

# Different Kinds of Truth: The South African Truth and Reconciliation Commission\*

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## A Prologue

I was in my chambers earlier this year when I received a message from reception that somebody calling himself Henry had arrived to see me. I went to the security entrance with a measure of anticipation. Henry had telephoned a few days earlier to say that he was going to testify to the Truth and Reconciliation Commission (TRC) about the bomb that had led to my car exploding and my losing my right arm. Naturally I was keen to see the person who had the courage, or the foolhardiness, or just the interest to want to see me.

I opened the door with my security pass and a slender, youngish man came forward. He introduced himself as Henry and gave his surname. He had been, I think, a captain in the South African Defence Force, and he strode down the passage to my chambers with not quite a swagger but a military gait, and I loped at his side with what I suppose was a jaunty, judicial, ambulatory stroll.

We sat down and started talking. I am sure he was as puzzled about me as I was about him. He explained quickly that his role had simply been to take the photographs and prepare a dossier for the persons who were ultimately to put the bomb in my car. He said that he had in fact dropped out of the operational group some months before the explosion, so that he could not give any testimony directly as to what had happened. But he knew the group that was involved, he knew the structure, and he was going to go to the TRC and tell his story and ask for amnesty for his part in it.

I was not quite sure why he had come to tell me this. I wanted to know more about him. Who was this person whom I had never seen until that moment, who did not know me, who had no anger toward me, whom I did not hate, for whom I was just a figure, who had tried to extinguish my life? What had passed through his head, how had he functioned, how did he fit into this group that was on "the other side" ("the enemy," "the apartheid state"), which was almost as anonymous to me as I was to them?

I tried to draw him out, to get him to explain his background. He said his parents were decent people who had brought him up with a strong sense of honor, especially his mother. He had been a good student at university and on graduating had decided that the military was the career for him. He had advanced rapidly, he told me with pride, had been an excellent soldier, and then he had been recruited for special operations.

I did not wish to preempt the interrogation of the TRC; I just wanted him to say as much as he was willing to say. He would have seen the dossier on me. It would have shown that I had been in exile in Mozambique (which neighbors on South Africa) working on the reconstruction of the Mozambique legal system; and that although I had been an active member of the African National Congress (ANC), and especially of its Constitutional Committee, I was not involved in any underground activity or military or intelligence work at all. Yet they had chosen me, had tried to eliminate me. Why? Because I was an intellectual and challenged their claim that no political system could be found to enable black and white to live together as equals in South Africa? Every intellectual dreams of being taken seriously by someone, but not *that* seriously.

We spoke for about two hours. He looked at me almost with a measure of jealousy. Here he was sitting in my chambers, beautiful pictures on the walls, I was a judge of the Constitutional Court, the highest court in the country, and he was now a demobilized soldier with a torn past and a fragmented future. He had not even been given a golden handshake but a brass one, a modest sum of money compared to what the retiring generals had gotten. Yet he had been willing to invest his energies, his intelligence, maybe even his life for his country, for apartheid. And now he had been cast aside. He too had injuries, he told me, he had been shot in the leg and walked with a slight limp. He seemed petulant: I was on the court and he was unemployed. We could have gone on eyeing each other and talking forever.

I stood up, a cheap emotion surged in me, and I was tempted to say: I cannot shake your hand, you know why. Instead I said, Henry, normally if someone comes to my office, when I say goodbye I shake that person's hand, but I can't shake your hand. I can't now. Go to the Truth Commission, tell your story, help the country, do something for South Africa and then perhaps we can meet again.

When he walked back to the security door he was without the upright soldier's posture he had had before, and looked uncomfortable, uneasy, and sad. He went through the door, I said farewell, and he disappeared.

## **The Truth and Reconciliation Commission**

Something like thirty truth commissions have been created in various parts of the world, yet none have had the impact of the South African one — neither for better nor for worse. None have been so profoundly influential in the countries where they functioned, none have attracted so much international attention. What has been so special in South Africa?

The first point to note is that our TRC wasn't the brainchild of a group of wise people sitting around a table and concluding that in order to deal with the injustices of the past the country should set up a truth commission. The pressure for the TRC in fact emerged from intense and specific internal South African needs.

The story starts with a meeting of the National Executive Committee of the ANC in August 1993, about eight months before the first democratic elections were due to be held. It was a passionate meeting, sharp, uncomfortable. The issue was how to respond to the report of a commission of inquiry set up by the ANC to investigate violations of human rights committed by ANC cadres in Angolan camps during the liberation struggle. The report stated that ANC security had captured or placed in captivity a number of persons suspected of having been sent by Pretoria to assassinate the leadership and generally create havoc; while interrogating them — this was in the early 1980s — the guards and security officials had frequently behaved barbarically.

I should mention that the organization itself had investigated the behavior, changed the whole security apparatus, and in 1985 created a code of conduct that was in effect a code of criminal law and procedure. It was probably the only liberation movement in the world that ever produced a code of that kind, with tribunals, prosecution, defense counsel all being established, offenses defined, charges being put, evidence led and challenged, and a system of appeals. By and large, though possibly not completely, the violations of human rights had stopped. Now it was 1993, ten years later, the war was over. Yet the violations had taken place. What did the ANC as a movement think about unaccep-

table things that ANC members had done during the course of the struggle? The report was empathic: certain people should be called to account by the ANC. The eighty-member National Executive Committee was now discussing what to do.

Some people said forcefully: we set up the commission, it has reported, we have to follow through. Others responded with equal vehemence: how can we do that, we were fighting a freedom struggle in terribly difficult conditions in the bush in Angola, the enemy was ruthless and they stopped at nothing, we had young people quite untrained in interrogation techniques, they did their best, they protected the leadership, how can we punish them now?

The reply then came: we are a freedom movement, we were fighting for justice, if justice does not exist inside our own ranks, if we do not hold to these values, if we simply use the techniques of the enemy, we are like the enemy, we are no better than they are, the people have accepted great suffering because they believe in our cause, you cannot fight for life and be the enemy of life at the same time. Pallo Jordan, who is now the Minister of the Environment, stood up, and with his well-elocuted, high-pitched voice said, "Comrades, I've learnt something very interesting today. There is such a thing as regime torture, and there is ANC torture, and regime torture is bad and ANC torture is good; thank you for enlightening me!" And he sat down.

The house was divided on the issue. Profound moral issues were at stake, not the sort of matters that could be decided by a simple show of hands. Eventually somebody stood up and asked the simple question: what would my mother say? The figure of "my mother" represented an ordinary, decent working-class woman, unsophisticated in politics but with a good heart and an honest understanding of people and the world, a person whose hard life experiences had promoted a natural sense of honor and integrity. He then answered himself: my mother would say there is something crazy about the ANC. Here we are examining without stop our own weaknesses and faults and exposing our nakedness to the whole world, which maybe has to be done. But in the meantime all those rascals and villains on the other side who have been doing these things and worse for decades and centuries, murdering, mutilating, and torturing our people, are getting away scot-free. Nobody is examining what they did and what some of them are still doing. Are we so perverse and introspective, are we so obsessed with our own moral health, that we do not even think about the pain and the damage that was caused by the other side, by people who are now getting away completely without any kind of punishment, without taking responsibility for anything? What kind of freedom movement are we when we are so insensitive to the pain of millions of ordinary people? Where is the balance? Where is the justice?

It was at that moment that Professor Kader Asmal, who is now Minister for Water Affairs, stood up and said: what we need in South Africa, the only answer, is a truth commission. Only a truth commission can look at all the violations of human rights on all sides from whatever party. Human rights are human rights, they belong to human beings, whoever they might be. And torture or other violation has to be investigated on an even-handed basis across the board, not just by one political movement looking at itself, but at a national level, with national resources and a national perspective.

He was clearly right. That was the moment when a political decision was taken that if an ANC government came to power after the elections, and it was assumed that it would, a truth commission would be set up that would examine all abuses of human rights, from whatever quarter, in the last years of apartheid.

The second crucial ingredient also emerged from the bowels of the South African experience. The negotiators had signed the draft of a new, nonracial, democratic constitution. We thought it was all over. We had worked out a two stage process of constitution-making involving an elected Constitutional Assembly, modeled very much on the Indian experience, which would draft a final constitution. We had agreed in the first-draft constitution on thirty-four principles that would be binding on the Constitutional Assembly. We thought that all that remained was to hold the elections. Then, at the last minute, we heard that the security forces had said to the leadership that they had been promised an amnesty by President De Klerk, they had loyally protected the negotiations process, they were fully prepared to safeguard the elections against a bombing campaign intended to destroy the whole transition process, they would defend the new government and the new constitutional order, but not if they were going to jail afterward for their actions in support of the previous government, that was asking too much.

This created a problem for the ANC leadership. The promise of amnesty had been given by President De Klerk, not by themselves. At the same time, they acknowledged that the security forces had loyally protected the negotiation process against many assaults from various right-wing sources. They were also aware that ANC security was not itself in a position to defend the election process — they just did not know who the bombers were. Generations had dreamed of elections on the basis of one person, one vote, of a new constitutional order in which everyone would be equal, in which the crimes of the past could not be repeated. If the elections were severely disrupted, the dream would be destroyed and racial violence would continue. The security forces were not themselves holding a gun to the transition process but were simply saying that they should get some recognition for enabling the democratic process to advance. At the same time, to grant them blanket amnesty because of their support for the constitutional process would negate the principle of institutional and personal accountability. It was at this stage, to reconcile these competing considerations, that the proposal was made to grant an amnesty to the security forces, but not a blanket or general one. The right to amnesty would be based on each individual coming forward and acknowledging what he or she had done, and then getting indemnity to that extent.

In this way the idea of the truth commission and the amnesty process were linked on an individualized basis. That turned out to be the foundation of South Africa's TRC, and the basis for its unprecedented success. It meant that the perpetrators of violations of human rights, the torturers, the killers, had a motive to come forward and reveal what they had done. In exchange the country would learn the truth. It was not through show trials, bribery, or torture that they would confess; it was not through using the methods that the old regime had used — keeping people in solitary confinement, making them stand for days on end, electric shock torture, getting compliant, emotionally destroyed witnesses to testify. It was through voluntary confession induced by the guarantee of amnesty.

Three elements turned out to be necessary for the process to work well. First, it was important that the TRC function within a sound legal framework in a clear constitutional setting. Thus the Constitution itself provided for a right to an amnesty for offenses committed in the course of the political conflicts of the past, but stated that the right could only be enjoyed under terms and conditions to be established by the new parliament. The new parliament then went on to provide that a truth commission would be the mechanism for determining how amnesty could be granted on a case-by-case basis. Second, although the drive for the TRC might have come primarily from the new government, the details could not be unilaterally imposed. Some measure of consensus, however incomplete and reluctant, had to be achieved. A year was spent on the enabling legislation. It was a strenuous period of consultation and debate, of trying to bring in all the different interested parties and civil society with a view to securing the best mechanisms, balance, and confidence in the process. Third, it was vital to staff the TRC with individuals of caliber, of standing, of manifest integrity, who had not

themselves been directly involved in the conflicts of the past. This did not mean finding "neutrals." Anybody who claimed to have been neutral in the face of apartheid would not have been the right person; nor would a person who had been neutral in respect of torture. What was needed was not neutrality but impartiality. This required people who were passionate about justice and human rights, but impartial in terms of evaluating the roles and functions that any particular persons, groups, parties, or formations had played in supporting or undermining respect for human dignity. This meant persons who would look at what had happened in the ANC camps with the same degree of objectivity and impartiality that they would use in examining the massive violations committed over long periods of time by the security forces of apartheid. And in Archbishop Desmond Tutu, chairperson of the TRC, an outstanding individual with such qualities was found. After a complex screening process that covered individuals from a wide range of social, cultural, and religious backgrounds, other personalities of manifest capacity and caliber were selected.

The commission was divided into three sections that functioned separately with different personnel. The first was the structure that heard the testimony of victims of gross violations of human rights. One must recall that the system of apartheid itself violated human rights, and had been condemned as a crime against humanity. All the laws in terms of which people were identified by race, forced to carry passes, evicted from land, and denied access to education, public facilities, and the vote — all of these violated human rights. But they were not the subject of the TRC investigation, nor were the harsh security laws under which people were detained in solitary confinement without trial.

The TRC investigated acts that were crimes even under apartheid law. These were human-rights violations so ugly and gross that they had been hidden and denied even by those who had openly supported race domination. The tortures, the assassinations, the people who had disappeared, the cross-border commando raids where people had been kidnapped or wiped out, had all been illegal in terms of South African law, even in terms of draconian apartheid security legislation. That was the focus of the TRC. The idea was not to investigate apartheid, which as a system had been condemned by humanity and totally repudiated by the new Constitution. The objective was to examine the crimes that had been committed and hidden during the apartheid period, mainly those committed in defense of apartheid but also violations of human rights perpetrated in the struggle against it. Tutu called this section the one for the "little people." At last those in the townships, the communities, the rural areas, whose voices had never been heard, would be allowed to tell of their grief, their pain, and their loss. People like myself had been on television, had written books about our experiences, had traveled around the world and spoken to many audiences about what had happened to us. But there were thousands and thousands of people who had suffered not only the initial shock of violence to their bodies, or the pain of the loss of a son, daughter, mother, or father, but the sorrow of having had to keep the hurt secret all the time. Something like ten thousand people testified in various parts of the country as to what had happened to them and their families.

Judges do not cry. Archbishop Tutu cried. It was not a court of law in the sense of an austere institution making formalized findings. It was an intensely human and personalized body, there to hear, in an appropriately dignified setting, what people had been through. In a court of law no one is there to help the witness, to pat the shoulder, to provide water or tissues when the person weeps; in the TRC hearings there were comforters sitting next to the witnesses. The sessions would frequently start with a song in beautiful African harmony, intended to give a sense of encouragement and support to everyone present. Or it could begin with prayers. And thereafter people spoke and spoke in all the regions and all the languages of the country. The testimony was televised, the nation became witness to what had happened and heard the stories directly from the mouths of the persons concerned. Those who spoke were not complainants in a court denouncing accused persons in the dock. Nor

were they litigants demanding damages for themselves, so that the greater the loss, the greater the sum they would receive. Neither punishment nor compensation were at issue, only the opportunity to speak the truth and have their pain acknowledged.

The five-volume report summarizing and analyzing their testimony was published in 1998.<sup>1</sup> And I might say it is a brilliant document. It has photographs and excerpts from some of the most poignant aspects of the testimony. It is not a dry governmental report but a passionate memorial that resonates with the emotion of the hearings themselves. In addition, it contains serious reflection on how evil behavior is condoned and spreads itself, and on what institutional mechanisms and what kind of culture are necessary to prevent its reappearance. That was one of the greatest objectives of the commission, not simply to let the pain come out but to explain the conditions that permitted gross injustice to flourish and so to ensure that these things do not happen again.

And no one escaped the inquiry. Business, where were you? Business was making money, business was cooperating directly with the security forces, supplying explosives, trucks, and information. The press, where were you? There were some brave newspapers and wonderful journalists, but by and large the press was racist in its structure and fearful in its thinking, and went along with the stories about these terrorists, how dangerous they were, and how they got what was coming to them. And the stories about people slipping on a piece of soap, falling out of the window, tripping down stairs, were carried by the press as if they might well be true, together with masses of disinformation that created a climate in which demonized freedom fighters could more easily be tortured or killed.

The legal profession, the judges, where were you? We judges, old and new, had hard debates in our own ranks. The strongest view was that the judiciary had contributed substantially to injustice by enforcing racist laws and showing an unacceptable lack of vigilance in the face of accusations of torture and abuse. When the executive took sweeping powers to lock up and detain people without trial, and brought witnesses from months and years of solitary confinement to court, this was treated as normal procedure. There were some judges, again, who showed outstanding poise and courage, proving that even in the most constrained of circumstances, choice always existed. They used what little space was available to them to maintain the greatest traditions of the law, and I am proud to say that some of them are my colleagues on the Constitutional Court today.

The Reparations Committee is completely separate. It will receive reports from the first commission and will ensure that each victim gets monetary compensation, probably on a lump-sum basis paid over a few years. The pain and suffering of a whole generation, not just those who testified, cannot be measured. We cannot take money away from schooling, health, and land reform. But some kind of material compensation will be given to all the victims who came forward. There will hopefully also be living memorials, dignified reburials, scholarships for the children of those who died, streets renamed, gardens created, and monuments designed — not grandiose "monumental" monuments, but monuments as simple as the people themselves and as searing, sharp, and evocative as the pain they suffered.

The third section of the commission, the one with the most difficult task, is the Amnesty Committee. It has two judges in each panel, and is the one that comes closest to being like a court of law. Whereas a criminal court normally decides whether a person should go to jail, here it is deciding just the opposite, whether someone should be freed from prosecution. Because personal liberty is at stake, something like due process of law applies, but without the strict rules of evidence and formal charges of a trial. A number of spectacular, terrible matters still await decision.

Chris Hani, one of the first guerrillas who rose to be commander of Umkhonto we Sizwe, the military wing of the ANC, and then became general secretary of the Communist Party of South Africa, was a great popular hero. He went jogging during an Easter break in the period when we were still negotiating a new constitution. As he got to his home, somebody got out of a car, put a pistol to his head, and gunned him down. It turned out that his killer was an extreme right-winger from Poland who had been living for some years in South Africa, working with a far-right grouping in the country. A neighbor gave the identity of the car, the police captured him, and, almost literally, a smoking gun was found. One of the ironies of our history is that it was the ANC's opposition to capital punishment that saved him and a co-conspirator from execution and enabled them subsequently to apply for amnesty. Should they get amnesty or not?

Then there was a group that was part of the Winnie Mandela football team. Winnie, brave, isolated, combative, passionate, warm, embracing, and, some would say, capable of destroying anybody or anything in her way, gathered around herself a group of people who committed mayhem around them and created great conflict with the local ANC. People died cruel deaths. It was not Winnie who applied for amnesty, but members of the football team, claiming that Mama Mandela had been the one who had ordered them to do these things. Should they receive amnesty? These are hard, searing, painful South African questions, requiring hard, searing, painful South African answers. Our TRC is harsh, it is raw. It has given rise to much controversy and invites deep reflections.

## **Knowledge and Acknowledgment**

I propose to share some of my personal thoughts with you. I would like to deal with the difference between knowledge and acknowledgment. Knowledge involves possessing information, being aware of facts. There was in reality an enormous amount of knowledge about repression in South Africa, but hardly any acknowledgment of what the cost was in human terms. Acknowledgment involves an acceptance not only of the existence of a phenomenon but of its emotional and social significance as well. It presupposes a sense of responsibility for the facts, an understanding of the significance that they have for the persons involved and for society as a whole.

One way of looking at the TRC process is to see it as a means of converting knowledge into acknowledgment. First came acknowledgment of the pain of the past. The fact that thousands of people had suffered was common knowledge — that the state had cracked down, that injuries had been sustained, that people had died in detention. Yet the human and personal dimension had been extruded, the pain shut out. That bare information became transformed when you saw individuals on the television, when you gave them a name, when you heard their stories firsthand. It was also different for those who testified, going home to the support of their neighbors, seeing themselves later on television. As a result of the TRC, the private sorrow and grief of tens of thousands has been publicly acknowledged in a warm and personalized way. Another form of acknowledgment has emerged from the perpetrators themselves: they have come forward openly in front of the television cameras, owning up to their crimes. Finally there has been acknowledgment by the whole country that these things happened and can happen again, that we need to fit all these facts together into some kind of significant pattern that will enable us to understand their genesis and do what we can to minimize any possibility of their recurrence.

## Four Categories of Truth

I have been profoundly puzzled, as a lawyer and a judge, by many features of the TRC. They mainly concern how we are to understand the concept of truth. The question asked in jest almost two thousand years ago still has to be answered: what is truth? I am not trained in the sciences of epistemology and ontology, so have invented four rough categories of truth that I find helpful in the situation: microscopic truth, logical truth, experiential truth, and dialogical truth.

Microscopic truth, whether in natural or social science, involves narrowing the field to a particular frame and excluding all variables except those to be measured. In a court of law we pose and answer a particular question in a defined field, such as whether a certain person is guilty of wrongfully and intentionally killing another at a particular time and in a particular manner. You identify, circumscribe, and verify. That is microscopic truth, detailed and focused.

Logical truth is the generalized truth of propositions, the logic inherent in certain statements. It is arrived at by deductive and inferential processes, and in the end, I suppose, it draws its strength from the capacity of language to reflect what is typical in nature as experienced by humanity. Much of the law is concerned with finding the connections between microscopic truth and logical truth, that is, with setting microscopic truth in a logical framework.

Experiential truth is of a different order. It is the understanding gained from being inside and part of a phenomenon. It is the truth that we are all exposed to by living through a particular experience. I first came across the concept when reading M. K. Gandhi's *My Experiments with Truth*. I was puzzled by that title. These were not experiments as I understood the term; experiments were what we did at school when testing hypotheses with Bunsen burners and flasks of liquid in controlled conditions. Gandhi started without a hypothesis. He was testing himself, not an idea or the world out there. The process was to immerse himself thoughtfully and sensitively in certain experiences, and then to draw conclusions from what he had lived through with an honest, objective eye. Central to the process was the capacity to stand objectively outside yourself and to look at your subjective experience in a truly unprejudiced way. Such experiential truth is deep and profound. Yet it embarrasses us in courts of law, we try to exclude it, we see it as subjective, irrelevant. We claim that all we want is the objective truth, what we call "the facts."

Finally there is what I call dialogical truth. This is a truth based on interchange between people. We all have different experiences of reality, and diverse interests and backgrounds that influence the meaning of those experiences for ourselves. The debate between many contentions and points of view goes backward and forward, and a new synthesis emerges, holds sway for a while, is challenged, controverted, and a fresh debate ensues. The process is neverending; there is no finalized truth.

Microscopic truth is definitive within its narrow frame; logical truth is objective, generalized, impersonal, and not dependent on external verification; experiential truth is open-ended but personal to the individual concerned; dialogical truth embodies elements of all of these, but it assumes and thrives on the notion of a community of many voices and multiple perspectives. In the case of South Africa, there is no uniquely correct way of describing how the violations of human rights took place, there is no single narrator who can claim to have a definitive perspective that must be the right one.

The experience of the victims of violations of human rights was intense and real but was no more exclusively true than the experience of the perpetrators or the experience of the press or the experience of the judges. This is not to eliminate standards for evaluating conduct. The TRC notion presupposes



measuring human conduct according to how it shows or denies respect for human dignity. It also assumes that people always have choices and must be held accountable for what they do. What dialogical truth implies is that the most pertinent description and the most meaningful evaluation of the phenomenon under question results from putting together all these layers of truth, these different experiences and this variety of voices. The TRC itself is not one homogenous entity with twelve, fifteen, or seventeen robotic heads, all thinking, seeing, and experiencing things in the same way. The narration and evaluation in the report are themselves the products of dialogue between different members of the commission. Tutu has his own particular confessional, personal, and experiential approach. His deputy has similar values but a different life experience. The other commissioners are from different backgrounds, reflecting diverse historical and cultural experiences. They composite rather than simply aggregate their different perspectives and evaluations. That is the way and the life of dialogical truth.

The strength of the TRC, and the reason why it resonated so powerfully, is that it was based essentially on dialogue, on hearing all the different viewpoints, on receiving inputs from all sides. It was not a case of people coming in as prosecutors and saying: we stand for the state, we are going to examine and get the truth out of you. The state did not get the truth out of anybody. It did not work that way. An increasingly rich and true story emerged from a multiplicity of voices and perspectives. Then the TRC, itself a variegated body, had the function of trying to find the language, mode of presentation, and way of telling the story that would be as meaningful and convincing as possible.

The problem I have is: why does so little truth come out in a court of law, when so much emerged from the TRC? It poured out in huge streams, with overwhelming and convincing force. Many of the details and some of the assessments may be challengeable, but the basic sweep is incontrovertible. One of its huge achievements has been the way it eliminated denial. Not even the most ardent defenders of the old order deny the evil that was done in its name. Court records, on the other hand, are notoriously arid as sources of information. Outside the microscopic events under inquiry, you learn little. The social processes and cultural and institutional systems responsible for the violations remain uninvestigated.

The answer to this puzzle must lie in the differing objectives of the respective inquiries. Courts are concerned with accountability in a narrow, individualized sense. They deal essentially with punishment and compensation. Due process of law relates not so much to truth as to proof. Before you send someone to jail there has to be proof of responsibility in the microscopic sense. When the penalties and consequences are grave and personalized, you need this constrained mode of proceeding. The nation wishing to understand and deal with its past, however, is asking much larger questions: how could it happen, what was it like for all concerned, how can you spot the signs, and how can it be prevented from occurring again? If you are dealing with large episodes, the main concern is not punishment or due compensation after due process of law, but to have an understanding and acknowledgment by society of what happened so that the healing process can really start. Dialogue is the foundation of repair. The dignity that goes with dialogue is the basis for achieving common citizenship. It is the equality of voice that marks a decisive start, the beginnings of a sense of shared morality and responsibility.

I think that is a great lesson for our country, and possibly for the world. We do need an international criminal court functioning according to due process of law, where virtue seeks unequivocally to trounce evil. But we also require a wide and flexible range of programs that would allow for other means of coming to terms with trauma and violence, where the format is not that of inquisitor and

accused but that of interlocutors trying to find common ground. All have an equal chance to speak. Some achieve relief through being heard, others accept shame when acknowledging cruel conduct; but they are speaking to each other, not trying to kill one another.

## **Truth and Reconciliation**

In an immediate sense there has been little direct reconciliation. Few of the torturers were forgiven directly by their victims, very few. People felt raw, angry, upset, the more so because not many of the perpetrators had been able to show much spontaneous human emotion. Yet there were exceptions. There was a man from the community who had been blinded by an ANC bomb in Pretoria. Abubaker Ismail, the person responsible for the bomb, applied for amnesty, explaining that as part of the freedom struggle his unit had put the bomb near a military target. He said he regretted very much that he had been compelled to fight with these methods, and felt especially sorry about the injuries caused to the victim. And the blind person put out his hand, shook the hand of Ismail who had been responsible for the bomb, and said: I understand why you did it, you were fighting a freedom struggle, that was your motivation, we must move forward now.

We had other cases in South Africa just like that. It was unusual, but it was not unique.

How do we prevent these things from recurring in future? Part of the answer is to convince the security forces that they cannot expect secrecy and cover-up in, the future. The security forces must never feel that they can rely on being protected by the state, come what may. The TRC has achieved this, at least for our generation.

Another part of the answer is to develop a new culture in the country at large. The TRC process has sunk into the consciousness of the nation. Hopefully the report will be integrated into school curricula and its conclusions will irradiate South African thinking generally. Evil and cruelty must be seen for what they are; protecting the state against some imagined terrible evil from outside cannot justify it violating all moral norms and committing great evils itself. A third safeguard comes from having strong institutions in place dedicated to defending fundamental human rights. Our Constitution gives great significance to such institutions. One of them is the Constitutional Court, of which I have the honor to be a member.

## **The Constitutional Court**

We have started a process of building a new Constitutional Court, which in a highly visible way will symbolize the "never again" principle in our national life. And here there happens to be a strong connection with India. We had an international competition for a new court building; 600 people bought the competition brochure and 180 entries were received, 40 from outside South Africa. The chairperson of the jury was the Bombay architect Charles Correa. He was chosen because we felt he had the right philosophy for the kind of building we wanted — not a copy of a North American building transplanted to South Africa, but an edifice that came out of our culture, located itself in our history, and responded to our light, physical texture, topography, and needs.

Geoffrey Bawa, a distinguished architect from Sri Lanka, was another member of the jury. Monika Correa, who accompanied her husband Charles, presented us with a luminous tapestry she had made showing a banyan tree firmly rooted in the ground yet floating in space. The symbol of the Constitutional Court is a large tree under which the people shelter; they protect the tree, the tree

protects the people. Her tapestry will have a prominent place in our court, possibly behind the judges, and there will be a direct Indian presence there. But the connection with India is not simply a physical one. The site that we chose for the court building is the Old Fort prison in Johannesburg. We say, with mixed feelings of satisfaction and shame, that South Africa possesses the only prison in the world where both Gandhi and Nelson Mandela were locked up. And those of you who are familiar with the story of Gandhi in South Africa will know that many of his most intense experiments with truth took place in precisely that prison. If I recall correctly, his decision not to take salt — when he saw that Indian prisoners received salt with their food while African prisoners did not — was made there, and generated the idea of voluntarily giving up physical pleasures so as to understand the experience of living like those treated as the lowest in society. Sadly, we in South Africa provided him with that rich experience.

For the most part, the hurt is still there. Instead of coming forward and speaking from the heart and crying and being open, most of the perpetrators came in suits, expressing tight body language, with their lawyers next to them, and read prepared statements as though they were in a court of law. Their admissions were important, but tended to be limited to a factual acknowledgment of unlawful conduct coupled with a rehearsed apology, rather than encompassing an emotional and convincing acknowledgment of wrongdoing. I am sure there is a huge generosity, particularly among African people, waiting to come out, but it can only express itself if there is a counterpart of openness and honesty of feeling on the part of the perpetrators. Just as even in this highly marketized world we still have a right to altruism, so even in a legal and moral universe based on accountability, there is a right to forgive. The problem is that the right to forgive can only be enjoyed if the perpetrators acknowledge their wrongfulness.

Yet even allowing for all these serious limitations in the reconciliation process, I believe that the basic objective of laying the foundations of national reconciliation has been largely achieved. On an individual basis and between all communities we have a long way to go, but at the national level we now for the first time have a single narrative, a common history of the most painful moments of the recent past. You cannot have a country with different memories and expect a sense of common citizenship to grow. You cannot have a white history and a black history that have nothing to do with each other except that they coincide in time and place. You have to have a single, broad, commonly accepted narrative of South African history. In that sense, although we are still living in an unfair country, where facilities and life opportunities are not the same for black and white, we are living in a much less divided country than the one we occupied before, as inhabitants of two countries in one. As one American put it — we are all on the same map. That has been the huge gain.

It should be remembered, too, that accountability can take many forms. Even punishment should not be seen simply as sending people to jail. The persons who appear on television and say, We cut up the body and threw the pieces to the crocodiles afterward, do not get off scot-free. They are punished by exposure, punished by shame. In conditions where they no longer exercise total power, they see the families of the victims, look into their eyes as equals. Afterward they go home and have to look into the eyes of their neighbors, their children, their families. Once upon a time they received handshakes and promotions, now they are abandoned and repudiated. Many are receiving treatment for post-traumatic stress. Their bleak faces serve as warnings to all in the future: nothing remains secret, the truth will out.

Many bodies of disappeared persons have been recovered. We now have the truth for the first time of how Steve Biko was killed, how the community leaders known as the Cradock Four were murdered — years of inquest and inquiry had produced nothing. So we have gained an enormous amount

both of knowledge and of acknowledgment. The price was to offer indemnity to those who came forward with the truth. Yet prosecution without evidence would have been difficult, and we would not have known whom to prosecute for what. I think the country is stronger for the process.

We need a new building for our new court and our new democracy, but we are going to keep the old prison structures. The prisons will be there, right next to the Constitutional Court, representing not only the "never again" principle but also the theme of survival, of hope, of the triumph of courage and humanity over despair and cruelty. We wanted the new building to be a simple edifice, where justice would be accessible, friendly, and warm. If I walk into a magistrate's court in South Africa today I feel guilty, and I am a judge in the highest court in the land! There is something about standard court architecture that proclaims authority, that says, Beware, the state is on top of you. Yet our court does not express power, it restrains power. Our job is to defend the new Constitution, to ensure that all the agencies of society, all public institutions, function in terms of the processes laid down by our Constitution and respect the values enshrined in it.

It is in relation to values that so much of Gandhi comes through to us. The underlying values of our new democracy are spelled out in our bill of rights and in the very concept of equal citizenship, which presupposes not only negative protections against abuse by public power but also affirmative claims to a decent and dignified life for all. The foundation of our work is accordingly respect for the humanity of the least among us. The Constitutional Court is expressly required to promote the values of an open and democratic society. Such a society acknowledges the equal worth and dignity of each of its members and respects difference in society. These are Gandhian ideals.

Yet it is not only the spirit of Gandhi that can be found in our Constitution, but the philosophy of Jawaharlal Nehru. I am honored to be speaking in the building most directly associated with Nehru, to be living on a campus named after him. It is no accident that the title of Mandela's autobiography *Long Walk to Freedom* was taken from a phrase by Nehru: there is no easy walk to freedom. The experiences of the Indian freedom struggle and the processes used to accommodate diversity in a democratic national framework had a profound influence on Mandela's generation and are reflected in our new constitutional dispensation. So we get themes about the institutionalization of democracy from one great Indian personality and about spirit, compassion, and self-denial from another. These were two enormous inputs, communicated across the Indian Ocean not just by writings but through the experiences of struggle and jail of scores of South Africans who worked directly with two great Indian leaders. The universalism of human rights comes from the universality of struggle and idealism. In this way the aspirations of generations of freedom fighters are embodied in the Constitution that I as a judge on the Constitutional Court have sworn to defend.

## Epilogue

A week before my companion and I flew out of Cape Town en route to India, I was at a party in Johannesburg, feeling quite light-headed after a heavy year's work in court. The party was at the home of somebody whose father had been one of the first to be assassinated by the hit squads; as a child she had cradled her dad as he lay dying. To this day she does not know who actually killed him, but she has got on with her life and has now become a filmmaker of repute. It was an end-of-year party for the actors and crew of a gritty and intelligent soap opera of which she was one of the directors.

In the midst of the music and hilarity I heard a voice saying to me: Hello. I turned around and saw a familiar face smiling at me, looking very happy. The person spoke again: Hello, I am Henry, do you remember me? At first the name did not register. The speaker went on: Remember I came to. ... And I remembered: You came to my office, you were going to the TRC.

The music was throbbing, the people were dancing around. We got into a corner so that we could hear each other better. He was beaming. I asked him what had happened. He told me that he had written to the TRC, giving them, all the information he could, and had applied for amnesty in relation to six different matters. And afterward, he said, he had spent hours with Sue and Bobby and Farook, all of whom had been in Mozambique in those hard years, answering their questions on behalf of the TRC. He was speaking on first-name terms about people I knew well, all freedom fighters who had been in Mozambique, and doing so with great affection and enthusiasm.

Then he stopped talking, looked at me and said: You told me that afterward ... maybe. ... And I responded: Yes, Henry, I said to you that afterward, if you cooperated with the Truth Commission, if you did something for South Africa, maybe we could meet again. ... I've only got your word for it, but I can see from your face you are telling the truth.

I put out my hand and I shook his hand. He went away elated. I moved away and almost fainted into the arms of a friend of mine.

\*This essay was delivered as the Fourth DT Lakdawala Memorial Lecture on December 18, 1998, at the Nehru Memorial Museum and Library Auditorium, New Delhi, as well as at a seminar on Truth and Reconciliation organized by the Prince Claus Fund for Culture and Development and Documenta11, on July 6, 2000, in the Hague.

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