

Rights, Reparations and Reconciliation: Some comparative notes

Edelstein, J. (1994). ***Rights, Reparations and Reconciliation: Some comparative notes***. Paper presented at the Centre for the Study of Violence and Reconciliation, Seminar No. 6, 27 July.

Jayni Edelstein is a former researcher at the Institute for the Study of Public Violence.

Date: 27 July 1994

Venue: Centre for the Study of Violence and Reconciliation, Johannesburg, South Africa

Introduction

I would like to focus my remarks today on issues relating to reparations for victims of past abuses. The Honorable Minister of Justice, Mr. Dullah Omar, has already made several public statements concerning the need to redress victims of human rights abuses as part of efforts to promote national reconciliation.

As an outsider looking in on the South African process, I won't speculate on whether society fully appreciates the extent of the infringement on human rights or the suffering of individual victims. What seems relatively certain, however, is that the repressive policies of apartheid subjected South African society to misinformation, isolation, lack of communication, and fear. Reconciliation means different things to different people, but assimilating the truth about this past could be a starting point in reconciling South African history as a nation.

Truth as a starting point for reconciliation and reparations is an approach that has been taken by Latin American countries undergoing political transitions. Providing legal redress to victims contributes to this process by recognizing state responsibility, by acknowledging the rights and interests of victims, and by raising public consciousness. What follow are some comments about the legal aspects of reparations, and an overview of models followed by Latin American countries in transition.

The Case for Reparations

In a narrow sense, the concept of reparations extends from its root meaning "repair". It is defined as "the act or an instance of making amends", usually by giving compensation to one who has suffered injury, loss or wrong at the hands of another.

In criminal law, reparations often signify the process of making amends by an offender to his victim, or to victims of crime generally. It may take the form of financial compensation, the performance of community services, or the return of stolen property. The term has also been used to describe situations where criminal offenders apologize to their victims and provide reassurances that an offense will not be repeated.

Reparations can also refer to land or money transfers from public funds, or symbolic measures to compensate individuals who have suffered from unjust government practices. While the courts are the logical starting point for pursuing such claims, reparations schemes are favored when there is difficulty in pursuing civil suits to recover damages. They are also favored when the members of a group are so numerous that individual claims are impracticable, when certain deprivations have been sanctioned by the courts, or when other sources of compensation are inadequate.

Reparations as a legal remedy has not been subject to in-depth review by scholars or others, but the issue has taken on new meaning with respect to international human rights law. Several United Nations instruments on human rights — including the Universal Declaration of Human Rights — require States Parties to provide "effective remedies" by national tribunals for acts violating human rights, or provide for the "right to be compensated" for acts violating fundamental rights. These instruments include the International Covenant on Civil and Political Rights, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (which South Africa signed in 1993), and the International Covenant on the Elimination of All Forms of Racial Discrimination.

The right to legal redress is also underscored by language in the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Resolutions of the U.N. General Assembly have endorsed general principles regarding redress and reparations, and the Council of Europe adopted a convention to regulate and improve existing compensation schemes in member states. The right to restitution or compensation is set forth in humanitarian law and in customary international law. Finally, the U.N. Human Rights Committee has required that compensation be paid to victims of prolonged imprisonment and torture, and to the relatives of victims of disappearance and summary execution.

Decisions by human rights treaty bodies highlight the practical implementation of these norms. Perhaps the best known is the decision rendered in the Velásquez Rodríguez case, brought before the Inter-American Court of Human Rights against the government of Honduras for the disappearance of Manfredo Velásquez, a Honduran citizen. In that case, the Court ruled that the State of Honduras was required as a matter of law to compensate the victim's family. In a subsequent decision on the issue of damages, the Court held that under international law, a duty to provide reparations attaches to every violation of an international obligation which results in harm. The Court emphasized that reparation "consists of full restitution, meaning the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm."

Of equal interest are recent findings by the Inter-American Commission on Human Rights that amnesty legislation enacted in Argentina and Uruguay violated basic provisions of the American Convention on Human Rights. In these cases, the petitioners claimed that the legal consequences of the amnesty laws denied them the right to obtain a judicial investigation in a court of criminal law. The effect of the amnesty laws was that cases against those charged were thrown out, trials already in progress were closed, and no judicial avenue was left to present or continue cases. In consequence, the petitioners alleged that the effects of the amnesty laws violated their right to judicial protection and their right to a fair trial, as recognized by the American Convention.

The Inter-American Commission distinguished the petitioners' right to compensation for "the original or substantive violations" and the denial of justice that was "the legal consequence of the amnesty laws." Specifically, it found that the amnesty legislation was incompatible with the provisions of the Convention guaranteeing the right to judicial protection and a fair trial. In consequence, it recommended that the governments pay the petitioners just compensation for those violations.

These decisions and trends reflect an increasing awareness of a state's responsibility to compensate victims of human rights abuses who are otherwise without recourse. Should the South African government compensate victims of human rights violations under apartheid, it will demonstrate that the state is serious about upholding international human rights law.

Truth Commissions & Reparations in Chile, Argentina & El Salvador: An overview

Over the past decade, countries undergoing political transitions in Latin America have established "truth commissions" as officially endorsed bodies to examine and inquire into the past. In Chile and Argentina, the issue arose in the context of new governments making a transition from dictatorship to civilian rule. In El Salvador and also in Guatemala, "truth commissions" emerged as the existing governments negotiated a transition from civil war to peace. Despite their differences in mandate, scope and approach, "truth commissions" are generally viewed as a starting point for national reconciliation and reparative measures.

Chile

For example, the national commission set up to account for the dead and disappeared in Chile envisaged three aspects to reparations: the disclosure of the truth and the "end of secrecy," the recognition of the victims' dignity and the pain suffered by their relatives, and measures to improve the quality of their lives.

The Chilean Commission recommended that specific measures be taken to compensate the relatives of the victims. As a result, the legislature enacted Law No. 19.123, published in the Official Daily on February 8, 1992. The law establishes a "National Corporation for Reparation and Reconciliation," a temporary, decentralised state organ under the Ministry of the Interior with a two-year mandate to provide compensation to victims' families and develop programs to foster a "culture of respect for human rights" in Chile.

The Corporation has two core purposes. The first is to examine over 600 cases that the Commission had been unable to resolve. The second purpose, directly related to the first, is to administer reparations to the victims as identified by the Commission on Truth and Reconciliation and by the Corporation itself.

Reparations include monthly pensions, fixed-sum payments, health benefits, and educational benefits. Specifically, the law fixes a monthly pension of 140,000 Chilean pesos for the relatives of victims. The pension is distributed by giving 40 percent to the surviving spouse, 30 percent to the decedent's mother (or father in the mother's absence), 15 percent to the mother or father of the natural children of the victim, and 15 percent to each child of the victim under the age of 25 and to disabled children of any age. Each beneficiary is also entitled to collect a one-time annuity equivalent to twelve monthly pensions, which is not considered taxable income.

The law also confers the right to free health care services in the national health care system to victims' relatives whose income is below the poverty line. In addition, the Ministry of Health established a "Programme of Reparation and Integral Health Care" to cover individuals affected by human rights violations. The programme includes general medical care, social services, psychological counselling, and other services free of charge. The victims' parents, children or siblings are eligible to receive this assistance.

The children of victims are entitled to special educational benefits until the age of 35. The law provides that children studying in secondary schools, universities, professional institutes or technical institutes shall receive scholarships to pay for registration and tuition fees, plus a monthly allowance to cover living expenses. Finally, the law exempts children of victims from mandatory military service.

Claims for reparations are tied to the work of the Commission and the Corporation itself. If a victim's name is included in the report, it is sufficient evidence to obtain benefits under the law. A "Higher Council" was also established to manage the Corporation and establish its internal regulations and procedural rules.

In addition to the financial compensation administered by law, symbolic measures have also been undertaken by the President and the legislature. In particular, former President Patricio Aylwin proffered a formal apology to the victims and their families on behalf of the state, and asked the army to acknowledge its role in the violence.

The Chilean Corporation is often regarded as a milestone in human rights protection. However, the law has also been criticized on the grounds that it does not provide fair compensation, compared to the civil remedies that would have been available under Chilean law had they not been precluded by a 1978 amnesty decree.

A second source of concern is that many victims of torture were excluded from coverage under the law. Since the Chilean truth commission's mandate was to investigate, *inter alia*, cases of disappearance of detainees, execution and torture **resulting in death**, reparative measures did not apply to individual victims of torture who survived their ordeal, because their cases were excluded from the Commission's report. Further, the Chilean amnesty decree made it difficult — if not impossible — for survivors of torture to bring civil suits against the state. Despite these shortcomings, however, the Chilean law has generally been viewed as a successful undertaking of considerable historical and legal significance.

Argentina

Moving to the experience in Argentina, it is important to highlight the historic measures taken by the state to establish accountability for human rights abuses. It first established an official national commission (CONADEP) to inquire into the disappearances that occurred during military rule. After the commission issued its report, documenting some 9,000 cases, President Raúl Alfonsín ordered former military leaders to stand trial. Nine high-ranking officials were later tried and several convicted of human rights violations, and the courts were inundated with individual complaints.

Unfortunately, amnesty laws and decrees issued in 1986, 1987, and 1989 severely compromised these initiatives. The first law set a 60-day deadline for terminating criminal proceedings involving offenses committed as part of the "dirty war." A flood of complaints before the deadline prompted a second law, which established an irrebuttable presumption that military personnel who committed crimes during the dictatorship were acting in the line of duty, thereby acquitting them of criminal liability. Finally, the presidential pardon issued on October 7, 1989 also stipulated that proceedings against persons indicted for human rights violations who had not benefited from the earlier laws would be discontinued.

Unlike the amnesty in Chile, the Argentine legislation stated that the amnesty "does not preclude filing a civil claim." Notwithstanding, the Government took measures to compensate victims. Law 23.466 granted a pension equal to 75% of the minimum lifetime salary to the next-of-kin of the disappeared. The pension could be claimed by minors under the age of 21 who demonstrated that one or both parents were the victim of forced disappearance. A surviving spouse and children under the age of 21, parents and or siblings with whom the victim lived prior to the disappearance could also qualify to receive the pension.

Later, President Menem signed a decree providing that persons who had been detained for political reasons during the period 1976-83 would be eligible for financial assistance. Special legislation was enacted to carry the principle of compensation further. Act No. 24.043, promulgated on December 23, 1991, provided for indemnification from the State, payable in six instalments, to persons who were "placed at the disposal of the National Executive, or who, as civilians, suffered detention by virtue of acts of military tribunals" during the state of siege, provided they had not received indemnification under a previous court order.

Specifically, compensation consisted of one thirtieth of the monthly remuneration at the highest category on the civil service scale for each day of detention. For death during detention, monetary compensation consisted of one thirtieth of the monthly remuneration for each day of detention, plus a sum equivalent to five additional years. For serious injuries suffered during detention, compensation consisted of one thirtieth of the monthly remuneration for each day of detention, plus a sum equivalent to five additional years, reduced by 30 percent. The law was implemented under the authority of the Human Rights Office of the Ministry of the Interior. Claims had to be filed within 180 days of publication of the law, and the claimant had to waive the right to any other compensation.

While the law sought to compensate the injuries suffered by unlawfully detained persons, a number of constraints have prevented many individuals from benefiting in

practice. First, victims must prove the number of days in detention by producing an arrest order (issued by the executive) and the order of liberty. However, the military government ruling the country typically refused to acknowledge the abductions, and the new government has not acquired disclosure of many of the necessary facts.

In addition, many victims and relatives have been unwilling to accept compensation from the government because, in their view, filing for financial compensation is a buy-off that cannot make up for what was lost. Public discontent over the Argentine amnesty provisions may have been balanced out by providing redress to victims, but was not viewed as a substitution for prosecution or as mitigating the state's obligation to identify and punish human rights offenders.

El Salvador

In contrast to the commissions in Chile and Argentina, the "Commission on the Truth" in El Salvador was established under U.N. auspices in 1992 pursuant to peace agreements between the government and FMLN guerrillas. The Commission's task was to investigate "serious acts of violence" that had occurred since 1980 and "whose impact on society urgently required that the public should know the truth." As part of its mandate, the Commission was also called upon to recommend "legal, political or administrative measures" that could be inferred from its investigations, measures to prevent the recurrence of violence, and "initiatives to promote national reconciliation." Bearing in mind the limitations of the Salvadoran legal system, the Commission recognized alternative forms of investigation, punishment, prevention, and compensation.

For example, the publication of the Commission's final report containing the truth about past violations served an investigative function. The publication of the names of those responsible served an investigative and sanctioning function. Recommendations concerning dismissal from the armed forces, dismissal from the civil service, and disqualification from holding public office aimed to constitute punishment. Another group of recommendations designed to remedy structural problems linked to the violence, and institutional reforms to prevent the repetition of acts of violence served a preventative function. And finally, material and symbolic reparations to benefit the victims attempted to serve a compensatory function.

In particular, the Commission recommended that a special fund be established, as an autonomous body with legal and administrative powers, to award appropriate material compensation to the victims of violence. It was envisaged that the fund would take into account the information on the victims reported to the Commission in the annexes to the report.

The Commission believed that the fund should receive an appropriate contribution from the State, but in view of prevailing economic conditions, it should also receive a substantial contribution from the international community. It recommended that the U.N. Secretariat promote and co-ordinate the initiative, and that at least one percent of all international assistance be set aside for this purpose.

Finally, the Commission recommended several measures aimed as symbolic reparations, including (1) the construction of a national monument in El Salvador bearing the names of all of the victims of the conflict; (2) recognition of the good name of the victims and of the serious crimes of which they were victims; and (3) the

institution of a national holiday in memory of the victims of the conflict and to serve as a symbol of national reconciliation. Unfortunately, a legislative bill has yet to be introduced to give effect to the letter or spirit of these recommendations.

Group Compensation

The reparations legislation recommended and adopted in Latin America sought to redress injuries on the basis of individual deprivation. In South Africa, however, several additional questions merit consideration. How should the fact that much of what was suffered under apartheid was not individual injury, but injury experienced by an entire community? Is the "individual plaintiff" model an appropriate starting point for redressing injuries inflicted by one group on another? Similarly, is it an appropriate model for race remedies?

Other precedents for compensating groups who have suffered violations of basic civil liberties and rights — even when such deprivations were sanctioned by the courts — highlight this approach.

The most comprehensive and extensive case is the legislation passed in the Federal Republic of Germany to benefit victims of Nazi persecution under the Final Federal Compensation law. Another example is the U.S. government's decision to provide reparations for injustices suffered several decades ago by an entire ethnic group (as distinguished from individuals), under the Civil Rights Act of 1988. The Act was a result of the "Commission on Wartime Relocation and Internment of Civilians" established in 1980 to report on the circumstances surrounding the internment of Japanese-Americans and aliens of Japanese ancestry during World War II.

The Commission's recommendations included (1) a joint resolution, signed by the President, "which recognized that a grave injustice was done and offers the apologies of the nation for the acts of exclusion, removal and detention"; (2) official pardons of Japanese-Americans convicted of violating orders to evacuate; (3) the establishment of a 1.5 billion fund for survivors of the internment camps; (4) the establishment of a foundation for education and humanitarian purposes.

The publicity surrounding these recommendations renewed interest by some in the African-American community to seek reparations for injustices caused by the removal of Africans from their native lands, their enslavement and their subsequent subjugation in the U.S. A Congressman recently introduced reparations legislation in the House of Representative in 1989 and in 1991. The bill sought, in part, "to acknowledge the fundamental injustice, cruelty, brutality and inhumanity of slavery in the United States and the 13 American colonies between 1619 and 1865 and to establish a commission to examine the institution of slavery, subsequent de jure and de facto racial and economic discrimination against African Americans."

The legislation met considerable opposition and the bill died at an early stage. A principal objection was that affirmative action programs were the proper means to help overcome the historical effects of discrimination, and that throwing money at old wounds would do little to heal them.

Conclusion

Each country must formulate its own policy with respect to past human rights abuses and reconciliation. Some argue that reconciliation means forgiving the crimes of the past. Others believe that it stems from an explanation and apology for the suffering that has been endured. Still others claim that genuine reconciliation must be based on truth and justice with regard to the past.

Legal redress may help to alleviate the suffering of individuals, but no commission of inquiry or amount of money can make whole the lives of those injured in the past. The reparations process in South Africa will do little to repair unless it looks backward to redress and looks forward to overcome the legacy of injustice.

In El Salvador the civil war is over, but it does not necessarily follow that Salvadoran society is reconciled. Attitudes, memories, and suspicions die slowly. The State may help to promote national reconciliation, but it is a responsibility that must be shared by all.