2 A long walk to justice

Archives and the truth and reconciliation process in South Africa

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“Without memory, there is no healing. Without forgiveness, there is no future.”

(Archbishop Desmond Tutu; Chair of the Truth and Reconciliation Commission)

Introduction

It has been more than 20 years since Archbishop Desmond Tutu handed President Nelson Mandela the main report of the South African Truth and Reconciliation Commission (TRC). The TRC had been appointed in 1995 to investigate human rights abuses during the apartheid era and it exposed the horrors of systemic torture, political oppression and economic deprivation. According to Justice Minister Dullah Omar, the TRC was a necessary exercise to enable South Africans to come to terms with their past on a morally accepted basis and to advance the cause of reconciliation.

The TRC will act as the prism through which to examine the struggle for human rights in South Africa at the dawn of democracy and its dual role of record-seeking and recordkeeping played in the process will be discussed. The National Archives of South Africa and its predecessor, the State Archives Service, had two fundamental roles in the process: to assist with the TRC's search for documentation and to archive the records of the TRC, once it had completed its deliberations. The TRC process rested on both the willingness of ordinary people to testify to their experiences and the availability of records. In addition, there is the complex question of access to the TRC records that also requires attention.

Background

To properly understand the context of the TRC, it is necessary to sketch the history of the deprivation of human rights in South Africa. The system of enforced segregation known as apartheid grew out of centuries of colonialism. Economic development was characterised by the exploitation of the African population as labourers on white-owned farms, in mines and

in industry. It was also characterised by the loss of land by black South Africans to white settlement and the curtailment of civil liberties. By the 1970s, 13% of the population controlled 87% of the land. Apartheid can be described as a vast social engineering experiment aimed at the complete separation of the races, inspired by the so-called Architect of Apartheid, Prime Minister Hendrik Verwoerd (Prime Minister 1958–1966).

In the 19th century, two British colonies controlled the South African coastline and two Boer republics controlled the interior. Traditional African societies were conquered, or otherwise absorbed into the colonial system. After a savage war between 1899 and 1902, the two former Boer republics and the two British colonies united as the Union of South Africa in 1910. This new British dominion reserved the franchise almost exclusively for whites, with the Coloureds (mixed race community) in the Cape Province retaining their colonial era voting rights. The African National Congress (ANC) was formed in 1912 to protest this situation. When the Afrikaner National Party took power in 1948, it set about rigidly imposing social and political segregation through legislation, the system described as apartheid. The first target was the voting rights of Coloureds and, after a prolonged constitutional struggle, they were deprived of their franchise in 1956.

The struggle against apartheid was long and multifaceted: military, political, economic, educational and religious. The record of human rights violations is equally varied. The first major campaign was against the carrying of identity documents, the so-called *dompas* (English translation: stupid pass). This prompted the adoption of the Freedom Charter in June 1955, which articulated a list of demands setting out a vision of a new, democratic South Africa, a vision that took until 1994 to realise.

On 21 March 1960, the Sharpeville Massacre took place when 69 unarmed protesters were killed by the police during an anti-pass law march. A State of Emergency was declared, and the era of peaceful protest ended abruptly. The ANC launched its campaign of armed resistance the following year and its leadership established a clandestine headquarters at Liliesleaf Farm in Rivonia, north of Johannesburg. Its location was betrayed to the police and a raid caught the main ANC leaders unawares, except for Nelson Mandela, who was already in jail for minor offences, but documents found during the raid implicated him in more serious activities.

The resulting court case, known as the Rivonia Trial, received international publicity and the apartheid government was widely condemned. The publicity may have influenced the judge in his sentencing, because he imposed life sentences rather than the death penalty. Then began the long years on Robben Island for Mandela and his comrades. By 1964, the apartheid regime had crushed all overt resistance and remained virtually all powerful until the youths of Soweto rose in anger in 1976. From 1976 until the release of Nelson Mandela in 1990, South Africa writhed in increasing turmoil.

During the leadership of PW Botha (Prime Minister 1978–1984; President 1984–1989), security regulations were tightened further and Botha declared that South Africa was under a “total onslaught” from liberation forces supported not only by communist regimes and liberated African states but also by the majority of members of the United Nations. The response of Botha and his colleagues was to devise a “total strategy”. This was given effect by the construction of a parallel state structure responsible to the State Security Council, rather than to the civilian Cabinet or parliament. The system was administered by the Security Secretariat, comprising the top brass in the military, the police and the intelligence services, who were collectively known as the “securocrats”.

Internal and external pressure had rendered apartheid unsustainable by the late 1980s, and in 1990 Botha’s successor, F.W. de Klerk (State President 1989–1994), released Mandela, unbanned the ANC and other liberation movements and opened negotiations with them. Apartheid was in its death throes.

The governmental system, from colonial to apartheid times, with its increasing obsession with racist and separatist ideologies and their regulation, generated records reflecting government control from the management of black labour, to the classification of people by race, to the operations of the security forces in oppressing the general populace. The obsession with racial separation at all levels meant that all government organs, from the headquarters in the Union Buildings to local town halls and police stations, generated vast quantities of records reflecting the complex and confusing hierarchies of government. This was exacerbated by the addition of the layer of securocratic bureaucracy imposed by the Botha Government as it struggled against apartheid’s increasing isolation.

Destroying the evidence

In July 1993, as the country edged painfully, but inexorably towards democracy, all government departments were instructed by the Security Secretariat to destroy all classified records received by them from other sources (with the exception of unaudited financial records). Anecdotal evidence exists that truckloads of records were dumped in the furnaces of the state-owned Iscor steel works. However, only the State Archives was empowered to authorise the disposal of records by destruction or other means, so the instruction could be and was legally challenged.

The State Archives was alerted to the existence of some surviving security records by a regional government office that had not received the circular and contacted the National Archives to request guidance. An alert archivist ordered the immediate transfer of the records to safety in the archives and these later provided crucial evidence for the TRC.

After the first non-racial democratic elections, the Government of National Unity took office with Mandela as president and F.W. de Klerk as one of the two deputy presidents. Addressing the legacy of past oppression was one of

the new government's urgent priorities. The functionaries and politicians of the apartheid regime wanted the past forgotten and for a blanket amnesty to be promulgated. On the other hand, many radicals preferred a Nuremberg Trials scenario – show trials of former oppressors that would satisfy their desires for vengeance.¹

The TRC, therefore, was inevitably the result of political compromises. It chose to focus on the surviving records of the security system, despite the systematic destruction of a huge body of state records and documentation as part of an attempt to remove incriminating evidence and thereby sanitise the history of oppressive rule. The reason for this was the TRC's very tight legislated time frame and its limited resources, given the enormity of the competing demands on a denuded fiscus. The departing apartheid regime had completely stripped the National Treasury of its funds and assets.

According to Marius Oosthuizen, "Simply put, understanding apartheid requires understanding how it worked."² He uses the example of how state direction of the vast Sasol synthetic oil-from-coal plant and the extensive Iscor steel works in the Vaal Triangle buffered the apartheid regime from many of the effects of international sanctions. He contrasts the access of white workers to cheap company housing, free education and other privileges with the black work force of migrant labourers living in single sex hostels, without their families, with minimal leisure activities and few educational opportunities. This played its part in "creating a generational and systemic tragedy, 100 years in the making." It is no surprise that the townships around the Vaal Triangle, such as Sharpville, were at the epicentre of the anti-apartheid uprisings.

A more focused example is that of the National Prosecuting Authority's Missing Persons Task Team. Established in 2005, the Task Team's purpose was to locate the remains of missing persons identified at the TRC hearings, by 2015 it had located 98 bodies.³ The team was heavily dependent on records and interviews for its clues; they combed through TRC records, court transcripts, police dockets, mortuary books and cemetery records.

These two examples, one economic and one harrowing, illustrate the imprint of state oppression on the South African archival record: it is not only the records of the organs and actors of government but also those of the state-owned enterprises, private enterprise and the mundane series of local records which need to be interrogated in order to understand the impact of apartheid on human rights: court records, police records, local records (births, death and marriages), diplomatic, political, military and para-military records.

The TRC, the National Archives and sensitive records

The example of South Africa's TRC and the role of the National Archives of South Africa (successor, in 1996, to the apartheid "State Archives") will be used to illustrate some of the dangers that human rights-related

records are subjected to during times of major political transition. It was well understood by archivists and historians that a careful analysis of the archival record would lay bare the chief features of the apartheid system and contextualise the uneven development, social contradictions and anomalies in South Africa's first decade of democracy. In 1994, this was more than just an intellectual need, it was a political imperative, born of the processes of conflict and negotiation that led to the establishment of the democratic order. Those who had been oppressed, who had lost loved ones and whose lives and livelihoods had been destroyed, thirsted to know the reasons why.

The establishment of a mechanism to address the needs of the oppressed, without provoking the former oppressors into revolt and racial civil war, was essential. Therefore, the establishment of the TRC was one of the most important actions that the newly elected democratic parliament took in its first year in office. The newly created body was tasked with investigating the atrocities of the past; exposing the evils committed in apartheid's name and in the name of those struggling to overthrow the system; giving amnesty to perpetrators who fully disclosed their misdeeds (if such deeds had a political purpose) and building a database of those victims who required compensation or restitution in some way or another. The aim of the TRC was summed up in its name: to discover the truth and to seek to achieve reconciliation.

There were three aspects to the archival work of the TRC that are of relevance:

In order to fulfil its mandate to discover the truth about the apartheid past, the TRC searched for, and sometimes seized, many of the records of those involved in the apartheid security apparatus. This required the intervention of archivists in support of other investigators.

The TRC generated a vast amount of documentation during its lifespan in all modern media: paper-based; audio; visual; audiovisual and electronic, all requiring archiving.

The TRC made a number of archives-related recommendations that required a response from the National Archives of South Africa and other agencies. These are discussed in the Archival Platform report, *State of the Archives*, by Jo-Anne Duggan.⁴

The TRC's hunt for the archives of oppression

The TRC was hampered in its efforts to obtain documentation about apartheid atrocities by a lack of resources, staff, time and, more importantly, obstructionism from within the former security apparatus and other sections in the apartheid bureaucracy. Above all, it was severely hampered in its efforts by the previously mentioned massive illegal destruction of records ordered in the months leading up to the first democratic elections on 27 April 1994.

A former TRC official made the observation to this writer that perhaps the only offence that could conclusively be pinned on former State President F.W. de Klerk was ordering the destruction of State documents without following the requirements of the old State Archives Act (which provided for a modest fine for the illegal destruction of official records). A further observation is that the “whistleblower” on the destruction of security records was a member of the staff of the National Archives who went on to work with the TRC in its search for records.

The five-volume report of the TRC describes at some length the steps taken to search for records documenting the atrocities of apartheid: in situ inspections, correspondence with various agencies and, ultimately, the use of legal warrants to seize documents. The documentation that was located included:

- Surviving copies of records of the State Security Council and the parallel government of “securocrats” that swung the resources of the State behind the so-called total strategy
- Files on individuals from the Department of Justice (DOJ) section which authorised detention without trial and intrusive observation and eavesdropping
- Security Police files
- Military documentation
- Secret intelligence files from the apartheid era National Intelligence Service and its Orwellian-named predecessor, the Bureau of State Security (BOSS)

The National Archives seconded officials, including Verne Harris, to assist with this process.⁵ Harris subsequently exercised a considerable influence on the archives-related recommendations of the TRC. International experts, such as Trudy Huskamp Peterson, also advised the TRC on archival matters. Harris left the National Archives in 2001 to head the South African History Archive (SAHA), a non-governmental organization based at the University of the Witwatersrand (modelled on the National Security Archive in Washington, DC), which has been running a Freedom of Information project, centering on the TRC files and other documentation from the apartheid era. Various writers and political activists have subsequently claimed that much evidence was hidden from the TRC and only came to light later as a result of Promotion of Access to Information Act access applications submitted to the military, among others. The National Archives also managed to secure the transfer of files relating to political prisoners that were not part of the TRC archives, but were prison administrative records.

Archiving TRC records

The TRC closed its offices in Cape Town in 2001 and its records were transferred by overnight train to Pretoria, an exercise undertaken by the

police and military. The National Archives made special storage and security arrangements for the TRC records. The TRC's legislation had been amended to specify that the DOJ became its successor-in-title and this department assumed responsibility for its assets and liabilities, including its "intellectual property." Intellectual property was taken to include the TRC's records, although the TRC had itself recommended that these be taken to the National Archives. Nevertheless, on the recommendation of the security and intelligence services, the TRC records were placed in the National Archives. Access was a different matter given the role of the DOJ. Public access was therefore managed under difficult circumstances of dual control, inadequate and conflicting legislation, complicated bureaucratic requirements and very public acrimonious criticism by NGOs and academics.⁶ Notwithstanding these difficulties, the National Archives was required to play its integral and important part in the exercise of peoples' human rights.

The march of events, and the continuing processes of democratising South Africa, has overtaken some of the TRC's archival recommendations. One of the most important events was the passing into law of the constitutionally mandated Promotion of Access to Information Act (PAIA) in the year 2000. This must be seen as a giant leap forward, because it was competing with the more pressing human needs of access to housing, health, education, water and power.

In 2001, the TRC finalised its official work as its legal, time-bound, mandate had elapsed, and differences of emphasis appeared between the various agencies with roles to play in the follow-up work.

It is perhaps appropriate to list the other steps that have been taken by the National Archives to archive the TRC records and manage the accessibility to the records of human rights researchers and victims' families:

- A special section was established at the National Archives to manage the TRC records and the other security-related and sensitive records that were transferred to the National Archives in terms of the TRC's recommendations.

- Two former TRC officials were appointed as archivists to assist the National Archives with the processing and management of the records and to manage work with PAIA requests.

- Two strong rooms were equipped with additional security measures for storage of TRC and other sensitive records.

- A project was established to archive the electronic records of the TRC but languishes due to lack of funding.

- All TRC Commissioners were informed of their obligations to transfer official records to the National Archives, but there was little response.

- A joint committee was set up with the DOJ and with the National Intelligence Agency (NIA) to implement access requests to the TRC records in terms of PAIA.

More resources and trained personnel are required to complete the task. The budget for the National Archives does not match its legally mandated responsibilities, let alone allow it to fully carry out the idealistic recommendations of the TRC.

Accessing sensitive records

The South African National Archives Act of 1996 is in serious need of a complete overhaul to be fully compatible with the Constitution and laws on access to information, protection of privacy and personal data that flow from the constitution. One area that needs legal clarification is aligning the clear instruction of the archives law that records are open after 20 years, with the conflicting requirements of the other legislation.

The National Archives broadly applies PAIA as its primary guideline. The constitutionally mandated PAIA gives expression to a fundamental human right and, therefore, would supercede the National Archives Act should a legal, or interpretative, conflict arise. Arranging access to TRC records can be a problem because of the previously mentioned system of dual control with the Department of Justice. However, in order to reduce delays, the National Archives allows open access to all TRC records that relate to public hearings and non-confidential discussions.

Effectively, this means that only a minority of TRC access requests have to go through the dual committee system. Access to other sensitive records is dealt with in terms of PAIA principles. For example, a person may have access to their own records as a political prisoner, but access would not be granted to a third party unless the ex-prisoner gave his or her permission. Generally, co-operation between the National Archives, the military and the police on access to sensitive records is courteous, professional and helpful. This is essential in sustaining the role of the archives as an institution trusted by both the public and the organs of state.

One issue that is often not considered by politicians debating secrecy or privacy legislation is how long should the protections last? PAIA implies that restrictions are lifted after 20 years, which accords with the National Archives Act, but, as yet there has been no test case.

The “Right to Know” is one of the most broad and fundamental of human rights. In many ways it frames the relationship between the citizen and the State. In the South African Constitution, this is encapsulated in the Bill of Rights as the right to “Freedom of Expression,” which includes:

- a Freedom of the press and other media
- b Freedom to receive or impart information or ideas
- c Freedom of artistic creativity
- d Academic freedom and freedom of scientific research

The Constitution also provides a right of “Access to Information,” which stipulates that “Everyone” has the right of access to:

- a Any information held by the State
- b Any information that is held by another person that is required for the exercise or protection of any rights

These rights are implemented through legislation, but they are not absolute in all respects. Consequently, administering and interpreting them in the archival context requires a delicate balancing act. The ICA’s “Principles of Access to Archives” give professional operational guidelines which have been of great value to the South African National Archives. The United Nations Principles to Combat Impunity, drafted by Louis Joinet in 1997 and updated by Diane Orentlicher in 2005, emphasises that the Right to Know includes the duty of States to preserve memory.⁷ The transitional justice imperative of “memorialisation” (flowing from the four pillars of the Joinet Principles) compared with the pure archival imperative to collect, appraise, preserve and make accessible provides a useful illustration of the tensions between the recommendations of the TRC regarding the management of the TRC Archive and the legal requirements of the Archives Act and PAIA when dealing with requests for access. Without supporting the critical services that are provided by the National Archives, governments cannot support their citizens’ “Right to Remember.”

Duggan is, in her aforementioned report, highly critical of both the DOJ and the National Archives for their handling of the TRC records and applications for access to the records. The report also alleges that both entities used PAIA to block access to the TRC records. However, because civil society organizations repeatedly made their requests for access to records of confidential TRC hearings (the so-called Section 29 hearings), in terms of PAIA, this obligated the DOJ and the National Archives to consider the access requests strictly in terms of the requirements and the exemptions set out in PAIA.

As the “mere” custodian of the TRC records, the National Archives could not do much more than make suggestions regarding the implementation of access to the records. When PAIA requests for access to confidential TRC and other security records were received, the National Archivist was obliged to consult with the office of origin and give serious consideration to their views, regardless of personal and professional opinions. However, in 2010, the sensitive records section at the National Archives was instructed to give unfettered access to all TRC records, other than the originally confidential Section 29 hearings (which would still have to be accessed via the DOJ). This was to avoid following the cumbersome PAIA procedures.

Conclusion

The long walk to justice in relation to the archiving and access to the TRC records is not complete, but a great distance has been covered. The National Archives has secured the records of the TRC, although it has not secured the funding to fulfil all the optimistic wishes outlined in the TRC report. A stable access regime has been developed and as 20 years have now passed since the final report was submitted, the National Archives has, in terms of its own legislation, a strong legal case to become the sole authority responsible for the access regime.

This development has come at an opportune time politically as the government of President Cyril Ramaphosa is committed to restoring the rule of law, so the inertia and impediments of the past nine years are disappearing. The new spirit of energy abroad in South Africa should be harnessed to resolve the outstanding issues relating to the TRC records. Let us hope that this will mean that future generations will study the TRC records for inspiration rather than out of necessity for searching for clues as to the fate of missing loved ones.

Notes

- 1 *Report of the Truth and Reconciliation Commission of South Africa*, vol. 1, p. 5, para 20–21. Available at www.sahistory.org.za/sites/default/files/volume_1_1.pdf.
- 2 Oosthuizen, M. 2019, “How South Africa Can Do Better at Reversing Apartheid’s Legacies,” *The Conversation*, 16 May. Available at <https://theconversation.com/how-south-africa-can-do-better-at-reversing-apartheids-legacies-116600?>.
- 3 Van Der Leun, J. 2015, “The Odd Couple: Why an Apartheid Activist Joined Forces with a Murderer,” *The Guardian*, 6 June. Available at www.theguardian.com/global/2015/jun/06/odd-couple-apartheid-activist-madeleine-fullard-convicted-policeman-eugene-de-kock.
- 4 Duggan, J., comp. 2015, *State of the Archives: An Analysis of South Africa’s National Archival System, 2014*. The Archival Platform, Cape Town. Available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/150901archives.pdf>.
- 5 Verne Harris: Archivist; Director of Archive & Dialogue – Nelson Mandela Foundation; Hon. Research fellow UCT: seconded to the TRC; worked for South African History Archives; Deputy Director National Archives South Africa; widely published writer on archival matters with several awards to his credit.
- 6 This is reflected in the paragraphs of the TRC report quoted in note 1.
- 7 Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>.

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