The Legal Profession and the TRC: A Study of a Tense Relationship

by

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Introduction

Since the 1980s, a new wave of transitions has taken place in countries where human rights were grossly violated. One after another, the new governments in these countries are confronting this dark past. The manner in which they cope with this legacy has varied. The different strategies can be placed on a continuum that ranges from large-scale criminal prosecutions, as the most juridical option of dealing with the past, to unconditional amnesty. Many discussions on the pros and cons of both radical options have taken place already. Each entails many risks; therefore, the installation of a truth commission is looked upon by many as the golden mean. A truth commission is not a judicial body as such, and assignment of guilt and punishment is not the primary concern.

When a country deals with its past, the legal profession often plays an important role. This is quite clear when a country opts for criminal sanctioning of perpetrators. The legal rationale demands gross human rights violations to be dealt with in a strict legal manner, i.e., by prosecution and punishment. Even when amnesty is opted for, it is often the legal profession that has to decide whether the conditions are complied with by the relevant actors. At the advent of a truth commission, the role to play for the legal profession in that country is neither evident nor clear, as it is not a legal process nor a judicial body that is given the task of dealing with the past. What would the attitude of the legal profession be towards this mechanism that pushes itself forward as a substitute? Does the installation of a truth commission mean that the legal profession would no longer be involved in the transitional process in which they would ordinarily have a large say? Or would they nevertheless try to have an impact on the process? Would they try to secure their professional domain and limit that of the commission? Would they shield themselves against such a commission and its way of dealing with the past?

I examine these questions in the context of South African and its Truth and Reconciliation Commission (TRC). Because of the complexity of the TRC, I focused on three different aspects in the process. The first is the period of legislative enactment, leading to the adoption of the Promotion of National Unity and Reconciliation Act (hereafter the TRC Act). The second is the Special Legal Hearing (SLH). The final aspect is the attitude of the legal profession, in some cases in Court, concerning the TRC. The research relies on documentary analysis in combination with 12 interviews involving important members of the different segments of the South African legal profession. Key materials included the submissions to the draft legislation, the submissions to the special legal hearing and the different judgements in regard to the TRC. The organisations represented in the interviews were the Centre for Applied Legal Studies (CALS), Lawyers for Human Rights (LHR), Johannesburg Bar, Judicial Offices Association (JOASA), National Association for Democratic Lawyers (NADEL), TRC, Black Lawyers Association (BLA), Legal Resources Centre (LRC).

The Legislative Process

Which Way to Go?

The decision to install a TRC has not been taken overnight. It was part of the overall transitional process, which is discussed sufficiently elsewhere (Spitz and Chaskalson, 2000). As a senior advocate explained 'At the latest in 1978, everybody in this country

knew: apartheid is dead. It was just looking for the political will to bury it and that unfortunately stayed out for much too long.'[1]

During this period, many different ideas and expectations grew in relation to dealing with the past. In the late–1980s some academics wondered whether a Nuremberg-like tribunal could be instituted in South Africa. This debate was not just an academic issue; many segments of the legal profession were also concerned.

In the early stages of the debate, many NGOs preferred the installation of a tribunal of the Nuremberg type. On their account, prosecution and punishment of every perpetrator for every crime was the only fair thing to do. This viewpoint is quite understandable, as these NGOs had fought against apartheid for many years. They tried many times to get the state or its agents convicted, but they were constantly frustrated by inadequate legislation, disappearance of evidence, etc. Finally the possibility of convictions seemed to become more achievable, so other ways of dealing with the past seemed completely unacceptable.[2]

The attitude of LRC is quite remarkable. According to the interviewee, LRC did not take a public view in the very beginning, as it considered this issue to be a matter of politics and therefore beyond its scope.[3] Neutrality in this matter was extremely difficult, however, as became clear with their further involvement in the process.

Eventually, all the legal organisations reconciled themselves with the idea of a TRC. The acceptance of a TRC was furthered first through discussions and workshops and secondly through two events on the political scene. From 1990 onwards, numerous conferences were convened in South Africa at which problems of transition and dealing with the past were thoroughly discussed. The NGO Justice in Transition, was set up to facilitate and promote this debate. It organised many workshops and conferences attended by international experts. Through those workshops, the idea of a Truth and Reconciliation Commission was promoted and the underlying principles were clarified. NADEL and LHR – organisations initially favouring prosecutions – were closely involved in these conferences and workshops and were swayed towards a position more favourable of the TRC. NADEL and LHR became true advocates of the TRC, and many of their members participated intensively in the TRC process.

On the political scene, two events transformed the demand for prosecution into support for the TRC. First, the Motsuenyane Report made the abstract idea of a truth commission more practical. It made clear that both sides would suffer if the past were dealt with by prosecutions and made people realise that the role of the right wing of the country had not yet been unveiled. Second, the epilogue of the Interim Constitution had an enormous impact, as it stated that 'amnesty shall be granted'. The context in which this commitment was made during the negotiations is well expressed by Albie Sachs:

> The focus was on their demands. At the same time we could not agree with a blanket amnesty. A balance was struck … . We could have ended up without an election, without constitution and without a country. (A. Sachs in Boraine, 1994, p.145)

This epilogue left no choice to the NGOs. 'The circumstances taken into account, I think

that in balance the TRC is the better process. But it is not the perfect process, if that is found, please, tell us what it is.'[4] The members of the organised legal profession too supported the TRC: 'It (TRC) did not happen overnight, it was a long process of negotiation where all the so-called conflicting factions were called together under one roof and this is the process they arrived at. And it was really a process for the future.'[5] Admittedly, some were less enthusiastic: 'Yeh, sure, I support it. But the TRC is a compromised product of the negotiating parties.'[6]

Conferences, workshops and changes on the political scene made the acceptance of a TRC possible, but it was not an easy thing to embrace for some organisations. Within the BLA and the NADEL, tensions arose.[7] For both, amnesty was a hard pill to swallow. In the BLA, this nearly caused a split. The majority did not accept impunity for gross human rights violators. They especially feared that this impunity would only encourage future violations. A minority pleaded to focus on the future of the country, and they finally succeeded in convincing the majority to give it a chance.[8]

Draft Legislation

The different conferences and workshops were not only concerned with the initial concept of a TRC, but also gave guidance in relation to the different elements that remained to be decided. NGOs, especially Justice in Transition, studied the different possible contents of these elements. (See Hayner, 1994, pp. 597-655).

Dullah Omar, Minister of Justice with the newly elected government, created an informal committee in order to draft the legislation concerning the Truth and Reconciliation Commission. This committee played an extremely important role in the drafting process. Almost all the members of the committee were jurists (D. Omar, C. Norgaard, A. Chaskalson, A. Sachs, J. Dugard, L. du Plessis, G. Bizos, M. Nasvat). It is quite striking that almost all of them were linked in one way or another to the ANC, but they may well have been selected because of their personal skills in the field of human rights more than because of this political affiliation.

The impact of the different jurists—and the legal profession more generally—in this initial drafting stage is uncertain. First of all, it is not clear whether the members of the informal committee drafted each a section according to personal preference, or whether all the sections were drafted by the consent of all the members of the informal committee. Second, it was not possible to evaluate the capacity in which the members operated—whether they acted as a member of a certain organisation or as independent individuals. Often the latter is argued, but no empirical evidence is offered. The interviewee of NADEL, furthermore, contradicted this assessment. He argued that because of the presence of K. Asmal and D. Omar, both members of NADEL, in the committee, many ideas of NADEL went from the bottom to the top of the agenda. He believed that in this way NADEL contributed substantially. Third, is it unclear why, apart from two members (A. Boraine and A. du Toit), all the members were jurists. Was it because of their technical legal skills or because the TRC was going to replace an essentially legal procedure? The impact of the legal profession at this stage remains quite obscure.

Eventually, a draft version of the Act was tabled for discussion in parliament. Anyone was

invited to suggest amendments by making a submission to the Standing Committee on the Promotion of the National Unity and Reconciliation Bill. Many members of the legal profession took this opportunity. Some were invited to give oral testimony in the parliamentary committee.[9]

A wide range of organisations and persons from the legal profession made written submissions.[10] Five Attorneys-General made a submission—independently from one another, as did the Association of Law Societies (ALS), the Pretoria Society of Advocates, the General Council of the Bar (GCB), Centre for Applied Legal Studies (CALS), Lawyers for Human Rights (LHR), the National Association for Democratic Lawyers (NADEL) and Justice in Transition.[11]

The lack of participation by judges and magistrates was, however, quite striking. The lack of an organisation representing the judges might be part of the reason for non-participation. Yet a definitive explanation cannot be given, as no judges were willing to participate in this research.[12] The JOASA interviewee explained the lack of participation by magistrates as follows: 'Everybody has his own tasks and capacities. I, for example, was a member of the Justice Rationalisation Committee at that time. And I thought that my community (black community) was well represented. It wasn't a matter of different professional groups, but one of different communities.'[13]

Some other arguments given by interviewees for non-participation included:

- Everything happened that quick. The TRC was a 'fait accompli' even before many had realised what had happened. And it was just one part of a complex political process—advocates were more concerned with the Constitution, the Constitutional Court, and the organisation and structure of the legal profession.[14]
- 'I don't think that the TRC was regarded as a legal process at the outset. But it certainly has become so.'[15]
- The TRC is the outcome of political compromises. Making submissions would not have made any difference.[16]
- 'It was a political process, put in place by those advising the politicians of the day.'[17]
- The organised profession was not aware of the necessity and the possibilities of such a process.[18]
- 'The Bar … many of its members are too preoccupied with making money and leading a good life.'[19]

From the interviews, it is evident that there was little discussion about the TRC legislation within the organised profession. So one can wonder to what extent the submission of the General Council of the Bar represented the opinion of the majority of its members.[20] The submission was nevertheless the official viewpoint of the General Council of the Bar.

Among the legal NGOs, by contrast, there was a lot of discussion on the draft legislation.

Content of the Written Submissions

Many different issues were identified in these submissions. Most of them focused on the definition of gross human rights violation, the time limits, the (non-)public nature of the hearings, the qualifications of the members of the commission, the amnesty and its requirements, the (in-)admissibility of evidence,[21] and the procedures. While a detailed discussion of all these topics is beyond the scope of this paper, a survey of some of the main points is illuminating.

a) Working period of the commission:
The draft legislation allocated the TRC a period of one year. LHR, NADEL, CALS and Justice in Transition believed that a definite period was necessary, but considered the time allotted too short.[22] None of the organised professions or Attorneys-General made a similar request, though that should not surprise anyone. As I described earlier, NGOs accepted a TRC, but initially wanted prosecutions. It is understandable that they at least wanted a Commission that could do a proper job and would not be frustrated by unrealistic timeframes.[23]

b) Deadline for gross human rights violations:
ALS wanted the violations committed during the pre-election period to be eligible for amnesty. NADEL believed that an extension in that sense would be unconstitutional, as the Interim Constitution stated the 5th of December 1993 as the cut-off date. The TRC Act initially gives the 5th of December as the cut-off date, but this was later extended later to the 10th of May 1994 (the inauguration of Mandela as a president).

c) The public hearings: According to Priscilla Hayner, one of the foremost comparative experts on truth commissions, hearings need not be public so long as the report is sufficiently open and accessible (Hayner, 1994). The legal NGOs of South Africa clearly disagreed with her assessment. According to the draft legislation, the Amnesty Committee hearings were to be held behind closed doors (in camera). The Association of Law Societies, the organization of attorneys, believed hearings had to be public, but was not vigorous in defending this position and even proposed a wide range of possibilities for closed hearings. The NGOs were convinced of their viewpoint and raised numerous cases in which closure was declared unconstitutional, non-efficient and non-therapeutic. Furthermore, they argued that in camera hearings jeopardise the reliability of testimonies and make it impossible to uncover the identity of other perpetrators. In its submission, Justice in Transition and other NGOs who signed its submission (BLA, CALS, LRC, LHR and NADEL, declared explicitly that

> If the secracy clause prevails, we cannot take for granted the support of the NGOs. It does call into question possible support from the organisations concerned and the politicians have to hear this … . The media must also be used to alert the government to the fact that public will not support any deals being made, secrecy clause, etc.[24]

NADEL added that it would actively oppose the truth commission when hearings were not

held publicly, and that government had to realise that without NGO support the TRC would not be able to fulfil its mandate accurately. The General Council of the Bar gave no remarks in relation to the secrecy clause—perhaps an indication of agreement. The Pretoria Society of Advocates went even further: they wanted a limitation on the naming of names.

Thus, there is a clear rift on this issue between the organised profession and the NGOs. Not only the content of their arguments differ, but also the extent of support given to their demands. The NGOs were willing to use their pressuring power in order to get what they wanted. The NGOs are convinced that their pressure had an enormous impact—the best evidence being the broad commitment to open hearings in the TRC Act. (van der Merwe, Dewhirst and Hamber, 1998)[25]

d) Qualifications for TRC Commissioners:

Here too a rift between the NGOs and the organised profession is noticeable. All the submissions argued it would be preferable to have some legal skills within the TRC. Certain of the reasons were practical; the underlying motive may have been the protection of their professional territory. In the end analysis, the advocacy was something of a moot point, as this basic criterion was already incorporated in the draft legislation. Nevertheless, there were important differences between the NGOs and the legal profession on the specifics of the provision, as the latter wanted 1) more legal members with 2) a higher legal education and 3) more experience then was stated in the draft. Furthermore, the latter argued that the chairperson of the Amnesty Committee had to be a judge, as this committee would make decisions of an essentially judicial nature; however, this again was already provided for in the draft. NGOs accepted the principle that people with legal skills should be involved, but did not require specific members (e.g., the chair of the Amnesty Committee) to be judges or jurists.[26] This all makes clear that the organised profession wanted a truth commission of a much more legal nature.

When the submissions on the procedure are studied in detail, one can draw a similar conclusion. The organised profession wanted to give the TRC a much more juridical look by introducing court-like formalised procedures. The NGOs, by contrast, emphasized the respect of basic principles such as 'due process', 'fair procedure', and 'natural and fair justice'.[27] A remark of one of the interviewees is quite interesting in this regard: 'There is that inherent superiority that lawyers seem to have in terms of social problems. We often believe that we have the answers to things—court will sort it out. It is a kind of supreme arrogance that we have.'[28]

Balance of the Legislative Process

During the entire legislative process, there was a major rift between the legal NGOs and the organised profession. First of all, there was a much broader participation on the part of the NGOs than there was within the organised profession (including judges and magistrates). Second, the content of the submissions each side made was quite different. The organised profession was not only more conservative, but also more 'legal' in its tone and substance. They could not look at the TRC without legal glasses and wanted to make the TRC a more legal process. In that way, they wanted to extend their influence and legal domain.

The legislative process was definitely more democratic when compared to other truth

commissions. Nonetheless, many seemed to believe that it was of no consequence to make submissions—the process was a political exercise and therefore it was far from democratic. The 'obscurity' of the informal committee strengthened this belief. It seems, indeed, that some elements were beyond possible influence (e.g., the amnesty issue), but others appeared to be open for discussion (e.g., the public character of the amnesty hearings). Therefore, to say that the whole process was undemocratic is certainly an overstatement.

Finally, one must add that the impression of the legal NGOs—namely that they truly had some impact—is not widely shared by other NGOs.[29] 'Most NGOs saw the process of legislative development as being politically driven at a national level and they did not see themselves having much influence. … on the whole the drafting and conceptualising process could not be said to be mainly a civil society product.'(van der Merwe, Dewhirst, and Hamber, 1998)[30]

The Special Legal Hearing

Section 3 of the TRC Act, which states the objectives of the TRC, also provided the justification for the organisation of the Special Legal Hearing (SLH). In particular, a primary aim was to establish as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1st of March 1960 to the cut-off date, including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the perpetrators.

In order to get as complete a picture as possible of the past the Committee for Human Rights Violations organised a number of hearings concerning important institutions and groups in society such as the health sector, the media, the army, the prisons, women (van der Merwe, 2000). The SLH, which took place on the 27th, 28th and 29th of October 1997, was one of those institutional hearings, focusing on the legal system under apartheid.

In studying those hearings, it becomes clear that, although the mandate of the TRC was limited to gross human rights violations, the objectives of the TRC could require the investigation of other violations. Investigations required to clarify the context, factors and circumstances of the gross violations of human rights may also illuminate other injustices and crimes. In the case of the SLH, issues such as detention without trial, lack of legal representation and discrimination within the legal profession were also highlighted.

Goals and Varying Expectations

Both the TRC and the different members of the legal profession had high hopes for the hearing. Those within the TRC were focused on the content of what the legal profession had to tell and on who would participate, as were outlined in the invitation to the SLH that was sent to the legal profession. The most important elements of this invitation were reproduced in the Final Report. The expectations of the different members of the legal profession were reflected in the submissions they made to the TRC in relation to the SLH.

The TRC – Committee for Human Rights Violations

Prior to the oral hearing of 27-29 October 1997 in Johannesburg, different members of the legal profession made written submissions at the request of the CHRV's working group on the SLH, presided over by Yasmin Sooka. In its invitation, the Commission requested that attention be paid to twelve issues, including the relationship between law and justice, the appointment of members of the judiciary, the role of the judiciary in applying security legislation, the exercise of judicial discretion, the attempt (if any) to undermine the independence of the judiciary and racial and gender discrimination within the legal sector.

The nature and the objective of the hearing are stated as follows:

> It is not the purpose to establish guilt or hold individuals responsible; the hearing will not be of a judicial or quasi-judicial nature. The hearing is an attempt to understand the role the legal system played in contributing to the violation and/or protection of human rights and to identify institutional changes required to prevent those abuses which occurred from happening again. We urge all judges both serving and retired to present their views as part of the process of moving forward. (TRC Report, volume 4, chapter 4, p. 95)

Three points need to be clarified. First of all, it is clear that the organisation of the hearing was grounded in Section Three of the law, which pertains to the search for the context, factors and circumstances of gross human rights violations. The SLH sought to understand the impact and role of the legal system, which implied the expectation of an honest and sincere co-operation of the legal profession. The true role of the legal system would never be revealed if information were concealed, blurred or perverted. The invitation did not say a word about regret or reconciliation. This did not seem to be one of the explicit expectations of the TRC. When the TRC reported about the SLH, however, it was not insensitive to this aspect, as we shall see later.

Second, the invitation stated that it was not within the objectives of the hearing to establish guilt or to hold individuals responsible. This approach would be atypical for a truth commission. The SLH was not intended to be of a 'judicial or quasi-judicial' nature. This contrasts with the amnesty hearings, where cross-examinations took place, which were conceived as quasi-judicial processes. Although the SLH had nothing to do with those amnesty hearings, and although the SLH is said not to be of a judicial or quasi-judicial nature, the questioning at the oral hearing often looked like a true cross-examination.

This clarification concerning the nature of the SLH seems to have been a response by the TRC to the negative reaction of the judges to the idea of a hearing that would examine the role of the judicial system in the past. This negative reaction was expressed even before the hearing started. In November 1996, then Chief Justice M. Corbett made clear that he opposed such a process as it was not practically feasible to make inquiries into the legal system under the apartheid regime:

> In order to determine whether Judge X had allowed justice to be subverted in some alleged manner in a particular case, the TRC would in effect have to retry the case. … The mind boggles at what all this would involve. The impracticality of it all is manifest. (Corbett, 1998, pp. 17-20)

In its invitation, the TRC stated clearly that this was not what it had in mind. There was no intent to investigate, on a case by case basis, to establish guilt or to hold individuals responsible. As this was not the procedure or intent of the hearing, the TRC made clear that this could not be a reason for the judges to abstain from the process. At the same time, it was an obvious sign to other participants: no individual cases would be examined, but instead the global framework had priority.

Third, the special attention given to the judges at the end of the invitation is remarkable. The TRC urged the judges to participate. This special attention is linked to a second reason given by Corbett to oppose the hearing. He was convinced that participation in such a process by judges would infringe upon their independence. This direct urging by the TRC tries nevertheless to persuade the judges to participate.

Yet in this early stage the judges had quite an influence on the SLH. It was to remain this way during and even after the hearing. Their attitudes determined to a large extent the nature and agenda of the hearing.

Members of the legal profession

a) The judges

The judges expressed reservations regarding the SLH at an early stage. As stated above, Corbett argued that on the one hand such a session is not practically feasible, and on the other, participation of any judge would infringe upon their independence. Corbett stated in his representation to the TRC that he did not speak on behalf of the judiciary as a whole. He continued, however, 'I would add, however, that I have circulated this memorandum among the present members of the Appellate Division and that it bears their endorsement.' (Corbett, 1998, pp. 17-20). The support he alludes to is probably one of the reasons why the TRC paid so much attention to the judges in its invitation. The high position of Corbett in the hierarchy of the courts would also have played a role.

The written submissions of the judges confirmed to a large extent the fear of loss of independence, as will be discussed later. Surprisingly, the argument of unfeasibility was also often repeated in these written statements, even though the TRC had emphasized at that stage that it did not want to investigate on a case-by-case basis.

b) Other members of the legal profession

The expectations of the other members of the legal profession were quite diverse. First of all, some of them expected the TRC to conduct additional research into miscellaneous topics, e.g. the practice of magistrates towards prisoners, the reasons for the lack of follow-up of the recommendations of the Hoexter Commission in 1983 and the suppression of children and youth since 1976. Others requested explicit recommendations for the future legal system.

Second, and more remarkable, was the expectation in relation to the participation and attitude of the judiciary. The attitude of Corbett was by then publicly known. Generally, the legal NGOs called upon the judges to testify and participate in the process.

Finally, the conception of the General Council of the Bar about its own participation to the SLH was also quite remarkable. The General Council of the Bar assumed that the enquiry

was primarily directed at the gross violations of human rights, as defined by the TRC Act, and for that reason it would concentrate on those violations. Only in the second instance would they discuss how these violations could occur in an apparently functioning judicial system. Their focus on gross human rights violations—killing, abduction, torture and severe ill-treatment—meant that they gave less consideration to general violations, e.g., discrimination within the profession. In this way, these violations were classified as less grave. The interviewee of the Johannesburg Bar illustrated this fully: 'We didn't kill, we didn't commit any offences in the strict sense of the word'.[31]

A Two-Stage Process

The SLH consisted of an oral and a written part. The oral hearing took place from the 27th till the 29th of October 1997. At this hearing people from the legal sector gave representations and a special panel asked questions. This questioning gave the hearing a judicial tone. The representations were often a repetition of the written submissions when these were made.

Participation

There were two countervailing patterns in participation. On the one hand, there was broad representation among the different segments of the legal profession. On the other hand, judges were noticeably absent from the oral hearing.

a) Broad representation

The different sections and members of the legal profession were invited to participate to the SLH. While all the key players and key organisations participated, the degree of participation differed. The judges and magistrates made only a written submission, they did not appear at the oral sessions of the hearing. Five important judges delivered, jointly, a written submission.

Some individuals participated either orally or in writing. Others did both, as did many of the professional organisations, including the GCB, ALS and the Society of Law Teachers. The Ministry of Justice and some Attorneys-General participated as well. Several legal NGOs were closely involved in the process: NADEL, BLA, LRC and LHR. Other human rights organisations, such as CSVR, Human Rights Watch and Amnesty International also made submissions. Finally, some academics gave comments on the role of the legal system between 1960 and 1994.

The participation of the legal profession in the SLH was much broader than its involvement in the legislative process. At this stage, the vague concept of a TRC had been filled out. The personal invitation to individuals and organisations was probably a very important cause of the high response rate. Finally, this process was of more interest to them—if only as a matter of self-interest—than was the general reconciliation process.

This high response resulted in a greatly increased involvement by the legal profession in the whole process of the TRC. Up until the SLH, many of them remained passive observers: the SLH changed this. Brandon Hamber and others say in relation to the special hearings: 'In addition, these hearings have mobilised those within the sectors focused on to engage with the TRC process. This must have had an impact on these sectors and their identities

and operations within a future South Africa.' (Hamber, Mofokeng, and Simpson, 1997, p.9)

The breadth of participation, however, does not necessarily reflect sincere self-examination. An interview with a member of the Committee for Human Rights Violations made clear that not everybody was enthusiastic and willing to participate:

> We had to do a lot of work behind the scenes to get people to agree that the Bar needed to make a submission. And the only reason why they did it was that they knew if they didn't, all the black organisations would come and say things about them and they wouldn't have the right to refute. But one is struck by the dishonesty of the submission.[32]

The non-participation of the Bar would, given the negative attitude of the judges, have reduced the whole SLH to a pretty feeble exercise. Fortunately, the CHRV managed to convince the Bar to participate.

b) The non-appearance of the judges

As outlined above, the judges refused to appear at the oral session of the SLH. Their most important written submission was the joint submission by Arthur Chaskalson, President of the Constitutional Court, Ismail Mahomed, Chief Justice, Pius Langa, Deputy President of the Constitutional Court, Hert van Heerden, Deputy Chief Justice and former Chief Justice Corbett. Some judges made a written submission in their individual capacity.

The magistrates too were absent at the oral hearing. As they were never independent during the apartheid regime—because they were part of the Department of Justice—their absence drew a lot less attention than did the non-appearance of the judges.[33]

- Confronting non-cooperation

As Corbett announced quite early in the process, the judges' participation was seen as an infringement upon their independence. Participation through written submissions, seemed, however, to be acceptable. In writing, it was possible to control topics and issues discussed. Participation in an oral hearing, where one can be challenged directly and immediately about one's testimony, has few such constraints.

The interview with a member of the Committee of Human Rights Violations made clear that even the joint submission was not undertaken voluntarily and with great enthusiasm. A lot of lobbying was needed to convince the judges of the importance of their participation:

I was invited by Judge X to address just a small group. I had the feeling that I was ambushed: there were 15 judges, most of them fundamentally opposed. They took the idea that they even shouldn't talk to us at all. I had composed a list of 15 topics on which I wanted an answer and Judge Y said: 'Why are you wasting my time with esoteric issues?' I said 'The law isn't esoteric for ordinary people.' As the meeting progressed, some of them were getting aggressive.[34]

Individual contacts with judges were sometimes of a total different nature. In that context, some were co-operative and even indicated that they thought that they should testify. 'But

there was that unwritten law that nobody goes, otherwise you break the pride of the group.'[35]

- To subpoena or not to subpoena?

The TRC had the right to subpoena, so they could have used that mechanism to force the judges to appear, upon penalty for non-compliance. This option was seriously considered once the judges' reluctance became apparent:

> The refusal of the judges to give oral evidence was condemned by Archbishop Tutu, by at least one of the university schools of law and by the press generally. The possibility of judges being compelled by subpoena to testify was mooted. (Kahn, 1998, pp.15-16)

The opinions in relation to the subpoenaing of the judges differed considerably. NADEL advocated the subpoenaing of the judges and believed that not subpoenaing them was one of the biggest failures of the TRC. BLA agreed that the judges missed a great opportunity, but was convinced that one cannot be forced into reconciliation. CALS, LRC and LHR thought it to be a big mistake of the judges, but also observed that a forced appearance could only damage the institutions: 'You cannot go through reconciliation with your bench after you've shattered it.'[36]

Two members of the Bar, as well as the chairperson of JOASA, believed a subpoena to be completely inappropriate for two reasons. First of all, judges do not carry much blame. Second, it would be an infringement upon their independence. The written submission of the General Council of the Bar did encourage judges to participate, but regarded 'oral' participation to be inappropriate. Thus, the professional organisations believed this participation to be contrary to the independence, as the judges did themselves, while NGOs believed just the opposite.

An interview with a commissioner made clear that the decision not to subpoena was not necessarily based on the conviction that it would be contrary to the independence of the judges. Direct pressure was put upon the TRC by the judiciary: 'The chair of the Commission was, at high level, informed that if we would subpoena, they would make it a constitutional matter'.[37] With this threat of a constitutional crisis, the judiciary abused its professional position.

Although there was no agreement on the issue of subpoena, the judicial sector was quite critical about the absence of the judiciary from the proceedings. The NGOs, in particular, repudiated the non-appearance of the judges and predicted that they would be punished for this in the future. The NGOs generally shared the opinion of John Dugard:

> The refusal of the judges to testify in person before the TRC did little to restore public confidence in the judiciary. … The appearance … would not be a mere symbol for judges to acknowledge that they are subject like other South African citizens, to the law and in particular to testify in the process of truth and reconciliation. This would also have been an acknowledgement that they accepted responsibility for implementing the law of apartheid, whether they did

> so willingly or not. (Dugard, J., as cited in Klaaren, 1999)

Davis, Klaaren and Marcus argued in contrast that the fact that some judges grasped the opportunity to make submissions was in itself significant. Furthermore, they contended that it was unlikely that the judges could have added anything at the oral hearing not already reduced to writing. According to Klaaren, the judges, by addressing the TRC, accepted accountability: 'By addressing themselves to the TRC, such submissions acknowledged the principle of judicial institutional accountability although demonstrating the lack of agreement over its meaning'. (Klaaren, 1999)

The fact that judges agreed to co-operate to some extent was apparently enough, on Klaarens account, to reach a conclusion on their acceptance of accountability. Yet he ignored every reference to the content of any of the submissions made. He formalised and thereby limited the process. A less formalised conception requires attention to the content, i.e., the different issues that were actually discussed at the SLH.

Digging into the Past

The submissions contained various views on different aspects of the judicial system from 1960 till 1994. On the one hand, the issues were not limited to the ones proposed in the invitation of the TRC. On the other hand, the items proposed were not fully and systematically discussed by all the participants. This made it quite difficult to compare the many diverse, often extended submissions. Instead, I focused on four topics that arose most frequently.[38]

Parliamentary Sovereignty

Until 1993, the principle of parliamentary sovereignty was accepted in South Africa. Its basic premise is that a law, once accepted in parliament, cannot be challenged in court. The judges were convinced that because of this principle there was not much room for them to act. The joint submission by the five judges stated that this principle was accepted during the apartheid regime, even without the presence of a democracy. The general acceptance of it inevitably limited them. According to the Attorneys-General, attorneys and the GCB, it was due to this principle that their deeds and choices were constrained: justice was justice according to the law, it had no independent meaning that they were at liberty to incorporate into the legal process. For the attorneys, this was the most important reason for their shortcomings.

> When the Association's efforts came up against the ultimate brick wall of the sovereignty of parliament, which completely blocked further lawful protest, the Association considered that it had little, if any, options other than to accept the position.[39]

The counter-arguments of NGOs are predictable. They, and academics as David Dyzenhaus, did not accept this whitewashing argument. The principle of parliamentary sovereignty could not be accepted, given that the fundamental precondition—democracy—was not satisfied. A parliament that voices the public opinion, a fundamental requirement to the principle, emerged only in 1994.

The Judiciary

The judiciary comprises judges and magistrates. Many submissions contained comments or remarks about the judiciary, though more attention was paid to the judges than to the magistrates. A lot of research has been done and a lot of discussions have arisen in the past in relation to their position, largely because of their status of independence. They also attracted scrutiny because of their aloofness. In that way, they gave the impression that they wanted to escape this self-critical exercise. Others wanted to make sure that their role and position in the past would not remain in the dark.

a) Independence

Magistrates had never been formally independent in the past. They operated as civil servants, and for this reason they were not held responsible in the same way as the judges. Graham Travers illustrated the lack of independence in his written submission. According to him, they were constantly threatened with geographical or administrative transfers. Magistrates, nevertheless, contributed to a large extent to the persistence of apartheid, as most of the cases were dealt with at their level.

Judges have always been formally independent, but were they truly independent? To the NGOs, it was clear: the judges acted not independently from the executive power and in that way they executed the policy of the government. CALS and LRC stressed that there were different kinds of judges and one should not judge them in too general a way. The judges themselves argued that although the laws were unjust, they did act independently from the executive and so 'justice was seen to be done'. Different judges supported this view in their individual submissions. None of them recounted experiencing any threat to their independence. It is quite remarkable that the GCB, the attorneys (ALS) and the Attorneys-General did not say a word about whether the judiciary was truly independent or not. This silence reverberated to the judges' advantage.

b) The margin of discretion

The margin of discretion refers to the principle that it is possible to interpret an unjust law in a less restrictive way to the benefit of the individual. It is clear that the acceptance or rejection of the principle of parliamentary sovereignty is closely linked to this idea: proponents would see no margin, whereas critics might seek to exercise a certain level of discretionary authority where possible.

According to the judges, parliamentary sovereignty restrained them a great deal. Some of the individual submissions of judges strongly denied that there was a large margin of discretion. A few were convinced that, apart from resignation, there was no other option available. The joint submission stressed that in some cases of uncertainty or ambiguity, decisions were taken in favour of the individual. The GCB confirmed that there was only a small margin of discretion left and that, in some cases, decisions were taken to the benefit of the individual. The Attorneys-Generals and the attorneys (ALS) were silent about this issue.

In response, NGOs and some of the academics (Dugard and Dyzenhaus especially) argued that the fact that some 'moral' judges used the margin of discretion in a positive way, is proof that the judges could have done more. CALS attenuated the statement a bit by warning that neither the degree of 'freedom' nor the extent of 'compulsion' should be

exaggerated.

c) Impartiality

In principle, a judge must be unbiased towards the parties involved: he/she must judge without prejudice. The judges did not speak their mind about the impartiality of their decision-making process. The NGOs, on the other hand, cited a lot of cases in which judges were clearly prejudiced against blacks and political activists. NADEL, CSVR/LHR and BLA were especially harsh in their criticism. They observed that a large number of political cases were tried by only a small number of judges. They quoted cases in which the death penalty was pronounced for less serious offences and referred to 'hanging judges' who often imposed the death penalty upon blacks and to the judges' refusal to recognise evidence of physical violence by the police. Academic research supported these findings.

Not only the judges remained silent about this issue, but also the attorneys (ALS) and the Attorneys-General. The GCB claimed not to know anything about a team of judges that was trying political cases and certified that the presence of 'hanging judges' is exaggerated. In this way, it shielded the judges from any attack.

Discrimination within the Profession

Everybody concurred on the presence of discrimination within the profession, but there was wide disagreement on the extent of it, as well as on the level of intervention by the professional organisations to address the problem. The NGOs testified on extreme discrimination and segregation. Neither the judges nor the GCB and ALS paid much attention to this topic. The GCB even stated that 'segregation was not particularly widespread'. Both ALS and GCB were convinced that they did much to oppose discrimination. They focused especially on the impact of the Group Areas Act, as a consequence of which black lawyers could not work or stay in some areas. The GCB stated, furthermore, that it did not approve of, and never supported, segregation in court. Since 1979, all the Bars, apart from the Pretoria Bar, accepted that there should be no restriction placed upon membership on the grounds of race or colour. In this context, the GCB claimed that it was engaged in 'endless protests, objections and delegations' and ALS claimed that it had 'a voice of protest that was never silent'.

The NGOs again argued to the contrary that the professional organisations failed to act and thus contributed to the institutionalisation of injustice. They used the unacceptable excuse that they could not interfere with politics. ALS, indeed, stated that 'politics was not the business of the organised profession'.[40]

One can add two remarks. First of all, Judge Pius Langa made a very touching, personal submission about the humiliating treatment he experienced as a black advocate. None of the judges tried to deny that such incidents occurred, but neither did they reflect upon such practices. Second, not only blacks and coloureds were maltreated. There was no support either from the Bar and ALS for the legal activists. NGOs and individuals testified about the many threats and intimidations they experienced and the lack of support they received from the professional organisations.

Attorneys-General

The position of the Attorneys-General was also often discussed, though the judges did not comment on them. The GCB was, on the contrary, quite sharp in their criticism, arguing that the Attorneys-General sided with the police and the security apparatus in pursuing convictions at all costs. A refusal to pursue prosecutions on the distorted basis that the security legislation established would have been a considerable help in preventing human rights abuses in South Africa. Moreover, the GCB was unaware of any objections by the Attorneys-General to the methods adopted to procure evidence, the detention of witnesses. [41]

NGOs, especially NADEL, BLA and CSVR/LHR blame them because of their manifest partiality: police and security personnel were rarely prosecuted. Furthermore, the Attorneys-General did not use their margin of discretion in order to decide whether to prosecute or not.

The Attorneys-General themselves were divided. Most of them believed they had no other choice than to apply the laws of the day. They believed that they acted objectively and, when necessary, police personnel were prosecuted. Attorney-General McNally explicitly recognised that there was a margin of discretion, albeit limited. Attorney-General Nel testified about the executive power obstructing him in doing his job.

Self-Critical?

Opinions about whether the submissions made by the different segments of the legal profession were honest and self-critical differ greatly and reflect the unresolved tensions within the sector.

The submission of the GCB was the most striking. A substantial part of the three volumes consisted of an enumeration of 'actions' undertaken by the GCB, such as the sending of delegations to the Ministry and the writing of articles in the press. The GCB clearly focused on the positive side of the picture: 'endless protests, objections and delegations.' One might get the impression that the GCB is looking for praise. Any shortcomings are presented as resulting from the federal character of the organisation. Inevitably such an approach meant that the organisation had to adopt the 'lowest common denominator' position on matters of controversy. Although the GCB acknowledged shortcomings, only the Johannesburg Bar and the Pretoria Bar apologised. The former did so for the striking off of Braam Fisher: they did not wish to retain the judgement striking Fisher from the roll. The latter apologised to all victims of its colour bar and for their refusal to join other Bars in protest. In this way, they prevented the GCB from speaking on behalf of the entire profession with one voice.

ALS too emphasised the bright side of the picture: 'The voice of protest was never silent.' They even took credit for the fact that some of their members were actively involved in Lawyers for Human Rights. It is not appropriate for ALS to harvest that glory, as membership is obligatory to every attorney. Prior to the submission, the President of ALS did acknowledge the failures of the organisation and on behalf of the organisation he tendered its sincere apology.

Both organisations were criticised—the GCB even more than ALS. BLA, NADEL, LHR

and LRC judged them sharply: they did not go far enough, they tried to hide behind the law, and though they apologised, they begged for understanding and did not show real regret.[42] One of the advocates interviewed replied to the criticism of dishonesty of the submission of the GCB as follows:

> When I left the hall, I saw a black lawyer at the left and heard her say to one of her colleagues what a self-serving submission this was - suggesting that it wasn't genuine. We were just driving on a political wave as it was. I don't agree with the criticism … You know it is one thing making the apology, but one also got to be constructive in receiving it. I'm not sure there is always two-way traffic all the time.[43]

Some of the submissions were quite emotional. Some of the individual judges and Attorneys-General apologised and asked for forgiveness. On the other hand, there were judges and Attorneys-General who argued quite bluntly that there was nothing to apologise for. In the joint submission of the judges, there was also no apology.

The Final Report: The TRC about the Special Legal Hearing

The Chairman of the TRC, Archbishop Tutu, delivered the Final Report of the TRC to President Mandela. It describes the activities, findings and recommendations of the TRC. Chapter 4 of Volume 4 deals with the SLH.

The Final Report

The Final Report provides a summary of the testimonies and submissions made to the SLH. A lot of attention is paid to the position of the judges. The TRC justified this overwhelming attention on the basis of the pivotal role of the judges in the administration of justice and by the controversy that surrounded their decision not to appear.

The summary is essentially divided into the argument of the two opposing camps, namely the 'establishment bodies' (i.e. the magistrates, the judges, ALS, GCB and the Attorneys-General) and the NGOs (i.e. BLA, LHR, LRC and NADEL).[44] The extreme generalisation paid no attention to individual contributions or arguments. The summary focused almost exclusively on the issues of parliamentary sovereignty and the judiciary. These were, however, only the two first central concerns discussed above. In this way, the TRC limited the value and extent of the contributions and gave the judges even more attention.[45]

In reaching its findings, the TRC assumed the validity of certain principles and concepts. Some of them were of a general nature, others more specific. The TRC did not expect the assumptions to be uncontroversial. Indeed, it expected some protest from the organised bodies.

The seven assumptions made in the report can be summarised as follows:

1. Judges were able to exercise a choice in almost all circumstances. Choices of a different and more far-reaching nature were available to legal practitioner, law-teachers and students.

2. The values of an organisation play an important part in shaping individual and corporate responses in situations where choices have to be made.
3. In the rare circumstances where little or no judicial choice exists, certain steps short of resignation are open to the judge, such as the criticising of legislative policy.
4. The doctrine of the separation of powers was applied imperfectly. The independence of the judiciary was undermined. This inhibited their will and authority to exercise a real checking and balancing of the other two branches.
5. The judiciary is vital in the day-to-day execution of policy and enforcement of current law. This also involves the removal of a sense of injustice. The 'space' available to the judiciary and to lawyers should be used to preserve basic equity and decency in a legal system.
6. The adherence to legalism serves as a powerful legitimating mechanism for unjust governments.
7. The interdependence between all parts of the legal profession implies that no one who participates in an evil system can be entirely free of responsibility.

One must keep these assumptions in mind when looking at the findings.

The Findings of the TRC

The TRC reiterated in the Final Report that it did not want to ascribe guilt to anyone, as its focus was instead on the future, and thus was reserved in making conclusions about individuals and events. Nevertheless, there are some pointed criticisms among its five broad findings concerning the legal profession.

- The TRC concluded that the courts and the organised legal profession connived in the legislative and executive pursuit of injustice. Many of them did it perhaps subconsciously or unwittingly, but some of them actively contributed to the entrenchment and defence of apartheid, as did the Pretoria Bar by the refusal of blacks.

  The Report stated examples of abuses and actively contributing attorneys, advocates, prosecutors, police, magistrates, judges and teachers. All the examples given are taken from submissions from the different NGOs that participated. The TRC did not take a position, however, as to whether these abuses were general practice or only exceptions.

  The report considered the apologies made by the Johannesburg Bar for the striking off of Braam Fisher to be dishonest and to have besmirched the conduct of the Bar even further. The Bar did not recognise political considerations to be the reason for the striking off, and for the TRC this seemed to be an important shortcoming.

- The TRC acknowledged the presence of the few people who were prepared to break with the norm, even among the judges. 'Had their number been greater, had they not been so harassed and isolated, the moral bankruptcy of apartheid would have been more quickly and starkly exposed for the evil that it was. … This "justification" would not have been possible had even a strong minority of the legal profession united to strip the emperor of his clothes.'

- The TRC thereby extolled the work of the NGOs.

- The TRC dealt with the mainly academic discussion of the resignation of moral judges: Should judges have resigned?[46] 'No' was the answer of the TRC: the alleviation of suffering achieved by these judges substantially outweighed the harm done by their participation in the system.

  Here, the TRC followed the position taken by Dugard (1984, p. 286-294).

- The TRC did not accept parliamentary sovereignty as an excuse or an explanation for conduct, because there was no democracy whatsoever and the point has been made that judges had a choice to act differently. Members of the legal profession should have used the skills and knowledge they manifestly possessed instead of hiding behind principles that do not apply.

  On this issue of parliamentary sovereignty, the TRC followed the position of the NGOs, as stated earlier.

- The TRC rejected the argument of the judiciary that their appearance at the SLH would have undermined their independence, though the importance of the principle is strongly confirmed.

  According to the TRC, the independence of judges was in no danger, as the SLH was not about establishing guilt or reopening particular cases. In addition, the exploration of judicial conduct at the time could hardly be said to impact on the current judiciary operating in such markedly different constitutional circumstances. Furthermore, it was unlikely to create a precedent given the exceptional character of the TRC. The collegiality argument was also rejected by the TRC. The Report noted that the failure to appear was all the more lamented considering the historic significance of the Commission. Judges failed to make a distinction between independence and accountability. The TRC condemned their attitude and believed that 'history will judge the judges harshly'.

Remarks on the Report

The TRC Report tried to paint a picture of the role of the legal system in the apartheid past. These findings will be archived and remain important for the past and the future. Only the future can tell how these findings will be dealt with and what an impact the Report will have. Nonetheless some remarks about its contributions are appropriate.

First, it did not add much to the testimonies and the submissions made by the different members of the legal profession. The TRC merely summarised the arguments and mainly bore out those of the NGO, in the process failing to thoroughly engage with the submissions and often leaving key questions hanging in the air. One of the examples is the undecided character of the abuses of the past: were they of a general or of an exceptional nature. It is also apparent that the SLH did not generate an impulse for further research.

Second, both the invitations to potential participants and the Report itself stressed that the

TRC did not want to ascribe guilt to individuals or groups. The Report, however, reproaches the Johannesburg Bar and the Pretoria Bar and held the judges responsible for much inaction. One can wonder whether this is not an ascription of guilt. It is clear that the line of demarcation between accountability and guilt is not easy to draw.

Third, a lot of attention has been paid to the judiciary. They have been given so much attention that some other issues were completely marginalised. A hearing about the 'judicial system' can comprise hundreds of issues. Some NGOs did look at the topic extensively in their submissions. They broached, for example, discrimination within the profession, lack of legal representation and testimonies obtained by torture. By placing such an overwhelming emphasis on the judges, the TRC gave the impression that other issues were not worth extensive discussion.

The TRC predicted that the attitude of the judges during the SLH will have negative consequences for them in the future. Other members of the legal profession, mainly the NGOs, supported this prediction. Judges missed a golden opportunity to restore confidence in the judiciary. Some interviewees were in low spirits: 'nothing has changed' and their attitude proofed their refusal for real, radical changes and therefore there is no room left for them within the new constitutional order: one has to start afresh.[47]

Fourth, the objective of the TRC was to build a picture of the past legal system. Did it succeed in carrying out its duty? The assumptions and findings created a picture of the past, that is to say of certain aspects of it, but whether it can be considered as the picture of the past is a far more complicated question. It is unlikely that the Report generated a consensus about the past and smoothed away the differences between the organised profession and the NGOs. One of the NGO interviewees remarked in this regard that a consensus is not a net result, it is a progressive act. Thus, the lack of institutional consensus need not diminish the value of the Report.

Fifth, one of the key interviews with a commissioner made clear that the participation did not always occur smoothly and often required a lot of lobbying. The Report did not mention a word about this behind-the-scenes process. In that way, relevant information was omitted. The fact that the General Council of the Bar was reluctant to participate or that the judges went so far as to threaten with a constitutional crisis, was kept silent. This is clearly very important information about the process. By adding this information, the Report would have afforded a more dynamic picture of the process and offered greater insight about future challenges. Maybe the TRC wanted to follow certain rules of courtesy towards the Bar and the judges, or try to prevent even larger rifts from forming within the legal profession.

The TRC in Court

Shortly after the start of the TRC, it was confronted with legal challenges. During its lifetime, it was so often involved in litigation that one could be forgiven for thinking that it was under siege.[48] The constitutionality, the procedures, the impartiality and some decisions of the AC were challenged, as was the refusal of W. Basson and P.W. Botha to co-operate after they had been subpoenaed.[49]

The design of the TRC was an attempt to avoid a classical legal model. The legal challenges to the TRC, however, transformed this original model into a more legalistic approach. I briefly discuss the challenge to the constitutionality and the procedures, as these court cases had an important impact on the TRC process. (See Sarkin, 1996; Dugard, 1997; Braude, and Spitz, 1997; Moelendorf, 1997; Reydams, 1995; Klaaren, 1999; Browde, 1998 and TRC Report (1998), Volume 1, Chapter 7, 174-201).

Constitutionality of the TRC

Not only NGOs (e.g. NADEL, BLA) who found the compromise of amnesty hard to accept; victims and family members similarly experienced the amnesty provision as a slap in the face. Amnesty could be gained in relation to not only criminal liability but also to civil liability. This left victims and their families empty handed. The Azanian Peoples Organisation (AZAPO), N.M. Biko, C.H. Mexenge and C. Ribeiro went to court to challenge the constitutionality of the amnesty provision. The removing of civil remedies for victims was, according to them, contradictory to Section 22 of the Constitution (right to have disputes settled by court of law or another independent or impartial forum). In support of this challenge the applicants argued that the state was obligated by international law to prosecute those responsible for gross human rights violations, and therefore, the amnesty provisions constituted a breach of international law.[50]

The amnesty provision was one of the most important and crucial provisions of the TRC Act. It contained the core of the political compromise. Nullifying this provision could therefore have jeopardised the whole TRC process. The decision was therefore awaited with anxiety.[51] The Constitutional Court held that the provision was constitutional[52] and in accordance with international law.[53] Taking the political context into account, the provision was justified and it was in accordance with the goals expressed in the epilogue: 'truth and reconciliation'.[54] In reaching this judgment, the Constitutional Court not only saved the TRC, they offered clear support for the underlying rationale of the TRC and in that way gave it a solid basis.[55]

Nonetheless, the judgement was criticised. The Court's response was to address the agony of the applicants and the sufferings of the victims of apartheid in eloquent language of a kind seldom found in a judicial decision. According to John Dugard, policy considerations, notably the amnesty of the 1993 political settlement and the incentive it provided for truth-telling, weighed heavily with I. Mahomed in his beautifully scripted judgement (Dugard, 1997). Dugard is especially unsatisfied by the legal reasoning of the Court, arguing that it fails to enquire thoroughly into the compatibility of the epilogue with both conventional and customary international law. In particular, the duty to prosecute under international customary law is not studied and this leaves the applicants and other victims dissatisfied.[56] Jeremy Sarkin also criticises the decision. He contends that the Court is too reluctant to scrutinise decisions of Parliament. They allowed Parliament to decide the extent of amnesty and the allocation of the limited resources of the country, without judicial interference (Sarkin, 1996).

This commentary suggests that the Court avoided scrutinising the legal question before it, possibly fearing the potential outcomes of such an in-depth examination. Thus, one can wonder whether the judges were truly convinced of the compatibility of the provisions with

constitutional and international law, or whether they instead took the decision based on political considerations, trying to avoid huge problems for their country and its fragile compromises.

Procedural Issues

According to Section 30 of the TRC Act, the commission had to afford any person implicated an opportunity to submit representations or to give evidence with regard to the matter under consideration within a specified time. If no procedure is prescribed to do so, the commission (or committee) had to determine the procedure itself. Some (alleged) perpetrators claimed that the procedure adopted violated their rights[57] and challenged them in court.[58]

Judge Corbett of the Appellate Division of the Supreme Court delivered the final judgement in this procedural matter. He held that the application of the audi alteram partem principle was applicable, irrespective of whether the body was quasi-judicial or administrative. He stated that: 'It seems to me that in a case such as this, procedural fairness demands not only that a person implicated be given reasonable and timeous notice of the hearing, but also that he or she is at the same time informed of the substance of the allegations against him or her, with sufficient detail to know what the case is all about.'[59] He further held that such granting of reasonable and timeous notice would not inconvenience the Commission, save in circumstances where a witness implicated a third party for the first time in viva voce evidence.

The implications of the decision were that the TRC was compelled to give prior notice to alleged perpetrators before evidence was heard publicly, and to provide them with sufficient information to enable them to make representations. This decision imposed a heavy administrative and logistic burden on the TRC' s work. The full impact only became clear when the report was composed: 'the Commission found itself in a position in which it was obliged to give alleged perpetrators a prior view of its report – a highly unusual circumstance for a report on a commission of enquiry' (TRC Report, Vol.1, Chapter 7, p. 186). Despite all the concerns, the TRC declared in its report that it complied with the ruling of the Appellate Division to the best of its ability. The decision caused the TRC a lot of trouble and made the process much more legalistic and formal than it initially was meant to be. Victims were, as a result, barred from speaking freely and the impression that the whole process was too 'perpetrator-friendly' was further strengthened.[60]

The decision also received a lot of criticism from the legal profession. According to Jeremy Sarkin, it was short-sighted in view of the impracticality of the arrangements it necessitated and the undue protection it afforded to alleged perpetrators. The effect was to constrain the Commission beyond what was necessary under the circumstances. He also questioned whether the decision was sufficiently informed by knowledge of the processes of the TRC, for it seemed to confuse and conflate the process for hearing victims with the separate amnesty process that enabled perpetrators to have their day at the hearings. (Sarkin, 1996)[61]

The second decision (overruled by the final decision) taken in this case (Judge Friedman in the first appeal case) and the decision taken by Judge Buchanan in the Nieuwoudt case made clear that a different reasoning was possible. Judge Buchanan clearly had a better

understanding of the meaning of the TRC process:

> it seems to me that it is inappropriate to equate the hearing of the Commission's CHRV with an administrative or (quasi-) judicial hearing … . It seems to me undesirable, except to the extent absolutely necessary, that procedural obstacles should be placed before witnesses who wish to make full disclosure of all relevant facts before the CHRV.

The TRC interviewee was likewise far from happy with the decision of the Appellate Division and did not think it to be necessary to make the process of the CHRV so formalistic. 'The presence of lawyers made it very technical, it ended up like a trial'. Another interviewee (CALS) expressed that this legalistic approach diminished the cathartic effect of the process: 'After all, this is a process where society heals itself, it's important that it does not become a lawyers preserve.' Some did not share that opinion. According to certain members of the organised profession (e.g., the respondent of the Johannesburg Bar) the respect for some legal principles is axiomatic. A senior advocate argued: 'The mere fact that people were compelled to run to the Appeal Court to protect their rights says it all. It made clear that the conduct of the TRC up to that judgement ignored fundamental rights in the exercise of its function'.[62]

Balance of the TRC in Court

The Constitutional Court judges reinforced the TRC and its moral underlying concerns. Nevertheless, they avoided a thorough analysis. If such analysis was to have yielded to a different solution, the country might have faced major problems. It seems that the Constitutional Court wanted to avoid that at all costs. They did take political concerns into account, and in that way they supported the way the TRC was drafted by the TRC Act. At the same time, judges (Appellate Division High Court) hindered the TRC in its daily work. When one looks at other decisions taken in the same case (not the final judgement), it is clear that a different solution was possible. To a certain extent, judges can take decisions that are guided by socio-political concerns, as the Constitutional Court did. The Appellate Division clearly took a rigid legal approach in deciding the matter, and indeed one can wonder whether the TRC process was thoroughly understood by these judges. In this way, the process ended up being much more legal then it was intended at the outset. The legal profession had gained a part of its territory back. The judges had the power to impose the rules of 'their' game on the reconciliation process and did so to an appreciable extent.[63] They endangered the sui generis character of the truth commission.

Conclusions and Recommendations

In both the legislative process and the Special Legal Hearing, the submissions of the NGOs were more progressive and less legal then the submissions made by the organised profession. The participation of the former was also much broader than that of the latter. A large part of the organised profession participated in the SLH, but judges' and magistrates' participation was limited to written submissions. Concerning the potential power of the different segments of the legal profession, one must note that the power of the NGOs during the legislative process was not negligible, but during the SLH and the TRC in court, judges had the largest amount of power. In both processes, judges used or abused that

power, indicating that they did not accept or respect the 'sui generis' character of the TRC. They looked at it from a narrow legalistic perspective. For that reason, one can say that the judges treated the TRC quite harshly. The TRC, on the contrary, was quite accommodating in dealing with the judges. It did not mention their threats of a constitutional crisis in the Final Report. One can conclude that the impact of the legal profession has certainly not disappeared when the option of a truth commission is chosen.

A series of general recommendations can be extracted from this case study

First, the involvement of NGOs cannot be underestimated. It is clear that if NGOs had not participated in the legislative process and in the SLH, both would have looked quite differently. Thanks to the NGOs, hearings were public, and thanks to critical submissions made by the NGOs, the SLH was more than just a superficial exercise. NGOs have a lot to contribute to processes aiming at dealing with the past, and hence, NGOs should be supported in periods of transitions. Support to NGOs can be given both nationally and internationally and in many different forms, ranching from verbal and political support to donations, human resources and information. When supported, NGOs should on their side, of course uphold ethical commitment to the process and the general public interest.

Second, Jose Zalaquett recommends that the mandate of a truth and reconciliation process be approved by a national referendum. During a period of transition, however, the logistical and administrative needs are seldom available for such a referendum. Nevertheless, one can certainly make a case for a democratic process to the maximum extent possible. Even then, it should be taken into account that various elements of a political compromise are tenuous and both government and civil society may not have sufficient capacity to influence these elements.[64] Different segments in society should nevertheless take responsibility and try to contribute where possible.

Third: Did the TRC attempt to prevent even larger divisions from emerging among the legal profession, by not being too harsh on the judges? And/or did it do so in order not to further undermine the legitimacy of the judiciary and legal capacity that is badly needed in the country? And if that was the intention of the TRC, will it be successful? If the future shows that this approach indeed is successful (e.g. improved co-operation between old order and new order lawyers and judges and improved legitimacy), then the conclusion should be that when a report intends to be future oriented and constructive, its conclusions should not be too critical. Therefore, raising high expectations of apportioning blame in this sector for past abuses may not be the best option (e.g. harsh judgements of the judiciary), as a more restrained approach may be constructive.

Fourth, it is clear that the legal profession remains a significant group in society and moreover, they have the power to block national initiatives. While principles of fair justice must be respected, a body with cathartic story-telling should not be bogged down by legalistic procedures. On the other hand, a more legalistic approach could be allowed in the Amnesty Committee, as it deals indeed with more legalistic matters. Therefore, the different committees and tasks of a TRC should be well understood by everybody, and more legal principles and approaches should be given their proper place. The balance between a social and moral approach on the one hand and a legal approach on the other, seem to remain a difficult one. Attention should be paid to that balance from the outset.

Further research is required in order to draw some guidelines for this balance.

Finally, subjecting the Act to a review by the Constitutional Court before enactment might save it from future challenges. This will also curtail the potential power of judges to make it more legalistic than was intended at the outset.

Notes:

[1] Senior advocate, 11/09/1998, Johannesburg.

[2] Interviewee NADEL, 03/09/1998, Johannesburg and LHR, 14/09/1998, Pretoria.

[3] Interviewee LRC, 25/09/1998, Johannesburg.

[4] Interviewee LHR, 14/09/1998, Pretoria.

[5] Interviewee Johannesburg Bar, 09/09/1998, Johannesburg.

[6] Senior advocate, 14/09/1998, Johannesburg.

[7] Interviewee LHR, 14/09/1998, Pretoria.

[8] Interviewee BLA, 21/09/1998, Pretoria.

[9] For the legal profession it was Attorney-General Kahn, LHR, ALS, Advocate Y. Sooka and Advocate G. Bizos.

[10] As the focus is on the legal profession of South Africa, the submissions by Amnesty International and Priscilla Hayner (for the Congressional Human Rights Foundation) are not taken into consideration.

[11] This NGO organised a workshop in order to evaluate the draft, many legal NGOs participated as there is LRC, LHR, NADEL and BLA. The submission made is the result of the workshop.

[12] One should not forget though that Albie Sachs and Arthur Chaskalson were both members of the informal committee and became judges in the Constitutional Court.

[13] Interviewee JOASA, 17/09/1998, Pretoria.

[14] Interviewee Johannesburg Bar, 09/09/1998, Johannesburg.

[15] Ibid.

[16] Senior advocate, 11/09/1998, Johannesburg.

[17] Advocate, 09/09/1998, Johannesburg.

[18] Interviewee NADEL, 03/09/1998, Johannesburg.

[19] Interviewee LRC, 25/09/1998, Johannesburg.

[20] Two advocates at the time, were not aware of any discussion within the organisation.

[21] The question whether evidence given before the TRC should be admissible in court afterwards.

[22] CALS proposed a working period of no longer than two years, the others preferred a period of 18 months that could be extended by six-month increments.

[23] The TRC Act gave the TRC a working period of 18 months, a possible extension of six months and another three months for the writing of the report. According to this timeline, the TRC had to finish 15th of June 1997 or 15th of December 1997. The mandate was extended until the 30th of July 1998. (Report – with limited report on the AC – October 1998)

[24] Submission, Justice in Transition.

[25] See also interviewees NADEL, LHR.

[26] The interview, with a member of the informal committee, made clear that there might be another explanation for '(ex-) judge as chair of the AC'. The interviewee said that members of the NP wanted it, as they feared that amnesty would be received or denied according to political preferences. That is why the NP demanded 'impartial' judges.

[27] Interviewee NADEL, 03/09/1998, Johannesburg. See also 'we didn't look at it with our professional hat on, but we looked at it as political activists'.

[28] Interviewee LHR, 14/09/1998, Pretoria.

[29] Interviewees NADEL and LHR.

[30] The NGOs referred to here included more types than just legal organisations.

[31] Interviewee Johannesburg Bar, 09/09/1998, Johannesburg.

[32] Interviewee TRC, 15/09/1998, Johannesburg.

[33] Gready and Kgalema contributed to fill the information gap in regard to the past of the magistrates, see Gready and Kgalema, (2000).

[34] Interviewee TRC, 15/09/1998, Johannesburg.

[35] Interviewee TRC, 15/09/1998, Johannesburg.

[36] Interviewee LHR, 14/09/1998, Pretoria.

[37] Interviewee TRC, 15/09/1998, Johannesburg.

[38] The analysis has been made mainly on the basis of the written submissions.

[39] Association of Law Societies, submission to the TRC.

[40] ALS, written submission to the TRC.

[41] This is quite sharp when one considers the position of the Attorneys-General compared to the one of the advocates. The former never enjoyed formal independence before 1993, whereas advocates have always been independent.

[42] Interviews.

[43] Interviewee Johannesburg Bar, 09/09/1998, Johannesburg.

[44] The Report does not mention the CSVR, which made a substantial submission together with LHR. It seems though that only LHR has been credited for it.

[45] For further analysis, the TRC made reference to the then unpublished work of Dyzenhaus, 1998.

[46] By not doing this, they lend credibility to the system.

[47] Interviewee TRC and interviewee BLA respectively.

[48] The legal challenges of the TRC are discussed in the Final Report, Volume One, Chapter Seven, 174-200.

[49] Finally there were legal challenges that were dealt with at the level of the TRC, which did not go to court, e.g., the complaints of partiality by the IFP and the SADF.

[50] In that regard they also claimed a breach of section 108 (1) of the constitution (right to prosecute).

[51] Interviewee TRC, 15/09/1998, Johannesburg.

[52] The reasoning is as follows: Section 33 of the Constitution allows rights to be circumscribed by another provision of the Constitution. As the epilogue is considered to be

an integral part of the Constitution, the epilogue to the Constitution trumps Section 22.

[53] The reasoning is as follows: If the provision is consistent with the Constitution, the enquiry as to whether or not international law prescribes a different duty is irrelevant. International law is relevant only to the interpretation of the Constitution itself, (and when incorporated in national law). Furthermore, the Geneva Conventions and Protocols do not outlaw amnesty (second protocol: concerning conflicts within a state).

[54] The Court added that the Parliament is entitled to decide on proper reparations and to decide on the limited resources of the country.

[55] 'The substantive rationale underlying the TRC thus passed constitutional muster in the highest court in the land' (Klaaren, 1999).

[56] He does not believe however that the conclusion reached was wrong in law or in policy, as according to him the present state of international law does not bar the granting of amnesty, but the court should have studied it.

[57] Violation of Section 23 and Section 24 of the South African Constitution.

[58] Du Preez and Van Rensburg, and in a separate case Nieuwoudt.

[59] According to him, in the present case this meant reasonable and timeous notice so as to —among other things—see the demeanour of the witness(es) and to provide alleged perpetrators with an opportunity to rebut the evidence or permit immediate cross-examination of the witness (latter might be duty of the TRC to allow).

[60] Ibid. 185.

[61] He makes these remarks in relation to the first decision made in this case, which had a similar outcome as the final decision, therefore his arguments can be repeated.

[62] Senior Advocate, 11/09/1998, Johannesburg.

[63] In that regard: 'I don't think that the TRC was regarded as a legal process at the outset. But it certainly has become so', Interviewee Johannesburg Bar, 09/09/1998; Johannesburg.

[64] E.g. amnesty and truth commission instead of prosecutions.

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