

ISSA Proceedings 1998 - Ubuntu Or Acknowledgment: An Analysis Of The Argument Practices Of The South African Truth And Reconciliation Commission



Winnie Madikizela-Mandela looked uncomfortable as she faced the third day of public hearings by South Africa's Truth and Reconciliation Commission examining her role in more than a dozen murders, many assaults, and her attempt to ruin the reputation of white, anti-apartheid Methodist bishop Paul Verryn. With Archbishop Desmond

M. Tutu, the head of the Commission intervening from time to time, witnesses testified that Madikizela-Mandela was either actively engaged in the murderous assaults of her bodyguards or gave her approval of their criminal activities during the late 1980's.

If this were the Nuremberg trials, the panel of distinguished judges would be deciding the length of Madikizela-Mandela's prison term. But South Africa's novel version of the truth commission, a quasi judicial way of coming to terms with past human rights violations in countries emerging from the shadow of oppressive regimes, seeks "truth telling", acknowledgment and reconciliation - the public accounting of the country's difficult past as a step to building a new South Africa. The Commission's mandated conclusion for its stories, acknowledged truth for amnesty, has met with much public critique. Many people find it difficult to believe that multiple murderers should walk free. Yet many in Nelson Mandela's government are supportive of coming to terms with South Africa's past through the commission rather than the courts. Richard Goldstone, a Constitutional Court judge, says: "Making public the truth is itself a form of justice." But is the Commission's construction of Justice spelled with a small j? Is the great emphasis placed on forgiveness, particularly by Archbishop Tutu, possible to justify in a discourse of "truth telling" about the cruelest of human torture by both white Afrikaners and the black ANC?

This essay analyzes the argument strategies used in the Commission's construction of the story of South Africa's human rights atrocities between 1960 and 1993. Through an analysis of portions of the proceedings, I will attempt to understand how that story interweaves as complete a picture as possible of the atrocities, the public shaming of those who admit committing the atrocities, and the Commission's prescriptions for reconciliation.

A close examination of particular hearings is critical to understanding if the argument forms employed in the quasi-judicial proceedings of the Commission can produce reconciliation. For instead of a general amnesty and corresponding reparations for all perpetrators and their victims, there is only individual amnesty and recommended reparations. Much like a criminal court of law, individuals are charged, the "truth" of each incident is exposed, and authorities pass judgment on the basis of the evidence heard during the Commission's proceedings. But unlike the criminal court, the end result is acknowledgment not responsibility, victims' catharsis and not justification, and amnesty not punishment. I will argue that the Commission's construction of the story of South Africa's violent past produces arguments for public acknowledgment of the "truth" of human rights atrocities, but cannot deliver reconciliation.

1. Constructing a New National Unity Through the New Constitution

South Africa is not the first nation in the late twentieth century to use the "truth commission" to confront a painful past in order to construct a national unity. From Argentina to Zimbabwe, governments have struggled to account for massive human rights atrocities without creating new violent fissures between the accused and their victims. All of these truth commissions have been born out of the compromise and political negotiation of new nation-state building. South Africa's Commission is no different. In particular, the Commission grew out of the compromise between Afrikaner security police, the military, and the National Party as the price for allowing the country to proceed to free elections with a completely enfranchised population.

The price was amnesty. The negotiation could have called for a general amnesty law produced by the Parliament, but this would have been to ignore the victims of past atrocities entirely. Those negotiating with the old regime recognized that the country could not forgive the perpetrators unless the honor and dignity of the victims was restored and reparations were made. And so a final clause was attached to the 1993 Interim Constitution the discursive evidence of South Africa's negotiated revolution which reads in part: "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 a legacy of hatred, fear, guilt and revenge.”

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not retaliation, a need for ubuntu but not for victimization. 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 conflicts of the past. To this end, Parliament under this constitution shall adopt a law determining a firm cut-off date ..., and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

With this Constitutions and these commitments we, the people of South Africa, open a new chapter in the history of our country”.**[i]**

When the new government of Nelson Mandela came to power through free elections in 1994; it was bound to this method of building national unity by sacred constitutional commitment. The goal of that commitment and the commission it created was not to conduct a witch hunt or to drag violators of human rights before court to face charges, but to enable South Africans to come to terms with their past and to advance the cause of reconciliation. How the Commission would do its work would determine if a real break from the past could be achieved.

After much discussion and debate, inside the new Parliament and out in the public, the scene was finally set for the appointment of the Truth and Reconciliation Commission, the setting of its objectives, and the development of its quasi-judicial procedures to achieve them. The charge to the Commission was daunting:

1. to conduct inquiries into gross violations of human rights , including violations which were part of a systematic pattern of abuse;
2. the gathering of information and the receiving of evidence from any person, including persons claiming to be victims of such violations or representatives of such victims, which establishes their identity and the nature and extent of the harm suffered by such victims;
3. facilitate and promote the granting of amnesty in respect to acts associated with political objectives, by receiving from persons desiring to make a full

disclosure of all the relevant facts relating to such applications to the Committee on Amnesty for its decision, and by publishing decisions granting amnesty;

4. prepare a comprehensive report which sets out its findings based on factual and objective evidence;
5. make recommendations to the President with regard to granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims; and finally
6. make recommendations to the President with regard to the creation of institutions conducive to a stable and fair society.**[ii]**

The Commission's charge came after an exhaustive inquiry into the ways other countries had gone about dealing with the past. Some members of the African National Congress originally wanted "Nuremberg trials". Anti-apartheid activist and international lawyer Kader Asmel, now a member of the Mandela government, argued that apartheid was like the Holocaust. Perpetrators of such massive scale genocide needed to be tried and punished.**[iii]** But two reasons prevented the "truth commission" from taking the Nuremberg form. First, after the peaceful transition to a democratic state, there was an overwhelming emphasis on national unity and reconciliation, personified by President Mandela. Second, guilty parties in both the security police and ANC camps would be protected. As Mandela and others reasoned, the amnesty provision in the Constitution should lead to reparation not retaliation, and reconciliation not revenge. Archbishop Desmond Tutu's influence framed the language of the Constitution in this rhetoric, invoking the African communal concept of "ubuntu", with its implications of "recognizing the humanity of the other" and "compassion." "Truth-telling" and amnesty was combined into one process with a hopeful outcome of "restorative justice".

Individual amnesty took the place of the general amnesty the security and military personnel originally demanded. It would be granted only to those who personally applied for it, disclosed full details of past misdeeds where they could demonstrate a "political objective", and expressed sincere remorse in front of the victims who had suffered because of their actions. Now a quasi-judicial set of procedures would have to be developed to hear the arguments and evidence that could result in amnesty, reparations, and reconciliation. The Commission with its three main committees would have to work through more than six thousand applications and decide what should be done. Its judicial-like rules for argument

would have to produce reconciliation and a new South African unity.

2. Judicial Argument Forms and Audience Expectations

That judicial forums serve as one of society's most important story tellers is not new. Oliver Wendell Holmes, Jr., likened the legal forum to the writing of a narrative of the moral history of a society, **[iv]** and Ronald Dworkin has likened this process to a group-written moral "chain-novel." **[v]** It remains important, however, to note that those presiding over judicial forums, in this case the Commissioners, are creating, as Robert Cover observed, a "normative universe" **[vi]** maintained through debate about, decision on, and enforcement of what is determined to be proper or "lawful" in our interactions with one another. Writing the moral history of South Africa's past was essential in the building of a new nation after the first non-racial election and the installation of Nelson Mandela's government. The country was still haunted by the legacy of its past as an apartheid state and by the atrocities caused by apartheid policy. From the beginning, apartheid policy was constituted as a legal problem. Apartheid policy had been described in international law as a crime against humanity, yet persons who had implemented and supported the apartheid policy were still active in important public positions. Some of those who had resisted apartheid policies by committing violent acts occupied influential positions in the new South Africa.

Moral history would be written by the Truth and Reconciliation Commission through a long and public performance of offenders telling the factual and legal stories of their crimes against humanity, victims telling of their suffering, and the community at large gathered to hear the truth. The granting of an amnesty would only happen after its Amnesty Committee would have a hearing that would include a full disclosure of all relevant facts about human rights violations, an acknowledgment by those who committed those violations, and the testimony of the victims or survivors of victims of what they have suffered. Identification and public disclosure of political offenses was essential to the Committee functioning as the South Africa's highest moral story teller. As Mr. Kader Asmel, Cabinet member in Mandela's new government said: "... while we can legally forgive past transgressions, we cannot ever forget them... History must not, ever, be allowed to repeat itself... acknowledgment is part of the process of grappling with the past, of purging ourselves of the pathology that afflicted our country." **[vii]**

These performances have all of the trappings of courts of law – barristers, rules of discovery, cross-examination and official opinions issued by Committee members.

But could they not just grant legal amnesty but deal with the following: How could the granting of amnesty be performed by a judicial forum to serve the purpose of promoting reconciliation in the South African state and in South African society without impairing the sense of justice or the force of law?

In considering the task, the Commission entered a minefield of sensitive issues. If apartheid was a crime against humanity, shouldn't the people who supported it or carried out its policies be treated like criminals? Could human rights offenses that were committed in the struggle against apartheid as a crime against humanity be judged by the same criteria with offenses committed by persons controlling a security force in defense of that system? Could an amnesty inflict new wounds on the victims of both sides who might consider that their suffering and the human dignity of those who had been killed are being disregarded? Could the great emphasis placed on forgiveness, particularly by Archbishop Tutu really produce reconciliation?

The answer to these questions cannot be given in the abstract. But a close examination of particular hearings and the arguments performed by victims, offenders and Commission officials can provide us with a glimpse of spectrum of the answers constructed by South Africans from both sides of the apartheid legacy. I will devote the rest of my paper to two very visible examples of those hearings – those of ex-President D.W. de Klerk and Winnie Madikizela-Mandela.

3. The hearings of D.W. de Klerk and Winnie Madikizela-Mandela

On June 6, 1997, De Klerk began his testimony with an eloquent apology for apartheid. He apologized to “the millions of South Africans... who over the decades – and indeed, centuries – suffered the indignities and humiliation of racial discrimination.” The apology, he offered, was given in the spirit of true repentance.

But after a poignant beginning, de Klerk was questioned and cross-examined at length by a lawyer about a series of bombings, tortures and killings in the 1980s, for which the commission found evidence of knowledge at the highest levels. Specific victims' stories were told in great detail: the murder of Ruth First, the wife of the communist leader Joe Slovo; and the activities of the notorious killing center run by police officers under de Klerk's direct demand.

Did de Klerk know about these atrocities? Did he consider them the necessary actions of a police state determined to wipe out “terrorists”? Did he condone them? De Klerk argued, in response, that the ANC challenged the state by advocating a revolutionary race onslaught. He admitted that terrible things were

done, but claimed that the ANC did terrible things as well. But again and again he denied that he personally authorized or knew about these specific acts. To support his position he pointed out that he established a commission to investigate these claims. He repeatedly stated that no one in his government had been outside the law. Most of those present seemed not to believe de Klerk's denials of responsibility. Commissioners, journalists, victims and the media were indignant. "He's lying," said one commissioner bluntly. At a press conference after the hearing Tutu lamented the negation of de Klerk's apology. How could he apologize and yet claim that he didn't know.

Winnie Madikizela-Mandela's marathon session in December 1997 was even more painful. Her opening statement was a series of denials about her responsibility for the actions of the United Football Club, charged with kidnapping, assault, torture and murder. Led by her lawyer through lists of allegations against her, she denied each in turn, often describing them as "ridiculous". She denied taking part in assaults on teenage boys although there were numerous witnesses who testified that she directly participated in them. She vehemently denied the most serious charge against her that she helped beat and stab 14-year-old Seipei Moekele to death and then disposed of his body. She argued that she had been a victim of a campaign to discredit her by journalists who were paid informers of the security police.

Madikizela Mandela's main claim was that she was either un-aware or "not accountable" for the violent activities of the Club, which lived in her back yard. Commissioner Yasmin Sooka made the observation that : "If you are telling the truth today, then everyone else is lying." She said to Madikizela-Mandela: "Do you not accept that you have to take on some responsibility?" Madikizela Mandela responded: "Yes, most of the witnesses here are lying... The youths who claim I gave them money to kill are lying... As far as I am concerned these ludicrous assertions are a pack of lies."

At every turn in the case being presented against her, she denied all responsibility and expressed disdain for the Commission's proceedings. When TRC lawyer, Hanif Vally, began his cross-examination Madikizela Mandala took on an aggrieved tone and said loudly: "I will not tolerate you speaking to me like that". When Tutu begged her to acknowledge her wrong doing and express remorse, she refused. Madikizela-Mandela used her final moments in the hearing to deliver a prepared speech. She concluded: "I have come to a public hearing...

so we can put to bed all the speculation, so my accusers can come into the open, so that everybody can judge whether the accusations were based on fact or fiction... Beyond today I hope that those who seek to vilify me cannot claim ignorance. Unfortunately I have a history no different from that of each one of us." Here she deviated onto a tangent about her role as "Mother of the Nation" which Tutu soon stopped, saying: "It sounds like a campaign speech and does not answer any questions of my colleagues." Madikizela-Mandela replied: "My political detractors have used means both fair and foul to undermine my stature. It would not be proper for me to deal with such issues in a forum like this one."**[viii]**

4. Conclusions

Both the de Klerk and Madikizela-Mandela hearings clearly demonstrate how the amnesty procedure fails to resolve South Africa's painful past. In a court of law, after the terrible facts of murder are laid bare, the psychological need for the law to exert its power and punish the offender is overwhelming. There has been tremendous criticism directed at the great emphasis placed on forgiveness, particularly represented by the Christian presence of Archbishop Tutu. One victim's husband who came home to find the body of his wife spread all over the yard objected bitterly to the imposition of the "morality of forgiveness."

One black African woman after learning at a Commission hearing how her husband had been abducted and killed was asked if she could forgive the men who did it. Her answer came back through the interpreters: "No government can forgive." Pause. "No commission can forgive." Pause. "Only I can forgive." Pause. "And I am not ready to forgive."**[ix]**

It remains to be seen whether the Commission can produce anything like reconciliation as a result of these individual amnesty hearings. As one victim, Amos Dyanti, who testified to the Commission admitted, it helped him to have his suffering acknowledged. But his trauma remained. The police captain who supervised his torture has continued to work at the local police station after amnesty was granted, and Dyanti encounters him every day.

And then there is the problem of reparations. The reparations committee of the Commission will begin its work early in 1999. Who will pay? And how much? Although substantial financial compensation is being recommended, the beneficiaries of apartheid continue to control the economic machinery of the country. The victims of apartheid, for the most part, remain poor and outside the power structure. The long-term goals of national unity and healing depend on the

righting of those long-term human abuses.

What conclusions can be drawn from an examination of the Commission's judicial proceedings? When the traditional arguments of a legal courtroom long used to discover the facts of a crime and the particular motives of those who committed it, there is a strong societal expectation that the law will deliver a penalty.

This expectation gains added poignancy when the perpetrators of "crimes against humanity" refuse to accept responsibility for their actions in the face of overwhelming evidence and show no remorse. Perhaps the greatest contribution of the Commission to achieve some measure of reconciliation for this anguished country will be its final report to the nation. The current plan calls for four volumes of a historical account of human rights violations. Can the TRC paint as complete a picture of the horrors of apartheid over the last three decades? Will ordinary South Africans, the only ones who can rebuild their nation, be satisfied? Can Tutu lead them through a public performance of Christian forgiveness? I am not hopeful. The Commission's construction of the stories of atrocities, public shaming and public suffering may produce public acknowledgement of South Africa's past, but cannot deliver reconciliation.

NOTES

- i.** Constitution of the Republic of South Africa, 1993.
- ii.** Dullah Omar, Minister of Justice, Government Gazette, January 1995.
- iii.** See Kader Asmal, Louise Asmal, and Ronald Suresh Roberts, *Reconciliation through Truth: A Reckoning of Apartheid's Criminal Governance* (Cape Town: David Philip, 1996).
- iv.** Holmes, "The Path of the Law," *Harv. L. Rev.* 10 (1897): 457, 459.
- v.** R. Dworkin, *Law's Empire* (1986): 28-250, 313.
- vi.** Cover, "Forward: Nomos and Narrative," *Harv. L. Rev.* 97 (1983): 4.
- vii.** Esther Waugh, "Disclosure Vital for Amnesty," *The Star*, May 26, 1994.
- viii.** Transcript of the Winnie Madikizela-Mandela hearing before the South African Truth and Reconciliation Commission, *Electronic Mail & Guardian/ZA*NOW*, December 4, 1997.
- ix.** Timothy Garton Ash, "True Confessions", *The New York Review*, July 17, 1997: 37.