■ artículo

The Interrelationship of Nation Building, Reconciliation and Guarantees of Non-Recurrence (or Non-Repetition) of Human Rights Violations Using the South African Transition as an Illustration: How Victim Rights and Needs Can Be Better Achieved

La interrelación entre la construcción de la nación, la reconciliación y las garantías de no reincidencia (o no repetición) de las violaciones de los derechos humanos a la luz del ejemplo de la transición en Sudáfrica: cómo mejorar la satisfacción de los derechos y necesidades de las víctimas

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resumen

Lidiar con las violaciones de Derechos Humanos cometidas en el pasado está, hoy en día, en la agenda de muchos países. En aquellos Estados donde ha habido división e inestabilidad, y ha habido procesos exitosos de transición hacia democracias más fuertes y respeto por los Derechos Humanos, en ocasiones y con el pasar del tiempo, vuelven a emerger dichas violaciones en mayor o menor medida que antes. Como consecuencia, en numerosos casos, los problemas vuelven a surgir, y hay un retroceso en la cultura de los Derechos Humanos que estaba en evolución. En este contexto, las prácticas de reconciliación se han examinado de forma extensa, con clara atención a la necesidad de la verdad, justicia y reparación para las víctimas. Sin embargo, poca atención académica o de otra índole se ha prestado hacia cómo la construcción nacional y los procesos de reconciliación pueden promover garantías de no repetición o de no recurrencia de abusos de Derechos Humanos. Aunque estas son necesidades importantes para las víctimas, han sido insuficientemente estudiadas y entendidas de forma inadecuada. El modelo sudafricano es un ejemplo para mostrar y ampliar la visión sobre estas cuestiones. Así, este artículo examina la transición de Sudáfrica para determinar cómo la construcción nacional, la reconciliación y la promoción de la democracia promueven garantías de no repetición o no recurrencia de violaciones de Derechos Humanos. También se discute cómo interactúan y se relacionan con otras cuestiones, por ejemplo, en cómo los procesos de democratización, que inclu-

yen la redacción de una constitución con nuevos derechos y protecciones, pueden ayudar a este respecto. También se pone de relieve el papel de las Comisiones de la Verdad y de Reconciliación.

palabras clave

Víctimas, Derechos Humanos, justicia transicional, garantías de no repetición, no recurrencia, reconciliación, construcción nacional, reconstrucción del Estado, Estado de derecho, democratización, reforma institucional.

abstract

Dealing with past human rights violations is now an agenda item in many countries. In such states where there has been division and instability, and processes to attain greater democracy and human rights are successful, at times, and over time, human rights violations re-emerge to a lesser or greater extent than before. Thus, in a number of cases problems resurface, and there is a slide backwards in the human rights culture that has developed. In this context, while reconciliation practices have been extensively examined, with much focus on victims' need for truth, reparations and justice, relatively little academic or other attention has been paid to how nation-building and reconciliation processes can promote guarantees of non-repetition or non-recurrence of human rights abuses. These are important needs of victims. They have been insufficiently studied and are inadequately understood. The South African model is used to illustrate and amplify the issues. This article examines South Africa's transition to determine how nation building, reconciliation and promotion of democracy advance guarantees of non-repetition or non-recurrence of human rights abuses and how they are connected and overlap with a range of issues. Issues discussed including how democratisation, including the drafting of a constitution, containing various rights and protections, can assist in this regard. Also focused on is the role of the Truth and Reconciliation Commission.

keywords

Victims, transitional justice, guarantees of non-repetition, non-recurrence, reconciliation, nation building.

1.   Introduction

This article examines how victim's needs to non-repetition, sometimes called non-recurrence of human rights abuse can be enhanced using the various tools that promote democracy and the protection of human rights. The intent is to also understand their interrelationship with nation building and reconciliation. This is done to determine how they interact as a means to ensure guarantees of non-repetition of human rights violations and to cater for victim needs in this regard. It does this using the South Africa's transition model to

illustrate and amplify the issues. This is extremely relevant as while the South African model is lauded and often exported, it is not the shining example it was in the years immediately after the transition anymore, particularly during the Mandela era (Sarkin, 2017). While it was seen, at least by some, to be successful in the years immediately after the first democratic elections in 1994, and the inauguration of Nelson Mandela as President, in the years following his stepping down as President, and particularly in the more recent past, South Africa has not done as well in regard to reconciliation and nation-building. It is particularly South Africa's human rights record that has become tarnished as it has sought to play a larger role in Africa, notwithstanding the domestic issues that have embroiled it. The country has also been embroiled in a multitude of political scandals that have undermined its position and role. The fact that the economy has also suffered has seen both an unwillingness and inability to right the wrongs of the past.

2. Victims needs to guarantees of non-repetition of human rights violations

The years following the end of the Cold War and the coming down of the Berlin Wall saw numerous transitions from repressive rule to democracy throughout the world (Huntington, 1991). It was the manner in which these new democracies dealt with their oppressive pasts that had an important impact on whether they enjoyed long-term peace, stability, and reconciliation (Sarkin, 2004).

To achieve successful transitions various processes have developed to deal with the past (Van Der Merwe, Baxter, & Chapman, 2009). A range of methods, which are supposedly more victim centred and oriented (Bonacker, Form, & Pfeiffer, 2014) have emerged internationally, regionally and domestically (Groenhuijsen, 2014), to ensure that the rights of victims are more absorbed into these processes (Van Dijk, & Letschert, 2011) and they are given more protection (Méndez, 2016). At times, however, this has occurred more in theory than in practice (see Humphrey, 2013). Nevertheless, there have been positive achievements. While previously, victims were not much of a focus of legal systems (see Hoyle, 2002; see also Van Ness, & Heetderks, 1997) today they receive relatively more attention even in transitional justice processes (McEvoy & McConnachie, 2012). Most commentators correctly argued that in the past, and still in many ordinary domestic systems, it is the state that has the central position in the justice system, and victims are given few rights and fewer opportunities. Morgan, Winkel and Williams have noted that the domestic legal system is usually "concerned almost exclusively with the relationship between the

state and the offender."(see Morgan, Winkel, &Williams, 1995: 302). In many places, it is still true that victims have very limited rights, few remedies, and little opportunity to gain reparations (see O'Neil, 1984: 369; see also Goldstein, 1983: 1286, referred to in O'Neil, p. 369, note 25).

With the more recent development of various processes at the international and national level to deal with the past (Aldana-Pindell, 2014) such as through the implementation of truth commissions, a more direct platform for victims has been created, which gives them more roles and allows more specific results (see Hayner, 2001: 172), such as reparations, to be achieved (see further Urban Walker, 2016). In other words, these types of institutions give an opportunity for victims to tell their stories, but also "to identify victims so that they may obtain some form of redress." (see Olson, 2002: 177). However, as José Zalaquett has noted a

> policy to deal with human rights abuses should have two overall objectives : to prevent the recurrence of such abuses and to repair the damage they caused to the extent that is possible. Other objectives, such as retribution or revenge, cannot be considered legitimate in light of contemporary international values as they are enshrined in international law and generally accepted legal doctrine (Zalaquett, 1995: 12).

Truth commissions, therefore, have become the common measure in the "establishment of the rule of law, respect for rights, and civil and social trust after severe abuses."(Walker, 2013: 264). As a result, in post conflict societies where such processes are established, victim's needs are supposedly catered for (Manrique Rueda, 2014). However, the operationalizing of their rights and needs, are far from globally secure or evenly spread across the world. This is also true across the multitude of types of institutions that have been created. For that reason, some argue that the processes that have been established, even at the international level, do always meet the desires of victims (Robins, 2009).

It is specifically true that victim's needs of non-repetition of human rights violations have been understudied and been the focus of little attention. In this context there are various things that can be done to promote non-repetition, sometimes called non-recurrence. Some of the issues that can play a part in this regard are issues such as state rebuilding, nation building and reconciliation. A range of other matters including democratisation processes, the rule of law and human rights protection can all assist in this regard. To understand the interplay, overlap and interconnection of these concepts to the issue of victim's needs to non-repetition of human rights violations, the case of South Africa is examined to determine what lessons can be learnt from the South African transition.

3.   South Africa's nation building and reconciliation process as a guarantee of non-repetition

A specific part of the transition in South Africa was a methodology to ensure non-repetition of the past (Bhekizizwe, 2012). In that sense, it was clear that the causes of the conflict had to be dealt with as a central feature of a new dispensation (see Borer, 2003). Thus, the new system had to contain features to deal with the legacy of the past, and to attempt to "guarantee" that what had occurred in the past could not occur in the future. Nation building and reconciliation were seen to be essential elements in that regard. (Barry, 2016).

From the beginning of the transition process in South Africa, seen to have begun officially on 2 February 1990, when the then President FW de Klerk made his now famous speech unbanning organizations such as the African National Congress (ANC), the Pan Africanist Congress (PAC), and the South African Communist Party (SACP), and announced the start of negotiations for a democratic South Africa, a central question was what could be done to avoid future violations (see Strauss, 1993). Inclusion of all political movements in any dialogue was agreed to in an attempt to avoid the allegation that some were excluded and therefore had a legitimate reason to continue the conflict (Degraft, Issifu, & Marfo, 2015). The process took years to finalise. Agreement on the mechanics of the transition was only reached during the 1993 Multi-Party Negotiating Process at Kempton Park, which had been preceded by two rounds of talks (CODESA I and II). 26 political parties agreed to the political pact that sought to navigate the sensitive political issues, while providing security to some groupings (see Bouckaert, 1997). Many of these parties had little apparent legitimacy and no mandate. Most of them disappeared after the 1994 elections as they received little support (see Muthien, & Khosa, 1995). The interim Constitution also contained 34 constitutional principles that would be the basis of the final Constitution (Gloppen, 1997). The critical issue was that the process was as inclusive as possible (Sarkin, 1998). This was important to promote non-recurrence by ensuring that all parties would use peaceful means to ensure the transition (Samuels, 2005).

Because there were clear problems in deciding whether to have an election or a constitution first, as both options were at the time undemocratic, a three phased transition occurred: first an interim Constitution, then elections, and then a final Constitution (Sarkin, 1999). These steps were meant to placate all political parties about the way forward. The first phase of the transition began when the interim Constitution was enacted by the Apartheid Parliament on 6 December 1993, even though it was designed outside of the Parliament. The second phase began on 27 April 1994 when elections were held and the interim Constitution came into force (Southall, 1994). The third and final phase began when

the final Constitution, drafted by an elected Constitutional Assembly, came into force in 1997 (Murray, 2000). These steps and process of dialogue were useful in nation-building and in beginning a reconciliation process (Sarkin, 2008), and as such did not allow the process to go backwards, which at times seemed possible. When political parties wanted to withdraw from the process much was done to keep them on board, by giving them assurances and making guarantees. For example, the Inkatha Freedom Party (IFP) remained outside of the process until a few days before the elections. Much was done to bring them back in to the fold on the realization that without them being involved they were likely to commit violence and destabilise the country (Von Holdt, 2013). Assurances were also given to the security forces to get them to defend the new government if there was an attempt to take the state by force after the vote.

A further guarantee of non-repetition was steps taken to give assurances to various groups that they would be safe and secure in a new dispensation (see also Aiken, 2010). One of the major themes of the negotiation process and a further guarantee of non-repetition was to give assurances to various groups that they would be safe and secure in a new dispensation, by relying on some type of federal system (Inman, & Rubinfeld, 2005) and protections for minorities (Murray, & Simeon, 2007). Using a decentralised system was seen to be important and even non-negotiable by some parties (Steytler, & Mettler, 2001), whose support came from certain parts of the country (Wunsch, 1998). The debate was also whether minorities were protected by way of group rights (Ellmann, 1994), or whether their rights were sufficiently protected within individual rights (Henrard, 2002). A general fear was that without the protections afforded by a bill of rights, unrestrained majoritarianism could harm minorities, or members of minority groups, and that therefore a check on the power of the majority was essential (Mureinik, 1994). These would be hallmarks of a new Constitution, which would influence how people saw the new system and mould a politics of memory (Klug, 2000). The Constitution's role was seen to be very dependent on the manner in which it was drafted. There was a clear recognition that its drafting history would vitally influence its reception in the society, positively or negatively.

In the South African setting, the Constitution's features were designed to be reflections through a mirror of a past where democratic and human rights values were absent. In other words, the constitutional text and the manner in which it was to be interpreted were meant to reflect the memories and legacies of the past (see generally Brown, 2013). The design of the Constitution was intended to be a product of the memory of the drafters, and those who participated in the drafting process, to allow change to occur which was not threatening but inclusive and protective for all. It was, therefore, developed on

the critical notions of inclusion (on the importance of inclusion conceptually see Bashir, & Kymlicka, 2008), accountability and oversight and hence was about non-repetition. Human rights were designed to be a key direct feature of the document in response to a history that was characterised by the absence of regard for human rights. Numerous public democratic and human rights institutions are established in the Constitution to ensure that the violations of the past cannot reoccur (Sarkin, 1998).

In this way, the Constitution was a useful tool to build the nation, promote reconciliation and promote co-existence, and therefore meant to reflect the promises and aspirations of the country for the future. These promises were built on the memory of the problems and mistakes of the past.

The 1996 Constitution of South Africa, building on the 1993 interim Constitution, provided for a further rebirth of the country, and was meant to continue the process of nation building (Benomar, 2004). It was certainly also about state rebuilding, as new and reformed institutions were central features of the instrument. It established many new and important rights for its citizens and still strives to provide a living document that is designed to promote transformation (Langa, 2006) and social justice (Smith, 1999). The rights enumerated in the Constitution are testimony to the problems of the past and the hope that the country will overcome this legacy, transcend all socio-economic barriers and ultimately unite the diverse population of the country. South Africa's history and socio-economic makeup is reflected and woven throughout the Constitution, a document designed to eradicate the apartheid philosophy and its effects and promote equality for all. This was done to deal with the past but also bring the country together. The document represents an effort to redress the oppression of the past and to reassure all segments of a divided society of their equal position in the democracy. To do this, it includes a bicameral parliamentary system based upon the principle of the sovereignty of the Constitution; a justiciable Bill of Rights; an independent judiciary, including a Constitutional Court; an electoral system based on proportional representation; and structures which ensure government at national, provincial and local level (Shugart, & Carey, 1992). Various state institutions supporting constitutional democracy also serve to promote the ideals and promises of the Constitution. Thus it creates a Public Protector, a Human Rights Commission, a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, a Commission for Gender Equality, and an Electoral Commission. All of these institutions are meant to be democratic devices to avoid the past and ensure non-repetition of past violations.

For instance, in order to see the role the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Com-

munities is meant to play with respect to nation building, one can look into the goals of this institution, which are set out as to "to promote and develop peace, friendship, humanity, tolerance and national unity among and within cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association." (Commission for the Promotion and protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002 (4.Objects of the Commission (b)) (My emphasis).

The question of land restitution (Walker et al, 2010), a major divisive issue, was dealt with by the establishment of the Commission on the Restitution of Land Rights (Hall, 2004). This is one of the various legs to the land policy pursued by the government (Lahiff, 2007). These are land restitution, land redistribution through market–related mechanisms, and land tenure reform (Weideman, 2004). The commission has the responsibility of receiving, investigating and taking forward claims. The law details how claims must occur and how the commission must deal with them. The Land Claims Court is tasked with the responsibility of ratifying agreements mediated by the commission, as well as arbitrating in cases where no agreement can be reached. The court's principal powers lie in the ability to determine restitution, compensation and rightful ownership (Levin, & Weiner, 1996). All these steps were meant to play a part in addressing the land question and avoid the emergence of violence in post-Apartheid South Africa on these issues.

Arguably, the most important feature of the 1996 Constitution, at least from a nation building perspective, is the Bill of Rights (see Reynolds, 1995). The Constitution provides, and promises, that rights in the Bill of Rights will be *respected, protected, promoted and fulfilled* by the state. The Constitution states that the Bill of Rights is a cornerstone of democracy in South Africa, enshrining, and therefore promising, the rights of all people, and affirming the democratic values of human dignity, equality, and freedom (Klug, 2010). Political rights (free and fair elections, voting, participation in political parties), property rights, human rights (equality, equal protection of the law, dignity, life, personal security, privacy, movement, religion, association, expression), children's rights, environmental rights, socio-economic rights and rights of accused persons are all entrenched in the Bill of Rights (Issacharoff, 2003). By constitutionalising socio–economic rights directly, and not as directive principles as in other countries, South Africa took the position that besides political transformation economic transformation also had to occur (Christiansen, 2007). Again, by protecting rights, and specifically rights to ensure transformation in the widest sense, and having processes to redress failures to do so, the hope was to avoid the problems of the past.

In addition to forbidding discrimination on the basis of 'race' and 'gender', the Bill of Rights also prohibits discrimination on the basis of sex, ethnic

or social origin, colour, sexual orientation, age, disability, religion conscience, belief, culture or language (Johnson, 2011). It did however insulate from constitutional challenge 'measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination' (Article 8(3)(a) of the South African Constitution)[1] and, in similar vein, provided for the 'right to respect for and protection' of dignity (Article 10),[2] which has generally been deemed to be the right of individuals to be treated with dignity by the state.

For the reasons stated above, various rights, such as the right to freedom of conscience, religion, thought, belief and opinion, were guaranteed. Despite the multi-lingual character of the population in the past, South Africa had only two official languages – English and Afrikaans. One of the proposals on the negotiation table was that the new democratic South Africa should officially recognise only a single language in order to facilitate national unity, communication and easier and cheaper administration. Those who would have had their languages excluded resisted this and their view found favour with the drafters of the interim Constitution (Reagan, 2001). Section 3 thus provided that 11 languages would be the official languages of the state at national level and 'conditions shall be created for their development and for the promotion of their equal use and enjoyment' (Heugh, 1995). In addition, provision was made in Article 6(5) of the Constitution for the establishment of an independent Pan South African Language Board to develop South African languages as well as:

> German, Greek, Gujerati, Hindi, Portuguese, Tamil, Telegu, Urdu, and other languages used by communities in South Africa, as well as Arabic, Hebrew, and Sanskrit and other languages used for religious purposes.

In addition, the Bill of Rights in Article 30 provides that:

> Every person shall have the right to use the language and to participate in the cultural life of his or her choice.

Again, the key issue was inclusion and national unity (Alexander, 1991), so that all groups would see their rights and needs being accommodated (Henrard, 2001). Thus, the inclusion of a multitude of languages had a nation-building effect (Johnson, 2011).

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1 Art. 8(3)(a) 'in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right'.

2 Art. 10. 'Human dignity.–Everyone has inherent dignity and the right to have their dignity respected and protected'.

To ensure a smooth and peaceful transition, and to ensure that those who may be feel threatened by the new state and what they could lose as a result of new system, 'sunset clauses' were written into the interim Constitution, essentially giving minority parties a stake in government (Maharaj, 2013). Thus, while the ANC was the majority party in the legislature, the government initially was a government of national unity (GNU), with the cabinet composed of the ANC, the National Party (NP) and the IFP. This continued until mid-1996 when the NP withdrew from the GNU. Again the idea was to be as inclusive as possible and give as little fodder to those who may have considered violently opposing the new state (see generally Obel, 2013).

South Africans also realised that at the core of the democracy was its electoral system (Reilly, 2005). The type of electoral system was seen to be a crucial aspect of the democracy that it could play a nation-building role (see generally Vandeginste, 2014). Therefore, as a means to be as inclusive as possible and not to exclude political parties, even those with very little support, South Africa decided on a system of proportional representation. This allowed parties enjoying some support to get representation in the Parliament in accordance with the percentage of the received national vote (Sisk, & Stefes, 2005). This helped to promote inclusion and greater peace and stability and thus non-recurrence of human rights abuse.

Symbols also play a major part in nation building (Naidu, 2012). For that reason the new post-Apartheid South African flag and national anthem, combine the colours and anthems from across the political divide into one anthem and one flag (Bornman, 2006). The anthem now has four verses, each of them in a different language. All these steps had massive effects on the country as a whole and helped to promote a national identity even amongst those who identify with a specific grouping in the country (see generally Reilly, 2005).

One issue that has a deep effect on whether conflict abates or returns is the economic situation of a country (on the need to view such issues as a part of dealing with the past see Gready, & Robins, 2014). This is a deep problem but widely ignored in transitional justice studies until recently (an early work in this regard was Mani, 2002). South Africa has not done well on the economic front and is an issue that continues to retard processes of reconciliation, and nation building. The economic divide in the country is the major factor that affects these processes today. This is because economic deprivation exists for many in the country. The official unemployment rate is more than 25 per cent but the real rate is much higher. Economics has therefore played a role in levels of crime as well as the major challenges the country has in xenophobia and violence against foreigners. Thus, dealing with issues of the economy and employment can have a major effect on issues of violence and conflict (see Miller, 2008: 285), as the South African case indicates.

4. The role of the South African Truth Commission in promoting reconciliation, nation building and non-recurrence of human rights abuse

South Africa's TRC was part of the process of reconciliation (Krog, 2015) but it did not work in a vacuum as far as reconciliation is concerned. Any state that has a TRC cannot be dependent on such an institution to achieve reconciliation alone, but must also weigh on the overall political, economic and social context in the country. All those issues influence the reconciliation process (Borer, 2004).

The South African TRC emphasized its complementary role vis-à-vis trials (Gade, 2013). The TRC argued that the truth-for-amnesty exchange mandated by its enabling legislation, constituted a form of public shaming (see generally Ausderan, 2014) that would follow alleged perpetrators back to their communities (Foster, Haupt, & De Beer, 2005). These processes were meant to promote truth discovery and therefore adequately deal with the past (Wilson, 1996). It was designed to have a reconciliation effect and build a nation (Heribert, 1999). But, it was also meant to prevent future violations, non-repetition, in a number of ways, including through exchanging truth for amnesty. This was meant to reduce levels of impunity, as without it victims will endure long-term harm (Westermeyer, & Williams, 1998). In this regard it has been noted (Wemmers, & De Brouwer, 2011), that in general (Patel, Williams, Kellezi, 2016).

> Impunity interrupts the normal process of healing of the survivor of repression, the grief of the families of disappeared victims, and the process of social reparation. Impunity prolongs the psychopathological consequences of repression, both in the individual and in the society (Gurr, & Quiroga, 2001).

Penrose therefore argued that impunity "is the victim's ultimate injury… [and is] one of the most prevalent causes of human rights violations in the world." (Penrose, 1999). Understanding the critical need to avoid impunity in South Africa, the TRC, in part, built up a record of human rights violations (Colvin, 2003). It played a role in ensuring that there was acknowledgement of what violations had occurred (Allen, 1999). It helped to cement a national consensus that such acts were illegitimate thus helping to ensure their non-recurrence (Van Zyl, 1999). Baden, Hasim and Meintjes agree that an effect of the TRC process was non-recurrence. They argue that an "outcome of the TRC process has been to create awareness of the terrible atrocities of the past and, at least in the public mind, to assert the need for a new human rights culture."(Baden, Hasim, & Meintjes, 1998). Such processes also help with non-recurrence by helping to limit deniability. These processes play a part in ensuring that those who have committed offences cannot continue to play the roles that they did in the past. This is a means of non-repetition.

Yet, while the TRC Act required perpetrators to fully disclose their participation in motivated crimes, it did not require remorse, restitution, or any other form of amends (McEvoy, & Mallinder, 2012: 435). Some argue that this was a flaw in the South African process. Admittedly, avowals of remorse and regret are easily faked and as such are often so detected by victims. They can be issued for the wrong reasons, particularly when there is material benefit for displaying remorse. They can also be delivered in ways that are only minimally sincere and thus inadequate for the victims (Byrne, 2004). Given that it is impossible to secure true and valuable remorse, it might be argued that remorse should not play a significant role in any meaningful reconciliation process. Yet, inviting—without demanding—acknowledgment of responsibility and remorse, may very well honour the victims as well as the perpetrators. Such an invitation will provide an opportunity to observe the absence of remorse, which—while disappointing—reflects the extent to which the population remains divided and the victims remain at risk (Backer, 2007).

Early in its inception, TRC discussions focused on national reconciliation (Verdoolaege, 2008). However, by the conclusion of its mandate, many questioned the degree to which the TRC had actively attempted to promote reconciliation and whether it played a sufficient role in this regard. Various activities and statements by the TRC document their role in the process of reconciliation, but public opinion about the Commission—which is one indicator of the level of reconciliation achieved—differed along racial lines (Mbembe, 2008).

The Truth and Reconciliation Commission not only invited victims to participate in the process, first as witnesses during the Human Rights Hearings, and then, at times, as opponents to amnesty during the Amnesty Hearings (Van der Merwe, & Chapman, 2008).

The TRC report examined their process of arriving at reconciliation as follows: Reconciliation involves various stages of development and change. One essential step is dialogue between adversaries (Jung, & Shapiro, 1995). The victim-oriented and perpetrator oriented aspects of the Commission's work was broken into separate functions. Victims told their stories in one forum and perpetrators in another. The interaction was thus often mediated purely by the media coverage of these events. While this may have been useful in providing safe space to engage them, or to maximize information gathering, the subsequent step of facilitating more direct dialogue needed to be addressed (see Wilson, 2001).

The TRC was also authorised in terms of section 25(1) of the legislation to make recommendations concerning institutional, administrative and legislative reforms to prevent the recurrence of future human rights abuses. This is very common to TRCs (Bakiner, 2013). Thus as an example, the Nigerian

TRC was also mandated to recommend judicial, legislative or other measures to redress past injustices and prevent their recurrence. Thus, TRC reports are useful documents for a range of reasons, including non-recurrence of human rights abuses (Amnesty International, 2000). Officially sanctioned reports of these bodies constitute a common and authoritative narrative that can often rebut the biased and revisionist versions of events that may circulate after an era of conflict (Goodman, Eyerman, Alexander, 2015). Their recommendations are critical on a range of matters to ensure non-recurrence of the past.

Thus, TJ addresses the need for institutional reform in states that were involved in, or failed to prevent, gross violations of human rights (Villalba: 9). If there was no institutional or structural reform, TJ would be unable to guarantee non-repetition (Hayner, 2011). Thus, institutional reform is also a part of a reparations process. In this regard, the reform of state or public institutions, such as the police (Rauch, 2001), military and judiciary, bodies that often take part as official instruments of repression and systematic violations of human rights by governments, can be an important (Stan, & Nedelsky, 2013: 99). TJ measures promote accountability and the prevention of the recurrence of violations (ICTJ – Institutional Reform). This mechanism has been particularly important in post-conflict contexts due to the fact that it is (re)implemented during a country's most fragile and unstable moment, or even arguably more so for post-authoritarian regimes. Therefore, in many places mechanisms are put into place to "vet and purge the security forces and other state offices of individuals who are perpetrators of crimes or who had some degree of complicity with them", thus challenging impunity. (Domingo, supra note 53, at 3).

5. Conclusion

Victim's rights in general have come a long way in the recent past, namely notions of victim's rights to truth, reparations and justice, which have gained greater traction, specifically after periods of conflict. However, victim's needs for non-recurrence of human rights abuses also need to be attained to a greater degree. The fact that so many states revert backwards and violations reoccur undermines victim's aspirations for living in place that is stable and peaceful.

It is clear that promoting processes of democratisation and the rule of law as well as respecting, protecting, fulfilling and promoting human rights can and do affect non-repetition of violations. They overlap and are interconnect with state rebuilding, nation building and processes of reconciliation.

The ways that these processes intersect and relate to each other can be seen in the nation building and reconciliation process in South Africa (Du Toit, 2017). The interim and 1996 (final) Constitutions have played a major role in ensuring that the law in South Africa adapts to deal with all the problems and challenges facing the nation (Gross, 2004). Under the new democratic dispensation, the two Constitutions have emphasized human rights and individual freedom while introducing measures to instil confidence and inspire trust in and between individuals and groups at the same time. The effect of law on society and what is just, fair and promotes equality are now key determinants in both the legislative and judicial processes. It is this shift to a constitutional system, emphasizing individual human rights, freedom and equality, the role of the courts, particularly the Constitutional Court, which is fundamental (Sarkin, 1997). Thus, the nation building and reconciliation processes have assisted in processes of non–repetition of politically motivated crimes. The South African model shows that one of the best safeguards of a rights–based democracy against falling back as far as violence and conflict is concerned, are institutions such as an independent judiciary, intrepid in its willingness to uphold the principle of separation of powers and to be the guardian of fundamental human rights and freedoms. Crucial, also, is the unifying effect of a Constitution and bill of rights. These documents, in tandem with such devices as the flag and national anthem, play symbolic roles in facilitating nation building and reconciliation and can also nurture a striving for common goals and aspirations (Wissing, & Temane, 2014). This is very dependent, however, on the extent to which the constitutional drafting process is perceived to have been inclusive and legitimate (Widner, 2007). If there is a sense that all sectors of a society have been incorporated, then national commitment to the ideals and values contained in the constitution is enhanced. If the instrument stems from a process that is only partially successful at inclusivity, those excluded or marginalised will in all probability view the document as a source of conflict and division.

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