



# STATE OF HUMAN RIGHTS

## Transitional justice and the unfinished business of the TRC

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### CONTEXT

This morning I want to reflect on the right to dignity as a self-standing right. In this talk I hope to display how this right, that each family member of victims of apartheid murders possesses, has been corroded through the passage of time. At the outset, we must distinguish between dignity as a right in the bill of rights from dignity as a constitutional value.

Section 1 of Constitution states that South Africa is founded on the value of human dignity. Section 7 states that the Bill of Rights affirms the value of human dignity. Detainees are entitled to conditions consistent with human dignity. Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity. In section 39, when interpreting the Bill of Rights a court must promote the values of an open and democratic society based on values such as human dignity.

But as a right, everyone has a right to dignity. The state has a constitutional obligation to respect, protect, promote and uphold

this right to dignity. Justice O'Regan in *S v Makwanyane* stated that "recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern". She went on to state that:

"Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new constitution."

It is within this context that I want to reflect on the Truth and Reconciliation Commission (TRC) process, its recommendations, and how the unfinished business of the TRC has persistently and slowly corroded families' right to dignity.

## HISTORY OF TRC AND ITS RECOMMENDATIONS

The epilogue to the interim Constitution expresses a philosophy of national unity and national reconciliation. These two concepts are what drove the vision of the TRC. The Interim Constitution stated that:

“The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society... In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives”.

The TRC Act, and the process it set out, was challenged as unconstitutional in *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others*.<sup>1</sup> In particular, the notion of amnesties for perpetrators of heinous acts was challenged as inconsistent with the Constitution. But the Constitutional Court found it to be squarely constitutional because it did not absolutely deprive victims of the right to prosecution in cases where amnesty had been refused. Prosecution was still on the table for those who did not apply and those whose amnesty was rejected. The Act reflected on the aims the TRC sought to achieve in light of the history of South Africa.

And laudable aims it had. Apparent in those aims was to deal with victims and their families in a manner that upheld their “civil dignity”. For example,

- one of its objectives was establishing and making known the fate or whereabouts of victims and restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims and by recommending reparation measures in respect of them;
- one of the functions of the TRC was to make recommendations to the president on the policies and measures taken in granting reparations, with the aim of restoring the civil dignity of victims;
- and lastly, victims, which was defined in the Act to include family members, were to be treated by the TRC with compassion and respect for their dignity.

Most certainly dignity as a value permeated the TRC process. But the process was well aware and empathetic to victims’ right to dignity within the context of our history.

In its final report, released on 21 March 2003, the TRC stressed that amnesty should not be seen as promoting impunity and highlighted the imperative of “a bold prosecution policy” in those cases not amnestied to avoid any suggestion of impunity, or of South Africa contravening its obligations in terms

of international law. After all, many of these crimes were of a serious nature such as murder, enforced disappearance, torture, and abduction. Some could amount to crimes against humanity. Most of these crimes were concealed in a system where law enforcement and the judiciary worked together under the spell of parliamentary sovereignty to achieve the objectives of apartheid. Families would never know what happened to their family members; magistrates would rule that deaths in detention were a result of suicide; murders would be blamed on black-on-black violence between factions.

The TRC was a process of unravelling all of that, with the aim of healing and affording victims and their families the truth of what really happened. It was for the purpose of respecting a human’s intrinsic worth to know the truth. But for those who did not apply, were rejected or refused to apply, it was also a respect and recognition of victims’ intrinsic worth to have a bold prosecution policy constructed.

## NKADIMENG AND THE FIRST AMENDMENT TO THE PROSECUTION POLICY

Amendments were made to the NPA’s prosecution policy after former president Mbeki in 2003 addressed the findings in the TRC final report. He stated that, while a new TRC could not be initiated, the NPA was permitted to negotiate with individuals who had information which could help to uncover the truth and make alternative arrangements that were permitted by law.

Now Minister Nkademeng and the widows of the Cradock Four challenged these first amendments to the NPA’s prosecution policy in *Nkademeng and Others v National Director of Public Prosecutions and Others*.<sup>2</sup>

Part of this policy dealt with prosecution of cases arising from conflicts of the past which were committed before the 11 May 1994. The policy was challenged on the basis that it introduced a prosecutorial indemnity for those facing prosecution or those who sought to enter into an arrangement with the NPA. The decision to prosecute pre-1994 crimes was based on a large and long list of criteria. It was argued that its effect was a rerun of the TRC. But the policy was declared unconstitutional, with the court stating that it was a real threat to the applicants’ constitutional rights.



One of the reasons this policy was challenged was because of the threat that suspects not granted amnesty could now have a new opportunity to be protected from prosecution. It meant, unlike what the TRC aimed to achieve, families were left unseen and unheard and their intrinsic worth to know the truth and see justice slowly began to corrode.

### **MBEKI PARDON PROCESS**

But it does not stop there. On 21 November 2007, former president Mbeki then announced a special dispensation of pardoning for those who claimed that they were convicted of offences that were politically motivated. It was aimed at dealing with the “unfinished business” of the TRC. This “unfinished business” included those who did not participate in the TRC process for whatever reason.

President Mbeki said:

“As a way forward and in the interest of nation-building, national reconciliation and the further enhancement of national cohesion, and in order to make a further break with matters which arise from the conflicts of the past, consideration has therefore been given to the use of the Presidential pardon to deal with this ‘unfinished business’.”

He created a reference group who would make recommendations to him. He pledged this process would be guided by:

“the principles and values which underpin the Constitution, including the principles and objectives of nation-building and national reconciliation; and uphold and be guided by the principles, criteria and spirit that inspired and underpinned the process of the Truth and Reconciliation Commission, especially as they relate to the amnesty process.”

What then became apparent was that the process excluded victims from participating. In fact, in 2009 the then president declined the request for victim participation. An urgent interdict against president Mbeki was sought preventing him from granting any pardons in terms of the special dispensation process until the finalisation of the main application. The now Gauteng High Court granted this interim interdict. However, this interim interdict was appealed before the Constitutional Court in *Albutt v Centre for the Study of Violence and Reconciliation and Others*.<sup>3</sup>

In *Albutt*, the court stated that “to pass constitutional muster ... the President’s decision to undertake the special dispensation process, without affording victims the opportunity to be heard, must be rationally related to the achievement of the objectives of the process”. The objectives sought by the special dispensation were national unity and national reconciliation.



Mbulelo Goniwe, Madoda Jacobs, Fort Calata and Matthew Goniwe in their home township of iLingelihle in 1984. Calata and Matthew Goniwe were two of the group that became known as Cradock Four.

The court found that these objectives were the same objectives of the TRC and that victim participation was fundamental and integral to the process of the special dispensation. These pardons and the special dispensation were unconstitutional. Why? Because, again, victims and their families are left to feel unseen and unheard. They were left to question their worth within a system professing to tell them the truth and offer justice to those who did not.

In 2021, Joao Rodrigues, one of the accused in the Ahmed Timol re-opened inquest, appealed to the Supreme Court of Appeal for a permanent stay of prosecution. In *Rodrigues v National Director of Public Prosecutions and Others*<sup>4</sup> the SCA recorded that between 2003 and 2017, the executive adopted a policy decision not to prosecute TRC cases. The SCA stated that it was “perplexing and inexplicable why such a stance was taken both in the light of the work and report of the TRC advocating a bold prosecutions policy, the guarantee of the prosecutorial independence of the NPA, its constitutional obligation to prosecute crimes and the interests of the victims and survivors of those crimes”.

Within this time, families were made to believe that their interests were being looked after, that their civil dignity and dignity were respected and protected and that steps were taken to prosecute those suspects. But this unveiled the complete opposite.

Incidentally, from 2017 onwards, the Ahmed Timol inquest, Neil Agget, Imam Haroon, Dr Hoosen Haffeejee, the Cradock Four and many others have since been re-opened. These inquests, some still before courts, are faced with perpetual delays. Now, the delays are complicated by the death of many of those who ought to have faced prosecution.

In May 2025, President Ramaphosa established a Commission of Inquiry into the delays in investigation of TRC cases. This was a result of a constitutional damages claim made by the families of victims who died at the feet of apartheid. The commission is yet to start and the damages case is still ongoing, with the president now opposing the damages component.

**REFLECTION**

When reflecting on the state of human rights from a transitional justice and human rights point of view, the common thread is the infringement of the right to dignity that each victim and their families have faced for decades. It is the utter helplessness, despondence, rage, fear, disgust, sadness, all bundled together that stands as a mirror against the state's inaction to prosecute and its efforts to politically interfere. Dignity as a value, which ought to permeate the actions of the state was lost when on multiple occasions pardons in one form or another were offered.

Dignity is lost when the offer for immunity is made without the participation of the families of victims. Dignity is not accounted for when policies are published that create an insurmountable obstacle to prosecution. And yet it was dignity, as a right and as a value, that the TRC was founded upon. It reflected upon the indignity faced for hundreds of years of colonialism through to apartheid. Even when amnesty was offered, it was offered on the basis that families will find dignity in learning the absolute truth about the fate of their loved ones.

This is the litmus test that I propose we use when asking ourselves where we are now. *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others*<sup>5</sup> is a case that examples dignity as a self-standing right, not a value that is read through other rights or a value that defines how state actors should conduct themselves. It is not a right which is read with other rights. It is a right in and of itself and we must enforce the right as a self-standing one.

The very fact that a constitutional damages case is before court decades after the TRC process is testimony to the indignity families are still facing when seeking justice for their loved ones. We do not speak enough about this in law, but to feel hurt, betrayed, abandoned, lost and confused as a result of steps taken by the state to deny you access to the truth and justice, are symptoms of our right to dignity being infringed.

In closing, if the question for today is "what is the current state of human rights?" I answer by reflecting on Justice O'Regan's observation that dignity is the touchstone of our new political era. And since we have seen the prolonged indignity of those that have waited for justice and seen perpetrators dying, I argue that the state of human rights in the transitional justice space and specifically within the unfinished TRC business is lacking. Time is now genuinely of the essence to restore whatever hope there is left. Otherwise, this right will be infringed in perpetuity. **A**

**Notes**

- 1 *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* [1996] ZACC 16.
- 2 *Nkadimeng and Others v National Director of Public Prosecutions and Others* (32709/07) [2008] ZAGPHC 422.
- 3 *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC).
- 4 *Rodrigues v National Director of Public Prosecutions and Others* [2021] ZASCA 87.
- 5 *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936.

