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Masters Research Report

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Abstract

There is an extensive body of work that engages with debates around the Truth and Reconciliation Commission (TRC) from various perspectives. There however is not much work on the TRC in its capacity as a Commission of Inquiry. Therefore, this research report focusses on the TRC as a Commission of Inquiry. To that end, this research report seeks to locate the TRC's position in the "grand tradition" of Commission of Inquiry in South Africa. Through an analysis of previous 20th Century Commissions of Inquiry and then the TRC as a Commission of Inquiry, the report found that the TRC was able to break new ground in both its structural orientation and the openness with which its processes were carried out. Through a comparative study of the TRC and Commissions of Inquiry that came after it, the report found that the TRC's terms of reference was much broader and more encompassing compared to the terms of reference of the other three Commissions examined. The report found that the more recent Commissions of Inquiry are very narrowly focused and geared towards only resolving specific situations. Finally, through a discussion around debates on the justice model employed by the TRC in the context of the political climate during that period, the report found that the TRC was unable to fulfil its fullest accountability ambitions because it was inherently forced to pursue an agenda which put it on the path of pursuing legitimacy. The ends of accountability and legitimacy were often at odds with each other in the TRC and the report goes on to highlight how this conflict may be playing itself out in two other Commission of Inquiry. Ultimately the report shows the way that the TRC forged a new path for Commissions of Inquiry but the inherent flaws within the TRC may have been passed on to its successors. The report shows that there were some positive aspects of 20th Century Commissions of Inquiry that could be replicated in order for more contemporary Commission to become more impactful democratic institutions.



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List of Acronyms

AMCU-Association of Mining and Construction Workers Union

ANC-African National Congress

CEO-Chief Executive Officer

IFP-Inkatha Freedom Party

LHR-Lawyer for Human Rights

MP-Member of Parliament

NEC-Native Economic Commission

NPA-National Prosecuting Authority

NP-National Party

NUM-National Union of Mine Workers

NUMSA-National Union of Metal Workers South Africa

PAC-Pan Africanist Congress of Azania

SANAC-South African Native Affairs Commission

SAPS-South African Police Services

SA-South Africa

TRC-Truth and Reconciliation Commission

Introduction

This research report seeks to better understand the politics of Commissions of Inquiry in the post-Apartheid South African state with a special focus on the South African Truth and Reconciliation Commission (TRC). Through an examination of significant Commissions of Inquiry during the 20th Century and Commissions of Inquiry conducted in the post-Apartheid era, this paper will plot the political trajectory of Commissions of Inquiry in South Africa from the start of the 20th Century to the present. This discussion will be able to unpack the development and evolution of Commissions of Inquiry through examining the way that the processes and uses of these Commissions may have evolved over time.

To do this, the research report will examine the earlier models of Commissions of Inquiry established during the Twentieth Century, focusing on the 'Grand Tradition' identified by Adam Ashforth in *Politics of Official Discourse in Twentieth Century South Africa* (1990) - namely the South African Native Affairs Commission (SANAC), Native Economic Commission (NEC), Fagan, Tomlinson, Wieham, Riekert, Eiselen and Cillie Commissions. It will then provide an account of the most significant Commission of Inquiry established during South Africa's transition to democracy, the Goldstone Commission. Having established the historical precedents, the paper will then give a detailed account of the South African TRC, as a Commission of Inquiry. The TRC will be examined alongside recent Commissions of Inquiry, established in the post-Apartheid era. The paper will provide a detailed description and analysis of three of these commissions: the so-called Arms Deal, Hefer and Marikana Commissions of Inquiry. The paper will analyse the terms of reference of these contemporary Commissions, and compare the processes within these newer Commissions against those of the TRC.

This research report will identify the TRC's place in the long tradition of Commissions of Inquiry, and attempt to understand whether the TRC altered the trajectory of Commissions of Inquiry, or whether it served to reinforce the continuity of 20th Century Commissions in the South African state. The focus of this discussion will be on issues of accountability and state legitimacy within the workings of Commissions of Inquiry, through discussing the different arguments about the justice models employed by the TRC, especially that developed in the TRC's amnesty hearings.

The TRC's significance in the area of judicial precedent and state exercises of accountability is often overlooked. Truth Commissions are distinguished from Commissions of Inquiry by the formers performing an overtly social function to engage with the public through an 'expose' of historical injustices¹. Commissions of Inquiry are meant to serve a function that is underpinned by a directive of the state and not necessarily the public. Therefore this dissertation will examine the prominent post-Apartheid Commissions of Inquiry from a structural and substantive perspective in order

¹Stanton, K "Truth Commissions and Public Inquiries: Addressing Historical Injustices in Established Democracies" *Social Science Research Network* (April 2010) <http://ssrn.com/abstract=15967>

to observe whether these newer Commissions conform to the above reasoning. Once this examination is done it may be possible to trace connections between the TRC and the Commissions of Inquiry that came after it.

The TRC was the first Commission of Inquiry held in a post-apartheid, democratic South Africa. The task of the TRC was no doubt greater than any other that preceded. But did the TRC alter the trajectory of this long tradition of Commissions of Inquiry? Or was it simply the latest in a long sequence of Commissions that aimed only to serve the ends of a state apparatus? Certainly, the TRC was more democratic and inclusive in its operations and outlook, as compared to earlier Commissions like the NEC. Where earlier commissions would make policy decisions based on findings garnered about “Natives” from “experts”, while “Natives” were excluded from the process, the TRC tried to make sure that South Africans were intimately involved in its processes.

However, in other ways, the TRC is but one link in a chain of a long tradition of Commissions in South Africa that continues to this day. What remains is that these Commissions are still in pursuit of the “official truth” of a given matter and they remain sources of state legitimation. The TRC’s ritualized amnesty hearings, and dramatic events that occurred around victim testimony, could be said to have served as a “symbolic theatre” - as Ashforth describes earlier Commissions². This symbolic aspect did not serve the forensic and scientific investigation into the truth of Apartheid but rather served a second function of Commissions of Inquiry, which is the legitimation of state schemes and practices.

In this research report, I argue that all Commissions of Inquiry, regardless of the ideological posture of the government of the day, are focused both on establishing a truth about a matter as well as the legitimation of state exercises. Importantly however, in a democratic society and state, Commissions may also have extra considerations. In post-apartheid South Africa, Commissions of Inquiry have been given an elevated position as sources of truth generating for the purposes of accountability. In the post-apartheid state, Commissions of Inquiry are established to resolve particular disputes have occurred and the state is attempting to hold the transgressors to account in some way or other. This alters the picture drawn by other authors and Ashforth in his *work The Politics of official discourse in twentieth century South Africa (1990)*, in particular. The Ashforth text clearly demonstrates how Commissions of Inquiry in 20th Century South Africa were primarily state exercises for “scientific” investigation not concerned with any “democratic” values such as openness, inclusiveness and accountability. The post-apartheid Commissions are defined by juridical practices – that is, the establishment of accountability for specific injustices – in ways that the earlier Commissions were not. In this context the example of the TRC – as both an accountability and a legitimation exercise – is of obvious significance. The relationship between these two imperatives, however, is not automatically clear or consistent.

² Ashforth, A “The Politics of Official Discourse in Twentieth Century South Africa”, Oxford: Clarendon Press, 1990 (page 8)

This research report asserts that the pursuit of accountability measures as well as the legitimization of schemes of the state are present in contemporary Commissions of Inquiry. This research report will illustrate that this was also the case with the TRC. The evidence will show that both the pursuit of accountability as well as state legitimacy were at the heart of the TRC. However, these pursuits were perhaps at odds then, and may remain at odds in contemporary Commissions. The preoccupation with the pursuit of legitimacy may be the cause of a weakening accountability milieu in judicial commissions - and perhaps in public institutions in general. The emphasis on using Commission of Inquiry, which are specifically designed for the purpose of achieving high levels of public accountability, to establish and maintain state legitimacy may contribute to the perceivable accountability deficit in South Africa in general. This will be addressed in the conclusion of the research report.

The literature on Commissions of Inquiry is complex and multi-faceted. There is an international and comparative literature on Commissions of Inquiry, in general, and post-conflict Truth Commissions, more specifically. In South Africa, a small number of key works have analyzed the history of Commissions of Inquiry in the apartheid era, and a far larger number have addressed the complex politics of the TRC itself. This research report draws upon examples of all of these works.

The international literature addresses several key concerns and concepts. Firstly, they illustrate the significance of Truth Commissions in the advancement of democratic principles in states that have emerged from conflict areas. They also address the significance of the manner in which these Commissions operated. The central theme here advanced is that Truth Commissions that operated more openly with higher levels of public engagement were able to impact on the broader promotion of democratic principles. Lastly, the literature shows that as a truth Commission in general, the TRC in South Africa is seen as a desirable model. The works drawn from mainly are: Hirsch, Mackenzie, and Sesay, *Measuring the impacts of Truth and Reconciliation Commissions: Placing the Global Success of TRC's in local perspective* (2009), Taylor and Dukalskis *A Old Truths and New Politics: Does the Truth Commission 'publicness' impact democratization?* (2012), Gibson, *The Truth About Truth and Reconciliation in South Africa* (2005)

The literature that deals with the history of Commissions of Inquiry are mainly drawn from Ashforth, *The Politics of Official Discourse in Twentieth Century South Africa* (1990) and Kros, *Seeds of Separate Development: Origins of Bantu Education* (2010). These works provide insight into the inner-workings of Commissions of Inquiry in South Africa across a great portion of the 20th Century. This literature illustrates the South African social and economic dynamics at the time and the way that the state used Commissions of Inquiry as a reaction to those conditions at certain times and at other times to steer conditions to a desired trajectory. It must be noted that the texts of Ashforth and Kros were not critiqued in this report. These texts were used as principal sources to provide historical context as an account of Apartheid and Segregation era Commissions of Inquiry. They

served as useful sources against which to compare contemporary literature on post-Apartheid Commissions of Inquiry.

The literature on the South African TRC is divided largely into literature that discusses the TRC as an example of transitional justice (the debates around the desirability of that model) and the TRC as a reconciliation platform through the generation of official accounts (creation of history) on the South African Apartheid experience. The literature shows that the TRC was a complex assignment but was by and large a failure on both counts- as a platform for reconciliation and as a desirable model of justice.

The texts that provide an historical account and reconciliation platform are: Mamdani *Amnesty or Impunity? A plerimany critique of the report of the Truth and Reconciliation Commission of South Africa (TRC)* (2005); Bundy, *Beast of the Past: History and the TRC* (2000); and Posel, *The TRC Report: What Kind of History? What Kind of Truth?* (1999)

The texts that discuss debates around justice and accountability are: Van Zyl *Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission* (1999); McGregor *Individual Accountability in South Africa: Cultural Optimum or Political Facade?* (2001); Wilson *The Myth of Restorative Justice: Truth, Reconciliation and the Ethics of Amnesty* (2001); James L Gibson in his paper *Truth, Justice and reconciliation: Judging the fairness of Amnesty in South Africa* (2002)

The body of literature covered has been able to explain the significance of the TRC as a Truth Commission, a platform of reconciliation and transitional justice. The body of literature has also served to shed light on the history of Commissions of Inquiry in South African. This study will be different because it takes a deeper look into the TRC as a Commission of Inquiry. Through its historical position of being the first Commission of Inquiry in a Democratic South Africa, it provides room to conduct a comparative study of the TRC with other more recent Commissions of Inquiry in the post- Apartheid era.

This research report will also contribute to the body of work around the TRC because it looks at possible causal connections between the TRC and other Commissions, which until now, has not been done.

Chapter 1

Introduction to the TRC as a Commission of Inquiry

The TRC in South Africa was a very complex undertaking with a number of different stated objectives. A new democracy would need to employ platforms for the exercise of accountability to address past injustices to not only set a tone for the framework of the judicial system but also to set a standard on the way that the state would hold individual wrong-doers to account in future political and social situations. The South African TRC was initiated immediately after the end of an ongoing low-level conflict situation (Apartheid) and this meant that the Commission strongly aspired to be the fundamental building-block for the reconciliation of a country divided across racial and ethnic lines³. These divisions were not only socially apparent but legally and politically enforced which created deep systemic divisions across racial lines. On the other hand however, the TRC was not very peculiar as a Commission of inquiry in general; this is because its other objectives conformed to the objectives of other Commissions of Inquiry. These are amongst others, the pursuit of an official “truth” around a particular social issue as well as garnering information in order to create a narrative around a given subject. This narrative could be found in the official report of the TRC⁴.

The South African TRC’s significance internationally is illustrated by the fact that it is widely viewed as a desirable model to be employed in post-conflict areas⁵. It is also significant because of its departure from the Latin American models that were used before its institution⁶. This departure is reflected in the South African TRC not employing a blanket or general amnesty but rather an individual amnesty model. The South African TRC also used a number of audio-visual techniques (broadcasted television episodes of hearings and radio shows) within the framework of hearings that were open to the public, which was different to the Latin American model, which were generally not open to the public⁷. The South African TRC was therefore unique in its approach, which may have caused unique results. Locally, the TRC is crucial because of it being a significant one of many institutions set-up during the infancy of the South African democracy that may have steered South Africa’s political trajectory.

³ Hofmann, C. “A Grain of Truth-An Appraisal of the TRC’s Contribution To The Process of National Reconciliation In South Africa.” *BSIS Journal of International Studies* 1 (2004)

⁴ Truth and Reconciliation Commission of South Africa Report Volume 2, National Overview, presented October 1998, www.justice.gov.za

⁵ Hirsch, M, Mackenzie M, Sesay, M “Measuring the impacts of Truth and Reconciliation Commissions: Placing the Global Success of TRC’s in local perspective”. *Conflict and Cooperation*. 47. No 3. Pp 386-403

⁶ Boraine, A, *A Country Unmasked: Inside South Africa’s Truth and Reconciliation Commission*, Oxford University Press. Oxford (2000)

⁷ Taylor L and Dukalskis A “Old Truths and New Politics: Does the Truth Commission ‘publicness’ impact democratization?”, *Journal of Peace Research*, Vol 49. No. 5 (2012)

As was alluded to above, the TRC's establishment came at a crucial time in the history of South Africa. The TRC was a major event amongst others that were major sign-posts of South Africa's transition into a democratic dispensation. Other such events around that period were the first Democratic elections in 1994 as well as the promulgation of the Constitution in 1996, the same year that the TRC was formulated. The TRC was a landmark stop on the journey to the attainment of a functional and deep democracy.

The importance of the TRC process is clear because it was borne out of the negotiated settlement and therefore a crucial part of the transition from Apartheid to a democratic dispensation and it would explain the plethora of literature around the topic. .

The TRC functioned at times, not as a platform of reconciliation within a post-conflict region but as a Commission of Inquiry in general. As a Commission of Inquiry in general, the TRC gathered information received from a wide sample in order to formulate a narrative around events during the Apartheid era, which were deliberately kept secret by the Apartheid regime⁸. It also gathered widely known and accessible material that would form the basis of the Commission's official version of certain events in the period 1960-1995. On the other hand the amnesty hearings that were conducted within the TRC framework were directly for the purpose of adjudicating whether an alleged perpetrator was to be given amnesty for their wrongdoings under Apartheid. However, the victim testimony that was unearthed within this mechanism served as a great source of information that ultimately became part of the archival objectives of truth-discovery within the TRC system⁹. The TRC was, therefore, a Commission of inquiry with other special considerations.

Overview of Commission of Inquiry from the 20th Century to Post Apartheid

The Commission of Inquiry as we know it today which is essentially an independently appointed investigative body formed to understand a certain social problem for a purpose within a society can trace its roots to 19th Century England. From around 1832, what had previously been known as the British Royal Commission had been reinvented to address major social issues or events in the British Kingdom. This model of Commission became popular amongst former British Colonies or Colonial territories during the 20th Century and the South African regime of Commissions of Inquiry took this form¹⁰.

The tradition of Commissions of Inquiry in South Africa follows a common thread from the formation of the South African Union in 1910, through to the National Party regime from 1948 and has continued to be a part of the political life of South Africa from 1994 to

⁸ Bundy C, "Beast of the Past: History and the TRC." *After the TRC: Reflections on Truth and Reconciliation in South Africa* (2000): 9-20

⁹ Posel, D "The TRC Report: What Kind of History? What Kind of Truth? A Preliminary Exploration (1999) www.wiredspace.wits.ac.za

¹⁰ Goerge, G "Royal Commissions of Inquiry". *Australian & New Zealand Journal of Criminology*, 35. 3 (2002) pp 289-307

the present day. Later in this research report, the manner in which these Commissions went about their work, and the purposes and function of their existence will be examined. Also, the development and evolution of Commissions of inquiry in the Apartheid regime will be traced, through to the present day. Unpacking the Commissions of Inquiry in 20th South Africa will provide a deeper understanding of the way that the TRC fits in a grand tradition of Commissions of Inquiry in South Africa. Gaining a better understanding of the history of Commissions, whether the TRC was able to introduce or add any novel mechanisms in the functioning of Commissions of inquiry may become clearer. Therefore, we might then be able to discover whether or not the TRC played a significant role in altering, reshaping and perhaps setting new precedents for Commissions of Inquiry in South Africa.

The examination below will provide an account of the major Commissions of Inquiry in the 20th century and illustrate the way that the state used Commissions of inquiry to generate an “official truth”¹¹ on a broad societal question and also at times be the scientific grounds upon which state policy will be based. It will also be shown that at times, the Commission was used to explain or even justify certain policy choices and employ methods of symbolic window-dressing in order to legitimise certain state strategies. This will be shown to be in contrast to the premise on which the TRC was formulated. The TRC was not necessarily a political exercise directed by the state. It was an independently authoritative body that was attempting to create an official version around events in Apartheid for the purposes of reconciliation and nation-building. The TRC was also meant to hear the cases of Apartheid perpetrators and judge whether or not they will be given amnesty based on the criteria the Commission had set. None of the functions of the TRC or the outcomes (amnesty granting and the Report) thereof, were meant to directly or immediately inform policy or be the scientific basis around which government policy would be directed. The TRC could perhaps be viewed as reflective of the philosophical grounding of government policy through programmes of redress and even affirmative action, but most importantly, it was never meant to play a direct role in concrete state directed policy.

The examination of the 20th century Commissions will show that the TRC diverges from the precedent set by previous commissions in three ways. Firstly, the 20th century Commissions were instituted to address societal questions in order to inform future policy. The TRC was not formed to be the basis of later policy but was perhaps engaged in a social exercise rather than a political one. Secondly, even though it will be shown that 20th Century Commissions had engagement with the public through publications and even the “natives” through interviews, the public was not part of the process of unearthing the information the way the public were in the TRC. Previous Commissions made discoveries about and for “natives” without consulting this constituency on a meaningful platform. Lastly, the TRC was also concerned with establishing accountability mechanisms for wrong-doing such as the Amnesty hearings. These kinds of mechanisms by and large, did not feature in the 20th Century Commissions of Inquiry.

¹¹ Ashforth op.cit

South African Native Affairs Commission (SANAC)

The work of Adam Ashforth in the book *The Politics of Official Discourse in Twentieth Century South Africa (1990)* illuminates the grand tradition of Commissions of Inquiry that were conducted in the 20th century. Ashforth's work deals with the major Commissions of Inquiry that were introduced by the State in the 20th Century. This discussion will draw from the work of Ashforth broadly to explain the analysis of the terms of reference. The work of Ashforth briefly explains the way the terms of reference reflected the Commission's intentions while analysing the broader impacts of the Commissions. The first Commission examined was the South African Native Affairs Commission. The SANAC was instituted in 1903 and continued to 1905. SANAC addressed the fundamental strategies on the way that the South African state was to engage with "Native" South Africans. The Commission was set up by the British High Commission to South Africa to gather information that would ultimately serve to inform the way that the state would deal with "Natives" from a labour as well as land perspectives. The outcomes of the SANAC and its subsequent report would be the origins of later, more well-known policies, that formulated laws like the Native Land Act of 1913 and other dominant labour policies that would impact on "Native" life¹².

The terms of reference set for SANAC was as follows:

"to inquire into and report on the following matters : 1) The status and condition of the Natives; the lines on which their natural advancement should proceed; their education, industrial training; and labour 2) The tenure of land by Natives and the obligation to the State which it entails. 3) Native law and administration 4) The prohibition and sale of liquor to Natives 5) Native marriages 6) The extent and effect of polygamy." ¹³

Ashforth explains that the terms of reference express the state's pursuit of the unification of principles upon which the state will be able to govern the "Native". The concerns of the state reach to all facets of "Native life" as shown by the extent of areas of "Native life" covered in the terms of reference¹⁴.

The terms of reference of the SANAC were broad and far-reaching. They were geared towards understanding broad social questions that might later come to inform macro-policy. This is evident in the fact that SANAC findings were the grounding upon which landmark legislation was instituted whose effects are felt today like the Native Land Act of 1913¹⁵. The terms of reference shows that the state was engaged in a scientific investigation that will frame the social and economic life of a people in this case, the

¹² Ashforth, op.cit (page 29)

¹³ Ashforth loc.cit

¹⁴ ibid (page 30)

¹⁵ Ibid (Page 48)

“Native” people of South Africa.

Native Economic Commission (NEC)

The Native Economic Commission (NEC) was the next major political Commission of Inquiry which was instituted in 1930. This was a period which saw Hertzog in the leadership of the South African Union through his leadership of the Nationalist Party. The crucial debate around this era with regard to “Native” affairs was the “Native” Franchise right in the Cape. Hertzog was very clear about his position in this regard and made it known that he did not support the franchise for “natives” in any part of the Union and any concession in such a matter would give the “native” false security¹⁶. Hertzog believed that the time had come for definitive native policy to be formulated so the “native” understands in no uncertain terms that the white man will be governing the Union over the “native”. Hertzog wanted to remove important privileges to the certain strand of “native” and inform discussion to understand the “native” as a homogenous group. The NEC report reconciled Hertzog’s pursuit in trying to remove the “advanced” “native” so as to establish homogeneity in the way that the state was to from here on engage with the “native”¹⁷. This was achieved in the NEC report through the scientific subjectification of the “native” with the assistance of categorising the “native” identity under “tribalist” while the European would be categorised as “civilised”. The scientific basis of the propositions that emerge from the report are found in Newtonian mechanics which is a study on the behaviour and properties of material things. The civilised European therefore in the findings of the Commission, is scientifically destined to dominate the tribalist “native”¹⁸.

The NEC’s terms of reference were as follows:

“to inquire into and report on 1) The economic and social condition of Natives especially in the larger towns of the Union 2) The application to Natives in urban areas of the existing laws relating to the regulation of wages and condition of employment and of dealing with industrial disputes and/or the desirability of any modification of these laws of providing other machinery for such purposes. 3) The economic and social effect upon the European and Coloured population of the Union of the residence of Natives in urban areas and the measures, if any, to be adopted to deal with surplus Natives in, and to prevent the increasing migration of Natives to, such areas. 4) What proportion of the public revenue is contributed by the Native population directly and indirectly. What proportion of the public revenue may be regarded as necessitated by the presence of, and reasonably chargeable to, the Native population”¹⁹.

¹⁶ Ibid (Page 69)

¹⁷ Ibid (Page 70)

¹⁸ Ibid (Page 75)

¹⁹ Ibid (Page 73)

Ashforth explains that the second part of point (4) “as necessitated by the presence of, and reasonably chargeable to, the Native population” was problematic for the state because it struggled to find an exact connotation of the terms. He reports that after deliberation, the Commission decided to only examine “the existing state of affairs” of contribution to the revenue²⁰. This seems to indicate that the state was not concerned with the nuances of “Native” contribution as it did not further the ends of the Commission.

The themes that are set-out by the terms of reference of the Commission seem to set-up the kind of findings and outcomes that Hertzog desired. The way the terms of reference is set-up allows the Commission to investigate the level of class differences that may have existed within the “native” population through the way the class structure of the economy was exerted. By investigating this, the Commission would give the state accurate information about class differences amongst the “native” population which thus will give the state the tools to be able to nullify such economic results to establish economic and social homogeneity with the “Native” population. This points to the way that the Commission was steered towards a particular directive which was to continue the domination of the “native” population.

Native Laws Commission (Fagan Commission)

The next Commission that will be described is the Native Laws Commission, better known as the Fagan Commission. The Fagan Commission was constituted in 1946 to address various problems that emerged through the economic and industrial trajectory that the South African Union had taken. Due to the boom of the mining industry many “native” workers began leaving the farms and reserves in their droves in search of employment in the urban areas. The legislation at the time had formally not allowed Africans in these areas but the demand for unskilled and semiskilled labour on the mines was unable to be ignored. There was now a critical shortage of labour on farms as well as a demand for labour in the large industrial-towns²¹. Hertzog’s ‘solution’ to the “Native Question” was clearly insufficient as it did not adequately address the labour distribution in a now developing agricultural and most fledgling mining sector. The brief of the Fagan Commission was therefore, to investigate the operation of legislation that impacted Africans in and around the urban areas, pass laws as well as the social conditions of “natives” working in the mining and other industries as migrant workers. The Fagan Commission signals a crucial step in the development of the South African state’s engagement with the population because it is now forced to acknowledge the nature of the economic system it found itself²². This system forces the state to recognise as Judge Fagan put it “Europeans and Natives are economically intertwined and should therefore be accepted as being... part of the same big machine”²³. The Fagan Commission diverted

²⁰ Ibid (Page 74)

²¹ Ibid (Page 115)

²² Ibid (Page 116)

²³ Ibid (Page 121)

from the SANAC and NEC because in its conception “Natives” were not merely one homogenous group but rather as part of the same machine as their white counterparts although were to serve a particular labour function. The Fagan Commission ultimately was forced to grapple with the new emergent reality that the economy would not allow for the total segregation of the two races but that legislation would need to accommodate “natives” as permanent members of the society but still at the level of a subject²⁴.

The terms of reference for the Native laws Commission were as follows:

“to inquire into and report upon a) The operation of laws in force in the Union relating to Natives in or near the urban areas where Natives are congregated for industrial purposes other than mining; b) The operation of the Native pass laws requiring the production by Natives of documents of identification c) The employment in the mines and other industries of migratory labour; its economic and social effect upon the lives of the people concerned; and the future policy to be followed in regard thereto and to draft such legislation as may be necessary to give effect to the recommendations of the Commission”²⁵

Ashforth explains the way that the terms of reference obligated the Commission to investigate all the economic impacts of the different systems of labour recruitment of “Natives”. This was meant to rationalize the law governing the interaction between the different races²⁶. This is significant as the second part of (c) in the terms of reference makes provision for the Commission to draft appropriate legislation based on findings.

The complexity of the terms of reference of the Fagan Commission reflected the complexity of the economic system that the Commission was now forced to grapple with. The state was forced to try to make sense of the new economic reality while making sure to hold on to the domination of the “Native”. The terms of reference of the Fagan Commission reflects the Commission’s philosophical grounding being much more scientific and unbiased in its approach. The Fagan Commission was seemingly attempting to make an honest and unattained diagnosis of the economic reality of the “Native” population at the time and the way the “native” interacted with the economy. The rationale behind this “honest” diagnosis however was meant to provide the tools to continue the domination and subjectification of the “native” population in the economic climate at the time. The terms of reference show that the Commission was meant to make complex investigations about “natives”.

Apartheid Era Commissions

²⁴ Ibid (Page 122)

²⁵ Ibid (Page 120)

²⁶ loc.cit

The Commissions that were described above were all instituted to inform the way that the state would engage with a particular problem that emerged due to one reason or another on the way that the South African government would deal with some or other problem of the “Native”. The Tomlinson Commission however was different in that it was instituted not to investigate the way a problem would be solved through the garnering of information but rather an investigation for a predetermined political solution²⁷. This solution was articulated by the National Party government in 1948 that dealt mainly with the domination and purification of the white race over the “native” population and also sought to entrench the concept of segregation of the races and separate development of the “native” in their own communities. The Tomlinson Commission’s report which was submitted to Dr Verwoed (the then Minister of Native Affairs who later became the Prime Minister) in 1954, diverged from the earlier Fagan report on the topic of the Reserves²⁸. Where the Fagan Commission report concluded that the Native reserve was insufficient to halt the influx of Natives in the urban regions, the Tomlinson Commission was meant to discover schemes to make the reserve a potential permanent home for the “Native”. The Tomlinson Commission’s findings had reflected various ideological stances previously articulated by the National Party prior to the Commission’s inception. The Commission found amongst other things, the justified sub-categorisation of the “native” people. The Commission acknowledged the different segments of the “native” people which Ashforth suggests also reflected the National Party’s stance on the heterogeneity of the white population²⁹. The National Party understood that “native” people could not be lumped and categorised as one homogenous group with no differences and therefore needed to have policy that would reflect this belief. Ashforth asserts that the Tomlinson Commission served the purpose of scientific grounds for the necessary violence and repression needed to maintain the structure of the state at the time³⁰. Verwoed asserted that the purpose of the Commission was scientific investigation but not strictly about policy. The Government rejected a number of recommendations made by the Commissions regarding the financing of the reserves and other areas but at the same time used the Commission as justification for policies that government later implemented that were found in the report³¹. This is important to the proposition that the Commissions of Inquiry in the 20th century were used to scientifically generate information that would inform resultant policy at later stage.

A later Commission appointed to deal with the grand “Native question” was the Wiehahn Commission. The Commission investigated issues on labour which included black trade-unions and job reservation. The Commission recommended the legalisation of Black trade Unions, which it hoped to assimilate black labour into a system of industrial relations and collective bargaining divorced from politics³². The Wiehahn and later Riekert Commissions both recognise the “native’s” right to reside outside the Bantustan and in the urban

²⁷ Ibid (Page 151)

²⁸ loc.cit

²⁹ Ibid (Page 155)

³⁰ Ibid (Page 156)

³¹ Ibid (Page 177)

³² Ibid (Page 198)

areas, which was a break from the findings of preceding Commissions³³.

Other government policies were also informed by the findings of Commissions, like those in the findings of the Eiselen Commission. The work of Cynthia Kros in a book called *The Seeds of Separate Development: Origins of Bantu Education* (2010), extensively examines the background and developments that lead to the appointment of the Eiselen Commission as well as thoroughly explain the inner-workings of the Commission and the consequences thereof. One important consequence of the Eiselen Commission is the provision of the scientific grounding for the justification for the well-known Bantu Education Policy³⁴. The work of the Eiselen Commission was completely overlooked in the Ashforth account of the Commissions of the 20th Century. Kros on the other hand, explains in detail, the inner workings of the Eiselen Commission. Kros explains that the Eiselen Commission's investigations have received very little attention and it is surprising because of the fact that the Commission was remarkably open in its interface with the public. Kros explains that the Commission took a decision to invite public scrutiny and engagement and committed to inform the public of its work through different publications namely, *Bantu World*, *Imvo Zabantsundu*, *South African Outlook* and *Kerbode*. Kros asserts that the Commission gathered a comprehensive and detailed set of data that was gathered from a wide-ranging sample of individuals and institutions associated with the subject of the Commission which included "natives". Kros asserts that there seems to have been a genuine attempt to salvage "Native perspectives"³⁵.

While the account of Kros may indicate that the public was free to scrutinise and question the work of the Commission through the various publications, it is well understood that the scrutiny would only have come from the white section of the population and not the majority African portion of the population who were in fact the chief subjects in the Commissions inquiries. Therefore, while it is noteworthy that there was a great commitment to have public interface in the work of this Commission, it could not have been substantially significant on the grounds that the largest part of population was not able to make meaningful contributions in this regard. The account of Kros that deals with the commitment of the Commission to genuinely get the perspective of the "Native" on the issues of education that the Commission was concerned with, supports the claim made by Ashforth that these Commissions were orientated towards speaking for, to and about the "Native"³⁶. The structural effect of the Apartheid system meant that a commitment to hearing the perspective of the "Native" does not mean that these kinds of Commissions would have treated the perspective of the "Native" with the same kind of neutrality as it would have with the other findings. The domination over the "Native" and the social treatment of this section of the population as subjects would always slant the way that it would treat the testimony of those individuals who come from that segment of society.

³³ Ibid (Page 204)

³⁴ C, Kros "The Seeds of Separate Development: Origins of Bantu Education". Pretoria: Unisa Press, 2010

³⁵ Ibid (Page 98)

³⁶ Ibid (Page 99)

Other well-known Commissions in the 20th Century were not only investigative projects that served to answer a particular political problem directly. There were other Commissions that were instituted to understand particular events. Such Commissions were the Commission that was appointed to understand the events that lead to the Sharpeville massacre of 1960 as well as the Cillie Commission appointed to investigate the events that lead to the SOWETO uprising in 1976. The Cillie Commission was purely investigative and did not have any intention of having real impact with regard to accountability through the punishment of wrong-doers. Justice Cillie was only able to make observations but the Commission was not given the authority to make any recommendations to the presidency³⁷.

Observations

The discussion above reveals the fundamental function of Commissions of Inquiry in the 20th Century. The state in South Africa was constantly grappling with the development of the society and thus needed these Commissions to serve as investigative sources in order to solve the political problem that emerged at the particular time. The Commissions analysed above mostly deal with issues relating to how the state was to engage with various aspects of the “Native Question”³⁸. It is clear that the South African state needed to use the platform of the Commission in order to garner accurate scientific information about their black subjects. Simply observing and then detailing the findings would have been insufficient precisely because the South African state did not engage with the Black population as a regular part of their constituency but rather as subjects. The domination over the black population of South Africa was the South African government’s greatest source of state power and therefore official measures on how to deal with this segment of political life were given great care. Commissions of inquiry were generally appointed by the leader of government at the time to find facts on a given topic in order to generate an official truth and then discard what they felt was out of the official area of discourse. What this meant, as the discussion above illustrates, is that the state used the platforms of Commissions of Inquiry to speak for, and about the “native”. Despite the fact that as the discussion on the Eiselen Commission indicates, the Commissions sometimes made efforts to gather accurate information about their subjects, the “natives” were never involved in the process of articulating the information that was received.

Importantly, Commissions of Inquiry were either the scientific basis of policy that was instituted based on the findings of a Commission or merely used as the scientific justification of postures and policy that was already going to be instituted. Regardless of what form they took at the particular time, all the Commissions of inquiry that were described above were served to legitimate schemes and strategies that were at the time or were about to be introduced by the state. The information gathered during the

³⁷ Pohlandt-McCormick, H. “I Saw a Nightmare”: Violence and the Construction of Memory (Soweto, June 16, 1976).” *History and Theory* 39.4 (2000): 23-44.

³⁸ Ashforth op.cit

Commission and its subsequent report would later inform official policy directions implemented by the state. It is clear that the Commission of Inquiry used various symbolic means in order to legitimise the position of the state at the time. The Commission of Inquiry in the 20th century was sometimes used to underpin policy, while other times it was used to justify policy. Sometimes it was used to address emergent economic and social realities while other times it was used to better understand a certain tragic or controversial event. The Commission of Inquiry in the 20th century however was always used to generate the official truth on a given matter as well as to scientifically and symbolically legitimate state schemes and the authoritative position of the state.

The above discussion was an historical account of the segregation era and Apartheid era Commissions that draws largely from the work of Kros and Ashforth. The political climate in South Africa was beginning to change with the release of Nelson Mandela and the unbanning of the liberation movements. The Commissions that will be looked at now are the Commissions that reflect the prevailing political climate at the time. The following two Commissions are inherently linked by virtue of their both being both part of a broader political ambition of national reconciliation. The discussion will now moves towards looking briefly at the Goldstone Commission and then the TRC.

The Goldstone Commission

The Goldstone Commission was appointed by President De Klerk in 1991. The mandate of the Commission extended to the investigation of various incidences of political violence around that time. This violence originated in the political intimidation and intolerance that existed between the different factions during the period of the late 1980's and early 1990's. The Goldstone Commission is seen by many to have played a significant role in facilitating the transition to democracy by somewhat quelling flaring tensions between the leadership of the National Party (NP), the African National Congress (ANC) and the Inkatha Freedom Party (IFP) enough to ensure that negotiations were able to continue. The Goldstone Commission is also seen by many as the precursor to the TRC. This is because of the Commission's link to establishing some kind of reconciliation among opposing political camps for the continuation of political negotiations as well as because the Commission was able to break impenetrable fortresses of silence around Apartheid security measures like the revelations of the Vlakplaas death squads and others in much the same way that the TRC was later to do with other Apartheid-era state-secrets³⁹

On the surface, the Goldstone Commission seemed to signal a significant break from the previously established traditions of Commissions of Inquiry in South Africa. The Goldstone Commission was not only meant to gain an understanding of the given situation but it was a fact finding mission for the purpose of being able to identify wrong-doers in instances of violence⁴⁰. This identification may not have had much legal authority to carry out punishment but the mere identification and signal of culpability has a strong

³⁹ Lotter, H P P. *Injustice, violence and peace: The Case of South Africa*. Vol 56. Rodopi, 1997. Page 106

⁴⁰ loc.cit

connotation of accountability that was previously unseen in the Commission regime of the earlier part of the 20th century. On the surface, the Goldstone Commission appears to have made a significant break from the previous tradition of Commissions of Inquiry most clearly illustrated by its attempt to identify perpetrators of violence around that period of time. The Commission however remains in the same mold as its predecessors. This is because the Goldstone Commission served as part of the dominant state objective at the time. The Goldstone Commission was not interested in attaining reconciliation and social cohesion for benevolent reasons but its focus on identifying violence was part of the objective of negotiations.

Truth and Reconciliation Commission

The TRC as a truth Commission and Commission of Inquiry, was novel in a number of different ways. This extended even to the expenditure on the process. The TRC's budget was considerably higher than those Commissions of Inquiry and truth Commissions that came before it. The TRC also had the authority to call for subpoenas and seizures as well as unlimited access to archival material which were both never seen before in truth Commissions⁴¹. The first significant divergence of the TRC from the grand tradition of Commissions of Inquiry in South Africa was the relative independence of the Commission, as well as the openness with which it conducted its work. Despite the fact that the Commissions in the 20th Century that were analysed above operated on the premise that each Commission was an independent investigative body, they were not necessarily independent. The chosen "experts" that were meant to investigate the particular subject were often made-up academics and members of the parties in the government. In the Tomlinson Commission for instance, some of the Commission members were also politicians affiliated to the National Party, which was the party in Government at the time. The TRC was set-up independently of the government and while it may be argued that the Commission's members might have been sympathetic towards certain political formations, these members were not active members of political parties at the time..

Previously, Commissions of Inquiry conducted their work behind closed doors and the outcomes of the work done were published and publicly accessible. The South African TRC was different because each step of the process regarding the gleaning of information during the period that was to be investigated was broadcasted and also publicly accessible. The inner workings of the TRC were publicised through television, radio and newspapers, and the public was also intimately involved in the processes. The Commission heard testimony of ordinary citizens that was publicly broadcasted throughout the various media platforms. The public nature of the TRC took the public access to Commissions of inquiry to new heights⁴². For the first time, ordinary citizens were able to have the platform to tell their stories and due to the accessibility of the

⁴¹ Posel, D "The TRC Report: What Kind of History? What Kind of Truth? A Preliminary Exploration (1999) www.wiredspace.wits.ac.za

⁴² Boraine op.cit

information around the TRC, there was lively ongoing debate on the processes conducted in the Commission⁴³. The TRC was an “official” exercise but by virtue of the debate being able to be in real-time, the TRC was thus a public endeavour. This signals a significant break from the manner in which the Commissions of Inquiry were conducted in the 20th century. The “official” truth about the society was no longer being unearthed by a group of “experts” but the members of the public were able to lend their own voices to the process by giving their own version of events⁴⁴. These testimonies were used by the Commissioners as the basis to generate the “official” narrative⁴⁵.

Another important feature of the TRC was the element of social cohesion. The TRC was not merely engaged in a political exercise but was geared towards fundamentally altering the fabric of the society. The TRC was attempting to establish the narrative of the Apartheid era from 1960-1995, which would also serve to inform a crucial component of the Commission, which was the Amnesty application of those found to have been perpetrators under the guidelines of the Commission⁴⁶. This component speaks to the most important divergence of the TRC from the grand tradition of Commissions of inquiry in South Africa and this in accountability. The examination of earlier 20th Century Commissions shows that accountability for wrong-doing was not a feature in these Commissions. These Commissions served an ideological purpose generally but were never geared towards accountability. The accountability mechanism that was first instituted by the TRC was crucial because it indicates an engagement with the citizenry and not merely a state political exercise. The accountability exercise indicates that the justice for citizens was important to the Commission, which was meant to forge the start of reconciliation within the society. There are a number of arguments about whether the accountability feature within the TRC was adequately constructed, this will be dealt with in much greater detail later. The very existence of the amnesty committee points directly to a serious attempt at engagement with or recognition of the significance of political accountability through official platforms.

The Commissions of Inquiry that have already been examined have usually been instituted to inform policy or to gain understanding on a social question that would later be the basis for political and economic policy. The TRC was not necessarily used in a similar manner. The TRC did not serve to underpin policy by the new democratic regime but rather to construct a narrative or grand picture of South Africa’s Apartheid past. Commissions of inquiry that have been instituted after the TRC have not been investigative projects to understand social problems but rather are meant to investigate events or allegations in the interest of public accountability. The Commissions that have previously been examined, attempt to deal with broad societal questions that may have served to plot a course of action which would have been articulated through official policy.

⁴³ Lodge T. *Politics in South Africa: From Mandela to Mbeki*. New Africa Books (Pty) Ltd (2002)

⁴⁴ Gibson, J. “The Truth About Truth and Reconciliation in South Africa”, *International Political Science Review*, 26.4 (2005): 341-361

⁴⁵ Bundy op.cit

⁴⁶ Promotion of National Unity and Reconciliation Act 34 of 1995



Chapter 2

Comparison of Post-Apartheid Commissions' Terms of Reference

The South African TRC has been lauded around the world as a strong model of a Truth Commission introduced in order to reconcile differences within a state that has experienced long-term oppression and conflict. It is seen by many as an improvement on the models demonstrated by its predecessors like those found in Latin America⁴⁷. The South African TRC model has been emulated across other African countries like Burundi⁴⁸.

While the concept of a Commission of Inquiry and "truth Commission" is not mutually exclusive, the focus here is not a comparison of the TRC to other "truth Commissions" around the world but rather its place in a grand tradition of Commissions of Inquiry in the South African state. The previous discussion illustrated the way the South African state employed Commissions of Inquiry in the 20th century prior to the Democratic transition. The Commission of Inquiry in that earlier period was used as the scientific basis of policy trajectories based on the findings garnered by a Commission or as the justification of policy that was already conceived⁴⁹. The Commission of Inquiry was used for archival purposes in order to create an official version of whatever topic was being addressed within the Commission. The work of Commissions of Inquiry were generally well publicised through newspapers and other sources although some were more secretive than others.

The discussion in the last chapter showed the way that the TRC broke from the Grand tradition of Commissions of Inquiry in South Africa by virtue of the fact that it was relatively independent, it sought to have an unbiased attainment of the truth behind events, it did not attempt to serve any government policy and the manner in which it operated was relatively open and inclusive.

This chapter will show the contrast between the terms of reference compiled by the TRC on the one hand, and the terms of reference of the more recent commissions on the other, which perhaps lead to differences in the way the TRC went about its work in comparison to the three contemporary Commissions. The similarities are apparent in the TRC and with the other three Commissions. The quasi-legal nature of the procedures in these Commissions and the TRC, as well as their common openness in their engagement with the public it could be argued, served to instill public confidence in the TRC and time will tell whether there is a consensus of public confidence in the contemporary Commissions⁵⁰.

⁴⁷Gibson, op.cit

⁴⁸ Hirsch, M, Mackenzie M, Sesay, M "Measuring the impacts of Truth and Reconciliation Commissions: Placing the Global Success of TRC's in local perspective". *Conflict and Cooperation*. 47. No 3. Pp 386-403

⁴⁹ Ashforth op.cit

⁵⁰ Wilson S. "The Myth of Restorative Justice: Truth, Reconciliation and the Ethics of Amnesty" *The South*

An examination of more recent Commissions will reveal that Commissions of Inquiry instituted after the TRC are not attempting to grapple with broader social questions but are narrower in their attempts to deal with specific events and allegations.

This report will now examine three Commissions of Inquiry that emerged after the TRC and consider whether or not they conform to mechanisms that were first established in the TRC. We will begin by examining the Commission of Inquiry into the Hefer Commission of inquiry that investigated accusations against the then National Prosecuting Authority (NPA) leader Bulelani Ngcuka, then the Arms Deal Commission of inquiry and then finally, the Marikana Commission of Inquiry. We will examine whether these Commissions break with the previous grand tradition of 20th century Commissions of Inquiry in South Africa and briefly deal with the openness and accountability features within these Commissions. We should be able to discover whether these Commissions were merely state-political exercises or if they indeed were motivated by the democratic principle of being accountable to the public.

The manner in which the TRC conducted its work had a special emphasis on the involvement of the public which has set a benchmark for more recent Commissions of Inquiry to strive towards. This discussion will analyse the structural make-up of the TRC and compare those with that of the three contemporary Commissions, with an emphasis on the Terms of reference. It is important to analyse the terms of reference of these Commissions because it is an indicator of a state's commitment to justice and accountability. This is because, despite the fact that these Commissions are meant to operate independently of the state, the terms of reference, which ultimately sets the limits on what the Commission may investigate and how it will operate, is designed by the President of South Africa.

The discussion will illustrate that while the TRC's terms of reference was lengthy and all-encompassing, the sheer breadth of coverage from the terms of reference resulted in the scope of the TRC's work being perhaps too broad to achieve desirable results from the perspective of it being a Commission of Inquiry. However, the observations below will show that the three recent Commissions were much more structurally focused than their predecessor, the TRC. The three Commission's terms of reference have been quite carefully considered so that they were broad enough to generate an adequate narrative around the events that lead to the incidents or allegations in question and narrow enough to at least be structurally able to achieve adequate justice in the matters dealt with by the Commissions. The three more recent Commissions therefore are structurally more sound than the TRC was because these three Commissions had a better quality of terms of reference to achieve the objective of truth discovery and justice. Lastly, the discussion below will also illustrate the way the quasi-legal nature of the way the TRC operated, was reproduced by the three more recent Commissions. It is noted that comparing the TRC with other Commissions might be problematic due to the fact that these Commissions do

not have the same primary objectives as each other and indeed the TRC. However, the TRC was the first major Commission of Inquiry in a democratic South African state and therefore the way that the terms of reference were framed by the TRC is a useful benchmark with which to compare more recent Commissions. It is useful to compare the nature of the terms of reference between different Commissions because they may provide a sense of the structural orientation that the Commission will ultimately gravitate towards.

TRC Terms of Reference and Comparison with chosen Commissions

The Terms of reference of the TRC is found in the Promotion of National Unity and Reconciliation Act 34 of 1995 that governs the TRC process⁵¹. The act has seven chapters. Chapter 1 deals with the interpretation and application of the act. It deals with the definitions of terms like “Commission” and most significantly what is the definition of a “victim” as perceived by the Act. Chapter 2 deals specifically with the Commission and has points regarding the establishment of the Commission as understood by the Act as well as the various objectives of the Commission. The Chapter also deals with the functions of the Commission and the powers and constitution of the Commission. Chapter 3 deals specifically with the Committee on Human Rights violations, their constitution, as well as powers, duties and functions of the Committee. Chapter 4 deals with mechanisms and procedures of amnesty. This is explained in the sections of the Chapter which deal with the establishment, constitution and powers and duties of the Committee. The Act specifically guides the Committee on aspects like granting amnesty and the effects thereof as well as not awarding amnesty and the effects thereof. Chapter 5 sets out the parameters in terms of the engagement with victims. Chapter 5 set-out the regulations on the establishment of the Committee on Reparation and Rehabilitation, the Constitution of the Committee as well as the powers, duties and functions of the Committee. Chapter 5 also deals with the application for reparation as well as parliament consideration on the reparation of victims. Chapter 6 set-outs the guidelines of the investigations and hearings that will be conducted by the Commission. This Chapter deals specifically with areas like the establishment of an investigative unit and the power the Commission has regarding the investigations and hearings. This is expanded on to deal with the way that the Commission may deal with situations regarding the hearings. Chapter 6 deals with a number of legal aspects of the way the Commission ought to conduct its investigation and hearings. Finally, Chapter seven deals with general provisions like the treatment of witnesses, the way it will handle sensitive information, the way it will conduct its work, the funding etc⁵².

The Act which is 39 pages long and its sheer length may illustrate the ambitiousness of the TRC project. The Act is as long as it is because of the magnitude of the undertaking. The Act illuminates the various objectives and therefore specific regulations are put into

⁵¹ Promotion of National Unity and Reconciliation Act 34 of 1995 pp 1-2

⁵² Promotion of National Unity and Reconciliation Act 34 of 1995Act pp1-39

place in order to safeguard each aspect of the TRC and the way it would proceed to operate.

The Act separates the different functions, duties and powers of the TRC by their relevance in the project. Notably, section 11 of the Act governs the way that the Commission will interact with victims. This section extensively sets out specifically the way that the Commission will deal with victims in all their dealings with the Commission. The section makes every provision to treat victims with the utmost respect and dignity in every aspect of their involvement in the Commission from making sure they are informed of every step of the process they will be involved in to making sure that the Commission makes every effort to minimize inconvenience for the victims⁵³.

The separation of the different areas of the Commission found in the Act reflects the different goals that the TRC was meant to achieve. The separation of Victims treatment, Amnesty provisions and Reparations, all related to the different objectives of the Commission. The Amnesty provision part relates to the objective of reconciliation, forgiveness and accountability, the Victim section relates to the generation of the narrative of Apartheid and the Reparations sections relates to the element of redress.

The criticisms of the terms of reference of the TRC are leveled at the fact that it is too broad because there are too many objectives to achieve substantive accountability. Mahmood Mamdani, a well-known African academic argues that the terms of reference of the TRC are too broad because it allowed the Commission to interpret its definition of a “victim” in a particular way. Mamdani argues that the Commission’s interpretation is in fact too narrow because they don’t take into account systemic impacts brought about by the Apartheid. Mamdani asserts, for example, that the Commission’s interpretation does not view the families dislocated by the Group Areas Act under Apartheid as victims which he implies is a miscarriage of justice. This same reasoning is used by Mamdani when he criticizes the Commission’s interpretation of what a gross human rights violation is as well. Ultimately, Mamdani’s criticism towards the TRC’s reading of victims and gross human rights violations are about its interpretation being too narrow. However, the room that is left for this narrow interpretation comes about by the terms of reference of the Commission being too broad⁵⁴.

Hefer Commission of Enquiry

Formally called the Hefer Commission of Enquiry into allegations of Spying Against the National Director of Public Prosecutions, Mr B T Ngcuka, this Commission will from here on be referred to as simply the Hefer Commission. The Hefer Commission was appointed by the President in September 2003. The Chairperson and sole member of the Commission was Judge F Hefer. The Commission was instituted amidst allegations leveled

⁵³ Act loc.cit 9-10

⁵⁴ Mamdani M “Amnesty or Impunity? A plerimany critique of the report of the Truth and Reconciliation Commission of South Africa (TRC).” *Diacritics* 32.3 (2005): 33-59

at the head of the National Prosecuting Authority (NPA) by Moe Shaik and Mac Maharaj, who were perceived to be allies of the then deputy President Jacob Zuma. At the time, Zuma was under investigation by the NPA for corruption. There were further allegations brought up by the City Press writer Ranjeni Munusammy that suggested that the allegations of Ngcuka being a pre-1994 Apartheid agent were true.

The focus of this discussion is not on the outcomes of the Commissions however, since the Hefer Commission is the only one of the Commission's that has completed its work, below are the findings of the Commission:

Based on all the evidence gleaned in the inquiry Judge Hefer's findings are as follows

- a) I find that Messrs Maharaj and Shaik's allegations of spying have not been established. Mr. Ngcuka probably never acted as an agent for the pre-1994 government security service*
- b) In view of this finding, the question whether Mr. Ngcuka has misused the National Prosecuting Authority falls away⁵⁵*

The controversy behind the appointment of the Inquiry is related to the fact that Ngcuka was involved in the investigation behind bribery and corruption charges being levelled at the then Deputy President Jacob Zuma and that these allegations brought forth by Shaik (whose family members were implicated in those same corruption charges) were a smoke screen by Zuma's allies to divert attention from the Deputy President and discredit any impending legal battles they might have. This seems a fair criticism and some questioned the very institution of an Inquiry based on these allegations. The response by Hefer in the report however does deal well with the criticism where Hefer points out that while he may recognise that such conclusions may be drawn, the fact that Ngcuka holds such a critical office in the state, any inclination of such allegations would need to be dealt with thoroughly in the public interest⁵⁶.

It is not within the scope of this report to examine the way that Judge Hefer came to the conclusions in the final report of the Inquiry nor is it within the scope of this discussion to analyse the merits of the conclusions drawn. What is more pertinent to this discussion is to deal with the reasons why such a Commission was instituted and perhaps deal with some of the criticisms leveled at the Commission for being in existence in the first place. While this Commission may seem to be the result of political wrangling between conflicting parties⁵⁷, the allegations of the highest office bearer in public judicial matters being an Apartheid spy would need serious attention. While on the one hand this Commission may seem to be purely politically motivated, the way that it was handled by Hefer does promote accountability especially in the way this Commission dealt a dispute

⁵⁵ The Hefer Commission of Enquiry into allegations of Spying Against the National Director of Public Prosecutions, Mr B T Ngcuka, First and Final Report, Page 61, from www.justice.gov/Commissions/Hefer

⁵⁶ The Hefer Commission of Enquiry into allegations of Spying Against the National Director of Public Prosecutions, Mr B T Ngcuka, First and Final Report, Page 12, from www.justice.gov/Commissions/Hefer

⁵⁷ Parker F. "Deep Read: Commission Impossible", Mail and Guardian online, (September 2012) www.mg.co.za/article/2012-09-03-deep-read-commission-impossible

of this nature which was a matter of public interest.

Terms of reference

The final terms of reference which were amended twice before are as follows:

“The Commission shall inquire into and make findings and report on the allegations by Messrs Maharaj and Shaik that the National Director of Public Prosecutions was an agent of the security services of the pre-1994 government under the Code name RS452 or any other code name, and as a result thereof, improperly and in violation of the law, taken advantage of or misused the prosecuting authority and, in particular, abused, advanced, promoted, prejudiced or undermined the rights and/or interest of any person or organisation”⁵⁸

The nature of these particular terms of reference assumes that if the National Director of Public Prosecutions is deemed to have been an Apartheid spy, then improper conduct in his capacity as the NPA is automatic. Conversely, if the National Director of Public Prosecutions is found not to have been a spy then the allegations of misconduct must instantaneously fall away. The terms of reference does not show any connection between the NPA and any improper conduct other than the allegations of him being a pre-1994 spy. These terms of reference are designed in this narrow way because ultimately, the allegations against the NPA were narrow. The narrowness in this sense meaning that the charges against the NPA related purely to fact that he was accused of being a spy, which somehow would have caused him to act improperly in his capacity as the NPA. The terms of reference makes sure to highlight the possible consequences of misconduct that could have occurred had it been found that the Head of the NPA was an Apartheid spy.

As was alluded to above, the terms of reference of the Commission was amended twice before the final one that was illustrated above. The original terms of reference, made no mention of misconduct on the part of Ngcuka in his capacity as the Head of the NPA⁵⁹. The original terms were only concerned with investigating the claims that Ngcuka was an Apartheid spy. The amendment to the terms seems to have come as a reaction to the idea that investigations into Ngcuka being an Apartheid-era spy does not have any sufficient connection to any misconduct on his part as the Head of the NPA. The terms seems to have been tailored in order to relate Ngcuka’s being a spy, to some kind of impropriety on his part regarding how he went about his work in the NPA. Hefer, in his report, does attempt to dispel any inclinations towards accusing the Commission of being politically motivated, by saying that allegations of being a spy against someone who hold such an important office is to justifiably be taken seriously⁶⁰. Hefer however, is not convincing with regard to how the terms relate to each other. It would be understandable

⁵⁸ The Hefer Commission loc.cit (Page 6)

⁵⁹ The Hefer Commission loc.cit (Page 5)

⁶⁰ The Hefer Commission loc.cit (Page 12)

that the public would want to know whether Ngcuka was a spy but if those allegations only came from a political rival those could be dismissed. Impropriety in office on the other hand is different but there was no connection between the two parts of the terms and no evidence to the effect before the Commission was instituted.

Commission of inquiry into the Arms Deal

The investigation into what is known as the “Arms Deal” has been a constant feature in the political landscape of South Africa for a number of years. The questions raised regarding unethical dealings on behalf of the ANC government in the procurement of military equipment which amounted to some R60 billion have never ceased and the call for accountability has only gathered more steam in the public consciousness over time⁶¹.

The development of this scandal and the Commission follows a complex timeline. The first whistle blower was MP Patricia de Lille who presented a dossier to Parliament in 1999 which indicated a number of allegations of bribery and corruption by the South African government. In October 2000 Parliament’s standing Committee on Public Accounts recommended a joint investigation on the Arms Deal. In August 2001 the National Prosecuting Authority (NPA) announced an investigation into the Arms Deal. In October 2004 Schabir Shaik was charged with the negotiation of a bribe from French Arms Corporation and Jacob Zuma has connections to the particular business dealings. Crucially, in April 2009 corruption charges against President Jacob Zuma were dropped after the surfacing of a recording of a conversation between The Head of the Scorpions Leonard McCarthy and the head of the NPA Bulelani Ngcuka in which they are viewed to be defeating the ends of justice by discussing the timing of the Zuma trial. The allegations of association of unethical and corrupt practices by members of the government are extensive in their connection to the Arms Deal. Various members of the government are alleged to have engaged in fraud, bribery and corruption in the procurement of this military equipment for South Africa and the allegations even extend to the highest office in the South African government, the presidency (which includes former President Thabo Mbeki as well as current President Jacob Zuma). In September 2011, after a number of years of mounting allegations of impropriety and increasing amount of individuals and groups stepping forward and making allegations regarding shady dealings in this procurement package, the Presidency announced that a Judicial Commission of Inquiry into the Arms deal will proceed. In November 2011, the Commission of Inquiry into Allegations of Fraud, Corruption, or Irregularity in the Strategic Defence Procurement Package (The SDPP) was instituted⁶².

Terms of reference

The Terms of reference of the Arms Deal Commission of Inquiry:

⁶¹ McKinley, D T “Arms Deal 2: Here We Go Again?” *The South African Civil Society Information Service*, (August 2013) www.sacsis.org.za

⁶² “Arms Deal Timeline” *Mail and Guardian online*, www.mg.co.za/arms-deal-timeline

“The Commission shall inquire into, make findings, report on and make recommendations on various aspects concerning the SDPP. The Commission will first deal with the rationale behind the SDPP and consequently ascertain whether the arms and equipment acquired in terms of the SDPP are being utilised or not. The Commission will investigate whether or not the job opportunities that have been anticipated to flow from the package have come to fruition at all, if it has to what extent has it materialised and if not, establish what steps are to be taken in order for them to be realised. The Commission will also investigate whether off-sets anticipated to flow from the SSDP have materialised, if they have to what extent and if not, the steps that ought to be taken to realise them. The Commission will also investigate whether any person or people inside or outside the South African government improperly influenced the awarding of or conclusion of any contracts of the SDPP procurement process and if this is found to be the case, whether or not legal proceedings should be instituted against this person or people in their dealings.”⁶³

The Terms of Reference for any Commission are crucial to the outcome of the work as the terms of reference sets-out the limitations on what the Commission can investigate. In the case of the Commission into the Arms Deal, the Terms of reference are broad enough that if it conducts its work correctly, the process of achieving accountability could be conducted efficiently. The Commission, through its terms of reference is able to not only investigate whether the Arms deal was a worthwhile engagement, but also whether the anticipated benefits from the deal have been accomplished and to what extent this may have been. Significantly, the Commission has the scope to investigate improper transactions by members of the government and outside parties in this large procurement package. Ultimately, the Commission would be given the power to illuminate the untold segments of the Arms Deal as well as the authority to identify and make recommendations to hold the wrong-doers to account. In this case wrong-doers would be the members of government that would be found to have acted unethically and fraudulently in many aspects of completing this major transaction call the Arms Deal.

The terms of reference of the Arms Deal Commission are designed in order for the Commission to conduct its work and achieve a fair outcome. It firstly sets out that the Commission will examine the rationale behind the SDPP. This allows the Commission to investigate the conceptual grounds upon which this deal was meant to take place. The Commission will be able to judge the merits of the purpose of this deal in the first instance. The terms of reference then deals with the specific intended outcomes of this particular deal⁶⁴. This is important to the substance of the Commission’s investigation because if the rationale behind the decision to make this deal is deemed to be sound,

⁶³ Government Notice, Department of Justice and Constitutional Development, No. R. 926, Terms of Reference of the Commission of Inquiry into Allegations of Fraud, Corruption, Impropriety or irregularity in the Strategic Defence Procurement Package (4 November 2011)

⁶⁴ Loc.cit

then those who have been accused of impropriety will have the onus to prove how this deal was in fact beneficial, as well as indicate exactly why it did not have the outcomes it was meant to have. The terms of reference are specific in the way that the Commission will judge the intended outcomes of this deal extensively. This is dealt with in the terms of reference by the highlighting the question of the usefulness of the equipment (whether it is being put to use), the job opportunities that were supposed to stem from the deal and any other offsets.

The terms of reference of the Arms Deal received mixed reactions from sections in the South African political scene. The Democratic Alliance for instance, welcomed the terms and was pleased that the Commission looked at the “rationale” behind the Arms Deal. They claimed that the Arms Deal was a “brave step” and that the terms of reference were “comprehensive”⁶⁵.

Others however, were not as impressed. Andrew Feinstein, one of the main whistle-blowers relating to irregularities of the Arms Deal welcomed the terms of reference for its broadness. However, Feinstein believes that the terms of reference are too narrow with regard to timeframe. Feinstein asserts that the terms of reference of the Arms Deal as they are now, are too narrow to investigate the manner in which the investigation was being thwarted by members of parliament⁶⁶. The illumination of facts around the obstruction of the investigation into the Arms Deal by elected representatives in the National Legislature, could be as important as discovering the truth about unethical activities in the R70 Billion Arms Deal. It is crucial to try and discover the things that went on after the Arms Deal, to try and cover it up, because these were allegedly conducted by the very people citizens have elected to represent them. The obstruction of accountability is perhaps just as important as alleged wrongdoing in the Arms Deal especially in this case because it was alleged to have been done in Parliament where elected officials are meant to act with the highest ethical standards. This culture of impunity could translate greater on the society if the leadership is found to have been behaving in this dishonorable manner.

Point Number (4) of the terms of reference “the Commission shall submit interim reports and make recommendations to the President from time to time and at least every six months prior to the finalisation of its report for presentation to the President. The Commission shall complete its work within a period of two years from date hereof and shall submit its final report to the President within a period of six months after the date on which the Commission completes its work⁶⁷.”

The most apparent problem with this part of the terms of reference which relates directly to what occurs after the Commission is complete and how it presents its findings, is that it

⁶⁵ Child, K, “Mixed Reactions of Arms Deal Terms of Reference”, Mail and Guardian online (27 October 2011) www.mg.co.za/.../2011-10-27-mixed-reactions-for-arms-deal-terms-of-reference

⁶⁶ Ibid (Child)

⁶⁷ op.cit (Government Notice)

will be revealed to the President first⁶⁸. The problem with this part of the terms of reference is that the President is heavily implicated in a number of allegations of fraud that supposedly took place during the Arms Deal and reporting to the President first before being made public is a conflict of interest. Feinstein and other Arms Deal critics argued this point in the media. Zapiro, the well-known cartoonist has even gone so far as to say that the Arms Deal is only a façade to divert public attention to give the impression of attempts at accountability⁶⁹. This claim is made in light of the fact that Terry Crawford-Browne, another renowned Arms Deal critic launched an application to the Constitutional Court against the President and the Government of South Africa to force the launching a Judicial Commission of Inquiry into allegations of fraud and corruption. Immediately after this application the President announced the establishment of the Commission. The President is empowered in terms of section 84 (2) (f) of the Constitution to appoint a Commissions of inquiry⁷⁰. The President can appoint the Judge to hear the matter. This of course may benefit the President and others in Government implicated in the Arms Deal because the President has the ability to appoint an ally. Judge Seriti who was appointed to Chair the Commission, has not been found to be an ally of the President but the sequence of the events has left room for such claim to emerge.

Commission of Inquiry into events at Marikana

The Commission was promulgated in the aftermath of one of the most tragic events in the recent history of South Africa. During clashes between striking mine-workers and heavily-armed Policeman, over 44 people lost their lives and around 70 people were seriously injured in what is being referred to in the media as the Marikana Massacre. Following great outcry from international and local media as well as the general public, the Commission of Inquiry into the events at Marikana was instituted by the President of South African on 12 September 2012. The Chairperson of the Commission is retired Judge of the Supreme Court, Judge Ian Farlam⁷¹.

As the official Terms of Reference proclaim:

“The Commission of Inquiry is appointed to investigate matters of public concern arising out of the events at the area commonly known as Marikana Mine in Rustenburg, North West Province from Saturday 09 August- Thursday 18 August, 2012 which led to the deaths of approximately 44 people, more than 70 persons being injured, approximately 250 people being arrested and damage and destruction to Property.”⁷²

Terms of Reference

⁶⁸ (Child) op.cit

⁶⁹ Zapiro “Zuma Announces new Arms Deal Inquiry, *Sunday Times* (18 September 2011)

⁷⁰ The Constitution of the Republic of South Africa, Act No 108 of 1996

⁷¹ Government Gazette, Proclamation by the President of the Republic of South Africa, No.50, 2012

⁷² Ibid (Page 3)

The Terms of Reference of the Marikana Commission of Inquiry will now be examined in detail. The Terms of Reference of the Marikana Commission are more extensive than the other Commissions that have already been mentioned. The Marikana Commission's terms of reference has four distinct sections. The Terms of Reference Proclaims that "The Commission shall inquire into, make findings, report on and make recommendations concerning the following, taking into consideration the Constitution and other legislation, policies and guidelines". Under this main heading the Terms of Reference highlights four main areas with subheadings under each. This is illustrated in the Terms of Reference as the conduct of Lonmin Co, the Conduct of the South African Police Services (SAPS), the conduct of the Association of Mineworkers and Construction Union (AMCU), its members and officials and the conduct of the National Union of Mineworkers (NUMSA). Under each category the terms of reference mentions specific areas of conduct by the parties of interest that the Commission of Inquiry will look into. The Terms of Reference has specifically highlighted the key protagonists in this tragic story and has attempted to flesh out in detail what their respective roles were in the playing out of this massacre⁷³.

There are a number of benefits to breaking up the sections of the Terms of reference by each different actor. This ensures that the Terms of reference does not keep the Commission bound to investigate general conduct of the parties but rather encourages the Commissions to investigate each party's conduct in the event in detail. By analysing each party's conduct specifically, their motivations and aspirations in the event will allow for a better, more nuanced picture to be created in order to create a better and more holistic narrative around the events at Marikana. By formulating a specific and detailed narrative around the event, the Commission will be able to better establish culpability by whatever group so that these culpable groupings can be held to account for specific actions in the tragedy. The Terms of reference deals with all the major parties in detail and does not only look at some broadly and others not. The terms of reference, deals specifically with all the perceived major role-players in this incident in detail.

The Marikana tragedy was an incident which saw the convergence of the state, in the form of the South African Police Service, organized labour, in the form of NUM and AMCU and business, in the form of Lonmin. The terms of reference, and the choice to detail the conduct of these significant role-players reflects this institutional cross-section. It is important to note however that the terms of reference only makes brief mention of the conduct of individuals and loose groupings of people involved in the event (miners) and the Mineral resource department of government. This is significant because the tragedy that ensued happened during an unprotected or what is referred to as a "wild-cat" strike. Wild-cat strikes refer to the strikes that are undertaken by workers without the official consent or without any directive of any trade-union. The fact that the strike which lead to the tragedy, was not conducted upon the instruction from either the NUM or AMCU means that the importance of the conduct of the individual or loose groupings of individuals is critical to attaching culpability in this particular case. However, the way that the terms of reference is structured which chose to focus on the conduct of Lonmin,

⁷³ loc.cit

SAPS, AMCU and NUM indicates a substantive protection of the marginalised workers who were the real victims of this tragedy ultimately. The Commission of Inquiry, through the structural prism of the terms of reference, with its emphasis on the conduct institutions of state (SAPS), labour (AMCU and NUM) and business (Lonmin) and their role in this tragedy, shows a willingness to protect the individuals involved in this event who were not protected by any of the aforementioned institutions on the day of the massacre. The focus on the conduct of the institutions despite this tragedy stemming from a wild-cat strike reflects the Commission's dedication to protect the positions of citizens as well as pursue accountability if these institutions are found to have not made every effort to attempt to mitigate this tragedy.

There are some criticisms of the terms of reference of the Marikana Commission. These are highlighted most clearly by a joint Civil Society statement with regard to the terms of reference which read that the terms "do not adequately allow for the investigation into the complexity of the incident". The criticism of the terms of reference is mainly based on the belief that they are too narrow with regard to the time-frame in which the Commission is investigating. The criticism is directed at the fact that the Commission will not be looking into the period in the aftermath of the tragedy on 18 August 2012, where it is widely alleged that police assaulted workers in custody as well as that police may have tampered with the evidence at the scene of the massacre⁷⁴.

The other criticisms regarding the terms of reference's narrowness relates again to the timeframe. Critics in Civil Society believe that the terms of reference do not go far enough back in time to attempt to investigate why the protesting miners were engaging in the strike. The Commission then, in only look at the period around the tragedy, is not in any way trying to understand the broader socio-economic situation that the miners found themselves in that would have fuelled a climate of dissent⁷⁵. Low wages and appalling living conditions for the miners are as much a part of the Marikana tragedy as any other the institutions that were highlighted in the terms of reference.

The terms of reference do leave some room for interpretation with regard to the overall circumstances that lie beneath the mindset of the workers on the day of the tragedy. This is however, not highlighted specifically in the terms of reference and this is problematic when you discover the underlying factors that may have fuelled the frustration of workers. There are allegations from a Thabo Rapoo who is the Secretary of the Bafokeng Landbuyers Association who claims that the Rustenburg Municipality have long been obstructing workers protests to protect the interest of the mining companies and the government. Rapoo claims that there have been a number of applications to protest put forth by workers that have been denied and it seems that the denial is unlawful. Rapoo is a member of an Association who represents communities in the Rustenburg area. He

⁷⁴ Munusamy, R "Farlam Commission: Finding Truths in the Marikana Labyrinth", *Daily Maverick* (6 September 2012) www.dailymaverick.co.za

⁷⁵ Duncan, J "Marikana, the Farlam Commission, and the undeclared state of emergency" *The South African Civil Society Information Service* (8 October 2012) www.sacsis.org.za/site/article/1448

claims that the Association has been asked to comply with a number of different bureaucratic checklists that include permits, authorisation letters from two different sources and a letter of acknowledgment of the intended recipient that they will be able to receive the memorandum of demands. The effect of this is that the recipient of the demands is able to dismiss any possible protest action by simply refusing to accept the memorandum. This kind of bureaucratic process is not found in the Regulations of Gatherings act (the Act contains not provisions regarding all the above mentioned processes) but Rapoo insists that it is what goes on in the area⁷⁶.

If it is widely known that miners lived in poor conditions and desired better wages and were being blocked from carrying out protest action to demand better conditions, then surely this would have needed to be explored as part of the broader context that may have been a significant part of the narrative at Marikana and the tragedy that occurred there.

Conclusions

The Commissions that have been examined are some of the most prominent Commissions of Inquiry in the post-Apartheid era. The Commissions were instituted to deal with allegations of powerful people in positions of political authority and a tragic event. The establishment of these Commissions reflects new kinds of accountability exercises developed since the TRC. In the 20th Century, Commissions of Inquiry were not as extensive when dealing with the kinds of events and allegations engaged with in the three examined Commissions. The typical Commission of Inquiry in the post-TRC era is geared towards holding wrong-doers accountable for their actions especially in the public sphere. In the previous discussion of 20th Century Commissions conducted by the South African state we examined the use of Commissions of Inquiry to solve broad political and societal problems.

In the Democratic era, while the overall proposition of this paper is to say that the TRC did signal a break from the prototype of the previous regime's use of the Commission of Inquiry, the TRC is the only Commission of Inquiry that attempts to grapple with broader societal questions. Through the construction of a comprehensive narrative of South Africa's past and the TRC's attempt to deal with the horrors that occurred in Apartheid, the TRC attempted to be a platform to deal with broader political and societal themes like redress, justice, reconciliation and others. The TRC seems to be the new society's SANAC, meaning that the TRC forms the basis for new societal consciousness the way that the SANAC Commission aimed to deal with fundamental political questions around the state's engagement with the "native". However, the Commissions of the post-TRC era do not deal with fundamental political questions even though the Marikana event is perhaps a microcosm of the difficulties that plague our society at present. There remains a strong element of judicial accountability that lies not only in the inception of these Commissions but their procedures and operations as well. The clearest conclusion that can be drawn

⁷⁶ loc.cit

from the discussion is that Commissions of Inquiry after the TRC have been designed to deal very narrowly with the subject that it is meant to investigate. These Commissions are not attempting to grapple with the underlying reasons why there is a Commission in the first place but are rather geared towards reporting findings to the public that deal specifically with the topic at hand. These Commissions it seems are not attempting to understand the broader context of South African society but are only trying to deal with matters that are immediately on the surface of these Commissions. This indicates that perhaps these Commissions are short-sighted and are part of an ad hoc reaction to deeper lying problems. This is especially apparent in the case of the Marikana Commission.

Structurally, the TRC has set a tone for the way that Commissions of Inquiry have been designed in the post-Apartheid era in order to carry out their functions. The three contemporary Commissions that were examined indicate that by and large, these Commissions were strong with respect to the formal and procedural basis upon which they were formed. Through the closer inspection of the Terms of reference of these Commissions, it is clear that these Commissions were designed in order to facilitate a function of accountability and transparency. However, as the discussion later will show, these Commissions have had problems with regard to the way that they carried out their functions. The discussion in the next chapter will deal with processes in the Marikana and Arms Deal Commissions. The Terms of Reference of the different Commissions demonstrate a commitment by the state to ensure that these Commissions carry out their functions of being platforms of discovery for the purpose of transparency and accountability on the particular issue that it is meant to investigate. As has been shown in the earlier discussions of older Commissions, the Commissions of Inquiry in the 20th century were structured and performed its duties for the purposes of state legitimation with other minor considerations⁷⁷. The Terms of Reference and structure of contemporary Commissions indicates at least a willingness in spirit to realise accountability within structures like judicial Commissions.

Structurally these commissions are sound. They are formally constructed to deal well with the given investigation. They too are able to be specific enough so that they are able to create a narrative around the given situation so that there are formal consequences that could be dealt with. The TRC on the other hand, is an ambitious undertaking with such broad limits on what its role and functions are and therefore the Terms of reference of the TRC is perhaps too broad to bring out specifically useful results and hence lends itself to not achieving all of its stated goals. The more recent Commissions have been formally well designed however, the Arms deal Commission and Marikana Commission have both been marred by delays, and even perhaps a lack of political will to complete their work as was stated before. The TRC also had a number of these difficulties. In principle, the TRC as well as the three Commissions examined in this section have a dedication to achieving accountability through formal means for specific instances of injustice. These accountability mechanisms in the case of Marikana and Arms deal have not yet been able

⁷⁷ (Ashforth) op.cit

to. The work of the Marikana Commission and the Arms Deal Commission should have both been completed proving that structural integrity does not always translate to efficacy. There must be a strong will to achieve the given objective, in the case of these two it is justice and accountability.

If we consider the structure of the Commissions of Inquiry that came before the TRC we can observe that these Commissions were set-up by the state in a manner that made these Commissions seem like purely state-exercises. The work of these Commissions was not specifically regulated by legal statute that would be publicly verifiable⁷⁸. The Commissions in the previous regime invited disclosures by witnesses as well as by experts but was done a way that was not legal in nature. The TRC was set-up with quasi-legal authority and functioned and behaved in a manner not unlike judicial proceedings. The Marikana, Hefer and Arms Deal Commission are set-up and function in this very same quasi-legal manner. In the previous regime, while Commissioners were often law-men, the Commissions themselves did not act in any way like the courts. The Quasi-legal nature of the TRC set a precedent for the way that later Commissions would be structured⁷⁹. Importantly, in this quasi-legal setting, in the three more recent Commissions, public involvement and testimony is used within investigations and hearings to facilitate the achievement of the objectives of the commissions which is different to what occurred before the TRC. The way previous Commissions conducted its work, gathering information that would then be submitted at a later stage and feature in the final report, gave the impression of the 20th Century Commissions of Inquiry being a purely state-engineered practise. There was not much transparency with regard to how the information gathered by the commissioners lead to the outcomes found in the report. The Marikana and Arms Deal Commissions in specific however, are formally and structurally adequate but the implementation of the mechanisms in these Commissions afforded by being structurally sound is not taken advantage of. The quasi-legal treatment reflects a sentiment of the pursuit of justice and accountability in principle. The Marikana and Arms Deal Commissions have been marred by inefficiencies which points to the weakness in the implementation of the new-found structural integrity.

⁷⁸ loc.cit

⁷⁹ Stuart Wilson's paper "The Myth of Restorative Justice: Truth, Reconciliation and the Ethics of Amnesty" *The South African Journal Of Human Rights*(2001) page 533

Chapter 3

Accountability v Legitimacy in the TRC and later Commissions

The discussion in the previous chapter illuminated the various important objectives the TRC was meant to fulfil. As with other “truth commissions” the TRC was borne out of a negotiated settlement which is used as a platform for the promotion of reconciliation within a society that was divided. This division may be on ethnic or tribal lines as in the case with a number of African examples or it may be a division borne out of support or opposition to the ruling military elite as in the case of the Latin American states. The Latin American models of truth commissions employed a blanket-amnesty⁸⁰. South Africa broke from that model of truth commission by opting for an individual amnesty model where single individuals will apply for amnesty and be granted amnesty under the condition that they provide full disclosure of their actions as well as if their actions met the criteria of being politically motivated as the Commission set it out. The choice not to employ a blanket amnesty to perpetrators reflects the TRC’s multiple objective strategy. It shows that while the TRC may have been deeply committed to the reconciliation of the divided nation, the TRC was also dedicated to establish a mode of accountability as well as sought to achieve justice for victims within a reconciliatory framework⁸¹.

This chapter will explore the TRC as a platform to promote reconciliation as well as a mechanism to achieve justice in a new Democratic dispensation. These two strong objectives were often at odds with each other when we analyse the TRC as not only a truth Commission but also as a Commission of inquiry. As the work of Ashforth illustrates, Commissions of Inquiry have been largely used as sources of legitimising operations of the state⁸². This chapter will also look at the concept of state legitimation and its relation to the TRC. Later the chapter will also discuss the way that the more recent Commissions of Inquiry that were examined in the previous chapter interact with the need for accountability while fighting against the current of institutional legitimation of the strategies of the state. The Chapter will show that the more recent Commission’s (the Marikana and Arms Deal Commission’s will be examined) reflect a serious digression from the gains made by the TRC explained in the previous Chapters.

What model of justice?

The TRC as a justice mechanism was specifically an example of an institution of transitional justice. Transitional justice refers to the system of justice that will be employed to address the human rights abuses that may have occurred under a previous regime. Under this banner of transitional justice, James L Gibson in his paper *Truth,*

⁸⁰ Gibson, J L “Truth, Justice and reconciliation: Judging the fairness of Amnesty in South Africa” *American Journal of Political Science*, Vol 46, No 3 (July 2002) pp540-556

⁸¹ (Bundy) op.cit

⁸² (Ashforth) op.cit

Justice and reconciliation: Judging the fairness of Amnesty in South Africa (2002) addresses the different theoretical options for justice the amnesty process of the TRC would need to engage with. Because the amnesty process put forth by the TRC (which was the outcome of the negotiated settlement) which called for amnesty for perpetrators of acts against people in Apartheid, there is an obvious “justice deficit”⁸³. This “justice deficit” would have needed to be outweighed by the TRC engaging in various justice concepts in order for the amnesty process to be seen as fair by the public. These options take the form of restorative, distributive, retributive and procedural justice. The concept of distributive justice is concerned with having a form of distribution of assets whether monetarily or land and goods as reparations for victims of past atrocities. The designers of the amnesty process Gibson believes, paid great emphasis to the compensating of victims of Apartheid for their losses and that the government would have the onus of paying for the damages of the groups who suffered. Under the concept of distributive justice the rationale is that compensation may correct any anger felt by victims of Apartheid with the process of granting perpetrators amnesty. Gibson believes the procedural justice element was satisfied by the fact that victims were not bystanders to the process of granting amnesty. Victims were directly involved with the process by being able to make statements about the events that surrounded a particular case. The fact that victims are given a “voice” contributes greatly to the perception of the fairness of the amnesty process and by extension the Commission in general⁸⁴. The recognition by the “new” state that a family or individuals were wronged through formal procedural means is meant to promote the perception of fairness with the processes⁸⁵. The retributive justice model was by and large overlooked. This difficulty with any engagement with a retributive model despite its merits, the truth of the political climate was that the TRC was based on the grounds that perpetrators be given amnesty for the sake of peace. The amnesty process is directly at odds with any element of retributive justice despite the many societal benefits that may be able to accrue from such considerations. The element of restorative justice is the strongest component of the amnesty process of the TRC. The concept of restorative justice is focused on restoring the society to a kind of equilibrium where victim and indeed perpetrator are able to exist in society together. The traditional African society had an emphasis on restorative justice where the wrong-doer is not only punished but is able to be restored in the societal dimension. The TRC has its strongest links to this variation of justice and it most conforms to the South African concept of “Ubuntu”⁸⁶.

Stuart Wilson’s paper “The Myth of Restorative Justice: Truth, Reconciliation and the Ethics of Amnesty”(2001) is critical of the restorative justice model as was employed by the TRC⁸⁷. Wilson advances the view that the restorative justice model that was employed does not necessarily have the higher moral grounding in comparison to the retributive

⁸³ (Gibson) op.cit page541

⁸⁴ Ibid page543

⁸⁵ loc.cit

⁸⁶ loc.it

⁸⁷ Stuart Wilson’s paper “The Myth of Restorative Justice: Truth, Reconciliation and the Ethics of Amnesty“ *The South African Journal Of Human Rights*(2001)

model that may possibly have been utilised. Wilson compares the two models of justice and illustrates the way that a retributive model of sorts would have been specifically useful in the TRC because it also have with it elements of restoration within a society. Wilson advances the view that the retributive model of justice was perhaps unfairly dismissed by the TRC and that it would have been useful in a number of ways. Wilson also is able to frame the debate around the morality of the amnesty process of the TRC. Wilson asserts that writers who deal with the processes in the TRC either advance the view that the TRC was purely a political exercise and borne purely out of a negotiation between two opposing camps where morality does not figure, or emphasise the TRC's moral grounding as an instrument of restorative justice. The restorative justice in this sense is in opposition to the more widely held retributive justice systems. Wilson firstly shows by use of examples how a retributive model could have been applied to the TRC process that would still have satisfied the notions of restorations held in such high regard by those who supported the processes within the TRC⁸⁸. This idea is driven by pitting restorative justice which is supposedly an inherently African model of justice against western models and it is highlighted by this statement by a Constitutional Court Judge

“the real test [of justice] . . . is not so much who gets paid out what, or who goes to jail for how long. The real test is what do we do in South Africa to change and transform our country, so that the massive injustices . . . are corrected.” Furthermore he says “it is very meaningful in terms of African culture that the whole community must take responsibility for traumas.”⁸⁹ .

Wilson also contends that the TRC's conception of restorative justice does not make sense of motivations behind preferring the amnesty process to Nuremburg-style prosecutions. Wilson asserts that restorative justice along with reconciliation, was just a façade for a process that was meant to consolidate political gains of a new regime⁹⁰.

Wilson, by explaining the benefits and restorative strengths of retributive models of justice, shows how the TRC process dismissed a useful model of justice. Wilson is able to point to defects in the restorative justice model which is the philosophical system upon which the TRC was built. Wilson's assertion that that the retributive model was not employed even though it would have had a number of benefits is crucial to the argument that the preoccupation to and apparent reverence of transitional justice served the function of creating “reconciliation” above all else. Any flirtations with a retributive model would not serve to legitimize the gains made by the political leadership during the negotiations and the post-1994 period.

What were the specific choices regarding amnesty that could have been employed?

⁸⁸ (Wilson) loc.cit

⁸⁹ McGregor, L “Individual Accountability in South Africa: Cultural Optimum or Political Façade”. Am. J. Int’L. 95 (2001) page 37

⁹⁰ Wilson op.cit (Page 535)

Within the amnesty process specifically, there were a number of competing arguments regarding the merits of the different models that could have been employed. Paul Van Zyl. In his essay *Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission* (1999), Van Zyl extensively details the competing debates around the justice action employed by the Amnesty Committee in the TRC. Van Zyl highlights the difficult undertaking of providing an adequate justice regime in the face of other considerations⁹¹. Similar work by Lorna McGregor in her essay *Individual Accountability in South Africa: Cultural Optimum or Political Facade?* (2001) which deals with the competing arguments around whether the individual-amnesty model that was used by the TRC was the best option that could have been used in the South African case⁹². In order to judge the merits of the avenues ultimately chosen to be employed in the amnesty process in the TRC, the TRC must be properly understood generally and also the views of the negotiating parties must be understood as well. The TRC was an institutional attempt at reconciling a divided country and a project in the discovery of the truth in a country with many secrets and lies all of which needed to be exposed for the purposes of gaining collective closure. More importantly however, it was also a major attempt to hold those who were responsible for the suffering of victims of cruelty during Apartheid accountable, in a platform that was not a court of law but still possessed legal authority. All these intended outcomes were balanced against each other and therefore it must be recognized that at different times any particular outcome received more emphasis than others. In other words, the entire TRC process attempted to achieve a different objective (retribution/restoration, truth discovery and nation-building) at different times regarding different factors and role-players⁹³.

The TRC, being a consequence of the negotiated settlement in South Africa's transition from Apartheid to Democracy, means that the sentiments of the competing parties in the negotiation regarding the TRC is significant. De Klerk, who was the leader of the National party at the time was of course very vehement in the pursuit of amnesty for perpetrators during Apartheid. So much so that this was a point that the negotiations almost broke down⁹⁴. The Nationalist's held firm in the deal that there will not be free elections held in South Africa unless there was a process of granting amnesty for those who worked for the Apartheid state. The ANC would eventually conceded to allow for a process of amnesty, not a general or blanket amnesty but rather an individual amnesty process where the person will receive full amnesty in exchange for full disclosure. When discussing the use of a blanket amnesty Archbishop Desmond Tutu highlighted the risk in not responding to the past: "You just cannot have a total blanket amnesty," he said. "Just to say, alright man, all is forgiven is not sufficient. It appears as if the government in fact is scared that it is going to open a can of worms. But I mean that can of worms is going to haunt us."⁹⁵

⁹¹ Van Zyl, P "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission". *Journal of International Affairs*, Columbia University 52 (1999) pp647-668

⁹² McGregor op.cit

⁹³ McGregor loc.cit

⁹⁴ Van zyl

⁹⁵ McGregor op.cit page 35

One of the difficulties with using a model that involves apology and forgiveness relates to the willingness of the guilty to show remorse and apologise and the victim to accept such an apology. The TRC hearings were especially difficult for the victims to ascertain whether or not those seeking amnesty were being genuine in their declarations of shame. This is because perpetrators had the incentive of seeking amnesty and appearing at the hearings in order to avoid being prosecuted and ultimately receive amnesty for the acts that they committed during Apartheid. The retributive mechanism that the TRC employs is one that is more moral and psychological as compared to the usual form of punishment which ranges from execution and prison-time⁹⁶. Any amount of prison time that would have been handed out to many of the offenders would not have in anyway been equivalent to the suffering that was experienced by the majority of the South African society. The TRC instead uses the shame and guilt of the victim as a way of punishing perpetrators for their actions. Offenders were asked to provide full disclosure on a public platform in front of the families of their victims which may have served as a way to bring guilt and shame to those who were seeking amnesty⁹⁷. It could be argued that the decisions taken and processes that were exercised during the TRC project were aimed at accepting the political reality of South Africa at the time while simultaneously trying to maximize on the reconciliation⁹⁸.

Accountability deficit

The most apparent problem regarding the use of an amnesty system is, as was mentioned before, the accountability deficit that resulted in not being able to fully punish those who perpetrated heinous acts in the Apartheid regime. There were many pronouncements regarding the abstinence of adopting prosecution/Nuremburg style trials. Those arguments generally hinged on the promotion of the catchphrase 'reconciliation'. The proponents of the individual amnesty mechanism often claimed that the particular chosen path was opted for because it was the moderate choice between, the extreme options of individual prosecution/Nuremburg-style on the one hand and the blanket amnesty on the other⁹⁹. The one problem with using the idea of reconciliation as the basis of an argument for an individual amnesty model is that it is perhaps disingenuous to say that an individual Prosecution/Nuremburg-style trial was not employed for the sake of attaining reconciliation among the racial groups in South Africa. As the discussion earlier illustrates, the point of amnesty was firmly incontestable from the perspective of the Nationalist party and because the Liberation movements did not defeat the Nationalist's through any means, the negotiation process made it impossible for the accountability demands of the majority of South African citizens to ever be manifested to its fullest limits. The employment of an individual amnesty system rather than a blanket amnesty

⁹⁶ *ibid*

⁹⁷ *Ibid*

⁹⁸ *Ibid*

⁹⁹ *Ibid*

reflects an attempt to put in place a moderate accountability regime for the TRC¹⁰⁰. The use of an individual amnesty model could be seen as a weak attempt at satisfying the accountability demands of a vengeful nation.

If the ultimate goal of the TRC was to achieve reconciliation through its processes and by extension to be used as a source for nation-building, then why was a blanket-amnesty not employed? Neville Alexander's work *An Ordinary Country* (2002) is a book that discusses debates around South Africa's transition to democracy. There is a chapter dedicated to the TRC. Alexander is critical of a number of aspects of the TRC including the report as a historical narrative construction as well as the truth for amnesty model that was used. Alexander argues that there was not a good enough reason given by the state for not opting for a blanket amnesty and he warned of the resultant humiliation and the consequences thereof of the individuals and family members of those who applied for amnesty. This humiliation which he predicted may have led to anger and resentment would have been counterproductive to the TRC as a source of reconciliation between the racial groups of South Africa¹⁰¹. The arguments put forth by Alexander and others ignite the question as to the usefulness of an individual amnesty model being employed by the TRC if the ultimate goal of reconciliation was genuinely pursued. The point of having an individual amnesty model was one that was fought for by the ANC during the negotiations so there would have had to have been good reasons why the ANC might have pushed this agenda. This question is made to be even more important when we look at the way the ANC engaged the TRC when 37 members of the Party/movement applied for a group amnesty which was an unlawful application under the auspices of the Promotion of National Unity and Reconciliation Act. In accordance with the reasoning of the TRC as a reconciliatory and profound nation-building exercise, the Amnesty Committee's decision to grant the 37 ANC members a group amnesty, directly compromises the credibility of the entire TRC process¹⁰². Once the decision was made to use the model that was employed, it indicated a lack of integrity from the ANC to attempt to receive general amnesty and a lack of resolve of the Amnesty Committee to grant the application successful. The integrity of the amnesty process is put further into question through what has transpired after the Commission has completed its work. To date, there has only been one case heard of an individual who has faced any sort of litigation for not seeking amnesty despite there being numerous individuals who are known to not have applied for amnesty. The punishment for not applying for amnesty was supposed to be prosecution but nothing of that sort has ever come to fruition. One might even argue that the government's lack of respect for the TRC process is put into further disrepute by the way they engaged with the Commission's recommendations regarding the reparations of victims. The Commission recommended that the government pay reparations to the tune of R136000 to families of victims but the government agreed to only pay a pittance of R30000¹⁰³.

¹⁰⁰ Ibid

¹⁰¹ Alexander, N. *An Ordinary Country: Issues in Transition from Apartheid to Democracy in South Africa*. University of Natal Press (2002)

¹⁰² Mcgregor op.cit (page 41)

¹⁰³ "Truth and Justice: Unfinished Business in South Africa" *Amnesty International/ Human Rights Watch*

Why have an individual amnesty model?

The discussion above has shown that the option of an individual amnesty model where those who were seeking amnesty would be granted amnesty in exchange for appearing at a hearing and disclosing all the information the Commission was attempting to glean from them, did not in fact promote the goal of reconciliation or nation-building. The individual amnesty model did not promote the two higher principles that the Commission was meant to be striving for, and neither did it satisfy the accountability and justice demands of a nation who suffered for many years under an oppressive system. The individual amnesty model was perhaps only a feeble attempt at satisfying such demands so there must have been another reason why the ANC would have opted to use this model. Of course they were well aware that Prosecution/Nuremburg-style trials were not on the table and since reconciliation and nation-building was the principle that they were apparently striving for, then surely a blanket-amnesty would have been the better option. It is not enough to merely assert that the individual-amnesty model was the moderate of two extreme and divergent options. There must have been a very good reason to employ the model that was eventually opted for.

The TRC traversed new ground in various areas of South African society. It was a first of many instances and was the first widely covered public act by the new Democratic leadership where the members of the old regime would have to answer for the wrong they committed during the Apartheid era. It is clear that the model employed was not able to fulfil its widely proposed function of reconciliation and/or restoration/retribution. The model was able to fulfil a function of a profound nature-where the ANC could announce its arrival as the new leadership in South Africa on the world-stage. The symbolic gesture of the old regime, through its representatives, asking to be forgiven for their transgressions illustrated a “changing of the guard” in South African Politics¹⁰⁴. White Afrikaner members of the Apartheid regime were not just given amnesty but were made to appear in front of a Commission appointed by a new government lead by the ANC, to ask to be forgiven for their previous transgression. They were going to be forgiven anyway but the symbolism of what that act represents was significant in the whole narrative of the TRC. This was an act of legitimising the ANC as the new leadership. It must be stressed that the amnesty hearings and indeed the TRC processes was not able to address the systemic issues at the heart of Apartheid policy¹⁰⁵. The Amnesty hearings put a human-face to the Apartheid system. The reason why putting a human-face to the Apartheid system would have benefitted the leadership of the government of the day is because this particular personification, allows the public to be preoccupied with the individuals instead of the structural impacts of the Apartheid system. Since by the time

Report (February 2003)

¹⁰⁴ (Mcgregor) op.cit

¹⁰⁵ Cronin J, “A Luta dis Continua? The TRC Final Report and the Nation-building Project” (1999) mobile.wiredspace.wits.ac.za/bitstream/handle/10539/7764/hws-78.pdf

the Amnesty hearings took place, the structural impacts of the Apartheid were far from transformed, it would therefore have benefited the ANC lead government to have the public focused on the individual representatives of Apartheid in order to keep public attention away from what the government was doing to redress the fundamental and structural inequalities brought on by Apartheid. While it is understood that the Government of National Unity composed of members of not only the ANC but also the NP and the IFP, neither the NP nor the IFP were too concerned with a transformation agenda and therefore would not have objected to the above.

The choice of employing an individual-amnesty model it seems, serves a purpose that is not about accountability but rather to establish legitimacy and perhaps this should not be surprising because as the work of Ashforth illustrates, Commissions of Inquiry in South Africa have long been used as platforms for the legitimization of state strategies¹⁰⁶. It must not be forgotten that even though the TRC was such a complex undertaking with so many different objectives, it remains the first major Commission of Inquiry conducted in Democratic South Africa. It was perhaps the mother of all Commissions of inquiry. In light of this, it will now be demonstrated that the function of establishing and promoting legitimacy remained strong within the TRC and its implementation.

In a country that was so deeply divided across racial lines, the ANC was viewed as the legitimate leadership amongst the majority black population which was reflected in their 1994 election victory. The depth of the division between racial groups coupled with democracy being ushered in through a stalemate rather than a military victory meant that, the white population which comprised of many who only knew a Nationalist government who was white, did not view this new "Black" ANC government as the legitimate leadership for them. In the case of South Africa, the winning of the election in 1994 was not enough to legitimise the ANC as the rightful leadership across the racial divide. Legitimacy used in this sense as, the recognition of a groups or entities right to govern. For a party who was a liberation movement and having only recently become a governing party, the ANC would realised that establishing political Legitimacy ought to be a high priority because Legitimacy can often be cast as a substitute for effectiveness. The ANC had never governed before and legitimacy creates a chamber of good-will which increases the willingness of citizens to accept weaknesses¹⁰⁷. The legal and institutional aspect of the TRC made it ripe for methods of establishing legitimacy through symbolic and suggestive mechanisms. Political and legal institutions are the custodians of the public political life¹⁰⁸. The high profile nature of the TRC made it even more important for legitimacy as it would have had ripples across the international community. The new government now has the platform to announce its arrival and establish a deeper legitimacy to its own citizens as well as the rest of the world.

¹⁰⁶ (Ashforth) op.cit

¹⁰⁷ Coicaud, J Legitimacy and Politics: A Contribution to the study of Political Right and Political Responsibility, Press Syndicate of University of Cambridge, Cambridge (2002)

¹⁰⁸ Ibid

The discussion in Chapter 1 plots the evolution of Commissions of Inquiry in South Africa during the 20th Century and reveals the way the state employed these Commissions in order to legitimate state schemes. The TRC signalled a break from the grand narrative of Commissions of Inquiry which saw at least in principle, a dedication and commitment to accountability. Also, this notion of accountability brought with it a new, citizen-centric outlook, in the way that the Commission went about its business. For the first time, the public were given the platform to appear in the hearing and allowed to make their voices heard. The discussion in this chapter however illustrates the way that the TRC was conceived not too be as dedicated to the stated accountability goal as one might think but rather held on to the trappings of promoting legitimacy for the new state. Because the TRC was such a unique and ambitious undertaking as well as not being purely a Commission of Inquiry but rather a project with a number of different objectives, it is hard to prove that the accountability deficit that stemmed from the amnesty hearings of the TRC had a causal effect on Commissions of Inquiry that came after it. However, there are a number of issues that surround the more recent Commissions of Inquiry that were examined in Chapter 2 that indicate a glaring lack of commitment to establishing an adequate accountability regime as well as remaining steadfast to the principle of using Commissions of Inquiry as a platform of state legitimacy.

The previous chapter examined the formal framework of the three more recent Commissions through the prism of their terms of reference. The discussion to follow will illuminate a number of aspects of the proceedings of these Commissions once its work had commenced. What has been illustrated in the discussion in this chapter regarding the TRC, was that it was not designed in a way that would be able to achieve adequate accountability measures within the process. The discussion to follow in this chapter will show that, despite the more recent Commissions having sound structural frameworks (which was illustrated in the previous chapter) for the achievement of justice and accountability, these Commissions have been marred by a number of procedural weaknesses which may have a serious impact on the way that these Commissions will ultimately report its findings. These weaknesses are aside from the fact that both the Marikana Commission and the Commission into the Arms deal have been fraught with delays and as it stands, both Commissions are way behind their scheduled conclusions.

Arms Deal Commission

The terms of reference and the motivation behind the appointment of the Arms deal were explained in Chapter 2. In short, the Arms deal Commission was appointed to investigate the rationale and outcomes of the now famous 70 billion Rand Arms deal. Chapter 2 illustrated the way that the Arms deal Commission was designed and structured which has been proven to be adequate in order to carry out the accountability demands of a democratic state. However, the Arms deal Commission has received a number of criticisms regarding procedural weaknesses since it began its work.

The allegations of fraud and corruption in the Arms Deal were brought to light in the main, by critics stemming from various areas. Most vocal of these critics being Andrew Feinstein, (former ANC Member of Parliament(MP) who resigned after he alleged that there was a number of attempts to stifle investigations into the Arms procurement package from the ANC in Parliament) Paul Holden and Hennie van Vuuren (co-authored a book *Devil is in the Detail : How the Arms Deal Changed everything*, which was an expose' of the inner-workings of the deal) and Terry Crawford-Browne (a retired Banker who wrote an expose on the Arms deal called *Eye on the Money*. Andrew Feinstein, Hennie van Vuuren and Paul Holden are now critics of the Arms Deal Commission as well and object to a number of procedural issues within the Commission by virtue of their engagement of the Commission as witnesses. The Commission consists broadly of Supreme Court Judge, Seriti who is the Chairperson, Judge Legodi and Judge Musi. Witnesses consist of either those who have been called "critics"(Holden, Feinstein, Dr Richard Young), or individuals from the government who were involved in the deal as well as those individuals affiliated to the companies who were a part of the deal. Other actors in the Commission are known as evidence leaders who gather, compile and analyse evidence found in the information submitted by witnesses¹⁰⁹.

There have been a number of criticisms levelled at the Commission. Some are directed at the supposed lack of independence of the Commission because the head of Legal matters of the Commission Advocate Mdumbe is also an official at the justice department of government. The credibility of the Commission was called further into question when the resignation letter of a member of the Commission Judge Legodi stated that his resignation was in light of him believing that Judge Seriti had a "second agenda". These allegations however have not been substantiated.¹¹⁰

The work of the Commission is divided into two different phases. The first phase deals mainly with the Commission gathering evidence from government officials who include the defence department and former Ministers like former Trade and Industry Minister Alec Erwin. The first phase of the Commission is meant to deal with the first part of the terms of reference for the Commission which is concerned with understanding the validity of the "rationale" of the Arms deal. The second phase of the Commission involves the Commission's engagement with evidence presented by those who have been dubbed "critics" of the Arms Deal which are represented by Feinstein, Holden, Crawford-Browne, Young and van Vuuren. This phase of the Commission is primarily meant to deal with the other part of the terms of reference which are everything around the alleged projected off-sets stemming from the procurement package¹¹¹.

The Commission has firmly set out the two different phases for the Commission and thus has made the decision to not allow "critics" to meet with the Commission's evidence

¹⁰⁹ Evans, S "Arms Deal Commission Hearing 'one-sided' evidence, say 'critics'", *Mail and Guardian Online* (22 October 2013) www.mg.co.za/article/2013-10-22-arms-deal-commission-one-sided

¹¹⁰ Underhill, G "Another Arms Deal Commission Resignation over 'Second Agenda' *Mail and Guardian online* (2 August 2013) www.mg.co.za/article/2013-08-02

¹¹¹ (Evans) op.cit

leaders to provide evidence in the first phase of the Commission. Feinstein was quoted in the Mail and Guardian explaining that “critics” would only give evidence in late 2014 as part of the second phase of the Commission. The following quote is from Feinstein in response to this,

“My concern with this decision and corollary to have only government people give evidence in phase one of the hearing and not on the numerous corruption allegations, is that we have many criticisms of the rationale of the Arms deal and the way this rationale was realised.” “We should have had the opportunity to put these concerns to those who appeared and we assume that some of the key people that have or still will give evidence in this first phase will be recalled in phase two when allegations of corruption are heard”¹¹²

Feinstein seems to have a valid concern with regard to the kind of information that is being allowed to be processed by the Commission in the first phase of the Commission. There is clearly a very strong question as to the actual motivation behind the Arms deal and the Commission should be balanced in the way that it processes the information in the Commission. It is also important to understand that despite the fact that the Commission has been broken up into two phases, these phases are not mutually independent. Each phase of the Commission should be judged in its entirety as part of a broader investigation. If each of the phases are going to ensure that accountability will be achieved, then there should be an involvement by the “critics” in every step of the Commission including the phase where the Commission attempts to establish the rationale behind the arms deals and the merits thereof. There may be evidence that could have been submitted to the Commission that would have been useful in trying to establish the merits behind the “rationale” to conduct the Arms deal and the “critics” may have been able to submit evidence that refutes evidence brought up by witnesses in this phase (who are mainly government officials and members of the firms that government members interacted with during the deal).

There have also been criticisms aimed at the Commission with regard to the manner in which the information being processed by the Commission is dealt with. There have been routine complaints from the legal representatives of “critics” regarding the access to information. There have been complaints from the Lawyers for Human Rights (LHR) who represent Feinstein, van Vuuren and Holden (who made a joint submission to the Commission) concerning their access to the relevant documentation in order to conduct a thorough cross-examination of witnesses from the Government’s department of Trade and Industry. As explained above, the Commission is divided into two phases. Those witnesses who wish to cross-examine phase 1 witnesses must apply to conduct an examination. The LHR claim they were given three days to go through the relevant information because the relevant documents were only provided the Friday before, what was meant to be a Monday cross-examination. The LHR believes that the information in

¹¹² Evans S “Arms Deal Critics: Seriti Commission Must Continue” *Mail and Guardian Online* (27 February 2014) www.mg.co.za/article/2014-2-27

this phase is totally one-sided because there is no question as to the validity of the information being provided which may colour the way the Commission might interpret the “rationale” behind the Arms deal¹¹³.

Another criticism of the Commission is specifically with regard to “classified” information. The issue of the classification of documents was the main reason that the Commission adjourned in August 2013. On Monday 17 February 2014 the Commission announced a brief adjournment in the proceedings in order to declassify information once again. Alec Erwin who is the former Minister of Trade and Industry, was testifying in the Commission. The LHR applied to cross-examine Mr Erwin regarding the 1999 Arms deal affordability report which was submitted as evidence to the Commission in January 2013 as well as the projected off-sets that were meant to emanate from the Arms deal. This report however, remains classified despite it having been in circulation after it was leaked. The Book that Holden and van Vuuren co-author has a chapter dedicated to this report which contains an analysis of the report and the projected off-sets. Alec Erwin was not cross-examined on the veracity of his claims made in his testimony nor in the affordability report, and the LHR have claimed that Judge Seriti was not pleased that the critics were in possession of classified information¹¹⁴.

The issue of declassification of documents came up repeatedly during the commencement of work for the Commission. Feinstein believes that Seriti should have dealt with this as the information found in this classified documents are central to the allegations levelled at the South African government in this Arms Deal. However, for Feinstein to expect Seriti to have dealt with classified documents would have been problematic as it is against the law for the witnesses to have had the documents in the first place even though they might already be in the public domain.

The Arms Deal Commission has received numerous scathing criticisms that all call into question the fairness and impartiality of the processes within the Commission. Because the Arms Deal Commission is concerned with the unethical behavior of people in government, the obvious criticism relates to the Commission being used to establish legitimacy of certain state actions which is of course at odds with the pursuit of accountability which a Commission of Inquiry is meant to be engaging in.

Marikana Commission

The Marikana Commission of Inquiry was appointed by the President of the Republic of South Africa and has retired Judge Ian Farlam as the Chairperson of the Commission. The Commission’s mandate is to “investigate matters of public concern arising out of the events at the area commonly known as Marikana Mine in Rustenburg, North West Province from Saturday 09 August- Thursday 18 August, 2012 which led to the deaths of

¹¹³ (Evans) op.cit

¹¹⁴ Evan, S “Arms Deal Postponement exposes Commissions flaws” Mail and Guardian online (18 February 2014) www.mg.co.za/article/2014-02-18

approximately 44 people, more than 70 persons being injured, approximately 250 people being arrested and damage and destruction to Property¹¹⁵.”

It must be kept in mind that the appointment of this Commission came after great public and local and international media outcry for accountability measures to be taken with immediate effect after this tragedy. It should also be noted that that the tragedy at Marikana was the most serious instance of state-sanctioned violence on the South African public since the 1960 Sharpeville Massacre. The Sharpeville massacre was a landmark moment in South Africa’s history which had a great hand in the adoption of the armed struggle of the liberation movements, widespread stay-away’s and boycotts, the banning of the ANC and the Pan Africanist Congress of Azania (PAC) and the beginnings of widespread economic sanctions on South Africa¹¹⁶. Time will only tell whether the massacre at Marikana will be the watershed moment in South Africa that the Sharpeville incident was because to date, the only consequence of the tragedy has been the establishment of the Commission which has, like the Arms deal Commission, suffered a number of criticisms.

The first criticism that must be expounded on in this discussion is the decision by the Commission to continue with proceedings despite the family members of deceased miners being absent from the hearing. On the 1 October 2012 the Commission held its first day of hearings and when Commission member Advocate Tokota read the names of those who died, and asked who of their family members were present at the hearing, no one stood up because they were not there. Apparently, family members of the deceased miners were not there because they were not invited or notified by either, the Commission or the South African government to attend the hearings. What was most noteworthy however, was that Judge Farlam opted to continue with the hearing regardless of the absence of family representatives of the dead miners. Advocate Ntsebeza who represents the families of 36 deceased miners called for postponement to ensure the presence of the family members but this was also denied. Later, following media outcry, the Commission chose to adjourn to ensure family members to attendance¹¹⁷.

The above decision by the Commission reflects the overtly bureaucratic manner with which the Commission has handled this delicate situation and points to a serious insensitivity. The most alarming thing about the decision to carry on without the presence of the family members is that it is an explicit divergence from the precedent set by the TRC with regard to the way that it treated the public and families connected to victims of violence. As shown in Chapter 1, the TRC’s decision to give families of victims a platform to be a part of the process of the Commission is shown to be a progression from the 20th century Commissions who were often seen as state exercises and not victim or citizen-

¹¹⁵ (Government Gazette) op.cit page 3

¹¹⁶ Bond P and Mottiar S, “Movements Protest and a Massacre in South Africa” *Journal of Contemporary African Studies*, Vol 31 Issue 2 (May 2013) pp283-302

¹¹⁷ Dugard J “Marikana Inquiry’s mistakes call for a rethink” *Business Day Online* (11 September 2013) www.bdlive.co.za/opinion

centric in its structure or procedure. The TRC altered that kind of approach to ensure that the public, in the form of families of victims, are part of the process. The decision to continue with proceedings with no regard for the families of the deceased is a serious regression of the gains made by the TRC, in the development of openness and inclusiveness of Commissions of Inquiry. The TRC as was shown earlier in this Chapter, was a practical example of the philosophy of transitional justice. Transitional justice is different from retributive justice because in a retributive system the victim is only a bystander in the process where transitional justice seeks to involve the victim in the carrying out of justice. The decision to continue with the proceedings in the absence of the families of victims, is a deviation from the principles of transitional justice that the TRC espoused.

The Marikana Commission, like the Arms Deal has suffered some setbacks that have halted the progress of the Commission's work. The issue around the funding for the legal representation of the injured (but not killed) miners has significantly stopped the processes within the Commission. On July 30, 2013, the High Court handed down judgment dismissing an application which was put forth by the legal representatives of the injured miners for the state to fund the legal team. On 19 of August the legal team found out that the Constitutional Court dismissed their application for leave to appeal the earlier High Court decision. On the 14 October 2013, the Pretoria High Court ordered Legal Aid SA to fund the legal representation of the injured miners. On the 15 October 2013 Legal Aid South Africa issued a statement that it would abide by the ruling but would seek legal advice on appealing the judgment. On 4 November 2013, Legal Aid SA applied for leave to appeal the High Court decision regarding the funding and on 11 November 2013, the injured miners applied for the lifting of the suspension of Legal Aid's funding. This occurred automatically when the group providing the funding seeks leave to appeal¹¹⁸.

The brief description of events above, occurred external to the actual process of the Commission but has evidently caused a number of delays. The legal counsel of the arrested and injured miners must be paid for their expert services. Of course, the group providing the funding to these miners is a state sponsored group referred to as Legal Aid SA. Legal Aid SA is a state sponsored institution that is meant to provide legal services for those who cannot afford legal service otherwise, which is accordance with section 35 of the Constitution which affords all persons the right to legal representation. On the 14 of October, the High Court ordered Legal Aid SA to fund the legal representation of the arrested and injured miners and proclaimed that it would be unlawful not to fund them. The Court made this decision on the grounds that Legal Aid's decision to fund the legal teams of the deceased miners but not those of the arrested and injured miners "cannot be justified and any rational basis"¹¹⁹.

In a Press release statement made on the 25 November 2013 Legal AID SA clarifies for the

¹¹⁸ <http://www.seri-sa.org/index.php/advocacy-8/marikana>

¹¹⁹ Legal-Aid SA Press Release Statement (15 October 2013) www.legal-aid.co.za

public, its decision to appeal the decision made by the High Court. Legal AID appeal the decision of the high court on the ground that the order was made despite the court not having evidence regarding the costs of the order and that it may seriously hamper the sustainability of the institution to provide legal assistance to other groups and people. Legal AID SA claim that the decision will negatively impact on its economic sustainability and that the decision “trespasses on the separation of powers”¹²⁰. On the trespassing of the separation of powers, Legal AID went on to say “In light of the fact that the Constitutional Court has already indicated that courts should not direct the executive arm of the State on how to deploy resources, our considered view is that the criteria set has a potential of instructing us on how to expend our funds”. Legal AID stated “it has the import of potentially opening the door to many other interested parties to make out a special case for legal representation and this will not be sustainable for the organisation....”¹²¹

Chief Executive Officer (CEO) for Legal Aid SA, Vidhu Vedalankar in the same press release went on to say “We furthermore hold the view that Section 34 of the Constitution does not find application in Commissions of inquiry as this section requires that there must be a ‘dispute’ that can be resolved by the application of law. Commissions of Inquiry are fact finding in nature and can only make recommendations. There is accordingly neither a ‘dispute’ nor an issue that is “resolved” by a Commission of Inquiry. The ambit of Section 34 has therefore been construed too widely”¹²². Section 34 of the Constitution is called Access to courts and it stipulates as follows: *Everyone has the right to have any disputes that can be resolved by the application of law in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum*¹²³

The statement released above is part of an issue that has been in the public discourse from the start of the Marikana Commission. Whether one agrees with Legal Aid’s decision to appeal the decision of the High Court, what is not contestable is that Legal Aid SA (which is an institution that is propped up by the state) takes a particular view on Commissions of Inquiry. In the part of the statement that refers to the way that Commissions of Inquiry are unable to resolve disputes and that they are “fact finding” in nature, reflects a particularly narrow view of Commission’s such as these. Some might say that this is a conveniently narrow view because to date, there has not been any civil or criminal matters heard in court regarding the tragedy at Marikana and therefore, the Commission of Inquiry provides the only legal recourse for the living miners involved in this tragedy. Furthermore, it is worrisome to see a state-sponsored institution having such sentiments towards a Commission of this significance. It is worrying because it reflects a disregard as to its importance on providing a resolution around the facts of the tragedy as well as the accountability mechanisms within such a Commission. I would contend that to appeal to such a narrow view of Commissions of Inquiry in order to argue

¹²⁰ Ibid

¹²¹ Ibid

¹²² Ibid

¹²³ Constitution of the Republic of South Africa Act 108 of 1996

a matter of legal principle, reflects a sentiment of not only indifference towards the justice measures that could come from such institutions but also a complete rubbishing of Commission's ability to provide justice to the victims of the tragedy the Commission is meant to report on.

The discussion above illustrates all the factors that lead to delays in the Commission carrying out its work. It must be conceded that due to the sheer vast breadth of stakeholder involvement in this tragedy, there would likely be a great amount of evidence to compile and analyse. However, the time-frame in which this Commission is meant to be reporting on is much smaller, if it were to be compared to the Arms Deal. The Marikana tragedy occurred in 2012 and still the work of the Commission has not been completed. The fact that the Marikana Commission has not completed its work is astounding if we compare that to the work of the TRC which was meant to go through 30 years of information compared to the Marikana Commission which is only looking at a 3 week period. More and more delays may increasingly call the credibility of the Marikana Commission into question. One of the most important implications of the delays in the work of the Commission is that as time passes less and less media coverage is focused on either the event at Marikana in 2012 or the Commission that is meant to report on the matter. This lack of media coverage and dwindling public interest could have a negative effect on calls for accountability because it escapes from the public discourse and the consciousness of the public, as several public figures have asserted in the media.¹²⁴

The work of Adam Ashforth in *the Politics of Official Discourse*, asserts that Commissions of Inquiry are not merely modes of scientific investigation but are also performances that serve to "authorise" a form of social discourse¹²⁵. Ashforth believes that this authorisation is made valid in these Commissions, which allows for the discarding of the information that does not come from the Commission's and therefore are not an "official" version of the event or findings. It is crucial therefore, that the Marikana and Arms Deal Commissions of inquiry carry out their work to the highest standards of excellence because these Commission have great significance in the narrative of both the allegations of fraud on the part of the government as well as the killing of many people at the hands of the police. The way that these Commissions have carried out its work could have a serious impact on the accountability measures that are meant to stem from such Commissions and the legitimacy of state actions. These Commissions of Inquiry are the providers of the "official" truth regarding these events. If the credibility of these Commissions is totally lost, then not only have they not satisfied the accountability demands of the public, but the version of events that will be presented by the Commission will only serve to legitimate the state's actions. These state-actions are in the form of the officials alleged to have been acting unethically in the Arms Deal and the police who killed the miners in Marikana and perhaps to a lesser extent Legal Aid SA.

¹²⁴ Dugard J and Tissington K, *Sunday Times* (30 June 2013).

¹²⁵ Ashforth op.cit

Conclusion

Chapter 1 of this research report provides an overview of the significant Commissions of Inquiry that took place during the 20th Century. The discussion in the Chapter explains the political climate of the period and showed how these Commissions were reflective of the political currents that were dominant at the time.

The terms of reference of these 20th Century Commissions, as described in Chapter 1, provided insight into the way that the Commissions sought to allow the state to overcome any political and economic obstacles in order for it to achieve the desired ambitions. What is most apparent from the discussion is that, the Commission of Inquiry in the 20th Century was used to try and understand the “Native” as well as to identify clear methods, based on the political and economic realities prevalent at the time, the way that the state was to engage with this segment of society. The work of Ashforth shows that the motivation behind the Commission of Inquiry was so the state could draw understanding on how to maintain the subjectification of the “Native”.

The examination of 20th Century Commissions of Inquiry was able to highlight the fact that Commissions of Inquiry were mainly state-directed exercises. These Commissions were by and large not concerned with engaging in the citizenry in any meaningful way and the Commission of Inquiry was used as a platform to either underpin policy or to be the scientific basis upon which policy will later be designed.

The TRC, as Chapter 1 illustrates, signalled a break from the previous tradition of Commissions of Inquiry on three areas. The first break with the grand tradition of Commissions of Inquiry by the TRC is illustrated by the fact that the TRC seems to have been relatively independent of the government with regard to the composition of its membership. The perceived independence of a Commission such as the TRC is significant to its perceived successes of such platforms and institutions. The second break from earlier Commissions by the TRC is the way that the information about and concerning the Commission was disseminated. The public were able to have a substantial access to information regarding the hearings as well as other work conducted by the Commission. Commissions of Inquiry in the earlier part of the 20th Century is characterised by secrecy and a lack of public access to work of the Commission prior to the official report that was publicly accessible. The third way in which the TRC was able to diverge from the previous regime of Commissions of Inquiry was by virtue of the nature of the exercise being a public endeavour rather than merely a state-exercise. The account of the older Commissions illustrates the way that Commissions were used by the state in order to carry out a specific function which was generally concerned with the formulation of state policy. The TRC was not a purely state exercise. The discussion shows that the TRC was concerned with social cohesion and public engagement and was not merely an instance of the state talking for and about the public in the same way as the earlier Commissions did.

Chapter 2 looks into the structural make-up of the TRC and other post-apartheid Commissions through their terms of reference. The discussion illustrates that the TRC's terms of reference were broad and extensive. The terms of reference of this particular Commission reflected the broad nature of the mandate the TRC was trying to fulfil. The breadth of the TRC's terms of reference was problematic. This is because the terms allowed the Commission to interpret important definitions. This was especially apparent regarding its interpretation of a "victim" and "gross human-rights violations where scholars have argued that the Commission interpreted those too narrowly. This may have impacted on the way that the TRC was later to report on its findings. Later in the Chapter, three more recent Commissions were examined from a structural perspective. This was done through the prism of their respective terms of reference. What could be extracted from the examination was that these terms of reference were seemingly well structured with regard to each Commission being afforded the ability to address the immediate issues that these Commissions were trying to investigate. The discussion of these Commissions revealed that Post-Apartheid Commissions of Inquiry were designed to investigate in a very narrow manner. These Commissions are only designed to address immediate issues and are not attempting to uncover the broader narrative that could have explained the fundamental reasons these Commissions were instituted in the first instance. The terms of reference of the Hefer Commission do not make provision for the Commission to investigate if Ngcuka is found not to have been a spy, what the underlying reasons why the individuals who accused him of being a spy did so in the first place. The Arms Deal Commission's terms of reference do not make provision for the Commission to investigate the allegations of the obstruction of investigations by elected representatives and the Marikana Commission's terms of reference neither makes provision to investigate the events in the lead up and immediate aftermath of the tragedy, nor the socio-economic conditions that compelled workers to strike in the first place.

The most significant conclusion that could be drawn by the comparative examination in Chapter 2 is that the terms of reference of the TRC were much broader than the narrow terms of reference found in the three contemporary Commissions examined. The broad terms of reference of the TRC reflects the wide-ranging objectives of the Commission. The narrowly defined terms of reference of the later Commissions analysed show that these Commissions are geared towards addressing specific events and allegations and are not focused on gaining an understanding of the society more widely.

Chapter 2 thus examined the structural make-up of the chosen Commissions while Chapter 3 looks at the processes of justice and accountability within the TRC, Marikana and Arms Deal Commissions.. The discussion around the TRC draws on debates regarding the employment of restorative justices models versus the use of a retributive justice model for the TRC process generally and the amnesty hearings more specifically. Through an analysis of the arguments put forth concerning the TRC process, as well as an analysis of the political climate at the time, the report makes the conclusion that the TRC sacrificed the fullest potential of accountability for a competing objective which was the legitimacy of the state and by extension the ANC led government. The discussion then

moved on to unpack certain aspects of procedural weaknesses in the three contemporary Commissions. These procedural weaknesses are not only interesting because it is juxtaposed with the strength of the structural design illuminated in Chapter 3, they may also serve as indicators to the milieu of weaknesses in accountability mechanisms in the South African institutions of justice. It is useful to bear in mind that Commissions of Inquiry are instituted when the regular avenues (like the courts) of resolving issues are not able to bring about a resolution or adequate accountability to the given situation. It is therefore crucial that these Commissions are able to carry out its functions to very high standards of excellence.

Chapter 3 was able to show that the credibility of the Marikana and Arms Deal Commissions are being called into question. The perception that these kinds of platforms are credible and legitimate go a long way to the continuation of public trust in the democratic system and the institutions that are meant to uphold it. Therefore, any dominant perception of the credibility of such institutions does not bode well for the accountability mechanisms that is meant to flow from these platforms as well as future public engagement with these platforms. .

From the conclusions drawn in this study, it could be argued that despite the obvious racist and oppressive intentions of 20th Century Commissions of Inquiry, they seemed to have been much more prospective in outlook if compared to Commissions of Inquiry in the post-Apartheid era. They were geared towards grappling with the broader society at the time to address future issues. Post-Apartheid Commissions make very little attempt at understanding broader societal questions and are geared towards a narrow examination of events. The TRC shares commonality with its predecessors because it too was trying to make sense of the broader social context although many would argue that it was too narrow. It however diverges from its 20th century counter parts with respect to the fact that it was retrospective rather than geared towards looking to the future. The TRC shares in common with the Commission's that came after it this very same outlook. The TRC share many similarities in structure with the more recent Commission's through formal means but it seems that the TRC's engagement with its citizens could stand alone. While it could be argued that the TRC set a precedent for weak accountability measures in platforms like Commissions of Inquiry, it is hard to prove. What can be argued however is that, if we are to take the Arms Deal and Marikana Commission as examples, then the gains made by the TRC with regard to the way that it engaged with the public is in jeopardy..

This study has shown that despite the fact that 20 Century Commissions were designed to subjectify a large portion of South African society, the state was nonetheless able to use Commissions of Inquiry to investigate social problems. The information gained from these Commissions could plausibly be used for purposes other than those of the state. If such Commissions were employed in a more open and inclusive way and designed to address future issues through an open platform, perhaps the outcomes could produce useful findings for state-society interface. The discussion has illustrated that despite the

democratic gains made since 1994, the Commission of Inquiry in general, is not easily divorced from being a state-platform and exercise. Therefore, while ostensibly they may be independent, inclusive and open, it they remain institutions that have the ability to generate official truths about events and social questions and by extension they too have the ability to be sources of legitimising practices of the state.

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