"Uncivil Society"

Challenges for Reconciliation and Justice in South Africa After the Truth and Reconciliation Commission

by

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Introduction

This presentation will attempt to focus on the challenges that face South Africa in the endeavour to build sustainable reconciliation after the operations of the Truth and Reconciliation Commission (TRC). In so doing, the presentation does not seek to offer a critique of the TRC, for it is patently obvious that the TRC was merely one of several mechanisms for managing *transitional justice* in South Africa and it was also only one of a range of initiatives necessary to building reconciliation in South Africa.

However, it is argued here that there are serious pitfalls in simplistically describing South Africa as a "post-conflict" society in the wake of the TRC, the party political settlements and the democratic election that paved its way. Instead, the real challenge in building enduring reconciliation lies in monitoring and fully grappling with the changing patterns of violence and social conflict that dominate the *new* South Africa – and the easy slide between the boundaries of political and criminal violence that have always complicated analysis of South African life. Therefore, through penetrating the veil of continuity and change in the patterns of violent social conflict in South Africa, this presentation does point to some of the (perhaps inevitable) limitations of the TRC as a restorative justice mechanism in the true sense of the term, because of its historical imperative and its explicit mandate to deal with the issues of violence and reconciliation exclusively by reference to issues of political responsibility, narrowly defined.

To the extent that the TRC is seen as one of the founding moments in the building of a new *nationhood* in South Africa; to the extent that it is understood as a primary mechanism for resolving past conflicts and ending violence; and to the extent that it is promoted as the primary tool for achieving reconciliation; this presentation will argue that the TRC has only begun a process, which still confronts a range of unresolved challenges. At worst, it may be suggested that the political context that gave rise to the remarkable creativity and innovation embodied in the South African TRC, may nonetheless have contributed to framing a somewhat narrow understanding of reconciliation, based upon a rather static perspective on the nature of violent conflict in South African society.

It is therefore my view that proper evaluation of the efficacy of various *transitional justice* mechanisms in South Africa (and perhaps elsewhere in the world), must be situated within the specific context of transmuting patterns of political and criminal violence – and the key

challenges that this presents for the agenda of transformation, particularly of inherited criminal justice institutions operating under such circumstances in a new democracy. Indeed, this perspective demands that we genuinely shift the debates on *transitional justice* from an exclusively retrospective scrutiny of past injustices (important as this is), to a strategic and proactive engagement with the challenges that face justice institutions in newly emerging democracies – where patterns of violence and social conflict change rather than simply ending through political settlements and where the lines of social cleavage that lie at the heart of such historical violence are redefined rather than simply staying the same. Such an approach demands an engagement both with the past and with the future and it insists not only on a scrutiny of justice in transition, but of violence in transition as well.

The Politics Fits the Crime: The Challenges of Justice in Transition

The orthodox discourse of a history of political conflict in South Africa often risks sanitizing the full impact of an urban working class criminalized by a succession of laws which were themselves illegitimate, but which increasingly sanctioned and indeed rendered it noble for the black majority of South Africans to be on the wrong side of the law. In the words of eloquent South African author, Jonny Steinberg, modern South African social history of the apartheid era is an account of "seismic dislocation; human beings [being] shunted around the landscape of modern South Africa and forced to live their lives in the most precarious and depraved of settings, punctuated by daily violence and violation". By comparison, orthodox political history portrays a century in which the gentlemanly voices of protest continued to fall on deaf ears, until rationally, and in sober knowledge of the gravity of the decision, this protest turned to violence. As it did so, it reached out to the popular classes – the industrial working class, the urban youth, the peasantry – and by the last quarter of the century, most of black South Africa was galvanised behind the liberation movement's moral authority in an orchestrated struggle against an illegitimate oppressor, which in turn systematically mobilised the full force of the state against the politically disempowered majority.

This simple political narrative is striking in the way it cleanses both liberation politics and state violence – associated as they were with the fortunes of particular political parties and movements – of the criminal pathologies of South Africa's particular social development. The prevalent violence of everyday social life finds little complex expression here, ignoring the extent to which the criminalisation of politics and the politicisation of crime have been – and still are – two edges of the same sword.

Of course these competing visions of history, each with its own versions of the truth, predated the TRC process. Indeed, as is pointed out by Posel and Simpson in the introduction to a forthcoming book on the TRC (*Commissioning the Past, Wits University Press (2002)*), in explicit and sometimes very searching ways, the TRC enterprise took the sorts of questions familiar to scholars of the past – questions about the nature of truth, evidence, orality and representation – into a much more heated public and political domain. In fact, Posel and Simpson note the irony that it is at precisely the point when many late twentieth century scholars of history – embracing post-modern theories widely in the ascendancy – abandoned the pursuit of truth altogether as a fruitless and impossible project, there has been a newfound political confidence in exactly this enterprise. The growing global enthusiasm for truth commissions represents a reassertion of not merely the possibility, but also the profound political importance, of the idea of objective historical

truth as a route to conflict resolution or restorative justice in societies emerging from authoritarian and violent pasts. This is placed in context by Felipe Fernandez-Armesto in his book Truth: A History and a Guide for the Perplexed (London, 1998) when he laments that "trapped between fundamentalists who believe they have found truth, and relativists who refuse to pin it down, the bewildered majority in between continues to hope there is a truth worth looking for, without knowing how to go about it or how to answer the voices from either extreme."

Posel and Simpson go on to argue that – to the TRC's credit – it did not answer all these questions, in part because its mandate to "commission the truth" was essentially impossible to fulfil in the delivery of some integrated, internally comprehensive or consistent body of truth. Ultimately, they conclude, the unevenness and incompleteness of the truth recovery is a site of strength rather than a weakness. If "the past is an argument" as Michael Ignatieff asserts, then it is to be welcomed that the TRC did not settle the matter or put paid to the debates and controversies about South Africa's troubled history.

However, the TRC's pursuit of truth through the prism of *nation building*, did prompt an important narrowing of focus, to that relatively restricted category of gross human rights violations deemed to be "political". Nowhere was this more evident than in the criteria required to apply for and receive amnesty under the National Unity and Reconciliation Act. In addition to its requirement for "full disclosure" necessary to acquire amnesty, the TRC also demanded a neat and clear-cut division between politically motivated violence committed in the name of a known political organisation, on one hand, and criminal violence on the other. South Africa's new Constitutional Court also approved the amnesty on the basis that these criteria, amongst others (most importantly the promise of State sponsored reparations for victims), rendered this amnesty conditional.

However, the TRC did not and could not ignore the blurred boundary line between the history of violence deemed socially understandable through its definition as "political" and that history of violence deemed anti-social because it was criminal in nature. Thus, the Human Rights Violations Committee of the TRC did hold hearings that exposed the role of criminal gangs (such as the Noxie Gang, the Koffifi Gang and the 3 Million Gang) in political assassinations. The Committee did also host sector hearings prying (in a somewhat limited way and without much conclusive outcome or institutional impact) into the responsibilities of the business sector, the medical fraternity and the Judiciary, where such questions of responsibility were not strictly framed by party political affiliations.

However, the real dilemmas presented themselves in the work of the Amnesty Committee which was responsible for making decisions based on the specific categorisation of violent acts as either political (and in the name of a known political organisation) or non-political. For its part, the Amnesty Committee thus turned down a substantial proportion of amnesty applications in judges' chambers and without a public hearing, on the grounds that these applications were brought by convicted violent criminals who could not prove a political motive for what they did. However, in the daily workings and hearings of the Amnesty Committee, the dilemmas of which acts were political and which were not, proved to be very controversial and they often appeared to be resolved arbitrarily. Thus, in the case of the Boipatong massacre, an Inkatha Freedom Party member was granted amnesty for – amongst others – the killing of an eight-month old baby along with its mother. In answering questions about this during the hearing, the applicant proffered by way of explanation the

argument that: "A snake gives birth to a snake", suggesting that if the baby's mother was a political enemy, then so too was the baby.

In another prominent case involving the murder of student activist Sicelo Dlhomo, it turned out that his own comrades murdered the deceased. This was explained on the dubious basis that he was a spy, yet one of the TRC investigators on the case concluded that: "We know who killed Sicelo Dlhomo, but we really don't know why?" Once again, the applicants were granted amnesty. More generally it is clear that the quality of "disclosure" in amnesty cases was generally clearly dependent on the quality or presence of counsel for the victims or their families.

Yet there are even more significant illustrations of the dilemmas posed for the Amnesty Committee in their adjudication of which acts were deemed to be political and which not. In some cases involving "necklace" murders and mob violence, amnesty was granted on the basis of the "implied authority" of political parties, yet in others, such as the assassination of ANC and SACP leader Chris Hani by two white right-wingers, no political authority was found to exist and therefore amnesty was refused. In some cases amnesty was refused on the grounds that money was paid to the assassins of political opponents suggesting financial motives that were personal, whilst in other cases it was held that financial bonuses paid to state agents for their acts of violence, did not supersede their political motives.

Perhaps the most important contradiction that played itself out in the findings of the Amnesty Committees was over the question of race or racism as a political motive for gross violations of human rights. In some instances, racial motivation was deemed to be "political" or in the name of a known political organisation, whilst in others it was not – resulting in some being granted amnesty for such actions, whilst others were denied it. The issue here is not whether the individual findings were "fair" or not, but rather to point out that in "privileging" acts of political violence, the ironic effect was in fact to denigrate and mask such issues as race, class or gender as relevant and *self-explanatory* categories in understanding the dominant patterns and experiences of gross violence under apartheid.

Despite these dilemmas and their consequences, the TRC's contribution to nation building and reconciliation could only be driven at the political level and – in practice – was only sustainable by denying the blurred dividing line between party political and other forms of violence.

In this context, Steinberg points out that: "The reality, of course, is both more complicated and less comforting than that. Twentieth-century South Africa bore witness to a host of political and social movements that will never find a place in the lexicons of political orthodoxy; movements both politically articulate and chillingly anti-social, movements enraged by, and yet symptomatic of, the psychological damage inflicted by South Africa's particular patterns of dispossession and industrialisation. Perhaps the most disturbing and illustrative of these movements are those that adopt the discourse and the practices of social banditry. Banditry is a deeply unsettling phenomenon in as much as it tampers with the boundary between acquisitive crime and political nobility. It hovers ambivalently between an aspiration to social equality and anti-social violence, between a disdain for the current order and disdain for social order in general."

Although time and space do not allow for it here, an analysis of the trajectories of youth

violence in South Africa both before and after the formal democratisation of the society and the constitutionalisation of its politics, illustrates very powerfully the slide that was often made by young marginalized men between involvement in political and criminal violence. Elsewhere I have argued that, in fact, the experiences of marginalization and alienation that shaped much of young men's engagement in political organisation and the violence of liberation during the 1970s and 1980s, remains largely unchanged and consequently equally underpins the sustained involvement of these young men in criminal gangs in the post 1994 period (Simpson G, *Shock Troops and Bandits: Youth Crime and Politics* in Steinberg J, (Ed.), *Crime Wave*, WUP (2001)).

In other recent work undertaken at the Centre for the Study of Violence and Reconciliation, comparable trends reveal themselves in respect of former combatants, self defence and self protection units (militias) or "demobilised" veterans. Similar issues of continuity and change in the violence associated with single-sex migrant hostels and in the role of *vigilantism* within the society also add to this composite picture of blurred dividing lines between criminal and political violence, which continue to play themselves out in the period after formal democratisation of the society.

The implications of this analysis are far reaching for how we understand the roles and challenges of transitional justice interventions, including the South African TRC. In particular, this impacts importantly on the need for a less simplistic or theoretical understanding of the dangers of impunity in society, than one that is simply premised on the need for compliance with the principles of public international law (vital though this is). Ultimately, the TRC's amnesty process denied apartheid's chicken thief any recourse, yet the political assassin or torturer quite literally got away with murder. Racially motivated killers sometimes received amnesty and in other instances were denied it. These concerns are further complicated by the dramatic failure of the criminal prosecutions of high profile apartheid figures such as Wouter Basson (former head of the apartheid government's chemical warfare programme) and Magnus Malan (former Minister of Defence) – who did not apply for amnesty – suggesting that we cannot afford to be naïve about the prospects of successful prosecutions (and arguably illustrating that criminal law is often a very clumsy tool for doing justice). To this must be added the popular impact of the devastating ineptitude and failure of criminal justice institutions to deliver effective public services in a climate of high crime rates, the sustained non-delivery by government of any meaningful form of reparation to victims who did appear before the TRC and the fact that socio-economic rights contained in the new Constitution have remained abstract and unrealisable, despite the new government's promises of "a better life for all."

All this provides for a crisis for law and criminal justice institutions themselves – and it is in this context that we must understand the nature and challenges for transitional justice and its implications for reconciliation in South African society after the democratic elections of 1994. The question that must be asked before it is possible to simply discard the risks that transitional justice tools such as the TRC may contribute to a sense of impunity, is how, in the context of what has been argued above, can these interventions better contribute to actively rebuilding popular respect for the rule of law – and what contribution they can proactively make to the transformation of criminal justice institutions which confront these violent trends in a new democracy? It is by these criteria that we can add to our perspective on what the contribution of various transitional justice institutions and tools is to restorative justice and reconciliation.

Conclusions: Implications for Nation-building and Reconciliation

What then are the implications of this analysis for sustainable reconciliation in South Africa after the TRC?

Beyond the negotiated settlement which dragged South Africa back from the brink of deepening violent confrontation and beyond the democratic constitutionalization of South Africa's political system to which these negotiations gave rise, the Truth and Reconciliation Commission was seen by many as an additional founding act of a new nationhood – a *rainbow nation*. Yet in his seminal speech to a national conference on racism in South Africa in 2000, President Thabo Mbeki gave cause for pause in claiming easy victories based only on a process of political reconciliation or a politically sanitized version of the past, which threatened to impair the vision of racial identities as entrenched material experiences that continued to shape the patterns of social conflict in South Africa. In soberly recognising the presence of "two nations" in South Africa that coincided race and access to privilege, the President called for a programmatic approach, which simultaneously engaged with white fears and black expectations.

Whatever the failings of government itself to foster and facilitate this through effective transformation and delivery programmes, this does nonetheless offer some useful insight into the dangers of an engagement with the politics of race which is conveniently suspended at an ideological or party political level, failing to adequately scrutinize racism as entrenched institutional (and often violent) practice embedded in the social fabric of South African society. From this perspective, it is most important that any reconciliation initiatives avoid detaching the engagement with past conflict from both a forward looking objective of driving change through redress of these race-based inequalities, as well as from an understanding of the transmuting patterns of violence in a transitional democracy.

In South Africa today, high profile patterns of racially and ethnically motivated *hate crimes* are dramatically prevalent. So too are exclusionary politics and patterns of violence based on growing xenophobia directed at foreigners, which suggest that the nation-building endeavour may well have operated with exclusive rather than inclusive consequences – a dangerous and damaging kind of *rainbow nationalism*. Discriminatory social attitudes remain entrenched and indeed, the patterns of violent crime that dominates the current South African landscape have become new vehicles for re-racialising and physically and emotionally re-dividing the "new" South Africa. They have also been the vehicles for popular outrage that has driven a retreat by government from many of its commitments to a human rights regime, in the name of fighting crime through ostensibly "better" law enforcement.

Processes of party-politically driven reconciliation initiatives, rainbow nationalism and black economic empowerment initiatives that serve not an impoverished underclass, but a new political elite – all do more to sustain race-based inequity than to resolve it. Similarly, the formal democratisation of South African politics, associated with the neutralisation of discriminatory laws, is not enough to build sustainable reconciliation if it is based on a narrow definition of political interest groups. Indeed, despite the formal equality guaranteed within the constitution, race-based inequality continues to be perpetuated as an historical condition – and "neutral" laws and institutions can serve to sustain rather than redress such structural deprivation.

It is patently obvious that these sustained fault-lines in South Africa's social fabric cannot be attributed to any specific failings or operations of the TRC. Indeed, one may be more appropriately critical of the new government in its inability to grapple with many of these enduring problems. However, there are challenges implicit in this analysis that may well serve to enable others who, confronting comparable social and political dilemmas, contemplate similar transitional justice arrangements. Whether through more carefully planned measures for redress and reparation, a better integration of prosecution processes, a clearer engagement with strategies for institutional transformation, or a greater level of sustained engagement and capacity building with the organisations of civil society that are critical to rebuilding the social fabric, it may well be possible to build these approaches more proactively into the strategies for transitional justice in other societies, so that they can remedy some of South Africa's limitations in building sustainable reconciliation.

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