

South Africa's Truth and Reconciliation Commission*

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I am not speaking to you today as a judge of the Constitutional Court. I am speaking as a citizen of the newly emerged democracy of South Africa of which I am sure you have heard a lot. I hope to add to what you have heard. I trust that by the time I have finished, your interest in what is happening in that country will have increased; but more than that, I trust that you will realize that the story of South Africa is relevant to everyone wherever they are.

It is relevant because we are all human beings. The people who are in South Africa, who did what they have done, are our brothers and sisters, irrespective of where we are. The same applies to people in every other country. There is a humanity that is common to all of us. There are times when we condemn other people's acts. We have disasters in certain nations. We have horrendous things happening, being perpetrated by governments and by dictators, and we wonder whether these are ordinary people. Is there something different about them? Is there something that makes them predisposed to those things? I think it is useful to listen to experiences from other places, because the bottom line is that we are all related. What happens in South Africa, what happens in Bosnia or elsewhere, is somewhat connected to what happens in the United States of America. The foundations of what is happening in other countries may in fact have been laid right here. So we need to look at our ancestors, our forebearers, sometimes quizzically, and wonder whether they are not in fact responsible for the good that is happening in other countries, and unfortunately the bad as well.

I want to talk about the Truth and Reconciliation Commission (TRC), because it was one of our very cathartic experiences in South Africa's transition from an oppressive society to a society where human rights are respected, and to a constitutional democracy where the Constitution itself is supreme. A person by the name of Milos Kundera once wrote: "The struggle of men against power is the struggle of memory against forgetting." It is, of course, an eternal dilemma facing nations that are newly emerged into a new and different

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dispensation. The dilemma is this: Should we remember or should we forget? Should we remember? Remembering might be painful. Younger generations, those who came after the changeover or those who saw both sides of the transition may feel it easier to forget; they may want to forget. But should we remember? Are there any benefits in remembering? In South Africa's case there is a long history of oppression, suffering, conflict, and division. Is there any value in remembering? Or should we forget?

Forgetting is easy; it is comfortable. You carry no baggage and you feel no pain. But also, you carry no lessons from the past. The struggle of memory against forgetting is not just a personal dilemma; in many countries it is a national one. Should we keep our history alive? Should we teach all these pieces of history, palatable and unpalatable, to coming generations? Should young people, the generation to be born in South Africa, be told anything about apartheid or should we succumb to blissful forgetfulness and be nice to them and say, "I am not going to tell you about the horrors of the past." Of what relevance is the past when the country is normal, when it has attained liberation and democracy, when everyone is equal and the past is just a bad dream?

The story of the Truth and Reconciliation Commission is consistent with remembering and then closing the book on the past. The book will always be there. The actors, the people who were involved, who were participants in the compilation of history, who acted out that history, will be there. The book was supposed to be a record of not only what the past was, but also of the failings of human nature. It is a record of the cruelties human beings are capable of—people who are otherwise flesh and blood humans.

South Africa has always been a very Christian society. All of the old constitutions of South Africa invoke the Almighty God and subservience to Him. And then, of course, Section 1 of the Constitution would say, "South Africa is a sovereign republic" and then go on to say, "We are in humble submission to the Almighty God." What then follows would be an espousal of apartheid, hurtful racial discrimination, and an insensitivity to the human rights of people of different races.

Is there a lesson for us there, as a developing generation? Let me give you the context of the Truth and Reconciliation Commission. A good place to start will be for me to do a little remembering. I knew a man. He became a very close friend of mine. Very close. He was actually closer to me than a brother. The man I knew could laugh. He loved life and he loved laughter. He would make a very loud happy sound when he was laughing. When he came into a room, his voice would boom and everyone would wake up and look at this man. He had a presence.

The man was trained as a lawyer. I had first met him just after he was released from jail, where he served a term of imprisonment. I know that while he was in this jail—it is called Robben Island—he became a teacher to other prisoners who had no education. He also furthered his studies while in jail. While doing that, he brought together those prisoners who needed to further their education and he taught them to speak English and to write it. He got them on the road to furthering their education. He was a lovely man.

My active association with him, when it started, had more to do with our work. I was an advocate and he was an attorney. The system is that attorneys brief advocates. Advocates have no work unless they get it from attorneys. It is a double bar system. I received a lot of work from Griffiths—that is the man. I did not get a lot of money from him because his clients were the poorest, and came from the weakest part of the community. These were people with mundane problems: housing, education, police harassment, and so on. They went to him for relief.

Griffiths was always attentive to them. His home became a legal advice office and a community center. People would go to him at all hours, both day and night. Obviously, during the day he would be at his office, which was open for meetings that were attended by activists. I repeat: He was a lovely man. We enjoyed his presence and he enjoyed living. He enjoyed life and he loved being with people.

My first political trials as an advocate were with Griffiths. Our clients often ended up in jail in spite of, or maybe because of, our representation. The security laws in South Africa were very tight; they were vicious. You had, as it were, to rebut presumptions of guilt when you appeared before the judge under security legislation. Griffiths would always be there, battling for them all the way. Often, when I approached him for my fee, I would find that he had not been paid. He did a lot of work without pay.

On this particular day, I met with Griffiths. It was in the evening, about 7:00 P.M. Griffiths appeared to be more somber than usual and the reason for that was because I was telling him that I could not do the matter he wanted me to do the next day. I had a prior commitment elsewhere. He was visibly disappointed. He just could not understand why I could not do the impossible and appear in two courts at exactly the same time. He tried to impress me with the information about this other case. The clients had just come to him that afternoon. It was something that was urgent and he felt that they needed to be helped. He felt that I could help them, so he had sent the papers to my chambers. I had to give them back to him and we parted on that note. I was unhappy because I saw that my friend was unhappy. We then parted and I drove my car in the eastern direction, while he walked to his car, which was parked somewhere behind us.

The next morning, I was called to a bicycle track outside one of the townships. The smile on Griffiths' face had been replaced by a ghastly mask of gashes. He had been stabbed. His face had been chopped. He was disfigured and he was dead. Now, who had done that? We cast about and there was no doubt in our minds who had done that—it had to be agents of the government. They must have picked him up directly after I spoke to him—they decimated him. He had fifty-two wounds on his body and his face. It seemed that they had been trying to obliterate his identity. Maybe they got very incensed at seeing this man, who was very much in control of any situation wherever he was, and they decided that was the only way to deal with him. Someone was later to testify before the Truth and Reconciliation Commission in an application for amnesty that he was with Griffiths during the last struggle. He said that he had never seen anyone as ferocious as the members of the police force who were trying to kill him. All they were doing was trying to kill him quietly, but he put up such a fight that they ended up having to defend themselves. That was Griffiths and that is just one story of a South African who suffered the same fate as many. We did not know the identity of the people who had killed him.

Subsequently, I worked with his wife who had qualified as an attorney. She was a beautiful woman—vibrant, very intelligent, diligent, and energetic. She had been the mainstay of the legal practice of her late husband. But now she had to go out and actually represent people and she did that. We worked closely together and I had to give her advice, as we continued with our political trials. She went about her work fearlessly and we continued to put the emphasis on service.

She worked as she grieved. After about three years or so, she was able to smile again. I remember sitting in a restaurant with her and some of her assistants one day after one of our cases in Pietermaritzburg. It was a tough case, so we had to go for lunch. We sat to lunch in this restaurant—I think we were the only black people there. As we were eating,

something happened that triggered her laughter. It was possibly something I said or something someone else said, and she laughed. It was an uninhibited laugh and everyone, all the diners, stopped eating and looked at us. I was feeling quite awkward. But she was like that—she was enjoying herself unconcerned with what others might think. She actually brought the whole house down. Other people had started laughing. They were laughing at our laughing. It was good. Follow the leader.

Then she got home one day and found people waiting for her. When I was next called, her body had been taken to the hospital. She was dead. She had been hacked with an axe and also shot. She was rushed to the hospital by her young son, but she was dead. Nobody has yet confessed to Victoria's death. So, we know in part and we do not know. We are still in darkness in part and that really summarizes the reasons why there is a Truth and Reconciliation Commission.

They had children, three lovely children, and they are just one couple out of many who suffered this kind of fate. Let us multiply this by hundreds. There are people I knew very closely; personally there were many who I knew but who were not that close to me. I would hear "this has happened to so and so and that has happened to so and so." Some were lawyers, my colleagues and so on. There were many I did not know. There were things that I heard about or read about or even got to know during the process of the TRC. Let us multiply this possibly 100 times and we get the picture—part of the picture, maybe.

Apart from the category of people who were killed in those circumstances, there is a category of people who were killed while actually in police custody. We have a system in South Africa where there has got to be an autopsy for every unnatural death—a judicial inquiry. The doctor, the pathologist, will examine the body and give a cause of death. He would record that the person died, was hit with a blunt instrument, or died of a knife wound. That is to eliminate the possibility of a person having been poisoned and then stabbed and so on. It is a good system.

I represented many families in those inquests, and so did many of my colleagues, when political activists had died in police custody. It was a feature of police custody, particularly in the hands of the security police, that people would die, and considering the circumstances under which people were detained, it was easy for that to happen. Easy because the law permitted the police to be in full, total control, once they detain someone. They do not have to tell anyone—those arrested do not have that one phone call, so there is not that window to the outside—to parents, a minister, a doctor, to anybody. And that is the first thing they say: "You are now in our hands. We can do anything we like." And more often than not, they did.

Now, what is curious about the inquests, that is, the autopsies, I attended where political activists had died during their inquiry? All the evidence is brought to the magistrate, or the judge. He has to evaluate it. An inquest takes place where no one is being charged. The judicial officer has to say the person died an unnatural death and so and so is responsible, or I find that the police are responsible, or I find that nobody is responsible. For instance, if someone commits suicide and is not driven to commit suicide, the presiding officer has to make that finding. Time after time, the verdicts that were returned by these presiding officers were "no one is to blame." Yes, the person died an unnatural death, yes, the person was in police custody, but nobody is to blame.

Of course, there would be a story that leads up to that. There was a man called Mdluli. He was interviewed and he was being quizzed by the security police. This is all, of course, allowed by law. They were protecting the state. They were doing a service to protect society.

So Mdluli was sitting there in this upstairs office on a chair and he was being quizzed by the police. That is the evidence that the police themselves gave at the inquest. Then suddenly he was dead. When the examination showed that there was a bruise behind his head—the sort of bruise you would get from a karate chop—people waited for an explanation. Who gave him this karate chop on the back of his head? The police explain and say something to this effect: “While we were sitting there peacefully interrogating him and he was talking, in fact, he was telling us about other people who were perpetrating these things with him. Then while everything was going on nicely, he just suddenly got up and he ran. He was running towards the window. As he was running towards the window, obviously to escape, he fell. He slipped and fell and hit his head on the backrest of a chair.” And that is what caused the karate chop. The thing is, how does a chair actually give a karate chop at the back of a head when you are running forward? The presiding officer recorded, “No one is to blame.” He accepted that the police had given a satisfactory explanation.

Someone fell down a long flight of stairs. What happened was that he was just walking. He was being interrogated and wanted to go to the toilet. So he walked to the toilet. Somewhere there was a bar of soap on the floor. His foot found the bar of soap. He slipped towards the flight of stairs, which was some distance away, and they picked him up below. Someone dropped down from the sixteenth floor of a building. Again, he was not being forced to do anything he did not want to do. He was answering questions and volunteering information. Suddenly, he ran to this window knowing full well that it was sixteen stories up. He flew out of the window—just like that flew out the window and dropped sixteen floors below—dead.

Steve Biko is possibly one of the most well-known detainees to die. He was credited with being the father of the doctrine of black consciousness in South Africa. He was a student leader. They got hold of him and interrogated him. He was stripped naked and beaten up. In a very sick state, when he was semi-comatose, he was put in the back of a truck and driven from East London to Johannesburg, a distance of some 700 or so miles. He had no medical attention, although they could see that he was almost dead when he left East London. I do not really know why he was taken to Johannesburg. He was dead when he got to Johannesburg. Inquest—no one is to blame.

The roll call is long. I have mentioned a few names—not many names. I went to a special service at a large Roman Catholic church in Johannesburg. The bell was tolling. It would go “ding” and they would call a name. It took hours. It was a roll call of the people who had died in police custody under those circumstances. There had been no arrests of anybody, there had been no charges against anybody. They were not even talking about people who had been charged and discharged by a court. Political activists, community leaders, trade-unionists, students, and others had died. There was no discrimination in this tragedy. There was possibly racial discrimination, but there was no gender bias. Males and females were killed. The young died just as often as the old.

Some of the detainees escaped death. I have relatives who were detained, who spent that detention in solitary confinement for a year or more and somehow got out still intact. Their mental faculties were still working, and when you hear about their horrendous ordeal you wonder how that is possible. But consistently, no responsibility could be fixed on anyone.

I have mentioned the myriad of security laws. Practicing law under those conditions was serious business. Accused persons would be produced in court, charged with serious crimes, political crimes. They would be produced, possibly groggy, after having been in solitary confinement for a long time. The only people they would have seen since their arrest would

have been their interrogators. They take them to court when they decide that they have been broken enough. No one from the outside has had access to those arrested. If any lawyer wants to intervene and represent you, they have got to know when this is going to happen and simply be at court on the particular day. That happened a lot.

We found ourselves in that situation practicing law under those conditions. In trying to extricate himself or herself from the charges, these people then find themselves confronted with a statement made while in detention under those conditions. A statement would invariably be a confession of one or another of the offenses with which the person is charged. Our job there is to prove these circumstances to the court.

I was tortured. The court looks at you very quizzically if you say you were tortured. You, the self-respecting counsel, actually have the temerity to stand before a judge and say that that police captain, that police major—respectable, active, helpful, in court wearing a tie—is a torturer or a liar. Obviously, you are not going to be believed and we were not believed.

That is another aspect of the Truth and Reconciliation Commission. When the act was set up, it was designed to help those who had been victims to regain their dignity. Many of them went to prison as liars, as cheaters, as common criminals. The only way for them to regain their dignity was to be believed. “This is what happened to me and this is what I really did and I did not do that.” They got to say this in a normal atmosphere.

Many other things happened. People disappeared without a trace. There were parents, fathers, mothers, brothers, and sisters disappearing. The police had no obligation to tell anybody that they had taken someone. If someone died in police custody they would often destroy the body. Many times, bodies would be found along with some evidence that implicated other activists. So the story is planted that this person has been killed by activists because this person was a traitor to the cause. Now the dignity of those people, the stigma attached to that, is very serious. If that can be corrected, it has to be, and that is another aspect of what the TRC was set up to do.

When day one of liberation got to South Africa, there were many questions that were being asked by various people. “Where is so and so?” People wanted to know what had happened to their relatives, friends, sweethearts, and spouses. A method had to be devised to flush out some of these truths, if not the whole truth, and to correct the accounts of those who had been disbelieved. The capacity to be disbelieved was great because the public was fed only what officialdom wanted them to know. The media carried what was fed to them and they did not know what was behind the stories that they received.

How does one restore this dignity of the disbelieved, the credibility of someone who has been branded dishonest? Our founding mothers and fathers who were involved in directing the transition made an agreement. This agreement was made by all sides, i.e., the principal parties to the South African conflict. The agreement was attached to the interim Constitution, which came into force in 1994. That agreement expresses the desire to achieve national reconciliation. It was opportune that they should make that agreement. The country had to be saved from a fate too ghastly to contemplate. The pursuit of national unity required reconciliation between the people of South Africa and the reconstruction of society.

The postscript to the interim Constitution expresses the agreement in the following terms. It states that the adoption of this Constitution lays the groundwork, the secure foundation for the people of South Africa to transcend the divisiveness and strife of the past that generated gross violations of human rights—the transgression of humanitarian

principles in violent conflicts and the legacy of hatred, fear, guilt, and revenge. They went on to say that these issues could now be addressed on the basis that there is a need for understanding, but not for vengeance; a need for reparation, but not for retaliation; a need for *ubuntu*, an African concept that simply means "a humanness"—being human as distinct from being an animal. There is a saying that you are a person because you have other people. It is a gregarious sort of concept. So there is a need for *ubuntu*, but not for victimization.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offenses associated with political objectives and committed in the cause of the conflicts of the past. To this end, Parliament was then directed to structure an act and they created the Truth and Reconciliation Act.

What was it supposed to do? What was the mandate given? First, the mandate was to establish as complete a picture as possible of the causes, nature and extent of gross human rights violations. Secondly, to facilitate the granting of amnesty to persons who made full disclosure. Thirdly, to establish and make known the fate or whereabouts of victims and restore the human and civil dignity of such victims by granting them an opportunity to relate their own account of the violations and by recommending reparation measures. Fourthly, to compile a report providing as comprehensive an account as possible of the activities and findings of the Commission. All of this is done in pursuit of one overriding objective: to promote national unity and reconciliation in a spirit of understanding that transcends the conflict and divisions of the past.

After the structure was put in place, Archbishop Desmond Tutu was appointed the head of it. He said, "This is a difficult thing and I have been chosen to lead it. I ask for your prayers and I appeal to all South Africans and people around the world to uphold members of the Commission in their prayers because the healing and reconciliation of a deeply traumatized and wounded people is a deeply spiritual exercise." This is what has been debated a lot: Is this a process or a solution? Is this process bringing people any closer to reconciliation? It is agreed that reconciliation is a primary objective. But what Parliament has done through that postscript to the Constitution is to say to individual victims: "You are victims of gross human rights violations. You accept that in some cases we are in a position to know who has perpetrated these violations—their identity in some cases is now known. You accept that. However, we are stopping you from pursuing this. We are not going to prosecute them. We are not going to allow you to bring in private prosecution. We are not going to allow you to claim damages."

Take Griffiths, his wife, and their children. I see large amounts of money being paid by institutions, tobacco companies, etc., for various violations. But Griffiths' children cannot claim damages from somebody for loss of support, although they did lose a lot. According to the law, if the perpetrators fall within the political category, they cannot be sued.

This was challenged in the Constitutional Court by some victims, including Griffiths' and Steve Biko's relatives. They argued for the right to sue. The Constitutional Court had to consider whether the postscript authorized a law that was going to suspend justice to achieve some other end. The government had to come to court and admit that they were suspending justice in respect to these victims. But there is a greater objective. What objective could there be? What good reason could there be to suspend justice?

Everyone wants justice. Justice is what we have been fighting for through all those years. This agreement, based on unity and reconciliation, tested us. If we opened this can of worms, there were going to be thousands and thousands of cases and we were going to be

talking about these human rights violations for years and years, because there will be court case after court case. The country will be bleeding, because bitterness will be exacerbated on all sides. People will be talking about this, tensions will rise, and there will not be any respite.

The Court, confronted with that argument, found that the legislation was authorized by the Constitution. We found that even civil litigation was forbidden. Is it appropriate to suspend justice in those circumstances? We had to look at sources everywhere else, but ultimately listen to what the Constitution itself said. The Court concluded that:

The result at all levels is a difficult, sensitive, perhaps even agonizing balancing act between the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a new future. Between encouragement to wrongdoers to help in the discovering of the truth and the need for reparations for the victims of that truth. Between a correction in the old and the creation of the new, it is an exercise of immense difficulty interacting in a vast network of political, emotional, ethical, and logistical concentrations. It is of an act calling for a judgment falling substantially within the domain of those entrusted with law-making in the era preceding and during the transition period. The results may well often be imperfect, and the pursuit of the act might inherently support the message of Kant: 'out of the crooked timber of humanity no straight thing was ever made.'

It was an excruciating decision to make, but we had to turn them down. We had to tell Griffiths' children that they cannot sue and the state cannot sue, if amnesty is granted to these people. The matter rested but the controversy continues. The acid test of the TRC's success will be whether the reconciliation that is being pursued actually does come about, for that is the only thing that would make this sacrifice of justice worthwhile. This is not a sacrificing of justice forever, however, but a temporary suspension limited to certain grounds only in pursuit of the national interest to pursue a noble goal of reconciliation.

Our generation and the coming generations owe a tremendous responsibility to those victims who cannot pursue their claims. The reconciliation is possible where people can meet on an equal footing. Apartheid caused many disparities and created very impoverished communities. Those communities are sitting side-by-side with extremely privileged people. These people were privileged through apartheid. The disparity is not only a statistical abstraction; people see it every day. People are wondering whether there is a common passage to follow to achieve the reconciliation. If the socioeconomic problems, the gap between the haves and the have nots, are not dealt with, reconciliation will be difficult.

What does reconciliation mean? Reconciliation means people learn to live together, society becomes normalized, and the old hatreds based on racial differences diminish. Racial and class differences diminish. People accept each other's hand and close the book on what has happened in the past. We say that we are now in a normal society; let us build the country together. But some people do not even have the capacity to build a country, because they have been left too weak and unequipped by that past. If they see those who were privileged by old policies simply continuing and pretending that nothing has happened, then reconciliation is going to be difficult. There is a tremendous responsibility on our leaders, our courts, and primarily on our younger generations, not just in South Africa but elsewhere. We defeated apartheid through international and internal action. People with no blood ties to the country were involved. They campaigned through the United Nations and through antiapartheid bodies throughout the world. They brought pressure to the South African government and there was change. We still need that pressure on our communities to drive them towards true reconciliation. The way to do that is to facilitate the situation where we are *all* enabled to be equal. I thank you.