On the Limits of Law at Century's End

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In this paper, I examine the generally accepted idea that law has definite limits to what it can be used to achieve. Toward this end, I discuss the limits of law as suggested by the Truth Commissions and the Truth and Reconciliation Commissions (TRC), and summarize the divergences between law and the TRC. I suggest reasons why law may not serve or may underserve the purpose of healing and reconciliation in our time and conclude that the TRC is at best a reminder to us of the limits of law as a principle of social ordering.

This paper is based on a belief that I do not defend here. The belief is that however good a social order that has law as its organizing principle is, it will always be second best to one that is able to secure all that law delivers without employing the instrumentality of law. That is, however much good law embodies or ensures, there is evidence of a widespread unease in most societies with law such that if they could secure the same amount of good without law, their inhabitants would prefer it.[1] But I hasten to concede that even though many feel this way, there is also widespread skepticism about the possibility of a world without law. Although many find the idea of a world without law eminently desirable, few would concede that such a world is attainable. Yet, even among those who insist that law is indispensable, very few deny that there are real limits to what law can do and that, on occasion, law is radically insufficient for the enthronement or inauguration of a good society.

On that score, there is agreement between those who are skeptical about the necessity of law and those who are skeptical about the desirability and or attainability of a world without law. It is this generally accepted idea that law has definite limits to what it can be used to achieve that I

propose to examine in this paper. That is one part of my task. The other part is traceable to the specific historical conjuncture—century's end—presaged in the title.

There are few more opportune times than now to raise questions about the limits of law. In the first place, the twentieth century has witnessed two global wars, several other wars that have evidenced incredible cruelties and unspeakable evils, genocidal movements in Cambodia and Rwanda, apartheid in South Africa, the operations of bloody regimes in different parts of the world, and the list goes on. Second, the century has witnessed some of the boldest and farthest reaching attempts at deliberate social transformation and the creation of new human beings and the subsequent disastrous failures of such experiments. Third, the century started with a revolution, the Russian Revolution, that challenged the dominance of the global capitalist system and the hegemony of its political twin, liberalism and the Rule of Law. It is ending with capitalism resurgent and liberal democracy, however many distortions afflict it in practice, triumphant. It is precisely this proclivity towards triumphalism and its attendant elevation of the law and its attributes to near sacred status on the part of their enthusiasts that provoked the inquiry undertaken here. At the present time, in the historical conjuncture of which I speak, Capitalism Resurgent has become deified and Liberalism Triumphant with the Rule of Law as its beloved offspring has become dominant. The rest of the world now bows before them in adoration and mimics them in its design of institutions and practices. It is ironic that the present tendencies towards the deification of law completely miss or misapprehend various other phenomena which, more than at any other time, serve to remind us who are mindful of it of the limits of law.

The specific phenomena I have in mind are those of *Truth Commissions* and *Truth and Reconciliation Commissions* in different parts of the world. Such commissions have been struck in the aftermath of some of the ugly realities of the century: genocide, apartheid, bloody civil wars, murderous totalitarian/authoritarian rule by military and civilian despots. It is very easy for us to assimilate these Commissions to instances of the operations of law and to nascent steps towards the entrenchment of the Rule of Law in the societies concerned. They may well be that in some or all of the cases. But that is not all that they are or may be. What tends to mislead us is that they are usually set up through the instrumentality of law and their *modus operandi* often enough mimic the operations of a properly constituted court. This is what a commentator said of the South African version:

> The Commission sometimes functions as a quasi-court: it has the judicial trappings of sworn testimony, subpoena power, investigators,

> cross-examination at amnesty hearings. And, like courts, it often hears many truths about the same events. But, [and what big BUT it is!] *the Commission is not a juridical body; it cannot mete out punishment, nor can it transform truth into justice.*[2]

I shall come back to this last sentence in a moment. What I am concerned to point out at this stage is that once we get past the quasi-judicial character of the Commission, to the fact that it is empaneled to uncover truth as a precondition for reconciliation; that its main aim is to facilitate healing and not mete out punishment; to enhance forgiveness while shunning amnesia; to ensure that the future does not witness any similar excesses rather than retrospectively to punish perpetrators. I suggest that in placing truth above justice and, sometimes, in shunning altogether the justice that law promises, the constitution of Truth Commissions and the goals that they are set up to achieve are founded on a basic realization that law may not be an appropriate means or institution through which to bring about the kind of society that those who embrace the idea wish to see incorporated in their communities. It should be easy to see why this is the case.

Recall that this is the century that gave us Nuremberg as well as the International War Crimes Tribunal that sat in Paris in 1972 to examine United States' involvement in Vietnam and that saw the active involvement of Bertrand Russell as chairman. What was significant about these earlier commissions and the current ones sitting at the Hague and Arusha, dealing with Bosnia-Herzegovina and Rwanda respectively, is that they were/are set up to "mete out justice" and punish those found guilty. In all such cases, the perpetrators involved had either lost in war to those who tried them, as in Nuremberg or Rwanda, or had lost in the bar of public opinion and morality, as did the United States in Vietnam and, in the main Serbia and Croatia, in Bosnia-Herzegovina. In such countries, the triers and the tried do not have to live together or work out any *modus vivendi* for future interaction within the context or, perhaps one should say, within the confines of a single geopolitical entity and unitary citizenship. This is a key difference. Let us explore it.

The fundamental difference between the countries where Truth Commissions have been used and those where Court trials have been held is that in the former, the crucial challenge is not so much to bring offenders to book but to go beyond to life after trials shall have been concluded. How are those who may have escaped trial but are easily identified as perpetrators go on, within the context of a common geopolity and shared citizenship, to live, interact, and commune with those who are victims but do not feel redressed? Lingering resentment, undischarged frustration, unsoothed hurt are not exactly the stuff of which peaceable social living is made.

A related difference is that the societies concerned have become so popularized and the net of perpetrators in Truth Commission countries is so widespread that to require trials along the lines of Nuremberg is to engage in an impractical exercise: putting entire segments of the population on trial. We must not make light of this impracticality. To put that many people in jail, even if it were possible, would ultimately bankrupt the country and slow down, if not arrest, its progress. But even if these costs were affordable, the costs in terms of further damage to the country in lingering resentment harbored by future generations must make us pause. I am aware that some might object that I seem to place more premium on the lingering resentment of the perpetrators or their descendants than I do on that of the victims whose hurt I said earlier would not be assuaged if trials were not all encompassing. Unless we wish to risk the makings of interlocking feuds or feud-like situations, we must take seriously the challenge to break the cycle of recriminations and revenge. Truth commission countries do not cover all cases of the perpetration of crimes against citizens nor do they operate to make the perpetrators go untarnished. What is important to note is that the punishment may be of a different kind and the moral censure that attaches to being identified as perpetrators of crimes against their fellow citizens is not washed away by the granting of amnesty. I shall say more about this later. It suffices to point out here that it is only an attitude that sees incarceration or execution as the only acceptable options for punishing perpetrators that will discountenance the force of moral opprobrium in the context of social living.

Meanwhile, even in countries where Truth Commissions have not been impaneled but where similar atrocities have been alleged, their inhabitants have considered it not worth the costs (in terms of being further traumatized) to set up tribunals to try perpetrators of crimes against the populace. I have in mind here most countries of Eastern Europe where whole societies would be rocked to their foundations were they to insist that all those who collaborated with the defunct communist regimes that brutalized them in the recent past should stand trial.

What has transpired in the countries that I have been describing is that there has been a trade-off between the goals set by desert and retribution that might have been served by trials under law, and those set by the need for national reconciliation anchored on knowing what happened to whom and when, who did what and when, and what was it that allowed those things to happen, which is what the Truth Commission is meant to supply. Archbishop Desmond Tutu, the Chairman of the South African Truth and Reconciliation Commission, put it best when he wrote, “the Commission remains a risky and delicate business, but it remains the only alternative to Nuremberg on the one hand and amnesia on the

other."[3] I am suggesting that in consciously rejecting the Nuremberg model, the designers of Truth Commissions repudiated the legal model and, in so doing, brought to the fore the limits of law in addressing the goals for which the commissions were created. Although I use the South African Truth and Reconciliation Commission as the focus of my discussion, what I say of it can be applied, *mutatis mutandi*, to other countries that have used the instrumentality of a Truth Commission. Such countries include El Salvador, Guatemala, Argentina, and Chile.

What has been done in each of the above cases is to separate out the most egregious cases of infliction of harm as beyond the pale; identify a category of cases where the inflictions of harm are not necessarily less deleterious but are committed in the process of facilitating a political objective. It is only acts of the latter type that are candidates for *amnesty* in the specific case of South Africa. As Beth Lyons puts it, an act that is a candidate for amnesty is defined according to principles drafted by

> Carl Aage Norgaard of Denmark and president of the European Commission on Human Rights, for use in the 1989 settlement in Namibia that foreshadowed events in South Africa. These principles require an examination of the: (1) motivation of offender; (2) circumstances; (3) nature of the political objective; (4) legal and factual nature of the offense; (5) object (state vs. private entity); and (6) relationship between the offense and the political objective, its directness or proximity or proportionality.[4]

Based on these criteria, "amnesty shall be granted if, in short, it is with respect to an act associated with a political objective committed in the course of the conflicts of the past and if the applicant has made a full disclosure of relevant facts."[5]

It should not be forgotten that the acts elegible for amnesty include murder as well as the infliction of torture. So we are not talking about petty offenses here. The question that such a recourse raises is: Why would a people, represented in a state and its institutions, forswear the demands of justice and deployment of law when serious crimes have been committed and confessed to and opt instead for amnesty as long as there is full disclosure of relevant facts? Beth Lyons asks: "Are truth and justice in opposition in this process . . . ?"[6] I answer, yes, they are. It is an acknowledgment of the limits of law and the justice it promises that South Africa opted for truth over justice. It remains to spell out what these limits are that render law unsuitable for the task of delivering what truth is adjudged to enable in this case. The answer lies in what goals are considered to be crucial in a polity in which truth is held to trump justice. It is time to examine the objectives of the Truth and Reconciliation Commission.

The fundamental aim of the TRC is to "promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past."

> The objectives are to (1) establish as complete a picture as possible of gross human rights violations perpetrated between 1960–1994 by conducting investigations and hearings; (2) facilitate granting of amnesty in exchange for full disclosure of truth for acts with a political objective within guidelines of the Act; (3) make known the fate of victims and restore their human and civil dignity, and allow them to give accounts and recommend reparations; (4) make a report of findings and recommendations to prevent future human rights violation.[7]

The overriding consideration that determined the objectives just iterated is articulated in different ways by some of the principal actors in this process. There is continual emphasis on "healing," "forgiveness," "reparation," "reconciliation," "unity," "understanding," "transcending the conflicts of the past," and so on. Here is the South African Minister of Justice, Dullah Omar, speaking on the significance of the TRC:

> The people of South Africa [can] transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge . . . these can . . . 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* [the essence of being human], but not for victimization.[8]

Again, I cite Archbishop Tutu who insists that, "We [the TRC] are meant to be a part of the process of the healing of our nation, of our people, all of us, since every South African has to some extent or other been traumatized. We are a wounded people . . . . We all stand in need of healing."[9] It is easy to argue that Archbishop Tutu's submissions are consistent with his professional calling and general moral outlook. What is remarkable is that the principal enforcer of the South African law, the Minister of Justice, would elect to support an alternative that seems to detract from most of what the law is ordinarily taken to enjoin. This is a significant departure. After all, were the Nuremberg model to be adopted, it would have meant the invocation of the processes and outcomes of criminal law and, to a limited extent, of constitutional law. Some of the victims of apartheid might also have had recourse to tort law for reparations for personal injury. The principal motivation for the criminal law is to punish the wrongdoer and mete out just desert, with the hope that the hurt of the victim will be vicariously assuaged by her seeing the person who hurt her put behind bars or made to pay in some other way. While this may satisfy the thirst for vengeance, it would be a stretch to suggest that it would promote understanding, or unity, or reconciliation, or any of the other lofty principles for the achievement of which the TRC was constituted.

In light of the objectives of the TRC and the expostulations of its principal actors, I would like to argue that the recourse to the TRC mechanism is a repudiation of law as an appropriate or effective instrument for the achievement of the understanding, unity, reparation, healing, forgiveness, and transcending of the conflicts of the past that South Africa needs to move forward as one country in the aftermath of the depredations of apartheid. It is an admission that the Nuremberg model with its recourse to law was inappropriate for the more fundamental goals of the new South Africa. Such an admission may have been prompted by the general recognition in South Africa that law was a principal instrument of the apartheid state and was, for that reason, a suspect tool to repair the damage done by apartheid while it lasted. Additionally, there seems to be a feeling that the objects of law—desert, punishment, and so forth—are at variance with the objectives of the TRC. These elements combine to yield the conclusion that law may fall considerably short of what would facilitate the healing of a wounded people. In the rest of this essay, I shall summarize the divergences between law and the TRC and why law may not serve or may underserve the purpose of healing and reconciliation. Needless to say, I do this at the risk of oversimplification, but it is a risk worth taking.

(1) Had law been the preferred mode of realizing the aim of the TRC described above, what law might it have been? Recall that, under apartheid, law was the handmaiden of a brutal regime whose principal mode of operation was characterized by the United Nations as a crime against humanity. That law was useless, if not worse, once the apartheid regime unraveled. But how about the sort of legal fiction that was deployed at Nuremberg where Nazi laws were dismissed as non-laws? That option was not available because, unlike the Nazi state, the apartheid state had not suffered total defeat. Furthermore, the principal operators of the apartheid state led by their last leader were also the principal negotiators of the terms of the dismantling of apartheid. Their participation in the latter process, as representatives of the apartheid state, in a supreme irony required that they be recognized as legitimate negotiators on behalf of the rogue state that, in different circumstances, would have made them defendants in a criminal trial. So the path of constitutional law was not available. How about criminal law? This would have been most intractable. First, the prosecutors would have had to be manufactured anew. By what authority would they have been appointed? That of the apartheid Constitution? As it turned out, the new Constitution that was worked out allowed for a transitional program under which the new one was accepted as a successor to the apartheid one. Then the question arose as to what to do with those who might argue that in committing various crimes under apartheid, they

were merely obeying orders, or carrying out the law as it then was in the apartheid state. One significant way out was the TRC.

Had the choice been made for a full blown Nuremberg model, given what we said earlier about the crucial difference between apartheid South Africa and Nazi Germany, the prosecutors would have had to pay serious attention to considerations of due process and the rights of the accused. One must not take lightly the gravity of these considerations. Yet one must remark the fact that their observance often impair or hinder the possibility of truth-finding. I shall say more about this anon. Worse still, most white South Africans and many black South Africans would have had to face charges. Might tort law have offered a less problematic way out? I do not think so. The requirement of identifiable parties who must prove that they possess *locus standi* by showing that they have been injured, and that they deserve compensation, would have been extremely difficult to meet for most victims of the apartheid state. Secrecy and anonymity were fundamental traits of the operations of the South African state under apartheid. So identification of possible defendants would have been extremely difficult. Meanwhile, given that the onus of initial fact-finding rests on the plaintiffs, the costs to potential black plaintiffs would have been prohibitive. Simultaneously, the overwhelming material advantages of white South Africans would have made this option inoperative for most black South Africans. The consequence would have been that most perpetrators of political crimes under the apartheid regime would have been able to hide their records. While a few black South Africans might have been able to secure justice through the courts, most would have had to trust their cases to the care of God!

(2) The motivating force of the law, especially of municipal legal systems, is that of desert, its principal form of resolution is that of punishment or retribution. A basic aim of the polity that adopts the Truth Commission model is to promote national unity and reconciliation. In the example of South Africa, it might have served the cause of justice, legally understood, to have locked up F. W. de Klerk, the last President of apartheid South Africa, for crimes committed under his direction. How would that have helped a South Africa that not only acknowledges a common citizenship for all its inhabitants but is, at the same time, desirous of creating a civic culture out of this broad cloth? In place of desert, the society elects to amnesty some perpetrators as *an unavoidable cost for the attainment of a future devoid of the rancours that wracked the past.*

(3) It can be argued that legal processes may not be the best or most efficient means of truth-finding. In the typical legal process, "lawyers calling attention to picayune legal technicalities"[10] may obscure rather than unmask the truth. For example, anyone who is familiar with the intricacies

of the Fifth Amendment under the U.S. Constitution knows that its invocation is a peremptory way of stopping the search for the truth on the part of the party that invokes it. At the same time, the American version of amnesty—the granting of different degrees of immunity from prosecution—is used to aid the cause of truth-finding. That is, on occasion even in the United States, notorious for the litigiousness of its citizens, considerations of truth-finding trump the concern with desert.

(4) Were law to be used instead of the TRC, the victims will not be restored, their agency will remain maimed or unrecognized, and they will remain without voice, without language. Except for the most rudimentary levels of the legal system, e.g., small claims court, litigants must employ the services of an *alágbàwí*, literally one who accepts to speak for them. In the proceedings themselves, the *alágbàwí* substitutes his or her voice for those of the victims, the latter remain voiceless, sometimes nameless or without a face, and the telling of their stories is bereft of the cadences of natural speech, shorn of whatever poetry cannot be forced into the narrow registers of legalese. In short, the victims become silenced again.

Consider the alternative TRC context. In that context, the agency of the victims is restored, they are given back their voices—a significant gesture in light of the fact that that was the first thing that their tormentors took away. They are enabled to tell their stories in their own inimitable ways without the intercession of an *alágbàwí*. Testifying in their own person, telling their truth to power, as it were, is evidence of the recognition of their agency, of their entitlement to the dignity that is theirs by virtue of their humanity. One must not underestimate the significance of this process of restoration for the recovery of what the Minister of Justice called *ubuntu* (the essence of being human).[11]

More importantly, they compel the perpetrators of political crimes to shed the cloak of anonymity that permits them to claim to be mere cogs in an impersonal machine. I suggest that tremendous moral force is generated when evil is forced to disclose its name and record its address. Particular torturers are no longer mere state representatives, they are fathers, brothers, sisters, and, sometimes, neighbors. The daughter of a murdered activist was reported to have told the TRC at a sitting in East London in April 1996: "We want to forgive, but we don't know who to forgive."[12] To ensure that the dialectic of forgiveness is not preempted, under the terms of the TRC, in order to qualify for amnesty, perpetrators must come forward, accept responsibility for what they did, describe in painstaking, exhaustive details what they did, where and when. One consequence of their stepping forward to accept responsibility is that they have to confront some of their victims, those who survived, who could then ask them to explain why they did what they did and have an opportunity to ask for

forgiveness. In so doing, the perpetrator has to listen to the voice that he had silenced, hear stories that in the past he had considered *infra dignitatem* for him to hear and, finally, concede the equal humanity of his victims.[13] With the unmasking of the perpetrators and their acts comes the removal of what Beth Lyons calls the "Privilege of Not Knowing" under which white South Africans of all persuasions expiated their guilt from complicity in the crimes of the apartheid regime.

What I have done from (1) through (4) is to show, at the risk of oversimplification, how a preference for law as symbolized by the Nuremberg model might have underserved or might not have served the purpose that motivated the adoption of the TRC mechanism. I conclude that even though the TRC came about through the instrumentality of law, beyond this formal genesis, it is at best a quasi-legal institution. In its operation, even when it uses some of the tools that a legal tribunal would use, it ought to be clear that it proceeds in a manner that shows that it does not consider the legal way an adequate or efficient one for attaining the objectives set for it by its designers. This is the basis for my contention that the TRC model serves to remind us of the limits of law as a principle of social ordering. That such a recourse would be had at the close of a century in which we have witnessed law in both its glory and its infamy is proof that law is seriously inadequate for the realization of the good society.

The TRC model has not been without critics. Even among those who are sympathetic to the model, they have interpreted it as a legal institution and have, accordingly, seen it as part of the process of implanting the Rule of Law in the societies where it has been adopted.[14] I have presented arguments for the claim that this view is inadequate. Others have objected that the empaneling of the TRC has cheated some victims out of their day in court where they would have confronted their tormentors and secured criminal convictions as a matter of justice and desert. I do not wish to suggest that some people may not be underserved by the TRC model. My rejoinder is that, without falling into the snare of crass utilitarianism, what is at issue in the debate over which model to embrace is the question of what kind of society is to emerge from the ruins of apartheid and how South Africa might move forward as a multiracial society, whose inhabitants, in spite of the conflicts of the past, must learn to interact, even in disagreement, as bearers of a single, indivisible citizenship. While selective prosecution, and it cannot be other than selective, may serve the yearnings of some for just desert for perpetrators of some crimes, the larger issue of moving the society past its conflicts and divisions is unlikely to be served by this manner of proceeding. It is significant that it is for similar reasons that the Constitutional Court in South Africa rejected the challenge to the installation of the TRC. The Court said, *inter alia*: "The

erstwhile adversaries of such a conflict inhabit the same sovereign territory. They have to live with each other and work with each other and state concern is best equipped to determine what measures may be most conducive for the facilitation of such reconciliation and reconstruction."[15] I do not interpret the Court as making light of individual claims. Nor is it to be read as giving the state unlimited power to determine what measures may be most conducive for the facilitation of such reconciliation and reconstruction. Rather it is a classic case of what the court has to do every day in every municipal legal system: that is, in light of contending social purposes and interests, come up with the best arguments for what it deems to be, on balance, the best interests of the polity. The judges too chose truth over justice.

The choices made by South Africans have implications for societies elsewhere. I will mention only one. Much of the debate about affirmative action in the United States has revolved around the issue of fairness and the issue of equal protection under the Constitution. This is as it should be. But it is only on the assumption that the justice of law is the highest form of justice attainable that one can continue to claim that affirmative action is unwarranted. In South Africa, there is a deliberate adoption of the view that if the new society is to be created in which no group will be inferior to another, then those who have been hurt must be made whole and those who have hurt others must be made whole, too. But the latter must concede that they had done wrong in the past as a precondition for forgiveness. In a similar way, the United States, too, can affirm its commitment to affirmative action as a necessary, even if insufficient step, on the road to building a better society in which those who are descended from those who had inflicted pain in the past acknowledge that wrong had been done to some segments of the population whose descendants deserve to be made whole. Affirmative action then becomes one of the necessary steps towards the building of a future society in which the need for it will no longer exist and where all of America's peoples shall be reconciled. That the justice promised by law for some white applicants might be abridged must not be denied. But that the country cannot be whole until it has made its historically disabled minority whole will be the ultimate, even if legally inconvenient, justification for upholding affirmative action and similar remedies. The issue is not whether it violates the law, but whether we can arrive at a good society without it.

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NOTES

1. The case for this belief is made in Olúfẹ́mi Táíwò, *Legal Naturalism: A Marxist Theory of Law* (Ithaca: Cornell University Press, 1996), ch. 6.

2. Beth S. Lyons, "Between Nuremberg and Amnesia: The Truth and Reconciliation Commission in South Africa," *Monthly Review* 49.4 (September 1997): 7–8; my emphasis.

3. Quoted in Lyons, ibid., 22.

4. Ibid., 19.

5. Ibid.

6. Ibid., 10.

7. Ibid., 9.

8. Quoted in Lyons, op. cit., 8.

9. Quoted in Richard A. Wilson, "The Sizwe Will Not Go Away: The Truth and Reconciliation, Human Rights and Nation-Building in South Africa," *African Studies* 55.2 (1996): 15.

10. Ibid., 16.

11. Ibid.

12. Quoted in Lyons, op. cit., 13.

13. "Identifying perpetrators—putting names with the descriptions of clothing, physical attributes, demeanor, brutalities and obscenities of the state's footsoldiers—is one of the Commission's key tasks." See ibid.

14. Lyons seems to me to see it in this way.

15. Quoted in Lyons, op. cit., 21.