ABSTRACT

This paper attempts to determine whether there is a universally applicable process of reconciliation. In order to do so, it examines various transitional justice methods employed by societies recovering from extensive human rights violations. In particular it focuses on: recollective repression in the form of denial, rationalism and relativism, criminal prosecution for crimes against humanity, Truth and Reconciliation Commissions, lustration of members of the previous regime from positions of authority, apology and compensation. It finds that although certain reconciliation processes may be relatively more effective in fostering social harmony, the application of a generic form of justice would be ineffective and socially destructive. Rather, it determines that enduring national stability and growth can only be achieved by employing a process which considers the unique characteristics of the conflict.

BIOGRAPHY

Juliet Davis is a third year Arts/Law student, majoring in History and Economics at the University of Queensland. Her current academic research centres upon an analysis of the behaviour of victimised social groups during and after an episode of genocide. A further area of interest is the role played by the justice system within an immoral regime. Upon completing her undergraduate degree, Juliet wishes to pursue a Masters in International Relations.
COME TOGETHER OR JUST LET IT BE?
The Long and Winding Road To Reconciliation

In the wake of horrific human rights violations perpetrated either by state authorities or external agents, societies are forced to confront the dilemma of “how shall we live with evil?” Each individual process of reconciliation seeks not only to rebuild shattered economic institutions and unite a people behind a legitimate, democratic government but also to determine a just compromise between “keep[ing] the past alive without becoming its prisoner [and]…forget[ting] without risking its repetition in the future.” In an attempt to achieve this delicate equilibrium, recovering societies have employed a number of diverse methods of reconciliation; including criminal prosecutions for crimes against humanity, Truth and Reconciliation Commissions, lustration of members of the previous regime from positions of public office, apology and compensation. Despite the benefits derived from each form of transitional justice, it is clear that there is no pre-eminent or universally applicable process of reconciliation. Rather, national renewal is most expediently achieved with regard to the unique characteristics of the discord. Only by the application of a specialised reconciliation strategy may a society emerge from the shadows of fear and repression and begin the process of ‘strengthening… respect for human rights and fundamental freedoms.”

Despite international recognition of certain ethical principles, local idiosyncrasies prevent the universal application of a single method of transition justice. Instead, an effective process of reconciliation can only be determined by examining the character of the previous regime or conflict, the nation’s prior history of democracy, colonialism or ethnic conflict, customary notions of justice, the duration and extent of the violations, the percentage of the population who perpetrated or were complicit in state sanctioned atrocities and the stability of the current peace. The application of a generic form of justice, without regard for such fundamental sources of disparity between emerging nations, will only serve to prolong and exacerbate the ‘birthing pangs’ of the newly liberalised state.

The disclosure of past atrocities is a vital element in the process of national renewal. However, many emerging countries employ social amnesia as a method of suppressing shameful episodes of the past. Thus denial, rationalisation and relativism are utilised in order to manipulate perceptions of history and ‘discredit, default, denigrate or even blot out portions of it.” Such mechanisms of recollective repression may be seen in the marginalisation of the Dreyfus affair and collaborative Vichy regime within contemporary French history and the social amnesia surrounding American military action in Wounded Knee and My Lai. This strategy of denial and reconstitution of historical myths, although universally favoured by perpetrators of atrocities, is fundamentally opposed to national reconciliation as victims of horrific human rights abuses are denied ‘recognition [of their suffering], indignation and compassion, [instead] there is…only silence.’ Such repression of public discussion not only serves to condone crimes against humanity by failing to expose those responsible, but may also engender private acts of revenge by victims deprived of legal means of justice. Whilst employed in order to prevent confrontation with past atrocities, social amnesia and denial merely impede the process of reconciliation and thus “[m]emory is the ultimate form of justice.”

Prior to World War Two, international law was dominated by the concept of national sovereignty, which prevented external intervention and punishment for crimes that contravened global moral standards. This precedent was, however, overturned by the decision of the International Military Tribunal at Nuremberg, which allowed individuals to be held criminally accountable for breaching international law. Although criticized by some as exacting ‘victors justice’ on a defeated enemy, the Military Tribunals of Nuremberg, Tokyo, Manila and numerous others, served as primary examples of trials which utilised the due process of law, in the most part, in order to ‘individualize the guilt’ of perpetrators of crimes against humanity.

As a result of these trials, criminal sanctions against individual perpetrators of atrocities have become an accepted means of reconciliation through legitimising the new leadership, providing a means of specific and general deterrence and erasing any perception of a ‘culture of impunity’. Based on the principle, articulated by Holocaust scholar Hannah Arendt, that we ‘are unable to forgive what [we] cannot punish’, the provision of legal redress to victims diminishes the perceived need to seek individual vengeance and thus brings some form of closure to victims of atrocities. The punishment of individuals for specific crimes also serves to rehabilitate an emerging nation as the indictment of individuals prevents the consignment of collective guilt to a people. Individualising guilt has however been criticised as a superficial means of reconciliation as, by creating ‘scapegoats’, it allows members...
of a complicit society to ignore their own guilt\textsuperscript{xvi}, thus preventing remedial institutional reforms and moral acceptance\textsuperscript{xiii}.

Despite the social benefits of a regulated means of punishment, certain fundamental flaws remain in the utilization of criminal sanctions as a form of reconciliation. Adherence to the rule of law by the new administration is vital in order to maintain social stability and manifestly separate itself from the methods of the old regime.\textsuperscript{xiv} However, by punishing individuals for committing acts that, though abhorrent to international ethics, were legal in the previous regime, the current leadership is in breach of due process through the creation of ex post facto\textsuperscript{xx} laws. Such retrospective justice serves to undermine the entire judicial process and may, as in the case of Rwanda, be perceived not as ending the cycle of vengeance but as a means of state revenge\textsuperscript{xv}.

A further disadvantage of criminal sanctions for violations of human rights is the necessary relegation of trials to symbolic gestures of moral condemnation as, due to time and financial constraints, only a small proportion of guilty parties will prosecuted. This narrow scope of possible criminal sanctions may result in the indicted parties being perceived as scapegoats whilst implying a grant of an amnesty to those not prosecuted.\textsuperscript{xxi} Thus, ‘in the final analysis, punishment is one instrument, but not the sole or even the most important one, for forming the collective moral conscience’\textsuperscript{xxviii}.

Despite the moral necessity of prosecuting human rights offenders, such retributive justice may be fatally compromised in situations when the past regime still maintains considerable force within the nation. Thus historically, successful prosecutions of past violators have only occurred where military rulers experienced demoralising external defeats.\textsuperscript{xvii} Where agents of repression are still active, such as Chile, a conciliatory policy of ‘pacification’ may be required, in which prosecutions of senior officials and military personnel are withheld in order to ensure the ongoing process of democratisation. Although condemned by many scholars as ‘lawful amnesia’\textsuperscript{xx} that undermines the legitimate and democratic nature of the new leadership, the granting of amnesty to human rights violators may ultimately assist reconciliation by ‘consolidat[ing] the peace of a country where human rights are guaranteed [rather than] seek[ing] retrospective justice that could compromise that peace.’\textsuperscript{xxv}

Perceived as a compromissory position between potentially destabilising prosecutions and social amnesia, Truth and Reconciliation Commissions provide an authoritative investigation into recent violations of human rights. Operating as an impartial body of enquiry, such commissions are only effective when implemented immediately after a change in the political situation and must not exceed a limited and specified period of operation\textsuperscript{xxxi} due to ‘society’s need to put the past behind it after a reasonable period of truth and justice’\textsuperscript{xxix}. Rather than applying a blanket form of amnesty, which would imply the condoning of human rights abuses by the previous regime and the continuation of a culture of impunity\textsuperscript{xvii}, immunity from prosecution is only granted to individual perpetrators in exchange for full disclosure of their violations. Thus the incentive of amnesty serves to expose and document atrocities which would otherwise be denied\textsuperscript{xxv}, fulfilling the social requirement of truth, even if at the expense of accountability. Yet, despite the benefits derived from granting immunity from criminal sanctions, the practice of state-sanctioned exoneration has been criticised as usurping the victim’s ‘exclusive right’ to forgive his oppressors\textsuperscript{xvii}, thus limiting closure and promoting private revenge.

Regarded as a restorative, rather than retributive form of justice\textsuperscript{xxvii}, Truth and Reconciliation Commissions also offer victims a unique means of receiving public acknowledgement of their suffering.\textsuperscript{xxviii} By providing a sympathetic platform for survivors to relate their experiences, such commissions serve to overcome official and community denial of atrocities, encourage public discussion and condemnation of crimes against humanity and individualise incidents within a greater context of political violence.\textsuperscript{xxix} Despite an absence of criminal sanctions, Truth and Reconciliation Commissions still have the capacity to exact punishment by exposing perpetrators and their crimes to public censure. However, despite ensuring a modicum of accountability and visibility, the practice of ‘naming names’ is a matter of controversial application. Whilst the commissioners of the ‘United Nations Truth Commission for El Salvador’ argued that ‘not to name names would be to reinforce the very impunity to which parties instructed the commission to put an end’\textsuperscript{xvi}, the Chilean ‘National Commission for Truth and Reconciliation’ declined to nominate perpetrators on the basis that it would be an abuse of due process due to the Commission’s lack of criminal jurisdiction.\textsuperscript{xxxi} Despite constraints on the commissions’ ability to hold perpetrators accountable for their human rights violations, the reconciliatory benefits of providing a public forum for investigation and discussion is such that, according to Cynthia Mgewu, the mother of a member of the Guguletu Seven, ‘if it means
this perpetrator...becomes human again...so that I, so that all of us, get our humanity back, then I support it all.'

After World War Two, thousands of denazification proceedings were commissioned in order to remove or prevent former Nazis from attaining positions of seniority in the post-war regime. This process of lustration, since implemented by many former communist states such as the German Democratic Republic and Czechoslovakia, supports the legitimacy of the new administration by removing human rights violators who are deemed a potential threat to the nation’s ongoing process of liberalisation. Despite serving as an effective method of deterrence, the utilization of lustration as a means of collective punishment is contrary to the rule of law as those suspected of political links to the previous regime may have inadequate access to due process protections. Thus programmes of summary dismissal without demonstration of individual guilt may in fact destabilise the political system by creating substantial opposition to the new regime. Therefore, a purging policy will only be effective if administered for a limited time period by a state-sanctioned, impartial body operating under the rule of law which guarantees the legal rights of those accused.

A key criticism of state-sponsored purges is based on the notion that ‘all [citizens] are responsible, each to a different degree, for keeping the totalitarian machine running.’ Due to the repressive nature of authoritarian and totalitarian governments, it is argued that many of those liable for lustration only obeyed the law, fulfilled the regime’s requirements of party membership and mouthed state ideologies in order to practice their profession or to avoid violent consequences. Therefore, a strict policy of state-sanctioned purges may hinder the process of reconciliation by denying skilled professionals the opportunity to contribute to the nation’s reconstruction.

Based on the compensatory theory of justice, reparations serve as a tangible condemnation of past wrongdoings through the award of money to victims. This form of repayment aids renewal of both parties by offsetting the victims’ material losses and generating public acknowledgement of past violations and also legitimising the new regime by separating the perpetrators’ deeds from common morality. Reparations also serve to establish new channels of communication between perpetrators and victims by replacing the search for universal models of reconciliation with local solutions agreed upon by all participants in the conflict. However, whilst the voluntary payment of compensation may facilitate self-rehabilitation, such as the Federal Republic of Germany’s recompensatory scheme that commenced in 1952, external inducement may result in resentment, as demonstrated by the 1919 Treaty of Versailles reparations treaty.

Despite the material benefits derived from reparations, rectifying wrongdoings by paying the victims ‘blood money’ may be perceived as an inappropriate trivialising of their injuries, especially in situations of intangible loss such as the death of a loved one. The use of compensation as a means of reconciliation also implies that, once paid for, the wrongs perpetrated have been fully rectified and need not be discussed again. Thus, a reparations policy must be combined with an absolute and genuine apology in order to be effective. The use of apology serves to diminish the superficial nature of monetary repayments by further assigning responsibility to perpetrators of atrocities and publicly highlighting the victims’ suffering. The simultaneous employment of reparations and apology serves as a powerful method of social reintegration through the granting of both symbolic and tangible recompense.

However, a significant shortcoming of recompensatory schemes is the reality that totalitarian, authoritarian and genocidal regimes commonly generate economically depressed states. In economic-rationalist terms therefore, the reconciliation of an emerging nation is best achieved by using its’ limited funds to boost the economy, restructure the bureaucracy and invest in future-orientated schemes rather than by making small, token payments to a victimized minority. Therefore, although reparations may aid reconciliation between perpetrators of atrocities and their victims, it may not be entirely effective in promoting national growth as a whole.

In conclusion, there is no process of reconciliation which is universally and invariably effective. Instead, when employing a form of transitional justice such as prosecution, Truth and Reconciliation Commissions, lustration, reparations and apology, it is vital to examine the unique characteristics of each emerging society. Only then can a nation come to terms with its past and begin a process of ‘rehabilitation and...restoration of...human and civil dignity.'
REFERENCES

6 Herbert Hirsch, Genocide and the Politics of Memory, 185.
9 Minow, Between Vengeance and Forgiveness, 4.
10 Ibid., 26.
12 Ibid., 94.
14 Ibid., After the fact.
15 Minow, Between Vengeance and Forgiveness, 124.
16 Ibid., 122.
19 Minow, Between Vengeance and Forgiveness, 20.
24 Ibid., 24.
25 Minow, Breaking the Cycles of Hatred, 18.
28 Ibid., 66.
31 Minow, Breaking the Cycles of Hatred, 82.
32 Hirsch, Genocide and the Politics of Memory, 186.


Minow, *Between Vengeance and Forgiveness*, 93.

Promotion of National Unity and Reconciliation Act 1995 (South Africa).