, “The Truth and Reconciliation Commission in South Africa: Relation to Psychiatric Status and Forgiveness among Survivors of Human Rights Abuses”, *The British Journal of Psychiatry*, Vol. 178, No. 4, 2001, p. 376.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Minow, *op. cit.*, p. 246.

of transitional justice aptly shows that the truth commission completely meshes with the continuity of the rule of law. The concept of transitional amnesty also justifies the fact that a truth commission's endeavour for peace by offering amnesty is consistent with the rule of law value. A truth commission therefore satisfies political, legal and ethical requirements simultaneously in a transitional setting.

A truth commission excels when it is empowered by the will of the people and is supported by the civil society. The personality and preferences of the commissioners composing the commission also play an important role in how successful a commission will turn out to be. A commission is mandated for a short period to ride on the political momentum and public support. A commission created by a legislative act rather than a presidential decree gains more legitimacy in the eyes of the people. An open public hearing process is also valuable in its own right. Moreover, a commission report can put an end to conflicts over the past lies, it points out institutional responsibilities including those of the military, police and the judiciary and it recommends reform programmes for them. A commission also slowly helps restore people's belief in various state organs. In addition, it gives the new government the necessary response time to rebuild various democratic institutions. A truth commission advances the causes of truth and reconciliation as well. The truth telling process may cause pain to individuals, but a democratic society has the liberty to decide whether to pursue truth and reconciliation for a better future.

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