

# Reconciliation, restorative justice and remembrance

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How can peace be established and preserved in countries in which neighbours slaughtered neighbours and hundreds of thousands or even millions perished – because they had different political beliefs or different religious beliefs, simply looked different or possessed some other characteristic which identified them as victims? In Cambodia, wearing glasses or speaking a foreign language were some of the multitude of characteristics by which people were identified as targets.

History has shown that there are numerous ways for a society to emerge from a cycle of violence, and that many of these paths are exceedingly difficult. Not all of them achieve lasting reconciliation or political stability. Some lead to dead ends, where society's conflicts are not reconciled, but rather hidden from view or simply covered over, at the risk that they will resurface later. This is particularly true in instances where the primary emphasis is on suppressing the conflict. Dolf Sternberger, a former political scientist at the University of Heidelberg, calls this a "*demonological peace*". It has as little permanence or substance as an "*eschatological peace*", which – usually founded on ideological indoctrination – promises deliverance from conflict. In this case, there is no effective, but merely a rhetorical, resolution of conflicts. This allows reconciliation to remain superficial, while oppression and violence continue to persist beneath the surface.

Only a *constitutional peace*, which is based on reconciliation, and which is supported both by generally accepted rules of coexistence and by institutions for the non-violent resolution of conflicts and interest intermediation, has any chance of permanence. Achieving such a peace requires a transformation of unjust political systems into democratic societies based on the rule of law. For post-conflict societies, this requires a political act of commitment and a forswearing of

violence. By no means are the formal establishment of conflict resolution structures, the holding of elections and formation of a government sufficient for achieving a constitutional peace. As is clear from the current process of transformation in Iraq, additional efforts are required in order to establish a societal consensus regarding values and a binding constitution, because without such a consensus any legal or political structures are an empty shell. Following a period of dictatorship and excessive political violence, confronting the past is a necessary step to forging this consensus.

The process of dealing with the past can last for decades. Many generations were to pass before Germany officially acknowledged its guilt for its colonial war of extermination against the Herero in the former German colony of South-West Africa. The same is true for the genocide of Native Americans and Australia's Aborigines. The compensation of Nazi Germany's forced labourers, like the trials of senescent Nazi war criminals in Germany and France, did not occur until decades after the fall of the Nazi regime. The current efforts to establish a UN tribunal to deal with the Khmer Rouge reign of terror from 1975 to 1979 are yet another example of how, after a period of tyranny and systemic injustice, efforts to challenge a culture of impunity and silence often may take decades to come to fruition.

Regardless of the means employed, the process of dealing with the past needs to accomplish three essential tasks. These are:

- Reconciliation and forgiveness
- Restitution and restorative justice
- Remembrance and establishment of a historical record

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Of even more importance than these interrelated objectives is the categorical imperative that what happened once never be allowed to happen again. This “never again” is an element that unifies the individual and often controversial aspects of these efforts, and which embodies the shared interest in reconciliation and a better future.

The decision to forego revenge and to prosecute only those guilty of the most horrendous crimes is usually made in those situations where political transformation rests on a compromise between the representatives of the former unjust political system and the political representatives of the victims, and where the policies for dealing with the past have been formulated without international involvement. This is the path events have taken in South Africa and in countries such as El Salvador, Namibia, Nicaragua and Uruguay. In these places, it has often been the case that important documentation which might have permitted large-scale prosecution of the crimes committed was destroyed. At the same time, there was a broadly shared desire among the people to find out what had really happened, and a broad-based hope for reconciliation. It is only with reservations that Cambodia can be included in this list of countries. The intervention of the international community has been much more evident here, while there are fewer of the internal social and political prerequisites necessary for a process of reconciliation and forgiveness based on the establishment of what actually happened.

Cambodia now has a tribunal, but it does not have a truth commission. The Cambodian judiciary is often accused of lacking practical experience or being corrupt or under the control of the government. The judges will be passing judgement on a small number of perpetrators. This, at present, puts definite constraints on the society’s ability to work discursively through the past.

When criminal prosecution is rendered impossible as a result of political compromises, the destruction of evidence, or for legal or societal reasons, or when criminal prosecution – as in Cambodia – is possible only on a very limited basis, then at the very least, the subjective truth as experienced by the perpetrators and victims in individual cases and crimes should be revealed. This is the trade-off embodied by “truth and reconciliation commissions”. Truth is something

which can be offered to the victims when justice is not possible. This type of clarification offers a third way between criminal prosecution and a conspiracy of silence, forgetting and suppression. In Cambodia, discussion of the past has not progressed very far outside of the spheres of politics, the tribunal and criminal justice, and society has yet to confront fully the systemic injustice which occurred. Perhaps it will be left to a future generation to show empathy for the suffering of the victims and to analyse the full extent of the tyrannical system that was responsible for this in all its horror, and in particular to closely examine its roots and set in motion a historical learning process.

### **Reconciliation and punishment**

Reconciliation can be applied at both an individual and a group level. The focus of the South African Truth and Reconciliation Commission was on individual events, the suffering of individuals and individual crimes – in other words, individual victims and perpetrators. The perpetrators admitted to their crimes and asked their victims and their victims’ families for forgiveness. This procedure led – when an amnesty committee composed of criminal judges agreed – to amnesty for the perpetrators.

The truth and reconciliation commissions in South America and Latin America have at times been criticised because they were not able systematically to clarify the methods employed by oppressive systems. The criticism – that these commissions reconstructed a rather diffuse overall picture of the truth without truly providing clarification – is justified, yet this does not in any way diminish their historic contribution to reconciliation.

The investigative commission for “Examining the history of the communist dictatorship in Germany and its consequences” proceeded in a much different manner. Although a large number of individual cases were examined here as well, the primary focus was on analysing the injustice of the system as a whole. We now know – this has been documented in 18 volumes with more than 15,000 pages – how systemic injustice, surveillance, repression and the system of rewards and punishments functioned in East Germany. The illegal acts of individuals in these cases became the subject of criminal proceedings in Germany and

were not subject matter for a truth and reconciliation committee. This has evoked complaints for numerous reasons, including the fact that there was no focus on reconciliation as the accompaniment of the public admission of guilt by the perpetrators and forgiveness by the victims. Any penance which resulted was done at the behest of the state, which at best offered a sense of legal closure, but no all-encompassing reconciliation or reintegration of society or, as it was called in its South African context, nation-building. Yet *nation-building* is one of the primary prerequisites for a lasting constitutional peace.

Why are societal reconciliation and a shared feeling of national unity so essential to the establishment of a constitutional peace? This question is particularly important because—as is frequently asserted—we find ourselves in a post-national constellation in which a cosmopolitan world community is emerging, increasingly overshadowing the national concepts of economy, politics and society. In such a situation (particularly in Germany), constitutional patriotism is called for rather than love of one's country or the display of national pride. Why, then, is so much being done in countries in the throes of transformation to promote both the creation of a national identity and a powerful sense of nationhood? In South Africa this goes beyond the rhetoric of national pride so often practised by the government to the initiation of full-fledged national pride campaigns.

Those who are put off by emotional and pathos-filled appeals to national unity and the promotion of national pride all too easily forget that these are not being pursued for ethnocentric or nationalistic objectives. Quite the contrary: The objective is the reconciliation of different groups within the state, in order to create a rainbow nation, as the South Africans put it. This type of state is the opposite of what is commonly considered a nation-state in Europe. A state comprising many different peoples or "nations" such as the Republic of South Africa was never the ideal of European nationalism, but was in fact its antithesis, as European nationalism was predicated on the ethnic emancipation and independent nationhood of each people. This is why nation-building in South Africa is a project of reconciliation and the opposite of the historic nation-building process in Europe, which went hand in hand with the destruction of multinational states. The old apartheid regime was acting in an ethno-nationalistic

fashion when it created separate "homelands" for the individual ethnic groups, while the new South Africa is in the midst of creating a nation characterised by freedom and ethnic diversity and which is united by choice.

### **Constitutional consensus and nation-building**

Reconciliation through nation-building and the creation of a constitutional state on the basis of majority-rule democracy with equal individual rights is not an easy matter. This process almost necessitates the formation of a majority culture, and means that nation-building runs the danger of thwarting the process of reconciliation between various sections of the population. The objective of national unity can easily come into conflict with the diversity of languages, religions, customs and behaviours. As a result, the question of establishing group rights for minorities is always an issue when drafting a constitution, highlighting yet again the limitations of a purely formal peace process. Problems emerge when, in the case of deep-rooted ideological, religious or language divisions – things which do not, after all, disappear as the result of a peace accord – the actions of the political community's institutions come up against cultural barriers, or when an open conflict erupts between the constitutional settlement's claim to universality and the claims of particular sub-cultures. Here, too, it becomes evident that there are political, legal and cultural preconditions necessary for a constitutional peace which are not met by the mere existence of a democratic system, particularly a majority-rule democratic system. Such problems can become serious if, in culturally segmented societies, structural ethnic majorities are organised into a political party. This precludes any change of government, and minorities are permanently excluded from the government. The pluralistic ideal of achieving a balancing of societal interests through the free competition of society's various groupings requires not only a multitude of overlapping group identities, but also fluid group identities and mobility among them. These requirements are not met in societies with rigid and mutually reinforcing social-structural, cultural and religious divisions.

The introduction of group rights, which has recently been the subject of consideration in western industrial nations under the banner of cultural pluralism, can be

a double-edged sword, for it is not only an expression of reconciliation and peaceful coexistence, but may also deepen society's divisions. Group rights are only unproblematic when they are restricted to well-defined areas and do not infringe upon the principle of equal political rights for all individuals. This is the case when disadvantaged groups, or groups which feel themselves to be disadvantaged, demand compensatory measures in specific areas, usually in the economic sphere or affecting everyday life, to combat their disadvantages. South Africa's black empowerment policies provide an example of this approach. I would, on the other hand, be sceptical of any moves to officially enshrine Islamic shari'a law for members of the Muslim community, as pluralistic legal systems generally impinge upon the ability to enforce the resolution of conflicts.

The situation is particularly difficult when members of minority groups demand that their cultural differences be enshrined in political distinctions. Such demands regularly accompany efforts to achieve political autonomy and self-government or to be given special privileges in the context of ethnic pluralism. In this regard, the spatial concentration of such movements is key. Territorial seclusion and under-representation in the political system can easily push such groups outside the framework of a constitutional peace. The ideal of a political community founded on equality and civil rights with constitutional guarantees and the establishment of specific minority rights are in sharp contrast to one another. That contrast's intensity may vary as the process of reconciliation and drafting a constitution proceeds, but it holds the potential for renewed conflict.

How far must reconciliation progress in order to contribute to the creation of a stable constitutional peace? Reconciliation and forgiveness do not mean that a conflict has ended; instead, they function as an act of recognition. Deep-rooted conflicts remain between blacks and whites in South Africa, and these dominate nearly every measure undertaken by the government and every parliamentary debate. In this regard, conflict resolution is not the objective of reconciliation. Reconciliation is primarily a matter of achieving an understanding of the offences of the past, which includes acknowledgement of the victims and of their suffering. In this sense, reconciliation and forgiveness are a prerequisite for being able to work together in the future.

The overriding goal is not the resolution of a specific conflict, but rather to achieve a comprehensive systemic transformation that leads to a stable constitutional peace. As progress is made towards this goal, the process increasingly moves away from specific aspects of the conflict and towards a system of institutions for comprehensive conflict resolution. However the actual details of a political constitution are determined, in order to meet the country's requirements and be able to deal with the country's specific social tensions – e. g. the balance drawn between the central government's power and local autonomy, or between individual rights and cultural group rights, the specifics of the electoral system, the mechanisms for forming a government – none of these problems are thereby solved. Their solution requires in-depth scholarly analysis and consultation. A well-designed political constitution is the decisive factor essential to any successful process of democratic change. Equally decisive, however, is the creation of a societal consensus based on reconciliation; without this, even the best constitution is of no use, making reconciliation and a constitution mutually indispensable.

## **Remembrance**

Fractured histories like those in countries with frequent changes of government pose special problems for the writing of history and for remembrance. The nation's past, which is usually considered to be something that promotes self-reflection and a sense of identity, is in these cases itself a source of conflict. Few nations have had more experience of this than Germany with its successive political upheavals. Since the founding of the German Empire in 1871, the Germans have experienced five regimes and corresponding changes of regime. The authoritarian Wilhelminian government was followed by a presidential democracy whose acceptance among the people was never more than half-hearted and whose constitutional underpinnings had severe defects, a democracy that was obliterated when the Nazis' brutal regime came to power. This was followed by a liberal-democratic parliamentary democracy in West Germany and a socialist system in East Germany. From 1949 to 1989 there were two German states and two different social orders on German soil: a capitalist system in the West and a socialist system in the East. These transformed the intra-societal class conflicts that led to the destruction

of the Weimar Republic into a conflict between East Germany and West Germany. The Berlin Republic resulting from Germany's reunification in 1990 continues to suffer from the economic and political effects of this separation. It can also, not least due to the continuing transfer of sovereignty to the European Union, be understood as another new type of regime.

Countries whose wars, colonial conquests and governmental developments were accompanied by fewer internal social divisions, such as Japan and Great Britain, for example, have been confronted with far fewer difficulties in writing their histories than those with fractured histories. Yet even these countries sometimes encounter external pressure to revise their views of history, something that is currently evident in the criticism directed by the Chinese and Korean governments at Japan's policies of dealing with the past, or by African nations at British colonialism.

South Africa, with its repeatedly fractured history, is in many ways comparable to Germany. The country is currently fostering a remembrance of its past in which it is trying to do equal justice to all its traumatic aspects, including the campaigns against the Zulu nation, the extermination of the aboriginal inhabitants of the Cape region, slavery and the deprivation of the Cape Malay of their rights, the atrocities of the Boer War, the colonists' theft of land, repeated forced resettlement and the crimes of the apartheid regime. The hope on which this is based, that political integration, the creation of a positive identity and self-knowledge are all fostered by societal learning processes when dealing with a fractured history, seems to be justified. At the same time, a policy of remembrance runs the risk of opening new rifts when attempting to achieve

collective atonement, or of turning such issues into everyday matters and thereby rendering them banal and of little import.

Experience has shown that only after time has passed is it possible to look honestly and unflinchingly at the past. There are both practical and psychological reasons for this – the investigation of systemic injustice is often slow and painstaking work, not least because of the fact that the most horrific crimes and violations of human rights committed by such regimes often remain hidden from public view. When the details remain unknown, or the knowledge thereof is not sufficiently widespread, it is often necessary to struggle against efforts to minimise or even deny what happened. In such instances, investigations carried out on a legal and scholarly basis are an important prerequisite for policies of remembrance. Dealing with the past can be a painful experience for a society, yet where it is successful, it can unleash the energy needed for a culture of remembrance and mourning that contributes to nation-building. Policies for dealing with the past can succeed only when they are simultaneously seen as policies for the future, serving as an opportunity and as guidance for finding a way to deal with conflict that is better than the methods of past generations. All experience has shown that this requires a great deal of time. Again, a constitutional peace, wherein society consents to submit to the rules of democracy and of peaceful conflict resolution, is a first and essential requirement. Only stable political relationships can offer a country the time it needs to fully confront its past and to accept the truth of its history, as painful as it might be, as the foundation for creating a better future.