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#### **Justice or just transition?**

#### **Thoughts on the Truth and Reconciliation Commission of South Africa**

The apartheid-system in South Africa existed as official politics between 1948 and 1992. The population was divided into four groups of white, black (bantú), mixed racial and Asian people. The layer of whites meant 8 % of the population, who were mainly descendants of the Dutch, German and French immigrants. The group of bantús included further ethnic societies as the zulu, xhosa, sotho, tswana, swasi, pedi and other minorities.<sup>2</sup> In numerous aspects of life this classification determined the rights and obligations of citizens.

One of the main aims of the government was to divide and turn against each other the ethnic groups in order to ensure their own political and economical power. They also wanted to sharpen differences among certain black tribes (so that they deal with these conflicts and don't turn against the government), but the differences were significant mainly between whites and blacks.

They also ensured a legal frame for the politics of distinction. Extremely disadvantageous legal rules were adopted related to the black population also comparing with the status of mixed racial and Asian people. As ground for it can be mentioned the Population Registration Act and the Territory Act of 1950, which established obligatory territorial separation. Beyond these norms also the Law of Labour, the Bantu Education Act of 1953 and the Bantu Self-Government Act of 1959 included provisions of a discriminative character. This latest act served as a milestone of the "Grand Apartheid Politics" realized by Prime Minister Henrik Verwoerd and his successors belonging to the National Party, which system restricted the political rights of bantús to a large extent.<sup>3</sup>

They had not only no right of assembly and public meeting, but neither appropriate medical service and education were available for them. The weekly appearing doctor, who went from village to village, was responsible for approximately 40 000 black persons. In case of whites this rate was 500 persons per doctor. The distinction on the ground of race was recognizable also in the field of education. The "bantú-education" meant the training for subordinate

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<sup>2</sup> South Africa, a Society in Transition. [www.southafrica-travel.net/pages/e\\_bervoelk.htm](http://www.southafrica-travel.net/pages/e_bervoelk.htm) (Date of downl.: 6<sup>th</sup> November 2004)

<sup>3</sup> Henrard, Kristin: Post-Apartheid South Africa: Transformation and Reconciliation. [www.findarticles.com/p/articles/mi\\_m2393/is\\_1\\_166/ai\\_106560181/pg\\_1](http://www.findarticles.com/p/articles/mi_m2393/is_1_166/ai_106560181/pg_1) (Date of downl.: 6<sup>th</sup> November 2004)

working positions. The education for some professions was not available, and the gates of some university faculties were also closed for black, coloured skinned and Asian students.

They couldn't step on the so-called "non-black" territories without permission. In some suburbs only a railway set apart the "two worlds", between which the passage was not permitted after 9 o'clock in the evening.<sup>4</sup> Mixed marriages were prohibited. There were more than 200 000 persons, who were arrested on racial ground, and most of them were tortured.<sup>5</sup>

The entirety of incidents covered adequately the definition of apartheid in the Convention of 1973 without a doubt, after which all politics and similar practice based on racial discrimination and segregation can be qualified as apartheid.<sup>6</sup>

As the conclusions of changes of the 1990<sup>th</sup> and intensive negotiations between the National Party and the African National Congress the Temporary Constitution based on political compromise entered into force in 1993. The issue of amnesty was ruled in this document in a special way. After its provisions those former perpetrators receive absolute amnesty, who reveal the circumstances of the crime in a deeply detailed way.<sup>7</sup> It is a debatable point whether this universal amnesty is legally correct, if we think on the obligations included in the Apartheid Convention of 1973. On the basis of this convention states are obliged to ensure appropriate criminal procedure and impose suitable punishments in case of crime of apartheid. In this respect case of persons belonging also to the governing power and the national resistance movement must be affected. Families of some victims of the police's brutality turned to the Constitutional Court with this problem. The Constitutional Court rejected these pleas, declaring that the rules related to the amnesty play the role of bridge between the system of apartheid and democracy, and according to this function this is fundamentally necessary.<sup>8</sup>

In 1994 the first democratic election took place. The African National Congress with leading of Nelson Mandela won the elections with 61 per cent of votes, and formed the new government. They tabled the draft of the Act of National Unity and Reconciliation, which was adopted in 1995.

The Truth and Reconciliation Commission established by this act became responsible for the enforcement of its provisions. Work of the Commission moved on in three organizational units: the Amnesty Council dealt with requests for amnesty, the Human Rights Council meant the forum where the reports of victims were put on record, and the Rehabilitation Council created mainly recommendations on compensation. The function of the three councils was

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<sup>4</sup> Population of South Africa. [www.del-afrika.hu/nep.html](http://www.del-afrika.hu/nep.html) (Date of downl.: 6<sup>th</sup> November 2004)

<sup>5</sup> South Africa: The South African Truth and Reconciliation Commission. In: Strategic Choices in the Design of Truth Commissions. [www.truthcommission.org/commission.php?lang=en&cid=3&case.x=42&case.y=7](http://www.truthcommission.org/commission.php?lang=en&cid=3&case.x=42&case.y=7) (Date of downl.: 15<sup>th</sup> October 2004)

<sup>6</sup> Convention on the Prevention and Repression of Apartheid. 30<sup>th</sup> November 1973. Art. 2

<sup>7</sup> 200/1993 Act on the Temporary Constitution. Art. 232(4) [www.ejil.org/journal/Vol8/No1/art4-06.html](http://www.ejil.org/journal/Vol8/No1/art4-06.html) (Date of downl.: 6<sup>th</sup> November 2004)

<sup>8</sup> International Law and the South African Constitution. Section VII. Amnesty [www.ejil.org/journal/Vol8/No1/art4-06.html](http://www.ejil.org/journal/Vol8/No1/art4-06.html) (Date of downl.: 6<sup>th</sup> November 2004)

controlled by 17 Commissioners.<sup>9</sup> For the position of President of Commission was appointed Desmond Tutu, the Anglican bishop of Cape Town, who had high reputation.

### **Relevant factors related to the work of reconciliation commissions**

During evaluation of the Commission's work it is essential to take into consideration the general rules, which apply in case of reconciliation commissions, and the relevant factors related to fulfilment of their tasks. In this respect the political environment is fundamental. There are different possibilities for closing the period of aggression. If the system changes in a way of unilateral military victory, the repression by a forcing power will be dominant; while in case of consolidation achieved in way of negotiations the fact-finding will be based on further negotiations and mainly voluntary principle will probably appear.

If the former perpetrators keep their political leading positions in some extent, they may undermine the efficiency of the fact-finding work of the commission with political pressure. On the other hand in such a situation the universal amnesty can be more expected.<sup>10</sup>

Dominant factor is related to the function of the commission, how wide acceptance the existence and concrete decisions of the commission enjoy on side of political parties, the political and military elite and the public opinion. This latest criterion, the support of public opinion can be based on generally accepted ideologies. It could have been ensured in case of South Africa by the Ubuntu theology which gave a central role to the principle of humanity, together with the Christian values of forgiveness and reconciliation,<sup>11</sup> if the further existing conflictive situation among the ethnic groups hadn't have reduced the strength of this theoretical background.

Beyond the relevance of the political environment also the personnel construction of the commission plays an outstanding role. It is essential to try to ensure the widest possible and equivalent involvement of political groups. It can increase the number of staff in great extent and in this way also the expenses of the commission.

On territories where it is difficult to find persons enjoying high reputation inside the borders, or their work at the commission would mean danger to their life, it is safer to appoint persons who arrive from outside of the state. The obvious disadvantage of this situation is, that these persons probably won't be fully aware of the concrete circumstances as the actors of the affected state.

The role of the earlier conflict's actors is also dominant related to the composition of the commission. The more former victims are involved in the work of commission, the more truthfully the commission can work for protection of victim interests. On the other hand if

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<sup>9</sup> Henrard, Kristin: Post-Apartheid South Africa: Transformation and Reconciliation. [www.findarticles.com/p/articles/mi\\_m2393/is\\_1\\_166/ai\\_106560181/pg\\_1](http://www.findarticles.com/p/articles/mi_m2393/is_1_166/ai_106560181/pg_1) (Date of downl.: 6<sup>th</sup> November 2004)

<sup>10</sup> Political Context. In: Strategic Choices... [www.truthcommission.org/factor.php?fid=0&lang=en](http://www.truthcommission.org/factor.php?fid=0&lang=en) (Date of downl.: 15<sup>th</sup> October 2004)

<sup>11</sup> South Africa. The South African Truth and... In: Strategic Choices... [www.truthcommission.org/commission.php?lang=en&cid=3&case.x=42&case.y=7](http://www.truthcommission.org/commission.php?lang=en&cid=3&case.x=42&case.y=7) (Date of downl.: 15<sup>th</sup> October 2004)

more former perpetrators get within the walls of commission, who keep their former political positions, the enforcement of the concrete decisions will be more likely.<sup>12</sup>

In order to increase the efficiency of the commission work it is inevitable, that the hearings lead to reliable, authentic and detailed testimonies. It is affected by numerous factors. Relevant question is how widely public hearings can occur, because these can serve as direct informing means. In this respect it is obvious that the remaining power of former perpetrators is an obstacle of realisation of these public hearings.

Further relevant factors are the concrete circumstances of the hearings. Special procedure is often needed considering these kinds of hearings. For instance victims are often visited in their own homes by the commissioners. The less official atmosphere there is in a hearing, the more can be shown the empathy regarding to their sufferings and pain and in this way the more possible is to receive reliable and detailed testimony.

It is outstanding significant to ensure in certain cases with help of interpreter that the person giving testimony can use his own language. On one hand this is a fundamental condition of revealing details of a case adequately, and on the other hand it can serve as a sign of respect and acceptance of cultural and ethnical identity of the witness. It is extremely important in a territory like South Africa with its ethnical complexity and 11 official languages.

The conflictive situation requires also the safe circumstances of hearings. Full testimonies can be expectable only if the witness doesn't need to be afraid of any life-dangerous negative consequences of the hearing.<sup>13</sup>

### ***Results of function of the Commission in South Africa***

Turning back to the concrete case of South Africa must be mentioned that the here functioning commission played an outstanding role in the history of reconciliation commissions (Argentina, Chile, El Salvador, Guatemala). More than 38 000 cases were elaborated, the testimonies of 21 000 victims and more than 7 000 perpetrators were recorded. The earlier mentioned dominant factors were also well ensured. The use of own language, safe hearings were possible, and the results were published within appropriate wide bounds.<sup>14</sup> It can be stated that comparing to the other commissions the proceeding of fact-finding at this commission moved on efficiently. Nevertheless, the ideas of reconciliation finally were not realized.

The Commission sent the Final Report to President Mandela in 1998, who asked for forgiveness of the victims for the apartheid-regime on behalf of the former government in a public way. This nice gesture was not enough for solving problems, while there was a lack of

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<sup>12</sup> Composition of Commission. In: Strategic Choices... [www.truthcommission.org/factor.php?fid=3&lang=en](http://www.truthcommission.org/factor.php?fid=3&lang=en) (Date of downl.: 15<sup>th</sup> October 2004)

<sup>13</sup> Proceedings. In: Strategic Choices... [www.truthcommission.org/factor.php?fid=5&lang=en](http://www.truthcommission.org/factor.php?fid=5&lang=en) (Date of downl.: 15<sup>th</sup> October 2004)

<sup>14</sup> Proceedings-case data. In: Strategic Choices... [www.truthcommission.org/factor.php?fid=5&mode=mc&lang=en](http://www.truthcommission.org/factor.php?fid=5&mode=mc&lang=en) (Date of downl.: 15<sup>th</sup> October 2004)

political support. The Parliament spent only a half day with negotiating the issues raised by the Report, and didn't deal with the main and most serious problems mentioned by that.<sup>15</sup>

A very low amount of "urgent damages" were paid to the victims. The entire amount meant less than 4 million US dollars, which was enough for 250 dollars per individuals. There wasn't declared any decision on the issue of total damages.<sup>16</sup>

The publication of the Final Report is also an interesting point to deal with. The Report is almost 4000 pages long and a shorter version doesn't exist. It is obvious that common African people, the real affected persons are not able to read through the original document. On the other hand it is not available for all of these people. Beyond these difficulties if the Report had been disseminated in an appropriate way, the next serious problem would have been, that the document was published only in English.<sup>17</sup>

Beyond all these weak points of the function can be mentioned that also the decisions related to amnesty were debated. The further existence of the conflicts among ethnical groups proves that the concrete resolutions and fact-finding work of the Commission had rather negative, upsetting effect. The disadvantageous status of black people still exists in an economical and social point of view, and on the other hand the white population can report "discrimination in reverse". Weak public safety, corruption and services of lower and lower quality caused that many people left the country till the end of 1990s, and mainly ones with higher education. Between 1994 and 1996 nearly 30 000 people emigrated, primarily white intellectuals.<sup>18</sup> Although the change of regime to democracy and work of the Commission meant a great step toward consolidation, the real reconciliation among ethnical groups of South Africa still keeps us waiting.

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<sup>15</sup> South Africa. The South African Truth and... In: Strategic Choices... [www.truthcommission.org/mission.php?lang=en&cid=3&case.s=42&case.y=7](http://www.truthcommission.org/mission.php?lang=en&cid=3&case.s=42&case.y=7) (Date of downl.: 15<sup>th</sup> October 2004)

<sup>16</sup> Miller, Andie: Truth and Reconciliation: 'Many layers, many seasons' In: A Journal of Media and Culture. [www.media-culture.org.au/0102/truth1.html](http://www.media-culture.org.au/0102/truth1.html) (Date of downl.: 15<sup>th</sup> October 2004)

<sup>17</sup> South Africa. The South African Truth and... In: Strategic Choices... [www.truthcommission.org/mission.php?lang=en&cid=3&case.s=42&case.y=7](http://www.truthcommission.org/mission.php?lang=en&cid=3&case.s=42&case.y=7) (Date of downl.: 15<sup>th</sup> October 2004)

<sup>18</sup> Szabó Ibolya Anna: Where will the help come from? – How AIDS spread out to South Africa. In: Hetek. II. évf. 13. sz. [www.hetek.hu/index.php?cikk=630&print=1](http://www.hetek.hu/index.php?cikk=630&print=1) (Date of downl.: 6<sup>th</sup> November 2004)

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