

South Africa, its past, human rights and reparations

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Is it time for business to acknowledge its role during the apartheid era and participate in the reparation process ?

The TRC (Truth and reconciliation commission) handed in the Codicil to its final report to President Mbeki on Human Rights day, the 21 March 2003 which historically commemorates the events that took place in Sharpeville in 1960 which was a defining moment in South African history.

The handover of the Codicil by the Commission removed the last obstacle to the government dealing with the Commission's recommendations on reparation. This right to reparation is well established in both domestic and international law, with our own Constitutional court having determined in the AZAPO case that "Reparations are usually payable by states, and there is no reason to doubt that the postscript envisages our own state shouldering the national responsibility for those".

Reparation is accepted by the international community as an acknowledgement by government of the wrongdoing that has been done to those who were the victims of gross human rights violations.

Governments often respond to the call for reparations with the notion that they have development programs which will benefit victims. In this regard, it is important to note that development is meant to advance the welfare and benefit of all citizens and must be distinguished from reparation which is meant to acknowledge the wrongdoing but also to ensure that the pain of paying it will be a "deterrent to a state committing violations in the future". So the aspect of "non-repetition" is incredibly important. Reparation becomes a restorative justice option which seeks to redefine the crime, it shifts the focus to the victims. It also aims at healing and restoring the dignity not only of the victim but also of the family and the entire community. Importantly it supports a system of justice which aims at accountability.

Incredibly, of course, the new government of South Africa will be shouldering responsibility for the crimes of the former state. Reparation is not a new facet of international law, in 1990, the United Nations compensation commission was established as a result of the Gulf War in 1990 to pay out billions of dollars in reparations to victims. In Chile, the cost of the reparation program at the time when the greatest number of survivors was alive was 16 million dollars per year. There, reparation included a monthly pension to victims, medical benefits for the victims and the families, educational benefits and military tax exemption.

The payment of reparations to victims constitutes the acknowledgement by the state of the wrongdoing and is meant as a deterrent to both states and private parties to ensure that they are conscious of the price to be paid when gross violations of human rights are committed.

Non-repetition is therefore an important component to ensuring that governments behave in accordance with international human rights law and international humanitarian law.

The Commission in its report also considered the role of various sectors in being complicit and aiding and abetting the apartheid government. The TRC expressed concern at the amnesia of business in regard to their role during the apartheid era and took a much harder line in the second report. The commission made findings in respect of the role played by business during the apartheid period, nine years into the transition, Business has not only failed to acknowledge the role that they played during the apartheid era: in not only supporting the policies of the apartheid government; but also in acknowledging how they benefited from apartheid laws and profited from their collusion with the apartheid government.

If the TRC is to be criticised, it should be for not pointing this out sooner. The destabilisation of family life and social system has left a bitter legacy in South Africa which has not been repaired. The single sex hostels, the exploitation of the Black migrant labour force, the legacy of the brutal land removals have left a dark stain on South African economic and the social life which the country struggles with today. Business needs to question itself on how it played a role in all of this.

The Commission made specific recommendations regarding the responsibility of business in the area of restitution "to those who suffered from the effects of apartheid discrimination". The Commission intended that business would be involved in the wider project of reparation in respect to all those South Africans whose normal development was impaired by the system of apartheid. This of course has not happened.

For business, it has been business as usual. In fact, in many ways having prospered under apartheid, many companies have shifted their assets to other parts of the world. While many have heralded this move, in reality, it has constituted a flight of capital. The Captains of Industry have been remarkably silent on this issue. When they have spoken, they have talked about their role in Black empowerment and their contribution to dealing with aids. It is interesting that ten years into democracy, Black business demanded that government pass laws to assist black empowerment as it is quite clear that there has been little or no empowerment. While their effort in the aids arena is commendable, it cannot replace their responsibility for the wider aspect of reparation. At the heart of the debate is whether business is prepared to acknowledge the fact that decades of profits were based on the systematic violations of human rights of the vast majority of South Africans. In 1895, when the migration control regulations were first drafted by the Chamber of Mines' native labour Department, the President of the Chamber of Mines said "a most excellent law... which should enable us to have complete control over the kaffirs". In 1944, the Chamber of Mines in its submission to the Commission on Native Wages argued openly for the "subsidiary means of subsistence" that migration back to the homeland guaranteed. This subsidised labour costs and the cost of reproducing that labour. In fact, the zeal and enthusiasm for population control laws by the mining houses set the precedent for the pass laws of the apartheid government.

Have we already forgotten the brutal suppression of workers in the period of the 1970's? The collusion between the mining houses and the state security forces to maintain production under the guise of law and order should not be forgotten. In 1979, Business heralded the "new era of business and state détente" after the Carlton Conference.

It is clear that apartheid not only suited business, but that it was a crucial element in providing cheap labour in order to make huge profits. A factor often not canvassed is how the destruction of the social fabric of Black family life has led to the destabilisation of our country today.

Sadly, business has refused to acknowledge their role or the legacy that apartheid has left. A question that has to be answered is whether any society expects business to act in an accountable way to ensure that rights are not violated in the process. Stephen Mulholland in a radio program articulated the view that businessmen are not angels, they are accountable to shareholders who demand that they make profits. Is it unreasonable to expect that shareholders who one assumes are honourable men and women who are also mothers, fathers, wives and husbands and who may have children of their own, to act in a way which is designed to create a world in which the dignity of human beings and their humanity is respected.

History is littered with examples of how business has colluded with corrupt and despotic governments in the brutalization of citizens. The case of Ken Saro Wira, the Ogoni people and Shell is a case in point. We know that many corporations and multinationals make more profits than the GDP of many countries and that this enables weak governments to be corrupted. Yet increasingly it has become clear that civil society and indeed the human rights world is no longer prepared to tolerate companies who profit at the expense of the rights of ordinary people.

The work of the Truth Commission was not just about the accountability of state actors or the liberation movements but also about the role that was played by those who were complicit in apartheid and who aided and abetted the apartheid government. As we stand here we celebrate the decision in the SOSA case which confirms the rights of anybody whose rights have been violated to bring their case under the Aliens Tort law asking for an acknowledgement of the wrongdoing and for the court to recognise their rights. It has become a universal principle of international human rights law for nations to recognise the rights of ordinary human beings whose rights are violated to bring actions under this law. We should ask ourselves the question, why are the victims meant to feel as if they have committed a wrongdoing by taking their case to court in the USA? Why are they the ones who are seen to be guilty of wrongs? Why have we, as a society not asked ourselves the question "what have we done to bring business to account?" Why have we not taken them to account? Why do our people have to sue them to bring them to the table? Why are they not voluntarily here? The UNDP report that was published this year is staggering because it established that despite their claim, they had taken more money out in profits than they had spent. When they did spend it was capital intensive rather than on people.

Why do we harp on this, why are we out of sync with what seems to be normal South Africa? In my view, it is ultimately about morality, the morality of beginning to build accountability not just for states and the behaviour of states but also about that of private actors.

The whistle-blower in the Enron case took part in a chat show on radio and indicated the deep involvement of Enron in the conflict in Afghanistan because of America's need for oil. Robert Fisk indicated how Iraq has incurred debt for reconstruction to leading American companies. In the DRC, conflict is raging and the UN has constantly named more than 200 companies for violations that are taking place there. Sadly many South African companies are there on the list. Anglo and De Beers protested to the UN because their names appeared. The Kimberly Diamond Process started by South

Africa started because of the horror of the role played by business in the conflict in Sierra Leone and its spillover in Liberia because of diamonds. Global politics has increased the role of multinationals. They control the economy and the body politic.

In South Africa, there is no doubt that business and in particular the mining houses and the parastatals benefited from the apartheid system, its laws and its oppressive system. Gottfried Wellmer has published a study dealing with the loans made to South Africa - mainly to Eskom - during the apartheid period. Today we suffer power cuts, particularly in the Black areas. Yet during the apartheid era, government borrowed money to ensure that white areas were properly electrified.

Last year, the moment of truth arrived for South African business, they needed to acknowledge that they played a decisive role in supporting apartheid and also colluded with the security establishment in oppressing those who opposed apartheid. Their profits were derived in a time when South Africa was regarded as a pariah state as apartheid was declared to be a Crime against Humanity. Business should not discount the enormous goodwill that such an acknowledgement would generate amongst South Africans who have shown an extraordinary generosity to those who have been willing to acknowledge their wrongdoing and who have been willing to participate in the regeneration and reconstruction of our society.

If the trigger pullers could acknowledge their role, then is it not time for both politicians of the Old order and the Captains of Industry to say "we did it and are sorry?"

Instead, they have put pressure on the government to step into the arena and our former Minister of justice took the unprecedented step of filing an affidavit in the apartheid law suit cases asking for the cases to be dismissed.

We sit at a dangerous time in our history; we have a country in which more than 60% of the country is either unemployed or semi-employed depending on which way you count it. Yet we also have people living at unprecedented wealthy levels. How do we reconcile this and how do we build sustainable reconciliation?

Priscilla Hayner who has written extensively on Truth Commission suggests that there are three questions that would need to be asked :

How is the past dealt with in the public sphere?

In other words, do people talk about the past, is there still bitterness and are people comfortable with discussing it?

What are the relationships between past opponents? Are relationships based on the future or the past?

Is there one version of the past or many?

One's response to these questions would clearly depend on a number of varying factors not least one's experience of the period post the transition. Clearly, one's material circumstances would determine how one viewed the present and the past.

In the main, most White people or beneficiaries want to forget the past. They feel that one should get on with life. It is of course difficult for the victims to move on and to forget the past, their futures and their potential to have a future are greatly determined by the past.

What does it teach us? What does a society need? It requires honesty, the consideration of the needs and feelings of victims, the restoration of their dignity and honour and of course acknowledgement. It requires the transformation of the physical conditions that they live in, the equalisation of benefit. Change has to be material, poverty and inequality make dignity impossible, this has to change. If it was possible to summarise what is needed for real reconciliation, then the following factors must be attended to:

There must be an end to the violence or the threat of violence

There must be an acknowledgement by the state of the wrongdoing done to the victims

Reparation to victims must take place

A constructive relationship must be built between victims and perpetrators

Structural inequality and material needs must be addressed

The passage of time can assist healing

The focus must be on justice for victims

Mahmood Mamdani, a Ugandan scholar has often argued that South African commission was flawed in that its focus on perpetrators meant that the beneficiaries of apartheid were allowed to escape any consequence or responsibility for apartheid. He suggested that “the focus on perpetrators fuels the demand for criminal justice options. A focus on beneficiaries shifts the focus to a notion of justice as social justice for victims”.

It is in this context that we need to see reparation as a means to social justice. Victims in South Africa never expected the state to pay out huge sums of money to them. They have understood the plight of the new government. Slowly, however, with time, corruption, the indifference of the haves eroded the understanding. Money cannot bring the dead back again. It can impact on the way victims live. Yesterday the second item on all the news stations was the picture of prominent victims accompanying Ed Fagan. I was deeply upset by the exploitation of victims by this man. However I was conscious of how deeply we have let victims down by allowing them to be so desperate. We paid those who were accused of Baby Tsepang’s rape R 80 000 000 for falsely accusing them and imprisoning them. We paid to the relatives of those who had lost their lives in the struggle and who had been tortured R 30 000. Where is the justice of it all?