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The Politics of Reconciliation and Constitutional Peace

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'The subject and the aim of politics is peace ... peace is the political category as such'. So wrote Dolf Sternberger, a political scientist from Heidelberg, in *Three Roots of Politics*, first published in 1978. But how can politics achieve peace when parts of the population are hostile, or even fight each other in hatred? How can reconciliation take place after civil wars, terror, ethnic cleansing and genocide?

History has known many, sometimes tortuous, escape routes from enmity, violence and chaos. Not all of them end up with reconciliation and political stability. Efforts at peace-building can come to nothing when societal conflicts are not truly reconciled but just superficially patched up, as they tend to erupt again sooner or later. This negative scenario is most likely if peace rests on the violent suppression of conflict. Sternberger calls this a 'daemonological peace' – a fragile dictatorial state void of truth and justice. Suppression of conflict often coincides with so-called 'eschatological peace'. Eschatology means the study of last things. Politicians who advocate this kind of peace pretend to ultimately deliver mankind from evil and, thus, fiercely fight their opponents whom they equate with evil. Whether peace-building rests on the suppression of conflict or on attempts to release mankind from conflict, these ways out of civil war do not solve conflicts in a substantial way. As violent or rhetorical solutions they remain subliminal while injustice and the use of illegitimate force continue.

In contrast to the false promises of the daemonological and eschatological forms of peace, the only lasting way out of violent conflict – according to Sternberger – would be to institute a constitutional system of justice and democratic participation. Constitutional peace rests on common and respected rules and on strong institutions of non-violent conflict resolution and interest intermediation. To reach this state of peace requires an act of consensual self-restraint and non-aggression. On the long journey from de-escalating a spiral of violence to a democratic constitutional peace, disarming and peace talks serve only as a first step.

Reconciliation, Restorative Justice, Remembrance

One has to pass through a process of disarming, mediation, external conflict intervention, conflict management and political compromise in order to set up a political constitution that suits the specific requirements of a given society. In this process it is not nearly enough to build formal institutions of conflict resolution, establish a well-functioning administration, organize elections and form a new government. As recent transformation processes in Iraq, Afghanistan, Cambodia

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and elsewhere have shown, there must be additional efforts to build up a consensus on societal values and normative constitutional principles. Without this consensus a political legal order is no more than an empty shell. To come to a lasting peace agreement after times of dictatorship and excesses of political violence, a society and its élites in particular need to face up to the past. There are three challenges that have to be mastered, or else the constitutional consensus and the aim of nation-building are put at risk. The necessary tasks are:

1. Reconciliation and forgiveness
2. Restitution and restorative justice
3. The politics of remembrance and mourning.

The success of a post-conflict democratic transformation depends on the fulfilment of the three Rs – reconciliation, restorative justice and remembrance. Reconciliation bears an individual as well as a collective aspect as can be shown by comparing the recent experiences of South Africa and Germany. The South African Truth and Reconciliation Commission concentrated on individual incidents, individual sufferings and individually committed crimes, that is, on single victims and perpetrators. Offenders confessed their acts of cruelty and asked their victims and their families or dependants to forgive them. Normally, this procedure led to amnesty – eventually backed by the professional judges of an amnesty committee.

South Africa and Germany Compared

The South African approach rests on the life-world experiences of those who suffered. Its excessive media coverage influenced the political attitudes of South Africans and supported their readiness for dialogue – not only in politics but also in everyday life – in the media, in the economy, in corporations, churches, schools and universities of the country. This was a risky endeavour as uncovering and publishing excesses of violence could have seeded new hatred. But the unconditional wish of the societal élites and of the whole population to reach a common better future overcame the wish for revenge.

The option to abstain from revenge and punishment except for the most violent crimes can always be found where political change and transformation rests on a political compromise between the representatives of a former system of injustice and its victims. Beside South Africa, this pattern applies in countries like El Salvador, Namibia, Nicaragua and Uruguay. Most often, documents necessary for penal prosecution have been destroyed or distorted in these countries. In South Africa evidence was systematically destroyed during the transitory phase up to 1994, when the democratically elected government came into power.

One reason for not practising judicial sanction is the principle of *nulla poena sine lege*: no punishment without law. The legal rule of not punishing when at the time of the offence no law existed restricts prosecution of the most excessive crimes against humanity. The principle ban of *ex post facto* law-making is no longer valid today if basic human rights had been violated or at least if violent crimes against humanity had been committed. Beginning with the UN Human Rights Convention of 1948 and the Nuremberg International Military Tribunal of 1950, such offences have been increasingly banned and made punishable on an international level. The first principle of the Charter of the Nuremberg Tribunal claims that any person who commits an act which constitutes a crime under international law is responsible and liable to punishment. Moreover, as

some new Eastern European constitutions demonstrate, there are exceptions to the rule of 'no punishment without prior law' to be found on the national level if, after regime changes, an act of 'historical justice' seems appropriate.

What happens if, as a result of political compromise or after the destruction of evidence or for judicial reasons, criminal persecution turns out to be impossible or limited? The least politics can do is to make it possible for the subjective truth experienced by perpetrators and victims to come to light in those cases. This is the raison d'être of truth and reconciliation commissions. Truth is what one can offer to the victims if justice is not possible. Clearing up single incidents of crime in that way seems to be a third way between strict prosecution and criminal punishment and it is an alternative to hiding and forgetting the past. Of course this means it is necessary to find a particular kind of truth or a reconstructive effort, which does not necessarily correspond to scientific truth, norms and evidence.

The South African Truth and Reconciliation Commission has been criticized because it did not and could not investigate the systematic working principles of the apartheid regime. The Commission did reveal many truths, yet those were not based on the history and power structures of apartheid. This was a consequence of the Commission's lack of systematic analysis of the fundamental attributes and operating mechanisms of apartheid, especially when compared to other systems founded on political violence and injustice. The widespread critique that a scattered picture of the truth had been reconstructed by the commission should not diminish its historical contribution to the reconciliation and nation-building process in South Africa.

In contrast, the parliamentary study commission 'Coming to Terms with the History and Legacy of the SED Dictatorship in Germany', established in 1992, was committed to 'make contributions to the political-historical analysis and political-moral evaluation' of the SED (Sozialistische Einheitspartei Deutschlands, Socialist Unity Party of Germany) dictatorship. A number of renown historians and members of parliament investigated the following:

- the structures, strategies and instruments of the SED dictatorship (the relationship of SED and state, the structure of the state security organs, the role of the so-called block parties and the militarization of East German society in particular
- the significance of ideology and integrating factors such as Marxism-Leninism and anti-facism (as well as the role of education, literature and the arts)
- human rights violations, acts and mechanisms of repression, and the possibility of further restitution of victims
- the variety and potential of resistance and opposition movements
- the role of the churches
- the impact of the international system and in particular of Soviet policy in Germany
- the impact of the Federal Republic of Germany/German Democratic Republic relationship (inner-German relations)
- the significance of historical continuity in German political culture in the twentieth century.

The commission has documented in more than 15,000 pages over 18 volumes how systemic injustice, surveillance and suppression, and reward and punishment worked in the former socialist German Democratic Republic (GDR). Only victims were heard by the study commission, while perpetrators were charged individually in front of criminal courts. Some have

complained about the fact that reconciliation as a result of public confessions by the perpetrators and acts of forgiving by the victims has not been a public issue. Judicial peace was at stake in Germany rather than an encompassing process of reconciliation and societal reintegration – nation-building, as it was called in South Africa.

Nation-building

Why are both post-conflict reconciliation and efforts to achieve national unity so important for the establishment of a constitutional peace? This question is particularly important because we are – at least in Europe – now living in a post-national constellation in which cosmopolitan attitudes are said to replace the national boundaries of the economy as well as those of politics, society and everyday culture. At least political scientists argue that individual nations cease to serve as a primary reference point for personal identity. In Germany, for example, constitutional patriotism is said to have replaced emotional bonds and national pride. But why is it that in the wake of post-conflict transformation, governments do a lot to establish national identities and promote a strong feeling of belonging to a single political nation?

In South Africa, the national government made use of a particular rhetoric of national pride and initiated a national pride campaign. Those who – with a post-modern attitude – feel irritated by the emotional appeal to national unity tend to forget that in most cases of post-conflict reconciliation governments do not strive for ethno-nationalist goals. On the contrary, reconciliation between different ethnic groups is the primary goal of nation-building. The inclusion of all citizens in one state – the rainbow nation, as South Africans call it – is the opposite of the legacy of historical nationalism and the European nation state. A multinational, multiracial and multilingual state, as has been set up in post-apartheid South Africa, had been the anathema of European nationalism. The latter refers to ethnic nations and – as a consequence – has deliberately destroyed multicultural societies. It has even excluded parts of the population from citizenship. In that respect the former apartheid regime and its segregationist homeland policies rested on similar ideological grounds as nineteenth and twentieth century nation-building in Europe, especially when it came to its extreme form of ethnic cleansing.

The Problem of Group Rights

Reconciliatory nation-building along with democratic transformation seems to be the only way to overcome historically deep-rooted conflicts. However, it also poses some intricate problems and even dilemmas for multicultural societies. Nation-building appeals to the feeling of a common identity and, in the course of democratization, is also part of the establishment of majority rule. Thus, in most cases, it strengthens a dominant majority culture at the expense of peripheral minorities. In that respect nation-building not only supports reconciliation but also, at the same time, runs the risk of negatively interfering with it. The goal of national unity does not naturally correspond with a multiplicity of languages, religions, customs and fractured histories. That is why constitutions need to become individually tailored for each country. They must not limp ahead or behind the structural conditions of a given society, as political scientist Otto Kirchheimer has emphasized in view of the

German Weimar constitution of 1919.

Individual tailoring of the constitution is a means of coping with a country's history and its given structure of social and cultural conflicts. This excludes solutions based on the literal copying of foreign constitutions and other ways of ill-considered institutional imitation. The most important constitutional questions are whether a country would be better suited to a unitary or federal system of government, whether political representation should rest on majority or proportional voting, and, last but not least, whether the principle of equal universal rights for individuals should be complemented by collective group rights, usually for cultural minorities or otherwise disadvantaged sectors of the population.

Let me concentrate on the group rights problem since, in contrast to a federalist or electoral design, it requires no 'technical' knowledge of constitutional engineering but reveals a genuine normative political challenge. The question of group rights poses intricate normative problems, which have been investigated by Donald Horowitz and Will Kymlicka, among others. Deep-rooted ideological, religious or linguistic cleavages usually persist in post-conflict constellations. Often they become even more salient due to political negotiations between the leaders of the respective groups. They may also persist in the long run if group affiliations remain strong and thus function as emotional building blocks of individual identities.[1] This can cause a cultural barrier to reconciliation and mutual understanding as well as open conflicts between a universalistic constitutional rights system and contradicting claims of particularistic cultures. Thus, besides its political and legal prerequisites, constitutional peace rests on specific cultural requirements, which cannot be guaranteed by democratic rule systems namely by those of a strict majoritarian origin.

Particular problems arise in culturally segmented societies if the respective segments organize themselves politically, that is, by seeking influence and representation through political clubs and parties. To translate cultural cleavages into stable political alliances together with group politics usually distorts competitive politics and thus impedes future changes of government.

Party cleavages and group voting that are based on ethnic, linguistic or religious conflicts tend to produce permanent structural majorities and thus weaken the democratic process. The pluralist ideal of partisan mutual adjustment is based on a competitive political process in which all parties must have an equal chance of gaining electoral support, otherwise the prospects of political compromise would be seriously weakened. Cultural or ethnic group voting impedes an open democratic competition since election results are determined by the population structure rather than by competitive politics. Moreover, petrified majorities tend to permanently exclude large parts of the electorate from government and thus may interfere with the aims of democratic transformation.

Majoritarian democracy has occasionally led to the exclusion of minority factions and democratic counter élites from political decision-making and has thus facilitated despotism and dictatorship. This is particularly true for a number of post-colonial African countries in which governments failed to build national

1. It is important to note here that the term 'cleavage', as introduced by political scientist Stein Rokkan from Norway, constitutes an antidote to any kind of psychological or sociological reductionism that treats politics as a mere reflection of underlying social, cultural or psychological processes. It implies that social divisions are not translated into politics as a matter of course, but that they are decisively shaped by their political articulation.

identities and instead reinforced political divisiveness. This happened through the establishment of clientelistic support based on structures which followed social, cultural and ethnic cleavages. What can be done in cases of deep-rooted social, cultural and religious cleavages that do not overlap, reinforce each other and thereby fail to produce patterns of multiple belongings and overlapping membership? One possible answer would be to create arrangements of political power-sharing between groups of a society.

The politics of power-sharing is supposedly facilitated either by counter-majoritarian constitutional devices (e.g. federalism, bicameralism, proportional voting) or informal patterns of non-majoritarian decision-making (e.g. coalition governments or corporatist arrangements). It is based on cooperation and negotiations between various political stakeholders but does not necessarily interfere with party competition in the electoral arena. Competitive party politics and bargaining practices between national and provincial governments, governments and unions, or governments and autonomous central banks do not exclude each other but have to be seen as two different sub-systems or tiers of policy-making. Negotiation democracy is used as the generic term for a number of power-sharing arrangements.

Power-sharing and Negotiation Democracy

According to current theories of negotiation democracy, a certain number of elements in modern political systems would help to channel deep-rooted social conflicts, foster compromise and simultaneously limit the power of structural or situational majorities. Generally three such elements can be distinguished in negotiation democracy:

1. Consensus politics and party concordance as indicated by grand coalitions representing a super-majority of the electorate.
2. Corporatist interest intermediation based on networks between the administrative state and civil society organizations, such as, for example, unions, business associations and non-governmental organizations.
3. Constitutional power-sharing as indicated by federalist or bicameral political systems, constitutional review, etc.

South Africa has attributes of more or less all three dimensions of negotiation democracy. It has become a grand coalition state and even more so as the New National Party – the successor of the former governing National Party of the apartheid period – joined the African National Congress (ANC) in 2004. As the incumbent party, the ANC represents about 70 per cent of the electorate. The ANC itself has emerged from a coalition of the ANC liberation movement, COSATU (unionist party) and the South African Communist Party. Together with the KwaZulu-based Inkhata Freedom Party, the South African government is now composed of a super-majority of almost 80 per cent of the electorate. Additionally the country's political system bears features of corporatism since the labour unions are closely intertwined with the ANC and – through the NEDLAC (National Economic Development and Labour Council) programme – also with the executive branch of government. Not least, South Africa's constitutional court has a strong voice especially when it comes to defining the interface between constitutional law and elements of customary law as applied in indigenous and religious communities.

Post-apartheid South Africa has put in place a constitution that is particularly well drafted and quite progressive, yet also recognizes some customary marriage and inheritance laws, for instance. Many countries during their transition to democracy face tensions and dilemmas in that respect. Muslims, for instance, have been allowed to adopt Islamic legal codes, which often concerns local residents of other religions. The persistence of community laws within a legal system is not unique to less developed countries of the South. Marriage and divorce laws are hardly 'uniform' in the United States either, since they vary from state to state, by communities defined geographically rather than religiously. Another parallel worth considering is that reservations for Native Americans have been granted some limited legal autonomy in the United States context. In Europe inherited customary and provincial laws survived far into the twentieth century.

In countries where the values of sectors of society are based on group rights rather than those of the individual, social and legal conflict has ensued. While proponents of social engineering eventually hope to change norms sufficiently to reconcile the clash between customs and rights, namely constitutional individual rights, some religious law is not by its very nature amenable to such pressure, even if political leaders are.

There is a certain ambivalence in the constitutional establishment of collective group rights as advocated by proponents of 'cultural pluralism' since such rights may both reduce and engender cultural conflicts. Group rights seem to be tolerable, for instance, in order to compensate those groups who suffered most from injustices of the past. The black empowerment programme of the South African government is a case in point. Its aim is to increase the portion of black Africans in the upper strata of the economy and it is thus confined to economic and social compensatory measures. Group rights would be hardly tolerable, however, if they hurt the principle of equal legal and political rights.

Problems arise when groups try to translate cultural differences into political differences. Most often such attempts involve demands for political autonomy and self-government. If such groups live in separated settlement areas and are politically under-represented, there is a certain danger of secession. In South Africa, for instance, the national ANC government played down the issues of full federalism and minority safeguards. Inkatha leader Chief Mangosuthu Buthelezi, who headed the provincial government in KwaZulu-Natal, recognized the trend toward centralization, and therefore insisted that the provincial governments should have 'significant powers'. In September 1996, the constitutional court refused to approve a new provincial constitution drawn up by the KwaZulu-Natal legislature, contending that it far exceeded the powers that the provincial legislature could rightfully claim. Similar centralization tendencies can be found throughout the developing world. Often dominant parties agree to quasi-federal compromises in an effort to allay minority misgivings and to smooth the way to decolonization. Then, with independence in hand, they quickly dismantle concessions on regional autonomy and centralized political control over their societies.

The idea of a nation based on equal individual rights for all citizens forms a sharp contrast to the institution of special rights not for individuals but for collectivities. In the course of the politics of post-conflict reconciliation and constitution-building this contrast often becomes a source of new tensions. To resolve them requires a carefully thought-out constitutional design. Existing consensus democracies with their special

arrangements of power-sharing may give some indication of how this challenge can be met successfully. Some European countries, such as Switzerland, Austria, Germany and the Netherlands, and not least the new South Africa, have shown how non-majoritarian institutions can be employed in order to achieve reconciliation and constitutional peace in a given particular context.

Bibliography

Gagnon, A.-G., and Tully, J. (eds). 2001. *Multinational Democracies*. Cambridge: Cambridge University Press.

Horowitz, D.L. 1991. *A Democratic South Africa? Constitutional Engineering in a Divided Society*. Berkeley: University of California Press.

Kymlicka, W. (ed.). 1995. *The Rights of Minority Cultures*. Oxford: Oxford University Press.

Kymlicka, W. 2001. *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship*. Oxford: Oxford University Press.

Lijphart, A. 1999. *Patterns of Democracy. Government Forms and Peformance in Thirty-six Countries*. New Haven/London: Yale University Press.

Reynolds, A. (ed.). 2002. *Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy*. Oxford: Oxford University Press.

Sternberger, D. 1978. *Drei Wurzeln der Politik*. Frankfurt: Suhrkamp.