

### CHAPTER 3

## RECONSTRUCTING THE PAST BETWEEN TRIALS AND HISTORY

### THE TRC EXPERIENCE AS A “REMEMBRANCE SPACE”

**Andrea Lollini**

*ABSTRACT.* What enables democracy to develop and what allows the consolidation of new democratic institutions after a political transition, is the search for “truth” and not the defence of only one “truth”. The search for truth about the past must be considered to be a dynamic process that is the result of collective participation. To attain this goal, a society needs to establish a particular space in which to execute the fundamental public and collective process of dealing with the past. After examining aspects of the European reactions to World War II (handling of the French Resistance, war criminals, and of Holocaust deniers) in this light, the author concentrates on the South African TRC, concluding that it represents probably one of the most interesting remembrance spaces (lieu de la mémoire) of our time.

In July 1997 the French newspaper *Libération* published the proceedings of a unusual debate. Some historians and journalists held a round table with two famous members of the French Resistance during World War II, Mr and Mrs Aubrac.<sup>1</sup> The debate focused on delicate topics concerning the recollection of certain controversial episodes of the French Resistance history. What was discussed was the suspicion of treason and “collaboration” of some Resistance combatants. In general, the participants at the round table analysed the role that the Resistance should have in the French collective memory and especially, whether the history and the remembrance of the Resistance should be considered something untouchable, monolithic and “holy” as a part of French Republican cultural heritage. The discussion also stressed the need to write a critical history of the Resistance in its relationship with the construction of national identity.

A few months later, in the autumn of 1997, the criminal trial of the former official of the Vichy regime,<sup>2</sup> Maurice Papon, started in Bordeaux. He was charged with complicity in crimes against humanity arising from his role in the Jewish deportation during World War II.<sup>3</sup>

Interestingly, these two events took place at the same time. Obviously they are not the same thing: one is simply a debate involving some

<sup>1</sup> See *Libération* 9 Juillet 1997, also at: <http://www.liberation.fr>.

<sup>2</sup> About the Vichy regime (that collaborated with the German aggressors in France during World War II), see Rouso 1990, 1994.

<sup>3</sup> See Conan 1998; Gandini 1999.

specialists, while the other is an actual tribunal.

The round table held by the newspaper *Libération* was about the Resistance, while the latter was a the prosecution of a member of a regime allied with the Nazis. However, it is important to note that fifty years after the end of World War II a “remembrance malaise” is still perceptible. This “remembrance malaise” relates not only to the memory of the events of World War II, but also to the recollection of the political transition after the end of the war. In other words, what is still strongly debated is not only the responsibility for crimes committed during the war, but also the events that represented the “genesis” (or origins) of the French Republican order. What is bitterly debated is the “founding myth”, in the anthropological sense, upon which the Republican system is based.

In this situation there are some elements that could be compared with South African political transition after the dismantling of *apartheid*. There is the question of justice, there is the need for “truth” about the past and the need for firm condemnation of the previous regime. But there is also the need to talk about national liberation movements and the role that they played in the struggle. In fact this is not so different from what South Africa has experienced recently through the experience of the Truth and Reconciliation Commission (TRC).

What is completely different is that the French debate mentioned earlier took place fifty years after the event. South Africa is facing these questions during its political transition and these questions are characterizing the transition itself.

Throughout Europe and particularly in France, Germany, Austria and Italy, after the Barbie, Touvier, Papon and Priebke’ criminal trials, and after the criminal proceedings against the Holocaust deniers, in the words of the French historian Henry Rousso, a veritable trend toward the “legal reading of history” has developed.<sup>4</sup>

Those criminal trials were characterized by a vast historical background in which individual criminal responsibilities were absorbed by the complexity of the historical dynamics.<sup>5</sup> For these reasons there is a risk that the contamination between juridical level and historic context may cause distortion in the application of the rules of evidence. The result could be a lack of legitimacy or a dysfunction of the procedural tools.

Some scholars have defined those trials as something like a “second

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<sup>4</sup> See Rousso 1998: 86.

<sup>5</sup> For a complete panorama about the criminal trials, in Europe after World War II, and in particular the trials in France, Belgium, Netherlands and Germany, see the bibliography in footnote 60 in Huyse 1999.

purge” after the end of World War II. This phenomenon showed a firm tendency to consider the discourse about the past, and to remember it from a legal perspective. This overlapping between trials and historiography was also evident during the criminal trials of the Holocaust deniers, in which some Courts have decided those cases by transforming historical interpretations into “forensic truth”.<sup>6</sup>

It is important to stress that a lot of European domestic criminal codes have introduced the offence of “Holocaust denial” in reaction to publications that seek to write a “different” history of the Jewish genocide. “*The assassins of memory*”, according to the historians Pierre Vidal Naquet<sup>7</sup> and Yosef Haym Yerushalmi,<sup>8</sup> are persons or organizations that deny the Holocaust or cast doubt on its essential aspects: the number of Jewish victims, and the existence of concentration camps and gas chambers. Such denial is unfortunately widespread not only in continental Europe but also in the United Kingdom and the USA.<sup>9</sup> Another example of this complex situation is the recent debate about the role that the Catholic Church and Pope Pius XII played in the Jewish Genocide. This discussion has emerged after the publication of John Cornwell’s controversial book *Hitler’s Pope*, which explores the role the Vatican played in endorsing Hitler’s regime<sup>10</sup>.

Indeed, these examples imply that, fifty years after the end of the war, political transition in Europe is not yet fully concluded. The debate about the attribution of responsibility for crimes is still open, and it often surfaces in a very dangerous way as in the case of the Holocaust deniers. The European Union and individual countries in Europe have reacted to this deeply worrying situation by implementing a juridical strategy based on criminal trials. Forensic truth has been selected as being more authoritative than historical truth. Juridical tools are deemed more useful than historical analysis, which aims to defend the remembrance of past events.

Many historians have strongly criticized this way of transposing historical debates into tribunals. They have also strongly criticized the possibility of performing a thorough and rigorous historical analysis through the technical rigidity of the juridical tools of criminal procedures, such as the rules of evidence and cross examinations.

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<sup>6</sup> For the relationship between the concept of “historic truth” and “forensic truth”, see Baruch *et al.* 1998; Le Crom & Martin 1998; Ferrajoli 1989: 18-69.

<sup>7</sup> See Vidal-Naquet 1985.

<sup>8</sup> See Yerushalmi 1982, 1998: 7-21.

<sup>9</sup> For a complete analysis of the criminal punishment of the crime of Holocaust denial see Fronza 1999.

<sup>10</sup> See Cornwell 1999.

The “*winner-loser*” approach is still used. In other words, today, trials and the authority of the judgement are one of the ways to give authority to the interpretation of past events. From this perspective, there is a continuity between the Nuremberg trials, the trials in domestic courts after the end of the war, the Barbie, Touvier, Papon and Priebke’ prosecutions and the Holocaust deniers’ trials.

What is important to note is that this ambiguous relationship between history and law is evident also in the trials of International Criminal Tribunals for former Yugoslavia and for Rwanda. For example, the first part of the Akayesu judgement, one of the first judgements for genocide, is dedicated to a large reconstruction of the historic background of the Rwandan genocide. The same type of historic re-construction is present into the Tadic judgement and into the Milosevic Indictment of the International Criminal Tribunal of former Yugoslavia.

In this context, two opposing forces are forging the collective memory structure of past dramatic experiences during and after the war:

1. On the one hand, the increase in historical studies and historical research about the war, about the political transition after the end of the war, and about the responsibility for crimes committed during the war.
2. On the other hand, the accumulation of trials and judgements on the same cases which are subject of the historical studies.

I would characterise the first force as “the hypertrophy of historiography”, and the second one as “the hypertrophy of judgements”. These ways of dealing with the past are progressively monopolizing the discourse about the past.

However, what is important to underline is that these two ways of dealing with the past do not help to maintain a distance with the dramatic past of the war and with the history of totalitarian regimes. They do not represent something that can lead, for example, to the writing of a critical history of the French Resistance during World War II; neither are they conducive to wider acceptance of the fact that common people played an important role in genocide, as demonstrated for Germany for the same period in D.J. Goldhagen’s book *Hitler’s willing executioners*<sup>11</sup>. In other words, neither the strictly historical approach nor the juridical approach help to lift the burden of the winner–loser approach from the discourse about the remembrance of the war’s dramatic past; neither are they conducive to

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<sup>11</sup> See Goldhagen 1997.

healing the wounds that are still open.

In Europe, for example, political clichés are much in circulation, and stereotypes about the past seem to be defended a-critically. The modern political system is based on conventionalised versions of history. “Fascism–anti-fascism”, “communism–anti-communism”, “fascism–communism”, – these are the oppositions that even today are very often used in domestic political debates.

These considerations can be of use for a reflection on the South African case.

For European observers, South Africa’s political transition and the TRC system are something that goes beyond the European approach of dealing with past crimes and abuses.

I do not wish to discuss the problem of how “transitional justice” can be dispensed after a previous authoritarian regime. I do not wish to emphasize the potentially beneficial effects of prosecution of the perpetrators, or the opposite idea of the importance of dealing with the past crimes through reconciliatory strategies like the TRC system.

What I would like to stress here is that the instrumental utilization of juridical tools and criminal trials in order to cope with mass crimes leaves a very unique mark on the perception of the past, and of how the past should be remembered. The widespread utilization of criminal trials for the purpose of carrying out political transition after the war has deeply characterized what we consider to be a “truth”.

Frequently the concept of “forensic truth” is automatically considered to be concurrent with the concept of “historical truth”. For example, trials (like the Touvier, Barbie, Papon, and Priebke’ trials) have been celebrated as a way of reaffirming the solidity of the collective memory of the war. This is like saying that an “authoritative truth” is needed. This kind of truth has to be confirmed by other judgements when the cohesion surrounding this concept start to be criticized.

In South Africa the “Conference for a Democratic Future”, the political transition which has been largely negotiated and in particular the procedures and the objectives of the Truth and Reconciliation Commission, make up an experience that goes beyond the strictly juridical or historical approach<sup>12</sup>. The South African debate on remembrance of the past started within a

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<sup>12</sup> For a general bibliography about the relationship between criminal trials and political transition see Linz & Stepan 1978; O’Donnell et al. 1986; Huntington 1991. For an analyse of the role of the trials during the political transitions see Kirchheimer 1961; Hannover 1966; Demandt 1990.

perspective of reconstruction. The process of dealing with the past has been developed with the aim of creating a new community. The process of nation-building, in which the TRC has played a fundamental role, seems to be a veritable case of *res publicam constituere*, “constructing the common good”. For these reasons, the South African process of confronting the past had been necessarily to be collective and public.

What is more difficult to achieve is to construct a collective memory background that in the future will prevent the possibility of developing shameful responses such as the Holocaust denials. In this sense it is of the greatest importance that the *Promotion of National Unity and Reconciliation Act* ruled out the possibility of blanket amnesty. Instead, the Commission grants amnesty only on the basis of a strictly personal “full disclosure of facts”. Only in this way does it become manifest that there were *people* behind the *apartheid* system. Paradoxically the utilization of criminal trials for mass crimes has made it possible to determine the responsibilities of only a few commanders.

Neither at the transnational level nor at the domestic level were criminal proceedings able to deal with personal guilt. The individual criminal acts were absorbed by the collective context of mass crimes committed by regimes, by military organizations and by criminal states. As we have seen in the European case, such ambiguity is at the basis of the need to continue to prosecute; this was the challenge, for example, of the Touvier and Papon trials.

The TRC findings and the final *Report* could be considered as a “starting point” for the development of the collective memory of the *apartheid* regime. By contrast, juridical decisions, largely utilized in Europe, represent the “final point”. The judgement is something that cannot be discussed, something that crystallizes the events into the concept of “forensic truth”. The judgement represents the negation of dialogue. In other words, trials simply reproduce the conflict, and they are absolutely not a collective thing. In trials, the judges are compelled to arrive at the sentence on the basis of esoteric judicial procedures, and in terms of a technical judicial language that is incomprehensible to the people at large.

This is the paradox of judgement as a conceptual category. Obviously it is used as a basis in juridical matters but also in historical analysis. Judgement makes it possible to choose rigorously between two opposite possibilities. In other words, it creates two radically alternatives “truths”.

The TRC system, in particularly in the South African form with the refusal of the blanket amnesty by imposing a personal full disclosure of facts, has probably introduced a different way of dealing with the past. The

panorama drawn by the TRC hearings showed that “different controversial realities” have co-existed. Beyond the shameful background of the *apartheid* system, other crimes have been committed, and in recent period involved a lot of different “histories” have been experienced. Clearly, a firm position must be taken in the face of crimes. Indeed, from the perspective of the future, what is important to note during a political transition of this calibre are two complementary dangers: the danger of creating “myths”, and the danger of the “sanctification” of only one “truth”.

The TRC has played a new role in the attempt to escape the Manichean<sup>13</sup> interpretation of the past, in particular by acknowledging the centrality of “victim’s words” in the process of dealing with the past.

In conclusion, what enables democracy to develop and what allows the consolidation of new democratic institutions after a political transition, is the search for “truth” and not the defence of only one “truth”. The search for truth about the past must be considered to be a dynamic process that is the result of collective participation. To attain this goal, a society needs to establish a particular space in which to execute the fundamental public and collective process of dealing with the past. In this sense, the TRC represents probably one of the most interesting remembrance spaces (*lieu de la mémoire*) of our time.

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<sup>13</sup> *Manichaeism*: referring to a scheme of thought associated with the name of the religious innovator Mani (Persia/Iran, 3rd century CE), and positing a radical division of the world into good and bad; in fact the scheme has much older antecedents, e.g. in Zoroastrian thought. (Eds.)

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