
Review Essays

Post-Conflict Societies: Reconciling Pragmatism with Principle

Rory Brady

Erin Daly and Jeremy Sarkin. *Reconciliation in Divided Societies: Finding Common Ground.* Philadelphia: University of Pennsylvania Press, 2006. 352 pages. \$65 (hardcover) ISBN: 0812239768.

Introduction

May 8, 2007 was an important milestone on Northern Ireland's pathway toward reconciliation. On that day, power — to be jointly exercised by political enemies — was restored to Northern Ireland. Speaking on that occasion, the new first minister, Ian Paisley M.P., stated that he “sensed a great sigh of relief amongst all our people who want the hostility to be replaced with neighbourliness.” Echoing the words of King Solomon, the new first minister stated his belief that Northern Ireland had come “to a time of peace, a time when hate will no longer rule. How good it will be to be part of a wonderful healing in our province. Today we have begun to plant and we await the harvest” (Paisley 2007).

The powerful symbolism of this new political dispensation reached its apogee when Paisley and the new deputy first minister, Martin McGuinness M.P., met with U.S. President George W. Bush at the White House in December 2007 with the goal of promoting American investment in Northern Ireland. Both Paisley and McGuinness have been regarded as figureheads of the recalcitrant politics of the divided communities of Northern Ireland and both had served terms of imprisonment. Nonetheless, they now share and jointly exercise executive powers. After decades of conflict — and many failed political initiatives — the unbelievable had occurred.

Rory Brady served as the attorney general of Ireland and as a member of the Council of State from June 2002 to June 2007. He has been a member of the Permanent Court of Arbitration in The Hague since 2005. His e-mail address is bradysc@eircom.net.

While real progress has been made in Northern Ireland, the primacy of politics that now characterizes that political entity continues to mask enduring sectarianism and tensions between its divided communities. The political experiment of mandatory coalition between former and bitter adversaries that was at the heart of the Good Friday Agreement of 1998 will not of itself secure the goal of reconciliation. It is a political blueprint for change in Northern Ireland, but that change will only occur if and when the great majority of the people of Northern Ireland actually desire such change. Change, in order to be permanent, requires goodwill and good faith between leaders and communities. Leaders conclude political agreements or peace pacts, but it is only individuals, communities, and peoples that can achieve reconciliation.

Hence, we must ask what constitutes reconciliation, what are its objectives, and what benchmarks are available by which one can measure its progress in different societies with many variables of a cultural, social, economic, political, and legal nature? In their book, *Reconciliation in Divided Societies: Finding Common Ground*, Erin Daly and Jeremy Sarkin give the reader a deep insight into these issues against a broad canvas of societies in conflict or marked by systemic abuse of rights.

Reconciliation as a Process

Daly and Sarkin correctly observe that each conflict is unique and therefore the trajectory of reconciliation must be tailored to each specific conflict. As the causes of conflict are multifarious, so its resolution is multifactorial. What will work in one country will fail in another. While this is undoubtedly so, what has emerged from the literature and the conflict experiences analyzed by Daly and Sarkin is a general framework that can be adapted to the needs of each post-conflict society. The purpose of that framework is to enable individuals, communities, and peoples to consolidate peace through reconciliation and to exploit the opportunities created by the political settlement of a conflict. The extent to which that opportunity is conducive to reconciliation depends upon the capacity of societal structures to induce reconciliation, the desire for reconciliation among people, and a recognition within divided societies of a common purpose.

Since World War II, at least thirty countries have pursued truth and reconciliation commissions (Tolbert and Solomon 2006). The nature of the conflicts and the fabric of the societies of the states that have been embroiled in conflict are diverse. Nonetheless, it is tempting to identify a common thread that runs through the concept of reconciliation. Is it predicated on any clear principle or is it simply an ad hoc collection of strategies for divided societies? As Daly and Sarkin note, some commentators have made the charge that reconciliation is unprincipled, a critique that derives from the proposition that some wrongdoers go unpunished. This criticism is, I believe, unjustified. It is inspired by a one-dimensional

criminal law view of how one deals with the past in the interests of the present and the future. Moreover, it ignores the reality that even in the best-ordered societies many wrongdoers are not punished. If one sees reconciliation as a charter for hope, it becomes clear that hope cannot spring solely from the criminal justice system. Its roots are broader and deeper.

If there is one overarching principle at the heart of reconciliation it is that, subject to certain conditions, an individual's right to individual justice can be subordinated to society's right to move on. But what are those conditions? In reality, these conditions are victim focused as they entail substituting the right to retributive justice with a broader set of partly social, partly economic, and partly political rights that are directed to improving the victims' quality of life. Achieving this for victims is the price society pays for relegating retribution to a subsidiary or minor role in the reconciliation equation. These social, economic, or political rights are: first, a right to know about prior human rights abuses with a concomitant public acknowledgment of their existence; second, a right to have resources of the state deployed or redistributed on an individual or communal basis to address prior wrongs, which may, at its simplest level, take the form of reparations or compensation; and third, a right to the preservation, by memorials and so forth, of the history of that prior wrongdoing. These rights are realized within a broader scheme that engages all elements of civic society. To be effective, reconciliation must, according to Daly and Sarkin, occur in, and involve people at, multiple levels of society.

Typically these new substituted rights are realized through truth commissions and good governance. The case for establishing truth commissions and their superiority to criminal justice must be made in each society.

Reconciliation will not make an imperfect world perfect; its objectives are more limited. It does not offer a utopian formula for dysfunctional societies. Rather it is an antidote to hatreds, fears, and apprehensions that might otherwise subsist indefinitely in a post-conflict era and in time become the pretext for further conflict.

How do we recognize reconciliation? Daly and Sarkin postulate a useful series of tests for determining when reconciliation has been achieved. It exists when conflicts in a society that would previously have resulted in violence get resolved through normal politics. It occurs when those who lose elections accept defeat. It manifests itself through integration of communities whether in schools, on the sports field, or elsewhere. It is reflected in the common approach to issues of public importance. Just as those who design a reconciliation process must address the social and economic dimension to a prior conflict, so also the markers of its progress or success must include societies' advances in these areas. These are its benchmarks. It may take decades to achieve and must be seen as a continuum.

Individual Healing, Forgiveness, and Justice — Truth Commissions

In terms of healing, the requirements of victims vary. Some victims will forgive the perpetrators of their abuse. Others will not; they will demand punishment for the crimes committed against them. That is their right — no society can compel a victim to forgive or forget. As Daly and Sarkin observe, many perpetrators do not seek forgiveness; indeed, they do not even recognize the wrongfulness of their conduct. As Justice Albie Sachs, a victim of the apartheid system and a leading jurist in South Africa, has noted, reconciliation does not require *each* victim to forgive *each* perpetrator. Nor does it require perpetrators to apologize or the parties to embrace. With such a variation in human response, it is clear that individual criminal justice — in the form of punishment — is not a factor that is a *sine qua non* of reconciliation.

The correlation between individual healing and justice is complex. The former is an individual entitlement and the latter engages society's right or interest. Crimes are, in general, offenses against the community at large. Punishment for those crimes is the right of society and is not contingent upon the consent of the victim to the prosecution of the aggressor. Moreover, the nexus between individual justice (in the sense of punishment) and individual healing is controversial. Daly and Sarkin analyze, question, and probe (Chapter 2) psychologists' views about what is required to achieve healing. For instance, they explode the proposition that individual reconciliation requires "a reconnection between the survivor and the perpetrator."

Retribution is not a determinant of healing nor of itself a solution to the problems of past human rights abuses. Healing must be considered in the context of the inherent limitations of all criminal justice systems. Thus, to insist that healing depends on retribution is to admit the failure of a new political dispensation to secure general forgiveness. Moreover, to rely solely on retribution can become a measure of a society's failings and create a dangerous equation between imprisonment or punishment and a society's capacity to reinvent itself in a post-conflict era. For healing to occur, one must look beyond mere criminal justice. Recognizing the limitations of criminal justice systems is a key to uncovering an effective reconciliation process.

A functioning criminal justice system does not vindicate the rights of all victims. Indeed, the grievance may be compounded by a succession of failed prosecutions. Such a result may cause or add to the psychological trauma of victims (O'Connell 2005). The inherent unsuitability of the prosecutorial system is obvious. It focuses on a victim and an accused. Its fact finding is circumscribed by the offense as charged and it is designed to result in a verdict, not a narrative. In the common law world, it is not focused upon eliciting the truth but identifying whether proof is established beyond all reasonable doubt. Many of the evidential principles of the

common law are directed toward the exclusion of evidence. This is the very antithesis of the truth-revealing process that some victims desire. It is also a fact of life that many who are guilty of crimes are found not guilty in accordance with law. In the debate between the merits of criminal trials and truth commissions, the latter is clearly the more preferable mechanism for revealing the truth. The evidence to sustain a prosecution — even of the most atrocious of crimes — may simply not be available. Hence, the role of the criminal justice system is of only secondary importance to societies seeking reconciliation.

It is for these reasons that truth commissions have come into vogue. Thus, Daly and Sarkin recognize that of all the things a government can do to promote individual reconciliation, “truth commissions may turn out to be among the most effective” (p. 60). Truth commissions have a broader remit; they address experiences other than through the filter of admissible evidence. They look at a society’s problems — and the causes of its conflicts — at a variety of levels including their historical, economic, and social dimensions.

The debate about reconciliation and its component parts is bedevilled by the language of the legal profession, but reconciliation is only partly driven by law. It is a multilayered process involving the application of many disciplines and many levels of society, part social, part cultural, part economic, part legal, and part political. To view it solely through the prism of legal rights and duties is to ignore its versatility and ultimately its utility. To understand the parameters of reconciliation, it is important to recognize that criminal justice systems are subject to their own inherent limitations, and thus to reveal the truth requires more flexible and innovative mechanisms. In short, the case for some form of truth commission as an element of reconciliation is compelling.

One area of truth commissions that requires further exploration is that of their role in what two commentators have described as “conflicted democracies” (Ní Aoláin and Campbell 2005). These societies appear to function under the rule of law. Beneath the surface, however, lie problems, such as systemic discrimination or the use of paramilitaries to execute opponents of the government. As a special case, such conflicted democracies throw up different challenges for reconciliation. The principal challenge, I believe, is that the process of establishing a narrative and revealing the truth of allegations of human rights abuse by state actors itself becomes a source of division. It represents a paradox: that which is perceived to be a feature of most reconciliation processes, that is, a truth commission, becomes an instrument of propaganda in a war by another name. Each community demands that *its* version of the truth be investigated, and each community sees the other communities’ demands as a continuation of the conflict through propaganda. This, of course, is not unique. As Daly and Sarkin point out, in Bosnia there were three separate war crimes commissions focused on “the victimization of their own group,” quoting Jakob Finci,

who served as president of the Bosnian Association of Citizens, Truth, and Reconciliation.

In these circumstances, a commitment to reveal the truth and establish a national narrative must rise above domestic political considerations and the international community has a role in this process. Judge Thomas Buergenthal, a member of the U.N. Truth Commission for El Salvador, has observed that “The establishment of an international commission will frequently make sense for a small country where the population continues to be politically polarized” (Buergenthal 2006). In addition, because the truth is itself contested and politicized, the type of truth commission required — in conflicted democracies — will probably be radically different from what is required in societies that have undergone a transformation from auto-crat or dictatorial rule to democracy.

Good Governance and Deterrence

Deterrence is a paramount consideration of reconciliation. There is no point in designing and implementing a process of reconciliation unless it ensures that the abuses of the past cannot recur. Punishment is not the sole determinant of nonrecurrence; it is simply one of a constellation of factors that give a stable society a guarantee that it will, thereafter and in all circumstances, be governed in accordance with the rule of law and not the rule of men. It is by achieving that state of permanent consensus — among those previously in conflict — that reconciliation reaches its terminus. The great gift of reconciliation is the way in which it procures structural changes in society that are not contingent upon filling the prisons with all of those who contributed to the history of wrongdoing. It takes a broader and longer view of the life of a society in contradistinction to the short-term focus of retribution through the criminal justice system.

Drawing on Daly and Sarkin’s work, I believe that the essential ingredients of good governance, in the context of reconciliation, are:

1. the establishment of a government department or other emanation of the state dedicated to achieving reconciliation;
2. a legal system based on constitutionalism and the rule of law that is secured through an independent judiciary;
3. dedication of the necessary resources for the purposes of securing the objective of reconciliation;
4. the achievement of demilitarization, demobilization, decommissioning, and reintegration of state and nonstate actors into civic society;
5. the creation of a narrative for the state actions and nonstate actions of the conflict era; and
6. the inculcation of respect for the rule of law and human rights norms.

The general acceptance of and consent to the rule of law is the most potent deterrent against repeating the past. If the circumstances that induced oppression cannot be repeated, then the abuses will not recur. One of the great ironies of history has been how those who have been oppressed themselves become oppressors. Reconciliation alone does not ensure we are not condemned to repeat the abuses of the past — that is achieved by good governance. In this context, Daly and Sarkin refer to some apposite remarks by the former Secretary General of the United Nations, Kofi Annan, who said “Good governance is also a component of our work for peace. It has a strong preventive aspect; it gives society sound structures for economic and social development. In post-conflict settings, good governance can promote reconciliation and offer a path for consolidating peace” (p. 216) — quite a cogent view from an authoritative source.

Conclusion

With their book, Daly and Sarkin have produced a detailed and comprehensive analysis of the problems and opportunities of reconciliation in divided societies. It contains a wealth of information, experiences, analogues, and precedents. Their treatise is, in my view, indispensable to those who are involved in the process of designing systems for reconciliation in divided societies and makes an invaluable contribution to our understanding of conflict and reconciliation.

REFERENCES

- Buergenthal, T. 2006. Truth commissions: Between impunity and prosecution. A lecture delivered at Case Western Reserve University School of Law, October 16.
- Ní Aoláin, F. and C. Campbell. 2005. The paradox of transition in conflicted democracies. *Human Rights Quarterly* 27(1): 173-213.
- O’Connell, J. 2005. Gambling with psyche: Does prosecuting human rights violators console their victims? *Harvard International Law Journal* 46(2): 295-345.
- Paisley, I. 2007. Speech to Northern Ireland Assembly, May 8. Available from http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/6636139.stm.
- Tolbert, D. and A. Solomon. 2006. United Nations reform and supporting the rule of law in post-conflict societies. *Harvard Human Rights Journal* 19: 29-62.