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Dealing with the Past – Complex Choices

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Dealing with the Past – Complex Choices

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Dr. Alex Boraine was appointed by President Nelson Mandela as vice-chairman of South Africa's Truth and Reconciliation Commission. Before that, he co-founded the Institute for a Democratic Alternative in South Africa (IDASA) when he walked out of parliament, where he had served as an opposition member of parliament for 12 years. Boraine was founding president of the International Center for Transitional Justice which works in more than 20 post-conflict countries. He recently served as chairman of the truth and reconciliation commission in Mauritius.

It is important to remind people that the historical past will not go away unless you deal with it. My title is *Dealing with the Past – Complex Choices*. I would like to approach South Africa's past through the lens of transitional justice. South Africa has undergone an incredible and relatively peaceful transition from apartheid to democracy. A peaceful transition has been the case not only in South Africa. Transitions out of totalitarianism and into democracy are occurring today throughout the world in very different ways – consider eastern Europe, parts of Latin America, and more recently, countries such as Egypt, Libya, Tunisia, even – tragically – Syria. These countries are facing very complex choices regarding their paths of transition. The word *transition* is obviously well known; it signifies that the old order is dying but that the new has yet to be born. A country in transition, including South Africa, is one emerging from a particular order but uncertain and unsure how to respond to the new. On the one hand, there is the challenge of dealing with the past that simply will not go away; on the other, there is the equally daunting challenge of ushering in a new dispensation and ensuring sustainable peace so that democracy and economic growth can flourish.

When we come to the word *justice*, however, the issue becomes much more controversial because there are different kinds of justice. Justice is often referred to as retributive, restorative, distributive, or even quite starkly as economic or social transformation. “Transitional justice” is way of describing the search for a just society in the wake of undemocratic, often oppressive and even violent, political dispensations. In my view, it offers a deeper, richer, broader vision of justice that seeks to confront perpetrators but also to address the needs of victims and to assist in the beginning of a process of reconciliation

and transformation. Without transitional justice, it is likely that we will simply revert again to the previous order.

The rule of law is fundamental to the existence of a free society. It is what separates us from anarchy. In order to maintain the rule of law, accountability for unlawful transgressions is imperative. Since the late 1990s in particular, the prosecution of war criminals has featured prominently in the international stage. International criminal law has shifted its focus from a number of individual situations, such as the Nuremberg and Tokyo war crimes trials that followed the Second World War, to a much wider legal issues. This shift, marked by an international consensus that has changed the goal from impunity to accountability via prosecutions has become, I believe, the defining feature of the human rights movement.

But I want to submit that the law has its own limitations. At Nuremberg, there were only 19 facing charges, thus omitting the vast number of other leaders who were directly responsible for the Holocaust. Those people who were not prosecuted nonetheless had had direct links with National Socialist crimes. We have to appreciate that practicality demanded a limit to the number of prosecutions. The same is true of Eastern Europe: think of the bloody wars that took place in the former Yugoslavia during the 1990s, during which thousands of people, perhaps even hundreds of thousands, were directly responsible for war crimes, but only a handful appeared before the 8th Tribunal. It is obvious that justice has become selective. Think of Rwanda, where 800 000 people were killed in three months: only 120 000 people were arrested and confined without trial for more than five years.¹ That is hardly justice. In the end, the government, the state and the prosecution were forced to suggest to those who had been incarcerated they should confess, even if there had been no trial, and they would be released on the basis of having spent five years or more in prison. In the end, the government had to abandon most prosecutions and revert to a much more primitive approach.

I have done a lot of work in Sierra Leone where we witnessed children being forced to fight the war. Child soldiers. In Sierra Leone, it was decided that there had to be prosecutions. But there were only about five or six people actually prosecuted in those trials. On the other hand, the government also introduced in the peace treaty a commitment to a “truth and reconciliation commission” which engaged thousands of people across the country. I think that holding in tension the two approaches – prosecutions plus commission – is far better than pursuing one or the other alone.

¹ A.E. Tiemessen, “After Arusha: Gacaca Justice in Post-Genocide Rwanda,” *African Studies Quarterly* 8, no. 1 (2004), 57-76.

There are many political restraints when it comes to dealing with the past, even for the International Criminal Court (ICC), a court that has rightly been lauded since it was established in 2002. At the same time, we are aware of the opposition to it from the United States, and we all know that the ICC is irrelevant to countries such as Russia and China, so a large part of the world keeps itself out of the court's jurisdiction.

So the realm of law has its limitations, suggesting that societies in transition need other instruments and models as supplements to retributive justice. Advocating a holistic approach attempts to apply restorative justice as a complement to retributive justice, forming an important foundation for establishing a just society. For me, the real goal ought to be not justice or retribution, or even restorative justice; it should be the creation of a just society in which the rule of law dominates.

In South Africa, we were faced with that kind of choice: what do we do about the serious human rights violations that had taken place over many, many decades at the expense, largely, of the majority of the black population? In the late 1980s, Kader Asmal, who was in exile in Dublin and a professor of human rights law, became a minister in the new Mandela cabinet. Before his recent death, I had many discussions with him and he told me that towards the end of the 1980s he was given the job of preparing an indictment against apartheid and its leaders, including the president, cabinet ministers and all those who were directly involved in maintaining and controlling the apartheid system. That indictment was going to be presented to the United Nations. So what happened? Why didn't that take place? Perhaps the best quote I can give you is from Thabo Mbeki, long before he became president of our country. He said: "Within the ANC the cry was to catch the bastards and hang them, but we realised you could not simultaneously prepare for a peaceful transition. If we had not taken the route – that is, the route of negotiation – I don't know where the country would be today. Had there been a threat of Nuremberg-style trials, we would not have undergone a peaceful change".²

The incoming new party and its leadership had decided that the way of negotiation was the only way forward; their military strength was incapable of overthrowing the state. The state had also realised that it was impossible to overcome the opposition. So there was a stalemate; there needed to be another way forward and that was for former enemies to meet around the table. People who had wanted to destroy each other now had to find a way to build a new South Africa.

² *Cape Times*, 24 February 1992.

There are many aspects to the Truth and Reconciliation Commission, which was appointed after successful negotiations towards a constitutional democracy. Certainly the commission was highly controversial. There were many who opposed it, largely in the white community. The then president, FW de Klerk, described it as a tragic set of circumstances that would pull the stitches which had been put in to heal the wounds and would re-open all the wounds again.³ Our response was that the wounds had never been healed and that healing needed to take place. As I say, there were many who opposed the entire concept. There had been an attempt to move towards some truth and reconciliation in the negotiations themselves, but this had been handled by the elite. What about the hundreds, the thousands, the millions of people who had been victims of the apartheid machine? With this in mind it was decided that we would appoint a Truth and Reconciliation Commission.

I must mention, almost in passing, as I haven't time to develop them, some of the reasons why there was some success, although certainly mistakes were made. There was some measure of success, so much so that throughout the world where there have been about 30 such commissions, South Africa is still looked upon as the yardstick. I think the favourable conditions included Nelson Mandela, who strongly supported the commission in both public and in private. I doubt we could have proceeded without his remarkable example. Secondly, I think it was positive that we entered into a parliamentary process of bringing about the Truth and Reconciliation Commission rather than by a presidential decree. It meant that there was honest and open debate in parliament amongst all the new parties following South Africa's first democratic election. I think too that a strong civil society, which had grown up in opposition to the apartheid system, helped immeasurably. We also learnt a great deal from other countries. We visited those countries and brought their representatives to South Africa so we could gain from their experience. The often controversial Desmond Tutu was, I think, absolutely the right choice as the chairman of that commission.

It was inevitable with Tutu as chairman that there would be a strong element of Christian theology underpinning the work of the Commission. When he was in the chair he would open the proceedings with a short prayer. Sometimes those present would spontaneously break in to singing a Christian hymn. But it was never at the exclusion of people of different faiths, and indeed of those who had no religious faith. The great doctrines of justice, peace, forgiveness and reconciliation were part and parcel of the discourse.

³"Truth Commission Not Promoting National Reconciliation: de Klerk," *South African Press Association*, 11 May 1996.

There were also certain features in the South African commission which ensured a measure of success. Firstly, there was an enormous amount of groundwork leading up to the draft legislation. Secondly, it was established through a parliamentary process rather than by presidential decree. But probably most important, the South African commission was the very first to be held in public. All other similar commissions had been held behind closed doors. So what were the implications? It meant that anybody from the public could be present to listen to the voices of the victims who appeared before us, as well as the voices of the perpetrators who too appeared before us. More than that, we had television cameras, the radio, and the media, which meant that the commission was not confined to a small group of commissioners listening to people behind closed doors but was rather watched and listened to in six different languages throughout the country. We travelled around South Africa and I was astonished time and again to meet people in remote places who knew all about what was happening in the TRC because they had listened to the proceedings on the radio.

One particular example that I remember was when we visited a particular village. In the middle of the huts was a tree stump. I asked them what the significance was of the stump because it looked as if people were gathering around it. On the tree stump was a transistor radio, nothing else, just a transistor radio. They were listening to the voices of the interpreters telling the stories of the victims, and of course the perpetrators as well. I think we must never under-estimate the role of the media and any system, any law, which threatens the freedom of the media has to be opposed.

I wish I could find the words to adequately describe the atmosphere which prevailed at the hearings of the Commission. Emotions ran very high. This was the first opportunity for victims to tell their stories, stories of deprivation, of harassment, imprisonment, torture and loss of loved ones. There was often anger as they listened to the perpetrators. But there was also relief that at last they knew the truth. There was a measure of relief, but also overwhelming sadness as they re-lived painful memories. But also, amongst some, a spirit of generosity and even forgiveness towards those who had caused them so much harm.

We also had powers of subpoena and search and seizure, which helped a great deal because there were many people who did not want to come before the commission. When we said indicated that if they did not come there would be a subpoena, they appeared. But PW Botha, former president, refused to appear and he was finally prosecuted under law for not

doing so.⁴ There was a controversial aspect to the South African model which was the granting of conditional amnesty.

The commission in its final recommendations stressed over and over again that the commission was not the last word, it was just the beginning of a shift from an oppressive regime to an open society, a just society; if it was going to succeed, it would have to be continued by all branches of South African society.

Obviously there were weaknesses as well. We never, ever won the support, or perhaps even the respect, of the majority of the white community. I think back to the thousands of people who attended the hearings. On one occasion in Port Elizabeth, 3 000 people were present for a particular hearing.⁵ There were angry people sitting close together, listening to victims who had been tortured or whose loved ones had been killed, burnt and thrown into rivers. The white minority hardly ever came to the hearings. The usual suspects were there; they came, but hardly anyone else. When the victims started to tell their stories, many voices were raised in newspapers, on radio and television insisting that they were telling lies. There was absolute denial until the perpetrators, the soldiers and the policemen came before the commission and echoed almost word for word what the victims had said. That, I think, was one of the greatest contributions made by the commission. The complicity of all of us in the apartheid system was there for all to see.

Inevitably, we didn't discover the whole truth. It wasn't possible. A disadvantage was that the former government, the National Party, had several years in which to destroy documents. In this regard they used not only machines in their offices but factories to burn documents. Not having this evidence was a real disadvantage for the Commission. I believe justice was in short supply. In our recommendations we urged the government to prosecute those who had come before the commission and had failed to receive amnesty, as well as those who had not come to the commission but against whom we had written evidence of direct involvement in human rights violations. We gave the names and details to the government, but they failed to act on the information. The ANC government simply sat on the information. This was one of the very real weaknesses of the TRC. I want to stress very strongly that the Commission spent an enormous amount of time, research and energy in compiling our recommendations on Reparations. Tragically, the State delayed its response to our proposals and when they finally published their response it was far less in monetary terms

⁴ "TRC findings: P.W. Botha," *BBC News*, 29 October 1998, http://news.bbc.co.uk/2/hi/special_report/1998/10/98/truth_and_reconciliation/203927.stm
Last accessed: 15 November 2013.

⁵ South African Communication Service, *SA Now*, vol. 1 (South Africa, 1996), 309.

than what we had recommended. This niggardly and delayed response brought about considerable dismay and disappointment amongst the victims.

Let me say very briefly – bearing in mind the time factor – that if one does approach the choices of a society in transition, there are five areas that I would want to highlight. The first is accountability. As I have stated before, the rule of law and the fair and even administration of justice must demand our greatest respect. No society can be free or democratic without special adherence to the rule of law. Dictators and authoritarian regimes abandon it at the first opportunity and resort to brazen power politics leading to all kinds of excess. It is of central importance, therefore, that as far as possible those who violate those laws should be punished or brought to book. And this is as true in South Africa and many other parts of the world today as it was 18 years ago. If power is abused, this has to be challenged. Legal prosecutions have at least three advantages: Firstly, in most cases prosecutions prevent high-ranking perpetrators from returning to positions of authority. Secondly, tribunals and special courts aim to punish those who bear the greatest responsibility for human rights violations, thus assisting to break the cycle of collective reprisals. Thirdly, due process avoids summary justice. It is often forgotten that Stalin and Churchill, at the end of the Second World War, advocated putting Nazi leaders against the wall and shooting them. The words of Justice Robert Jackson, Chief US Prosecutor at the Trials, are salutary. “The wrongs we seek to condemn and punish have been so calculated, so malignant and so devastating that civilisation cannot tolerate their being ignored because it cannot survive their being repeated. That four great nations flushed with victory and stunned with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgement of the law is one of the most significant tributes that power has ever paid to reason.”⁶ I think it is a timely reminder for all of us. In our own approach, we tried to distinguish not only accountability but also the recovery of truth. Former US Secretary of State, Madeleine Albright, is on record as saying: “Truth is the cornerstone of the rule of law and will point towards individuals, not peoples, as perpetrators of war crimes”.⁷

It is only truth that can cleanse ethnic and religious hatreds and begin the healing process. I think this is one of the aims and objectives of the South African transitional experience. We obviously distinguished between factual and forensic truths and personal or

⁶ International Military Tribunal, *The Trial of German Major War Criminals by the International Military Tribunal Sitting at Nuremberg, Germany (Commencing 20th November 1945): Opening Speeches of the Chief Prosecutors for the United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics* (London: HMSO, 1946).

⁷ See Albright’s statement to the Security Council at the time of the adoption of Resolution 827, Provisional Verbatim Record of the 3217th Meeting, 25 May 1993, SC Doc. S/PV 3217.

narrative truth, even dialogical truth which emerged in discussions between the victims and the commissioners; and then the healing and restorative truths. The law which governed the TRC had to look at the past and to the future. The truth that the TRC was required to establish had to contribute to the reparation of the damage inflicted in the past as well as the prevention of it ever happening again. But for healing to be a possibility, knowledge on its own is not enough. It must be accompanied by acknowledgement and the acceptance of accountability. Public acknowledgement that thousands of South Africans paid a very high price for their attainment of democracy affirms the human dignity of victims and survivors and is an integral part of society's healing. I have mentioned reconciliation a number of times and of course it can be abused, it can be spurious when used as an excuse to forget the past and to move on and not deal with the situation. That would be the third institutional reform. The fourth would be that we started to consider not only individual suffering and individual guilt, but also institutional abuse and the transformation of those institutions. The army, the police force, these are tough things to do, but it is part of reconciling challenges. I have referred to reparations but don't have time to deal with the issue in detail.

Here in South Africa we should listen again to the voice of Khalil Gibran's works. He talks about victims of the past as a voice which causes the heavens to tremble. Unless South Africans come to terms with the rightful demands of basic service delivery, the sort of actions that we are witnessing now all over South Africa will continue and can only spell very serious trouble.

In trying to assess what contribution the Truth and Reconciliation made towards the noble goal of "unity, reconciliation and Reconstruction" in the words of the Constitution it is helpful to refer to the fundamental philosophy contained in the Constitution without which there would never have been a commission. The Constitution provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice and a future founded on the recognition of human rights, democracy and peaceful coexistence with development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. 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 conclusion, I want to quote a poet. His foreword was published in a book called *My Neighbor, my Enemy: Justice and Community in the Aftermath of Mass Atrocity*.⁸ I refer to the Chilean novelist and playwright, Ariel Dorfman. Some of you will have read his play, *Death and the Maiden*, or possibly seen the film. This is what he writes in the foreword:

Comforting to watch the accusations, the evidence, the witnesses. Justice is being done, punishment will be meted out, a balance has been redressed to a universe gone mad. And yet, crucial as these efforts to deal with the unspeakable may be, beneath my enthusiasm there has always lurked the suspicion that such performances of justice are not enough, that they do not answer by themselves, cannot answer, the really hard question left in the wake of destructive conflicts inside nations. How can survivors coexist with those who killed their most beloved kin? How can trust be restored to a community where our best friends betrayed us, refused us refuge? Can the needs of an international war crimes tribunal for forensic evidence be reconciled with the needs of families desperate to identify and bury their butchered relatives? Indeed, can reconciliation ever be truly achieved in the society where the perpetrators deny their crime?" "Are there", he asks, "alternative systems of restorative justice which more efficiently integrate the vast and still fearful community, taking into account the customs and traditions of its own members? And how to involve the victims in the definition of what is to be done, how to avoid imposing on them formulas from afar and from above, how to make them true participants in the rebuilding of their lives?"⁹

Every situation is different. You cannot impose the South African experience on other countries; alternatively, people may learn one or two lessons as we did, but I am convinced that the holistic approach to transitional justice offers and affords a genuine opportunity for at least some accountability, some truth, some reconciliation and healing, some transformation and reparation for victims.

⁸ Eric Stover and Harvey M. Weinstein, ed., *My Neighbor, my Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge University Press, 2004).

⁹ *Ibid.*, xiii-xiv.



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