

From South Africa

RESTORING JUSTICE

by Desmond Tutu

The Truth and Reconciliation Process

During the period preceding our historic first democratic elections of 27 April 1994 which we will commemorate as we celebrate a decade of freedom, negotiators had to decide how to deal with the horrendous legacy of our immediate past, the ghastly prelude to the advent of freedom and democracy. Some, especially of the apartheid regime, advocated that a general amnesty or blanket amnesty be granted to all, so that as they imagined bygones would be bygones, that the past would not hold the present and future hostage. Mercifully we don't possess a fiat by which we can declare 'Let bygones be bygones' and they dutifully become bygones and go and lie down quietly. They have an uncanny capacity to return and haunt us. An unexamined and unacknowledged past finds all kinds of skeletons emerging from all sorts of cupboards to bedevil the present. Just ask General Pinochet. Santayana declared hauntingly: 'Those who forget the past are doomed to repeat it.'

Any general amnesty victimizes the victims a second time round by asserting that either what happened to them did not really happen, or worse, that it was of little moment. They are not able to experience closure and will nurse grudges and resentments which may have dire consequences for peace and stability as their anguish festers. They may then one day take their revenge. Some others thought the easiest path would be to follow the Nuremburg trial option and arraign all known to have committed or suspected of committing gross human rights violations. Nuremburg happened because the Allies defeated the Nazis and could impose what has been called 'victors' justice. In our case neither the apartheid Government nor the liberation movements of the ANC and PAC defeated their adversaries. There was a military stalemate. It is almost certain the apartheid security forces would have scuppered any scheme at the end of which they might be indicted. South Africa could not afford the long trials nor could an already overburdened judicial system have coped.

The negotiators opted for a principled compromise — individual amnesty (not general amnesty) in exchange for the whole truth relating to the offence to which amnesty was being sought. — ‘Amnesty for truth’. Many have asked in genuine concern, ‘But what about justice? Are you not encouraging impunity?’ First of all it is important to stress that this way of going about things was deliberately designed only for this delicate period of transition, ad hoc — once for all. It would not be how South Africa’s judicial system operates to free people who had committed crimes if they made a full disclosure. Far from encouraging impunity this way of going about things stressed accountability since the amnesty seeker had to admit committing an offence. Innocent people or those who claimed innocence obviously did not need amnesty.

What about Justice?

As to ‘What about justice?’ it was clear that most who asked this question thought in terms of only one kind of justice, retributive justice which is what obtains overwhelmingly the world over. The purpose of it all is punitive to ensure that the offender is punished. That is the primary aim of retributive justice. Its advocates might point to the biblical injunction of an eye for an eye as justification for it. It is in fact a misconstruing of the biblical injunction to think it sanctions revenge when it was intended to restrict blood feuds to targeting only the culprit and not others whose one fault was to have been related to the offender. It has seemed that harsh penalties for crimes have not always had the desired effect. There is no doubt that in a moral universe such as we inhabit, flouting its laws should indeed have consequences for those breaking those laws, that they should not contravene them with impunity. But it is an incontrovertible fact that the penal systems of most countries have failed to stem the tide of recidivism. The first time offender who is sent to prison for his crime is as likely as anything to end up being a repeat offender, that harsh sentences designed to be only punitive are turning out to be quite costly. Prisons are overcrowded. In my country they have been sentencing motorists to prison for motoring offences in a bid to deter others. It does not seem to be working and there are now all kinds of suggestions about how to reduce the prison population including avoiding custodial sentences for motoring offences.

Countries that have maintained the death sentence do not show a drop in crimes of violence or murder. The death sentence does not appear to have much to show as a deterrent. There is no marked drop in the numbers of

those sentenced to death. Columbine happened in the United States where two students shot and killed fellow students and fairly recently a schoolboy of 14 shot and killed his teacher. Then there was the panic caused by the sniper in Virginia. This happened in a land they knew would sentence them to death if found and convicted. Even more significantly there have been no appreciable increases in serious crimes in countries that have abolished the death penalty, certainly not increases that could be linked directly with that abolition. If there are now increases they are not related to the absence of the death penalty coming as they do so many years after the ban on death sentences. It does appear as if the death penalty makes very little difference to the crime statistics. What it seems to be doing is to brutalize society.

President Bush was Governor of Texas, a State notorious for the high number of executions that state carries out. It may not be fanciful to see a connection between this and the belligerent militarist policies that have produced a novel and dangerous principle: that of preemption. This principle has come about on the basis of intelligence reports that have been shown can be dangerously flawed and yet were the basis for the United States going to war, dragging a Britain that declared that intelligence reports showed Iraq to have the capacity to launch its Weapons of Mass Destruction in a matter of minutes. An immoral war was thus waged and the world is a great deal less safe place than before. There are many more who resent the powerful who can throw their weight about so callously and with so much impunity. We see here on a global scale the same illusion that force and brutality can produce security at national and communal levels that harsh sentences and being tough on crime necessarily make our neighbourhoods safer. How wonderful if politicians could bring themselves to admit that they are only fallible human creatures and not God and thus by definition can make mistakes! Unfortunately they seem to think that such an admission is a sign of weakness. Weak and insecure people hardly ever say 'sorry'. It is large hearted and courageous people who are not diminished by saying 'I made a mistake'. President Bush and Prime Minister Blair would recover considerable credibility and respect if they were able to say 'Yes, we made a mistake'. I hold no brief for Saddam Hussein — if now the reason being trumpeted for the war is regime change, why there and not, for example, Burma or North Korea? Who makes the decision about which regimes should be changed and what authority do they have to do whatever they may think is right? Is it a matter of might is right and to hell with the rule of international law?

Ubuntu

In the South African experience it was decided that we would have justice but not retributive justice. The Truth and Reconciliation Commission process was an example of restorative justice. In our case it was based on an African concept which is very difficult to render in English as there is no precise equivalent. I refer to *Ubuntu/botho*. *Ubuntu* is the essence of being human. We say a person is a person through other persons. We are made for togetherness, to live in a delicate network of interdependence. The totally self-sufficient person is sub-human for none of us comes fully formed into the world. I need other human beings in order to be human myself. I would not know how to walk, talk, think, or behave as a human person except by learning it all from other human beings. For ubuntu the summum bonum, the greatest good is communal harmony. Anger, hatred, resentment are all corrosive of this good. If one person is dehumanised then inexorably we are all diminished and dehumanised in our turn.

A criminal offence has caused a breach in relationship and the purpose of the penal process is to heal the breach, to restore good relationships and to redress the balance. Thus it is that we set out to work for reconciliation between the victim and the perpetrator. There may be sanctions such as fines or short exile but the fundamental purpose of the entire exercise is to heal. In the retributive justice process the victim is forgotten in what can be a very cold and impersonal way of doing things. In restorative justice both the victim and the offender play central roles. Restorative justice is singularly hopeful, it does not believe that an offence necessarily defines the perpetrator completely as when we imply that once a thief then always a thief. There were many instances when ghastly hair raising revelations were made about the awful atrocities an amnesty applicant had committed.

‘We gave him drugged coffee and then we shot him in the head. We burned his body and whilst this was happening and it takes 6/7 hours to burn a human body we were having a barbecue and drinking beer.’

You wondered what had happened to the humanity of someone that they could be able to do this. Quite rightly people were appalled and said people guilty of such conduct were monsters or demons. We had to point out that these people were indeed guilty of monstrous, even diabolical, deeds on their own submission but whilst this was important it did not turn them into monsters or demons. To have done so would mean that they could not be

held morally responsible for their dastardly deeds. Monsters have no moral responsibility. Even more seriously, it meant we were shutting the door to any possibility on their part to improve and if that were so we should really shut up shop because The Truth and Reconciliation Commission was based on the premise that people retained the capacity to change, that enemies could become friends.

Ubuntu, and so restorative justice, gives up on no one. No one is a totally hopeless and irredeemable case. We all remain the children of God even the worst ones. We all retain the capacity to become saints. For us as Christians the paradigm was provided by our Lord and the penitent thief on the Cross. He had led a life of crime presumably until he was crucified. Some might be appalled at this death bed repentance and conversion, but not God whom we seek to emulate – ‘be as perfect as your heavenly father is perfect’ is Jesus’ exhortation. We are not able to declare categorically that so and so has a first class ticket to hell. We shall be surprised at those we meet in heaven whom we least expected to be there. Perhaps we shall also be surprised by those we do not find there whom we might have expected to be there!

Lord Longford was constrained by his deep Christian faith to make what for others might have appeared provocative and unfeeling appeals for parole on behalf of those who were regarded as being totally beyond the pale. Relationships are a matter of faith, otherwise we would not have so many being divorced who when they married were madly in love. You stake your life on this one as an act of faith, hoping that it will turn out all right. So too we must, having taken reasonable precautions as in any relationship, have faith in those who might have fallen foul of our laws that many do want to go straight, do want to be rehabilitated, do want to be decent and productive members of society. They need someone to have even a modicum of faith in them so that they can turn the corner.

We can say that the principles of *ubuntu* have helped in our case in South Africa to avert a catastrophe of monumental proportions in substituting forgiveness for revenge and reconciliation for retribution. It may be prudent to see what it can do to redeem any penal system that clearly is not delivering the goods.

It does seem as if in this case as well there is no future without forgiveness, for forgiveness means the offended being willing to give the offender another chance to make a new beginning. We were exhilarated by many examples

of victims forgiving the perpetrators in a display of remarkable magnanimity and generosity of spirit. It was not just black South Africans who did this. Many white South Africans did as well. What is more it was not confined only to South Africans.

Amy Biehl Foundation

Peter and Linda Biehl were an American couple whose daughter Amy, a Fulbright scholar, was killed brutally by stoning by a mob of young blacks chanting the blood curdling slogan, 'One settler, one bullet'. The irony of ironies was that Amy had been a passionate supporter of the anti-apartheid movement. Her mother, her father having since died, attended the Amnesty hearing of the four young blacks serving sentences for their part in her murder. The Biehls spoke in favour of granting amnesty. Not only did they do that, they also set up the Amy Biehl Foundation to try to salvage as many black youths from the violence and dead-end of township ghetto life. Their daughter's murderers now work for the foundation which is achieving outstanding development work in the townships where their daughter was murdered. They are giving new beginnings to many. One of the most moving scenes was Linda meeting with the mother of one of her daughter's murderers. The mothers united by this awful tragedy embraced, one white the other black, one South African, the other American, both bound by the bond of humanity, the bond of ubuntu, connected by their essential humanity. They embraced with tears streaming down their faces, speaking of the possibility of forgiveness and reconnection, the possibility of new beginnings, of healing and restoration, of life out of death.

Bishop Desmond Tutu is the retired Archbishop of Cape Town Bishop Tutu gave a version of the above paper on 16th February, 2004, in London as the Third Longford Lecture, organised by the Frank Longford Charitable Trust working in association with the Prison Reform Trust and sponsored by The Independent. It is reproduced through the kind agreement of Peter Stamford, one of the trustees.