

# NOT ONE ANSWER?

By Martin Böhmer



Often discussions about massive human rights violations revolve around a single question: How should a country, any country, come to terms with a past event of radical evil? In this brief essay I argue that the question thus articulated is impossible to answer reasonably, *i.e.* providing enough details and nuances in order to organise an overall public policy response adequate for any country at any juncture of its history.

## PUNISHMENT FOR ALL?

One such answer is pushed from the new institutions of international law such as the International Criminal Court: justice in the form of criminal punishment. In accordance with such institutions, if a country fails to redress an event of radical evil, the international community is bound to prosecute the wrongdoers and punish them. This answer has a long and venerable tradition starting with the Nuremberg trials and it seems the most natural one, “a crime has to be prosecuted, tried and punished”.<sup>1</sup>

Nevertheless, and even though since the Holocaust the universal conscience became more sensitive to events of radical evil and multiple international treaties and constitutions regulated generously and judges enforced strongly human rights rules to limit popular will, despite judicial review being extended to countries that had rejected it, thus bringing to an end years of legislative (or executive) supremacy, and regardless of the fact that massive human rights violations still happen, seldom was a perpetrator prosecuted, tried and punished.<sup>2</sup>

The situation is not surprising. Watching Eichmann, Hannah Arendt admitted the powerlessness produced by a banal perpetrator of radical

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<sup>1</sup> Diane Orentlicher, “Settling accounts: The duty to punish human rights violations of a prior regime”, *The Yale Law Journal* 100, 8 (1991): 2 537.

<sup>2</sup> See Carlos Santiago Nino, *Radical evil on trial* (Yale University Press, 1996).

evil: if, in order to organise massive, systematic violations of human rights an accordingly massive network of willing, though banal, perpetrators is needed, who to punish? Every one of the hundreds of thousands? And how to punish, what kind of punishment is fitting for a literally unimaginable string of horrifying deeds? The famous end of her report (since you do not want to share the earth with us we cannot be expected to want to share the earth with you) attests to the intellectual despair in the lack of an answer.<sup>3</sup>

## PUNISHMENT

The justification of criminal punishment is a traditional example of the opposition between two theories of metaethics: deontologism and consequentialism. The former justifies punishment when it is the response in the form of a proportional evil inflicted on the wrongdoer to the evil she committed against her victim. In a Kantian fashion the perpetrator deserves to be punished and, in order not to use him as a means to society's ends, punishment has to be inflicted albeit in a proportional way. Retribution is deserved; otherwise her dignity would be violated.

Utilitarianism is the consequentialist theory that has developed a justification of punishment based on deterrence. In this case, punishment is inflicted in order for the perpetrator (or others, society at large) not to do it again. In this case both the sanction inflicted and the number of perpetrators punished depends on their efficiency in achieving the desired goal: when balanced the evil done to the perpetrator (the sanction) with the good done to the community (the crimes deterred) the latter has to outweigh the former.

Both have problems, and more so in the context of radical evil. Retribution, the theory behind Arendt's perplexity, has the problems of proportionality (what should be done to someone who is responsible

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<sup>3</sup> See Hannah Arendt, *Eichman in Jerusalem, A report on the banality of evil* (London: Penguin Books, 1994).

for the killings of millions?), banality (what kind of *mens rea* is required from an autonomous perpetrator?), scope (who, out of the thousands responsible, should receive due punishment?), and aim (are we punishing deeds or the particular evil will of the wrongdoer? Are we punishing her for what she is rather than for what she did?). Retribution seems too close to vengeance. Deterrence, on the other hand, has the problems of a public policy of punishment using the perpetrator as a mean to society's aspirations, and thus seems contradictory to the goal of putting an end to the vicious circle of treating human beings in an instrumental way. Deterrence seems too close to slavery.

Why then is it so natural to think about criminal punishment in the context of everyday crimes, heinous as they may be, and so difficult in the context of radical evil? Some answers were already mentioned: the radicalism of its evilness, the amount of people responsible, the proportionality problem, the contradiction between goals and principles. But on top of all that, societies that experienced an event of radical evil tend to have their institutions dismantled and their civil societies in moral disarray. Criminal punishment assumes too much institutionality: a working Judiciary, a system of legal defense, trained prosecutors, a way to publicize the decision and prisons, or a decent set of law enforcement institutions. In this sense a consequentialist approach may be what is needed, but one connected to the creation of a constitutional culture, respectful both of a democratic mandate, the restrictions of human rights and a sense of community flexible enough to sustain a plural *demos*. I will come back to this alternative later in this essay.

## TRUTH

Many societies have chosen different strategies to cope with massive human rights violations. One usually endorsed is truth, the search for a neutral report on what happened. Truth, which recently became a right on its own, a right even criminally prosecutable, is also a difficult goal. It used to be regarded as a substitute for punishment, a response adequate to those societies that lack the necessary institutional devices

to prosecute the perpetrators. Nevertheless, it eventually won relevance on its own. One reason is that the search for truth is a strategy directed towards the victim, it is a way to acknowledge her loss, a way to set the record straight in the most neutral way possible.<sup>4</sup>

Perpetrators of massive human rights violations tend not to limit themselves to the imposition of suffering. It is usual in these events that they seek to transform social narratives: to wipe out certain doctrines, opinions, world views and to impose theirs in the belief that there is a way to create a unified world anew out of the corpses of their enemies. To counteract such an attempt and to vindicate the world that suffered under the atrocities through a criminal trial is not the best of alternatives. Trials are not about truth, they are about justice, *i.e.* they tend in the first instance to discard the possibility of an innocent to be punished, putting a disproportionate burden on the side of the prosecution and only when it succeeds is the accused is duly sanctioned. Thus, in such instances, victims (witnesses) are cross examined ferociously; their narrative is disregarded, changed for the one better suited to the occasion, their recollections doubted, their credibility questioned.

If on the contrary, for reasons I will later explore, a certain society wants to put the victims at center stage, to reconstitute their confidence and to send a message of acknowledgement of the evil committed against them, the community ought to listen rather than talk, to believe rather than doubt, to find rather than hide. Thus Truth Commissions were created to achieve an array of goals of which trying to set the record straight and to give back to the victims as much dignity as possible are none the less important.

But the achievement of truth is a difficult task. Proofs are hard to get, narratives are contradictory, perpetrators tend not to cooperate and the record created with such fragile instruments seems many a time a

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<sup>4</sup> See Martha Minow, *Between vengeance and forgiveness* (Boston, MA: Beacon Press, 1998). Her book is an excellent overview of the strategies I deal with here.

victor's story, the narrative of the winners. But even when it is more plausible to set the record straight, when the evidence is not tampered with, when there is a certain consensus about what happened and why, the drive of the endeavor could prove, once again in some instances (like in the cases of deterrence and retribution), counterproductive. In effect, a democratic society should be able to deal with plural narratives, more so in societies that live under the shadow of a past event of radical evil. The search for common ways of dealing with disagreement and conflict is key to the creation of a decent society and the idea of a single truth about the past may endanger that goal.

### RECONCILIATION

Events of radical evil create individual as well as social wounds. The possibility of reconciliation between perpetrators and victims is based on the hope that the healing of one kind of wound, the individual, would help the healing of the other one, the social. Guilt, when present, is difficult to deny without pain. Shame of victimisation, on the other hand, is hard to admit even when it has nothing to do with the person's own deeds. The effort at reconciliation tries to have people meet in that difficult space between guilt and shame. It needs from the victim a perception of the perpetrator's apology as sincere and the disclosure of an event that is now regarded as evil, as truthful. In the case of the perpetrator, reconciliation calls for the perception that the victim does not seek revenge and if she does not forgive, at least the acknowledgement of the perpetrator's effort and repentance as being close at hand.

For many people events of radical evil are also products of radical moral disagreements. Perpetrators will seldom admit any guilt and victims will seldom admit any repentance. For others, forgiveness is too close to forgetfulness, thus, the attempt at creating settings to achieve forgiveness among the actors jeopardise the efforts to keep the discussion going in order not to repeat the story again. Reconciliation is thus a too easy way out: dangerous if insincere, and dangerous if completely successful.

## REPARATIONS

Sometimes, searching for ways of acknowledging the wrongdoing, societies reach out to the victims collectively, hoping to offer a way of showing common repentance. This is what happens when reparations are offered. Money, in cases of gross inequality or when there are no other alternatives at hand. Land, or scholarships, or a grave, or a monument are also means to try to repair the irreparable. These gestures have a possibility to succeed when performed in the right context, when they do not try to occupy the whole space of the scar, when they serve the purpose of showing repentance, of providing a place or an opportunity to mourn and maybe to forgive. In their collective aspect they are also a communitarian endeavor; their very existence is evidence of a collective effort to identify what happened as something that should not happen again and the suffering as something that is not deserved by the victim. The reparations, if successful, are a way to show both their own limits (their radical inappropriateness) and the common will to weave again the fabric of society. In such attempts lies their possibility and their danger: a failed attempt to repair could be regarded as a mockery, as a way to banalise the pain of the victims in trying to commensurate what is incommensurable.

## DIAGNOSIS, NORMATIVE THEORIES AND PUBLIC POLICIES

Going back to where I started: this brief account of the usual responses to radical evil shows that there is no single answer, a one-size-fits-all response. The nuances of each case are way too intricate and varied, and humble any attempt at trying to provide a single, universal answer. That is the reason why we find different and multiple approaches in different countries. In what follows I will try to show that to account for these differences one has to identify in each case, a.) the diagnosis each society produced about why the events happened, b.) a normative theory of why they were wrong, and, c.) a public policy to redress the societal trends that produced the events. I am not implying here that societies are always right. They may get the diagnosis wrong, or their normative theory could be inadequate, or the

policies could be ill planned or badly enforced. My point is that these three aspects explain both the decision each country made, the differences in responses among countries and that, when coupled with a good history of their development, they may even become a source of social knowledge about how to deal with radical evil.

### THE CASE OF ARGENTINA

Argentina's experience of radical evil happened in the mid 70s, only thirty years after the Holocaust and less than that after Nuremberg. A military coup d'état had taken over (once again, since this was the sixth since 1930) the democratic institutions amidst a generalised situation of political violence. The response, once the armed forces were in power, was to orchestrate a clandestine system of massive kidnappings, torture and killings under the cynical name of "disappearances". The State itself became terrorist and criminal even under the legal definitions valid at the time. The diagnosis of why it happened was contested but eventually one won the day: the problem was the breach of due process, the complete disregard for the rule of law. The families of the victims (a crucial actor: the Mothers of Plaza de Mayo) asked for the truth of their whereabouts, and for due process if they were indicted of a crime and for punishment if those who took their children away were acting unlawfully. Many were the social trends blamed for this event: the traditional disregard for rules, corporatism, a system of concentration of powers, the lack of a culture of liberal values. In any case, when the dictatorship collapsed under the pressure of an economic crisis, the defeat in the Malvinas war against Britain and crucially under the weight of the mounting internal but very importantly external pressure of human rights groups, a process of transition to democracy started.

The winning party campaigned using the Constitution as a rallying cry and promising to prosecute the perpetrators. It was not clear they would be able keep their word. After all, the military responsible for the atrocities was still in office and had fire power over the civilians. The international situation was not favorable. Most of Latin America was under dictatorships, the brief spring for human rights in the region

the Carter administration had brought from the United States of America was gone and the Cold War was in full swing under Reagan. The Berlin Wall was still standing and Mandela was still in prison. In that context and only with Nuremberg as precedent, a civil government put together a Truth Commission to gather evidence, and with that information printed in the famous *Never Again Report*, prosecuted the members of the Juntas that until recently were the owners of life, death and liberty in Argentina. In a few months five civil judges sentenced them to prison. It was in that trial that the closing remarks of the prosecution ended with the same words as the title of the Report: “Your Honors: Never again!”

After this trial (which was not the only one, hundreds of military personnel were being tried at the time) the story has highs and lows. There were violent eruptions of military pressure to limit the prosecutions that forced the hand of the government amidst difficult economic circumstances, a hazardous change of government that brought a general amnesty, the permanent pressure of human rights organisations that would eventually open up trials based on the right to truth, the search for the children of the disappeared, and then the decision to prosecute again under the justification that amnesty in these cases was unconstitutional and illegal under international law.

But I believe that the success of the struggle for the right to due process should not be evaluated against the story of the criminal prosecutions. If the diagnosis had been the lack of rule of law, the evaluation of the strategy to address this issue has to focus on whether it changed the configuration of Argentine politics in order for it to never again produce dictatorships and violations of human rights. The strategy was the following: out of the demands of the families of the victims assumed by a political party, the democratic government decides to prosecute the worst perpetrators of State sponsored massive human rights violations. It gathers a Truth Commission peopled by a group of notables which compiles evidence to be used by the prosecutors and published in a Report. The worst perpetrators are prosecuted and sentenced to several years of imprisonment. In hindsight the strategy is translated into the reconfigured Argentine politics as follows: A mobilised civil society becomes organised



collectively and collectively identifies a public policy as a violation of human rights. The organisations demand the authorities to end the violation and when they do not respond they look for alternatives. Eventually the definition of the situation (a violation of a right) is translated into legal jargon and taken to the Courts, which produce a decision that has to be enforced by the authorities and the enforcement controlled by the civil society in an endless game.

In effect, the courage of the Mothers and the human rights organisations is translated in the Argentine democracy into the hundreds of new NGOs that collectively defend plural definitions of human rights. Now we have rights where in the past there was only the common good defined by the State, even a non democratic one. The shame produced by the Report (which became a best seller) explains why social protests are not criminally prosecuted in Argentina even when there are more than three thousand street and highway blockades a year. No democratic government wishes to be equated to a dictatorship. In fact, a President had to step down when two people were killed by police in a public demonstration. The intervention of the Courts, the use of constitutional rights and of the international human rights treaties, opened up a huge locus of deliberation about the adequacy of public policies unheard of in Argentina's history before. Some truth, some punishment, some reparations, some amnesty in different proportions, changed Argentine politics. Almost thirty years have gone by and we still find unimaginable the possibility of a coup, and the ethics of human rights pervades every interstice of our political language. It is impossible to think that just one answer, one strategy, would have accomplished so much.

#### THE CASE OF SOUTH AFRICA

I do not dare speak about South Africa in detail, but add a comparative perspective, if Argentina's diagnosis was the lack of rule of law, then its normative theory was that the violation of due process was wrong and that criminal prosecutions were the answer; it was not South Africa's diagnosis. On the contrary, it seems that there was a thin rule of law under the apartheid regime. It was horribly unjust, but it was

regulated by law and applied by authorities and judges. South Africa's diagnosis was the lack of equal dignity, thus it was not reasonable to demand criminal prosecutions.<sup>5</sup> The idea was to bring dignity back to the people and that is not what victims receive under cross examination in a court of law. Dignity is re-established when people are heard intently, empathically, when all the others, but prominently the State, hears in awe and reverence the story of the sufferings, when officers of the State cry with them, when their neighbors acknowledge their loss and mourn with them, when the community tries to repair what can be repaired and attempt to establish the truth even at the cost of less due punishment. That is the reason for the existence of the Truth and Reconciliation Commission: a certain diagnosis, a certain normative belief and a public policy that puts dignity, rights and a new Constitution at center stage.

#### NOT ONE ANSWER? THE PLACE OF ART IN THE FACE OF NEGATIONISM

At this point I want to insist on my first proposal.<sup>6</sup> There is no single answer to these tragedies. But then again, is there not? All these events, no matter what strategy the communities use to counteract the pull of evil behaviour, in the end all tend to enforce one mandate: keep the conversation going. This mandate is ambiguous, though. It could assume the hope that the persistence of the story will avoid the recurrence of the event. The call to show the documentaries on the genocides or to teach their history in schools attests to such interpretation. But just the telling of the deeds will not do it. If the hope is justified, the mandate to keep the conversation going should stress the fact that it is a *conversation* we are talking about. The mandate should thus include, prominently, strategies to make people *listen* when they do not want to. To listen to stories that show the human capacity to perform radically evil deeds is not easy. Repetitions of testimonies

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<sup>5</sup> As proposed, among many other sources in Alex Boraine, *A country unmasked. Inside South Africa's Truth and Reconciliation Commission* (New York: Oxford University Press, 2001).

<sup>6</sup> I owe many things to Jorge Semprún's work, on this issue; see his *Literature or Life* (New York: Penguin Books, 1998).

become boring, some renditions seem implausible, the work of skeptics erodes the trustworthiness of the victims and sheer horror or shame make people turn their heads away. The threat if it does not is silence, is to have people leaving the conversation, quitting the effort to understand each other, the effort to live with each other. The threat is to forget what we were capable of, to forget the source of our shame, to not be afraid of producing an event of radical evil again.

That is the danger of negationism: the call to exit the conversation, to leave the victims alone, to deny their story, to not listen to their truth, to not pay attention to their claims, to not listen to them as witnesses in court or with the necessary empathy of those who would like to be forgiven for not having done enough. And it is also the danger of banalisation: to pretend that every claim is a fundamental human rights claim, that anyone can become an exception as the victims of radical evil rightfully can. It is the danger to pretend that authorities can, in their ambition to govern, reclaim the sacred power of the founding exception and disrupt the rule of law under the guise of enforcing a human rights policy.<sup>7</sup>

Some authors have thus insisted on focusing on the performative effect of the strategy proposed. The question is thus: Will the policy make people listen? And even: will the policy produce the kind of empathic attention that will eventually produce the kind of political culture able to prevent evil? Will it have the qualities of a work of art, one that works well, one that performs well?<sup>8</sup>

The way to avoid this danger is to find new ways of listening intently, empathically to others, to those others that are difficult to listen to, either because they are radically different from ourselves or because their story is so extremely painful. The strategies that make us look again, listen again, no matter which discipline claims them as their own (be it law, psychology, religion or politics) are properly called art,

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<sup>7</sup> On the dilemmas transitions to democracies face, see Ruti Teitel, *Transitional justice* (Boston MA: Oxford University Press, 2000).

<sup>8</sup> See Hubert Dreyfus on Heidegger on art at: <http://socrates.berkeley.edu/~hdreyfus/html/papers.html>.

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artifacts beautiful enough, weird enough, challenging enough to make us take another look at things we do not usually want to see, or to see again or that we have banalised as natural, thus losing its unique power to make us talk, to create communities and to honour the sacredness of the oath to never again. And that is the only answer we have imagined thus far.



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