

Discuss the importance of truth commissions as part of a process of justice in post-conflict societies (with particular reference to South Africa or Haiti).

1. Introduction

In post-conflict societies, new regimes usually face the difficulty in dealing with human rights violations committed by former regimes. Although there is a classical approach of trial process through criminal prosecutions, for the last thirty years, several countries have employed another approach, the truth commission method.

A truth commission is very controversial approach. Proponents of prosecution criticise that it does not serve justice because of its feature of ruling out prosecutions. This essay discusses how a truth commission contributes to 'justice' by taking the example of the South African truth commission.

The discussion begins with the brief explanation of two different conceptions of 'justice'—retributive justice and restorative justice. The next section describes the features of the South African truth commission. This is then followed by the assessment of the relations between each justice and the truth commission with particular reference with a most controversial issue of truth commissions—amnesty.

2. Two conceptions of 'justice'

A dictionary defines 'justice' as "the principle that punishment should be proportionate to the offence" or "the administration of law according to prescribed and accepted principles."¹ This is a general and traditional conception of 'justice.' Punishment, which is an action against the criminal, is expected to act as a deterrent, and is justified on the grounds that a criminal creates an imbalance in the social order. In this context, 'justice' means retributive justice which provides a means of punishing evildoers for their criminal conduct and fulfils victims' desire for revenge through prosecution.²

There is another conception of 'justice,' which is called restorative justice. Restorative justice emerges from the desire to reconstruct a just society and to create a new nation by moral, cultural, psychological, and human ways, rather than just legal and instrumental ways.³ It attempts to rehabilitate both offenders and victims and to re-establish relationships and common humanity based on the assumption that within society equal concern and respect exists.⁴ It emphasises the importance of healing the victims' wounds and reintegrating the perpetrators into society, rather than punishing them. Restorative justice is relatively new conception of 'justice' and controversial in relation to retributive justice.

Truth plays different roles for each conception of justice: broadly speaking, retributive justice positions truth as a means to achieve positive legal justice, that is, the

civil or criminal prosecution of alleged human rights violators; on the other hand, restorative justice positions truth as in itself a form to realise social justice.⁵

3. The truth commission in South Africa

A truth commission (TC) is established generally “after a totalitarian/authoritarian regime has been succeeded by a democratic one.”⁶ It is a temporary organisation created to “investigate human rights violations committed by military, government, or other armed forces under the previous regime or during a civil war.”⁷ It does not aim to prosecute but attempt to assemble a full accurate record of what happened, what motives were at work and who was responsible for prior misdeeds including assassinations, disappearances, and other human rights abuses. This practice focuses more on victims than perpetrators. After all the procedures, the results are published so that the society can keep a lasting record and a guide to prevent future breach of human rights.⁸ Within the definition above, a truth commission can take diverse forms depending on its location.⁹

In South Africa, two other commissions had been created before the TC.¹⁰ The first one was created in 1992 by Nelson Mandela to examine human rights violations at African National Congress detention camps. This commission drew attention as a rare example of investigating its own abuses, although the findings were criticised as lacking impartiality. The second one, consisting of three commissioners from South Africa, Zimbabwe, and the US, is also appointed by Mandela and found out the necessity of establishing a TC to grasp the overall human rights abuses committed in South Africa for a very long period. The government of South Africa set up the TC in December 1995, which is chaired by Archbishop Desmond Tutu and is composed of 17 members.

As Kader Asmar, minister of water affairs at that time, stated in his lecture at the University of Western Cape that there was no prototype of the TCs that could be applied automatically to South Africa, the government “sought to learn from past mistakes [of other TCs] and develop a different kind of truth commission.”¹¹ The TC in South Africa has four unique features different from any other TC that has taken place anywhere in the world.

First, the process of the TC, including the appointment of commissioners, the promulgation of the TC act and the attendance to any of the hearings, was democratic and open to the public. Public hearings were followed by the debate in Parliament. Important decisions made during the committee hearings were also opened to the media and public. People in the whole country participated in the work of the TC from the beginning through media.¹² Public hearings had also been held in some of other countries, but there were outstandingly more hearings in South Africa: 140 hearings in 61 towns were taken covering 22,000 victim statements and 37,000 violations.¹³ Second, the names of perpetrators, as well as victims, were made public by the TC.

People who were named were given an opportunity to make their response. Third, the TC “had powers of subpoena and of search and seizure.” The TC could summon alleged perpetrators and those who were considered to have decisive information in order to hold special hearings. It also “could secure files and documents that had been secreted away by the previous government and its agents.”¹⁴ Last, the most striking feature was limited amnesty under severe conditions. The TC had semi-judicial authority to grant amnesties to perpetrators. Amnesty was made possible in exchange for truth. This conditional amnesty was quite different from blanket amnesty in other TCs which was granted by unavoidable necessity to start negotiations in a fragile peace and to allow ignoring the past.

4. Justice and the truth commission

Retributive justice and the truth commission

Proponents of retributive justice criticise that the TCs “sacrifice the pursuit of social justice.” They emphasise that punishment is different from retribution and it may play various roles to reinforce the rule of law by controlling or denouncing crime, isolating the dangerous, rehabilitating perpetrators, and giving them their just deserts.”¹⁵ It is only those who found guilty that should be punished, and the extent of punishment is demanded according to the degree of culpability. In this point of view, the TCs do not serve ‘justice’ because they are generally established on the premise of ruling out prosecution.

Although human rights organisations such as Amnesty International and Human Right Watch tend to overstate that governments have a duty under international law to prosecute those who have committed serious human rights abuses, international law, to be precise, merely permits prosecution.¹⁶ Many advocates of the TCs accept the criticism above and attempt to offer moral justifications from the viewpoint of restorative justice as an alternative conception of ‘justice’,¹⁷ which is going to be discussed in the next subsection.

There were several reasons why many TCs decide to avoid the process of prosecution. Newly-established democracies simply may not have conditions essential to prosecute effectively including the power, popular support, legal tools. They may find their judicial functions are too weak, unskilled or biased in order to keep impartiality and transparency during the trials. There are some problems on prosecution itself. It is almost impossible to prosecute all violations of human rights and the reality is some possible cases have to be selected. It might cost a lot and take too much time to proceed. As a result, so many cases could be left unfinished and ‘justice’ would finally not be established. Overblown expectations to high profile prosecutions may become a backlash against the new regime if the result was disappointed. Prosecution may cause a

serious resistance against democratic institutions as well as severe financial problems. It can be destructive for fledgling democracies with a renewed violence.¹⁸ And moreover, “prosecutions that would be perceived as politically motivated or politically tainted could not advance the rule of law.”¹⁹

Restorative justice and the truth commission

The prosecutorial approaches to find ‘justice’ have been carried out as usual since the Nuremberg and Tokyo trials in 1940s, just as the conception of retributive justice is regarded as general ‘justice.’ However, prosecutions face multiple barriers in fulfilling the missions. This section examines how the South African TC, which ruled out the prosecutions and thus sacrificed retributive justice, contributed to ‘justice’ from the viewpoint of restorative justice.

Restorative justice does not refute the legitimacy of retributive justice, but provides an influential alternative to ‘justice.’ Its priority is given to “correcting imbalances, restoring broken relationships -- with healing, harmony and reconciliation.”²⁰ The TCs have been created for the last twenty years to reveal the truth about injustices, as was in South Africa. In addition, the South African TC emphasised its effort to restore and assure the human and civil dignity of victims and the importance of, first, public acknowledgement of truth and, second, official recognition of victims as legitimate sources of truth.²¹

Victims and their relatives had been denied citizenship and civic rights under apartheid. This fact was known only by those who were involved in such atrocities and violations of human rights but were much less admitted by the government during the apartheid era. Victims also suffered political violation, that is, government’s refusal to acknowledge violations, as well as gross abuses of human rights. Public hearings of the TC, where people were enabled to tell their own stories, played a significant role in that the government publicly acknowledged former lack of the human and civil dignity. Victims’ lost dignity was restored by public acknowledgement of the truth of what was done to them.²²

As far as prosecutions of retributive justice are concerned, victims and their relatives are requested to give testimonies which are relevant to decisions of guilt or innocence in accordance with strict rules of evidence. The courts ask and listen to them with scepticism. The TC’s victims-centred position, in contrast, gave them opportunities to tell their stories and asked perpetrators or the accused to account for the truth in a public forum. Storytelling enabled them to be recognised as legitimate sources of truth with claims to rights and justice and it symbolised their right of participating in reconstructing their country.²³

These two set of results, what Andre du Toit calls ‘truth as acknowledgement’ and ‘justice as recognition’ respectively, were significant benefits which public hearings

of the South African TC produced. The victims' human and civic dignity was restored and some measure of accountability from perpetrators had been reserved as a result. South Africa was a fledgling democracy. Regular institutions and functions to carry out prosecutions were not for granted, and there was a need of ensuring a new culture of rights and equal citizenship. The truth and the work of the TC contributed to 'justice' by correcting injustice and restoring equal political rights and dignity. The notions of truth as acknowledgement and justice as recognition provide restorative justice, that is, "a coherent alternative to notions of justice based on criminal prosecution and punishment."²⁴

Amnesty and justice

The granting of amnesty to individuals for acts constituting gross violations of human rights is most controversial issue when creating the TCs. The South African TC adopted a qualitatively different approach to amnesty from other TCs. It was not blanket amnesty which encourages amnesia and impunity, but conditional one which included three major requirements: applicants have to make full disclosure of all relevant facts; the act they apply for amnesty was politically motivated; and the act they apply for amnesty was not committed for personal gain or personal malice. However, the South African TC was "not immune from such controversy"²⁵ and many from international community claim that it was wrong to offer amnesty to perpetrators.

Amnesty can assist the work of TC by revealing the past events more effectively. Members of the old regime may help the TC with necessary cooperation only when their amnesty is assured. In fact, the National Party strongly asked that "its supporters be indemnified from criminal prosecutions through an amnesty agreement."²⁶ Amnesty can also help the TC by establishing more harmonious relations with former adversaries, which otherwise would exacerbate the situation or hinder consolidation of the new regime. Amnesty plays a significant role to bring and keep more people involved to the TC and, thus, to collect more truth to the commission. The more the truth revealed, the more the TC seems to accomplish restorative justice.

However, focusing on its effect to individuals, amnesty does not at all serve justice. Amnesties for those who have committed murders and tortures involve a degree of injustice from the view point of both retributive and restorative justice. Perpetrators have no complaint because they are treated better than any situation without amnesty. Yet, "their undeservedly generous treatment is unjust from the standpoint of victims and survivors, and the whole community."²⁷

This viewpoint is hard to refute because most people believe that it must be better to give any punishment to offenders than to let them go free. But the amnesty which the South African TC granted can still be justified by looking at the disadvantages of prosecution and the benefits of the TC. On the one hand, prosecutions

might exacerbate old wounds. It is almost impossible to prosecute all human rights violators and the whole truth will never be revealed. Criminal prosecutions usually take too much time, often extending for years. Prosecutions may exacerbate old wounds.

On the other hand, the South African TC could reveal much more truth by its victim-centred position, impose informal sanctions to even those who were granted amnesty, and reconcile the relations between victims and perpetrators. The unique features of the TC functioned effectively. It was given the powers to summon alleged perpetrators and suspects and hold public hearings. Around 8000 perpetrators who applied for the conditional amnesty accounted for their acts. The TC succeeded in collecting plenty of truth from both victims and perpetrators, identifying a number of human rights abuses, and creating “a record of what crimes were committed by whom.”²⁸ The exposure of the record became “a heavy price to pay”²⁹ because it could form the basis for informal punishments from the society such as public dismay, censure, and ostracism to perpetrators. To victims and their relatives, storytelling in a public forum helped them to heal their traumas because it enabled them to have a sense of being heard and believed.³⁰ Exposure of the past, that is, identification of the activities of the past and recognition of responsibility for those actions brought reconciliation or at least mutual understanding to live together.

Granting amnesty to those who committed tortures and murders is in itself unjust. But the new regime need stabilise the government and restore injustice which the former regime produced to achieve successful transition. The conditional amnesty which the South African TC granted was significantly effective to promote restorative justice which the TCs can create. It urged more perpetrators to confess their past violations and more truth had been revealed because of the condition which required them to make full disclosure of the past activities.

5. Conclusion

A fledgling democracy usually faces the difficulty of how to deal with the human rights violation of the former regime while consolidating its own system. Considering that the simplistic questions of guilt or innocence framed by prosecutions can never reveal the multiple sources of mass violations, gaining public acknowledgement and producing a complete account of what truly happened can be another social goal.³¹ Renouncing prosecutions and granting amnesties are unjust especially for individuals who suffered from gross violations of human rights. But this injustice is a necessary means to reduce future injustices and reconstruct .a just society.

The South African TC, with the help of conditional amnesty, succeeded in serving to restore human and civil dignity of the victims, as well as revealing more truth than prosecutions and reintegrating the society. A truth commission is an approach to create future justice, and can be “an admirable alternative to prosecutions.”³²

Endnote

- ¹ *The Collins English Dictionary* (HarperCollins Publishers, 2000).
- ² Landsman, Stephan, 'Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions' *Law and Contemporary Problems*, Vol.59, No.4 (Autumn 1996), p.84.
- ³ Rotberg, Robert, 'Truth Commissions and the Prevention of Truth, Justice, and Reconciliation, in: Rotberg, Robert and Thompson Dennis, *Truth v. Justice: The morality of Truth Commissions* (New Jersey, Princeton University Press, 2000), p.10.
- ⁴ Crocker, David, 'Truth Commissions, Transitional Justice, and Civil Society,' in: Rotberg, Robert and Thompson Dennis, *Truth v. Justice: The morality of Truth Commissions* (New Jersey, Princeton University Press, 2000), p.103.
- ⁵ Sangster, Kirsty, Truth Commissions: The Usefulness of Truth-telling, *Australian Journal of Human Rights*, Vol.5, No.1 (1999).
- ⁶ Rotberg, Robert, 'Truth Commissions and the Prevention of Truth, Justice, and Reconciliation, in: Rotberg, Robert and Thompson Dennis, *Truth v. Justice: The morality of Truth Commissions* (New Jersey, Princeton University Press, 2000), p.3.
- ⁷ Harris, Peter, and Bennett ,Christopher(eds), *Democracy and Deep-Rooted Conflict: Options for Negotiators* (Stockholm, International Institute for Democracy and Electoral Assistance, 1998), p.287.
- ⁸ Landsman, Stephan, 'Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions' *Law and Contemporary Problems*, Vol.59, No.4 (Autumn 1996), p.82.
- ⁹ Quinn, Joanna, 'Dealing with a Legacy of Mass Atrocity: Truth Commissions in Uganda and Chile', *Netherlands Quarterly of Human Rights*, Vol.19, No.4 (2001), p.385.
- ¹⁰ Harris, Peter, and Bennett ,Christopher(eds), *Democracy and Deep-Rooted Conflict: Options for Negotiators* (Stockholm, International Institute for Democracy and Electoral Assistance, 1998), p.283
- ¹¹ Graybill, Lyn, *Truth and Reconciliation in South Africa* (Colorado, Lynne Rienner Publishers, 2002), p.1.
- ¹² Boraine, Alex, 'Truth and Reconciliation in South Africa: The Third Way', in: Rotberg, Robert and Thompson Dennis, *Truth v. Justice: The morality of Truth Commissions* (New Jersey, Princeton University Press, 2000), pp.144-6.
- ¹³ Graybill, Lyn, *Truth and Reconciliation in South Africa* (Colorado, Lynne Rienner Publishers, 2002), p.8.
- ¹⁴ *Ibid.*, pp.146.
- ¹⁵ Crocker, David, 'Retribution and Reconciliation', *Institute for Philosophy and Public Policy website* (University of Maryland, 2000).
http://www.puaf.umd.edu/IPPP/Winter-Spring00/retribution_and_reconciliation.htm
(Accessed: 15 January 2004)
- ¹⁶ Graybill, Lyn, 'South Africa's Truth and Reconciliation Commission: Ethical and Theological Perspectives', *Ethics and International affairs*, vol.12 (spring 1998), p.58.
- ¹⁷ Gutmann, Amy and Thompson, Dennis, 'The Moral Foundations of Truth Commissions', in: Rotberg, Robert and Thompson Dennis, *Truth v. Justice: The morality of Truth Commissions* (New Jersey, Princeton University Press, 2000), p.22.
- ¹⁸ Landsman, Stephan, 'Alternative Responses to Serious Human Rights Abuses: Of

Prosecution and Truth Commissions' *Law and Contemporary Problems*, Vol.59, No.4 (Autumn 1996), p.84-87.

¹⁹ Minow, Martha, 'The Hope for Healing: What can Truth Commissions Do?', in: Rotberg, Robert and Thompson Dennis, *Truth v. Justice: The morality of Truth Commissions* (New Jersey, Princeton University Press, 2000), p237.

²⁰ Truth and Reconciliation Commission, South Africa, *Truth and Reconciliation Commission, South Africa: final report*, vol.1, ch.1, par.36 (1998).

²¹ Kiss, Elizabeth, 'Moral Ambition Within and Beyond Political Constraints', in: Rotberg, Robert and Thompson Dennis, *Truth v. Justice: The morality of Truth Commissions* (New Jersey, Princeton University Press, 2000), p71.

²² Du Toit, Andre, 'The Moral Foundations of the South African TRC: Truth as Acknowledgement and Justice as Recognition', in: Rotberg, Robert and Thompson Dennis, *Truth v. Justice: The morality of Truth Commissions* (New Jersey, Princeton University Press, 2000), pp132-5.

²³ *Ibid.*, pp.135-7

²⁴ *Ibid.*, pp.139

²⁵ Slye, Ronald, 'Amnesty, Truth, and Reconciliation: Reflection on the South African Amnesty Process', in: Rotberg, Robert and Thompson Dennis, *Truth v. Justice: The morality of Truth Commissions* (New Jersey, Princeton University Press, 2000), p170.

²⁶ Graybill, Lyn, 'South Africa's Truth and Reconciliation Commission: Ethical and Theological Perspectives', *Ethics and International affairs*, vol.12 (spring 1998), p.59.

²⁷ Greenawalt, Kent, 'Amnesty's Justice', in: Rotberg, Robert and Thompson Dennis, *Truth v. Justice: The morality of Truth Commissions* (New Jersey, Princeton University Press, 2000), p200.

²⁸ Slye, Ronald, 'Amnesty, Truth, and Reconciliation: Reflection on the South African Amnesty Process', in: Rotberg, Robert and Thompson Dennis, *Truth v. Justice: The morality of Truth Commissions* (New Jersey, Princeton University Press, 2000), p181

²⁹ Ntsebeza, Dumisa, 'The Uses of Truth Commissions' Slye, Ronald, 'Amnesty, Truth, and Reconciliation: Reflection on the South African Amnesty Process', in: Rotberg, Robert and Thompson Dennis, *Truth v. Justice: The morality of Truth Commissions* (New Jersey, Princeton University Press, 2000), p164.

³⁰ Minow, Martha, 'The Hope for Healing: What can Truth Commissions Do?', in: Rotberg, Robert and Thompson Dennis, *Truth v. Justice: The morality of Truth Commissions* (New Jersey, Princeton University Press, 2000), p244.

³¹ *Ibid.*, p.238

³² Minow, Martha, 'The Hope for Healing: What can Truth Commissions Do?', in: Rotberg, Robert and Thompson Dennis, *Truth v. Justice: The morality of Truth Commissions* (New Jersey, Princeton University Press, 2000), p240.

Bibliography

Boraine, Alex, 'Truth and Reconciliation in South Africa: The Third Way', in: Rotberg, Robert and Thompson Dennis, *Truth v. Justice: The morality of Truth Commissions* (New Jersey, Princeton University Press, 2000), pp.141-157.

Burton, Mary, "The South African Truth and Reconciliation Commission: Looking Back, Moving Forward - Revisiting Conflicts, Striving for Peace," in: Hamber, Brandon(ed), *Past Imperfect: Dealing with the Past in Northern Ireland and Societies in Transition* (Derry/Londonderry: INCORE, 1998), pp.13-24

Crocker, David, 'Retribution and Reconciliation', *Institute for Philosophy and Public Policy website* (University of Maryland, 2000).

http://www.puaf.umd.edu/IPPP/Winter-Spring00/retribution_and_reconciliation.htm

(Accessed: 15 January 2004)

Crocker, David, 'Truth Commissions, Transitional Justice, and Civil Society,' in: Rotberg, Robert and Thompson Dennis, *Truth v. Justice: The morality of Truth Commissions* (New Jersey, Princeton University Press, 2000), pp.99-121.

Du Toit, Andre, 'The Moral Foundations of the South African TRC: Truth as Acknowledgement and Justice as Recognition', in: Rotberg, Robert and Thompson Dennis, *Truth v. Justice: The morality of Truth Commissions* (New Jersey, Princeton University Press, 2000), pp122-140.

Graybill, Lyn, 'South Africa's Truth and Reconciliation Commission: Ethical and Theological Perspectives', *Ethics and International affairs*, vol.12 (spring 1998), pp.43-62.

Graybill, Lyn, *Truth and Reconciliation in South Africa* (Colorado, Lynne Rienner Publishers, 2002).

Greenawalt, Kent, 'Amnesty's Justice', in: Rotberg, Robert and Thompson Dennis, *Truth v. Justice: The morality of Truth Commissions* (New Jersey, Princeton University Press, 2000), pp.189-210.

Gutmann, Amy and Thompson, Dennis, 'The Moral Foundations of Truth Commissions', in: Rotberg, Robert and Thompson Dennis, *Truth v. Justice: The morality of Truth Commissions* (New Jersey, Princeton University Press, 2000), pp.22-44.

Harris, Peter, and Bennett, Christopher (eds), *Democracy and Deep-Rooted Conflict: Options for Negotiators* (Stockholm, International Institute for Democracy and Electoral Assistance, 1998).

Kiss, Elizabeth, 'Moral Ambition Within and Beyond Political Constraints', in: Rotberg, Robert and Thompson Dennis, *Truth v. Justice: The morality of Truth Commissions* (New Jersey, Princeton University Press, 2000), pp.68-98.

Landsman, Stephan, 'Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions' *Law and Contemporary Problems*, Vol.59, No.4 (Autumn 1996), pp.81-92.

Minow, Martha, 'The Hope for Healing: What can Truth Commissions Do?', in: Rotberg, Robert and Thompson Dennis, *Truth v. Justice: The morality of Truth Commissions* (New Jersey, Princeton University Press, 2000), pp.235-260.

Ntsebeza, Dumisa, 'The Uses of Truth Commissions' Slye, Ronald, 'Amnesty, Truth, and Reconciliation: Reflection on the South African Amnesty Process', in: Rotberg, Robert and Thompson Dennis, *Truth v. Justice: The morality of Truth Commissions* (New Jersey, Princeton University Press, 2000), pp.158-169.

Quinn, Joanna, 'Dealing with a Legacy of Mass Atrocity: Truth Commissions in Uganda and Chile', *Netherlands Quarterly of Human Rights*, Vol.19, No.4 (2001).

Rotberg, Robert, 'Truth Commissions and the Prevention of Truth, Justice, and Reconciliation, in: Rotberg, Robert and Thompson Dennis, *Truth v. Justice: The morality of Truth Commissions* (New Jersey, Princeton University Press, 2000), pp.3-21.

Sangster, Kirsty, Truth Commissions: The Usefulness of Truth-telling, *Australian Journal of Human Rights*, Vol.5, No.1 (1999).

Slye, Ronald, 'Amnesty, Truth, and Reconciliation: Reflection on the South African Amnesty Process', in: Rotberg, Robert and Thompson Dennis, *Truth v. Justice: The morality of Truth Commissions* (New Jersey, Princeton University Press, 2000), p170-188.

Truth and Reconciliation Commission, South Africa, *Truth and Reconciliation Commission, South Africa: final report*, (1998).

Wilson, Richard, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*, (Cambridge, Cambridge University Press, 2001).