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COMING TO TERMS WITH THE EVIL PAST:

DOES THE UNION OF SERBIA AND MONTENEGRO NEED A TRUTH COMMISSION?

Summary

This paper comprises three parts. The first describes the typical characteristics of truth commissions, relying on a comparative review of the experiences of countries that have had such bodies. The second part analyzes the justification of the need for a commission. This part entails two sections. The first section outlines a general justification of truth commissions. The second section confronts such general legitimacy pattern with the particular features of the political and cultural context in Serbia and Montenegro, in an effort to explain and justify the need for a truth commission in our country. The third part provides a sketch of possible specific arrangements for a potential future commission.

Introduction

After the change of regimes, the new proto-democratic order is, among other things, confronted with the tasks of establishing the rule of law and guaranteeing basic rights in a society in which these foundational features of democracy were either destroyed or non-existent. This complex task acquires yet another dimension in societies whose immediate past has been marked not only by the authoritarian nature of the previous regime, but also by mass regime-sponsored crimes. The basic question is simple: does the new political community, legitimized by its democratic intentions,

need to reckon with the crimes of the previous regime? Dilemmas that are brought up by this question span legal, practical-political and moral considerations. This should come as no surprise, given that most often at issue are the crimes perpetrated in the name of a whole political community, or in the name of a group constitutive of that community. Answers are sought between the poles of the policy of oblivion and the policy of an open and multidimensional confrontation with the past.

Skeptics usually point to the contextual complexity of the democratic transition: the new regime is confronted with multiple problems which burden the transitional process with always new and often mutually contradictory political and economic imperatives. In such a context, the demand to deal systematically - legally, morally, politically - with disturbing legacies of the past would only divert attention from really pivotal issues, opening up at the same time the Pandora box of painful questions to which there are no conclusive answers, and resulting in the further deepening of already thorny social, political, ideological divisions. If we agree that the transition to democracy requires a minimum consensus on values, goals, instruments, and on the sequencing of transitional steps, and if we pay due attention to the plain fact that such a consensus in a new polity, if it exists at all, is as a rule extremely vulnerable, then a rational strategy requires that we apply 'gag rules', i.e. that we agree to leave aside all issues that could harm the prospects of reaching and stabilizing social and political integration around new values and institutional arrangements.

On the other hand, those who claim the necessity of confronting the sinister past will typically argue that without this reflective process the preferred democratic future remains beyond reach. The argument is that with the regime change this past has not ceased to be relevant, i.e. that its legacies cannot be simply eradicated from the public sphere by an act of political will. The conse-

quences of the past deny the possibility of choice between forgetting and remembering: the character of their presence is such that a decision to promote a policy of forgetting would only mean promoting refusal to confront reality.

I accept the second position: reflective processes of obtaining knowledge, seeking recognition and institutionalizing acknowledgment about the true nature and consequences of the misdeeds from the close past, are necessary for democracy. I hold that reflection on the past is a process that contributes to 1) moral, political and legal disassociation from the crimes of the previous regime, 2) establishment and stabilization of a new democratic legitimacy, 3) creation of the basis for civil normality and justice after the period of barbarianism. Elsewhere I have tried to develop arguments for this normative thesis (Dimitrijević N.: 2000, 13; Dimitrijević N.: 2003, 8). This paper focuses on an (incomplete) analysis of institutional forms and instruments appropriate for dealing with the past. Attention will be focused on the body that is most often referred to as a truth commission. Specifically, I will advocate the creation of a new truth commission in the State Union of Serbia and Montenegro.

Most of scholarly literature about the truth, responsibility and institutional mechanisms for confronting the past focuses on the concept of transitional justice. Starting from the claim that criminal justice is insufficient for properly dealing with the crimes committed during the previous regime, additional categories are introduced: compensatory, restorative and transformative justice. Taken jointly, these categories indicate that mastering the past in the transition period requires a complex set of measures, all of them to be led by a normative objective of building a different future. Within the scope of this paper, transitional justice shall refer to a set of moral, legal, political and social processes, measures and decisions passed and implemented during the transition to democracy. The

aim of such measures is to remove the instruments, protagonists and consequences of massive violence from public and social life, and to contribute to the creation of a community based on freedom, equality, human dignity and respect of the right to diversity.

The paper comprises three parts. Part One deals with the typical characteristics of truth commissions, relying on a comparative review of experiences of countries that have had such bodies. The most important argumentative points are developed in Part Two, which deals with the issue of legitimation. Can the need for a commission be justified, and in what manner? This discussion is articulated in two sections. In Section One, I try to sketch a general justification for setting up truth commissions, establishing their authority, outlining the scope of their activity and the validity of their findings. In Section Two, I apply such a general matrix to the political and cultural context of Serbia and Montenegro in an effort to explain and justify the need for a truth commission in this country. Part Three offers a brief sketch of possible concrete solutions for a potential commission. The sketch shall focus only on a limited number of controversial issues.

1. On what a truth commission is

Choosing appropriate institutional forms and procedures for dealing with the criminal past presents a complex problem in which moral, legal and political issues are intertwined. At stake is institutionalizing an approach to the past that will not undermine the prospects of stabilization of the new democracy (Crocker: 1999, 43). First, it should be noted that - contrary to the expected 'objectivity' of abstract legal procedures - the moral and political approaches to the problem directly affect the character and the scope of possible legal measures¹. The question of an adequate legal confrontation with past crimes can surface in several forms,

three of which will be mentioned here. First, can the new regime that proclaims fidelity to the rule of law bring to justice those who - in committing acts that are by democratic standards deemed crimes - acted in accordance with the valid laws of the old regime? Second, should criminal justice be applied at all, or should a general or partial amnesty be proclaimed instead?² Third, what is the reach of a procedurally individualized criminal proceeding in a situation in which the subject of the confrontation with the past is a mass crime, a large portion of which can be identified as an administrative massacre?

In regard to the last issue, I accept the claim that the criminal prosecution before domestic and international courts - even when it is accepted and carried out - is not sufficient to overcome the bad past. Obviously, this should not be read as an argument against criminal justice: to respond to mass crimes through criminal procedure is to affirm the principle of the rule of law (Minow: 1998, 25). However, the question remains of whether the character of the crime - the role of the regime in criminal activities, the number of perpetrators, the behavior of by-standers, the manner in which targets of the crimes were chosen, the huge number of victims, the grave moral and political consequences of the crimes felt after the change of regimes - exceeds the capacities of criminal justice. Pragmatic arguments endorsing the thesis about the insufficiency of criminal trials claim that the mass character of the crimes and the weakness of the post-authoritarian judicial system impede an efficient legal confrontation with the past. A more abstract argument stresses that a judicial procedurally strictly delineated focus on the individual perpetrator and her culpability is not capable of meeting the tasks of transitional justice. First, due to the character of crimes, it is often difficult to individualize guilt and to distinguish perpetrators from collaborators. Second, criminal justice does not suffice to overcome the social consequences of evil, because it

fails to obtain a clear picture of society in which the most drastic violations of human rights were made possible through broad endorsement of a perverted value system, and through the complicity, collaboration, or 'passive support' of many, ranging from those at the top of power to 'ordinary men' (Dyzenhaus: 2000, 473). It is thus essential to establish an appropriate "mechanism elaborated to cope with the evil of the modern repressive state, since bureaucratic murder calls for its institutional counterpart" (Teitel: 2000, 78).

Such a mechanism has been found in the form of truth commissions, which in the past two decades have been established in two dozen countries throughout the world.³ Truth commissions are bodies set up to investigate and compile reports about breaches of human rights in a given country and in a certain conflict that took place in a precisely identified time period in the past. Priscilla Hayner identifies four primary elements that define a truth commission. First, a truth commission is focused on the past. Second, a truth commission does not deal with specific events, but strives to document the greatest possible number of cases of human rights violations. Third, a truth commission is an extraordinary body that usually exists for a limited, pre-defined period of time, and which is supposed to complete its work with the submission of a report. Fourth, a truth commission has certain authority granted to it by the political body which has established it (Hayner: 2001, 14; Hayner: 2000, 35).

Truth commissions are established as special institutional arrangements for a historical context in which the undesirable past is far more present than the desirable future. They are expected to help in providing answers that would be both morally correct and politically viable (Zalaquet: 1995, 205). Hence, their formation presupposes not only principled choices, but compromises as well. Such a particular mixture of principles and compromises will typi-

cally be expressed in the way a commission is formed, the scope of its competencies, its priorities, the way it operates, its internal organization, its attitude towards the victims and the perpetrators, and in the authority of its findings (Du Toit: 2000, 126).

Most often, truth commissions are set up immediately after the political transformation, to demonstrate the discontinuity with the values of the past regime, and to prevent the destruction of data needed to acquire knowledge about the past. Commissions are typically state bodies, established by the legislative or executive branch. However, there are also commissions that have been established and have operated under the sponsorship of the United Nations (East Timor, El Salvador). In some countries, actors in civil society (Bosnia and Hercegovina, Brazil, Cambodia, Columbia) have organized projects with the same objectives.⁴ Finally, it is important to bear in mind that, although established by the state or international authority, a commission is supposed to be an independent body: ideally, the founder has no right to control, intervene, or in any other way affect the work of a commission.

The state act establishing a commission defines its authority, the type of events that a commission will be allowed to investigate, the way evidence and data will be collected, its composition and the internal organization, rules of procedure, the types of reports a commission should prepare, to whom and by what date this report should be submitted, as well as the validity of its findings (Hayner: 1995, 246).

The general framework of a commission's mandate is usually outlined by the task of exploring the violation of human rights in a certain time period. Violations can include police murders, torture and illegal arrests, crimes committed during an armed conflict by the military and paramilitary forces, expulsion, destruction of property and other forms of systematic abuse of political or military ene-

mies, individual civilians or whole groups of civilian population, etc. If the regime change involved political compromise, the critical question will concern the treatment of human rights violations that the outgoing elites are directly responsible for. As concerns procedures for collecting evidence, commissions are given access to sources of information, the right to call witnesses and, exceptionally, also the right to propose that criminal proceeding be instituted.

The composition of a commission frequently reflects the effort to find a compromise between confronting demands and principles. Commission members are supposed to represent all relevant social and political groups, but they must also enjoy a wide respect that would supersede their group affiliation. Only across-the-group acceptance can guarantee a degree of legitimacy that, in turn, would provide this body with the authority necessary for effective accomplishment of its tasks. (V. Dimitrijević: 2001, 70). A commission should be composed in a manner that guarantees its neutrality, although it is also typically expected - implicitly or explicitly - to promote liberal democratic values in a predominantly illiberal context. One additional practical question is whether a commission should be made up mostly of experts (crime experts, forensics experts, legal experts), or whether experts should be involved only in the auxiliary bodies, providing necessary specific knowledge to commission members.

Yet another controversy concerns the question of whether the work of a commission should be public. The fully public proceedings of the South African commission represent an exception in comparative practice, whilst there are known cases of commissions that allowed the public to observe certain stages of their work (Sri Lanka, Uganda).

A commission completes its work by submitting a report, often within the deadline formulated by the founding act (typically six months to two years). Given the complexity of tasks (drafting the work plan, collecting information about a large number of events, organizing hearings, writing the report), there is a risk that imposing a timeframe might compromise the validity of the findings. Still, it is believed that the lack of the deadline exposes a commission to growing political pressures, and increases the risk that the report never be completed. (Hayner: 2001, 222).

What do commission reports contain? First of all, a commission is expected to submit a true, documentary and detailed report on the greatest possible number of concrete cases of human rights violations and abuses of authority. Furthermore, a precious contribution of a commission to the stabilization of democracy may consist in providing specific suggestions for reforms of political institutions, branches of the state apparatus (primarily the military and the police), or of the judiciary. Commissions may propose measures for reparations and rehabilitation of the victims, as well as measures to strengthen those social sectors (science, education, media) that may promote positive values of tolerance, pluralism and respect of human dignity. (Hayner: 1995, 229).

2. Legitimizing truth commissions

2.1. From the (authoritative) truth to (transformative) justice

The answer to the question what is a truth commission remains incomplete unless the reasons advanced to justify its existence are addressed.

The assertion that the democratic transition necessitates a broad confrontation with the past is based on both moral and practical-political considerations. The primary aim of moral reflection on the

past should not be condemnation, ascription of guilt, paving the way for official apologies, nor even reconciliation. It should rather be understood as the reconstruction of the motivational patterns of a behavior that in the recent past led to a massive violation of human rights and universal moral values. The practical-political objective of such a reflection would be to enable the citizens to regain in the recent past severely damaged capacity to distinguish between right and wrong, just and unjust. (Habermas: 1997, 2). If such a goal were not accomplished, the liberal values proclaimed by the proto-democratic regime change could easily slide into ritual façades without legitimizing and practical authority.

What makes commissions appropriate instruments for reckoning with past wrongs? In approaching this question, one could start with two preliminary cautions. First, given the differences between individual countries, any abstract analysis of truth commissions is of limited value. Nevertheless, all commissions have one thing in common - they are established after the regime change, in countries where the consequences of massive and systematic violence and abuses of human rights represent the main feature of the heritage of the past. (Boraine: 2000, 142). It follows that the types of moral and practical-political questions that can be raised before these bodies are also comparable (Crocker: 1999, 63). Second, it should be noted that some of the objectives that are advanced to justify the establishment of these bodies, are better read as statements of intention, whose plausibility can only partially be confirmed by reviewing results of commissions' activities. The argument that by discovering the truth about past crimes commissions contribute to reconciliation, 'national healing', the renewal of national unity, individual and group 'catharsis', or that they help the victims and their dear ones overcome the traumas of abuses, strives to establish the authority of these bodies by invoking aspirations the feasibility of which is highly questionable (Allen: 1999,

317). At the very least, the accomplishment of such aspirations depends to a great extent on the specific political and cultural context. This is best illustrated by the case of South Africa.

I will try to demonstrate that a more plausible justification of commissions should be sought in the analysis of the relationship between the categories of the truth and justice. I will focus on the analytical, normative and practical-political aspects of the use of these categories in the work of truth commissions.

In the broadest sense, the request for the truth means that commissions should investigate past events and present to the public facts about violence, crimes and other forms of human rights abuses. According to one possible interpretation, this prompts the demand for the respect of the principle of objectivity and for a documentary approach to the past. A commission report would not be a generic narrative on the causes, forms and effects of violence, but rather a documentary record covering the greatest possible number of concrete cases: "The greater the detail, the stronger the counterweight to prior state silence. The more precise the documentation, the less is left to interpretation and even to denial" (Teitel: 2000, 83). However, according to another point of view, evaluation and interpretation are inherent elements of the truth that a commission is supposed to provide. A commission can help promoting justice only if the presentation of the events adheres to an explanation that will point out the role of violence in the construction and reproduction of the old regime. Such an explanation ought to unveil the causes of violence, its institutional context, as well as the basic patterns of its use (Crocker: 2000, 101).

The dilemma 'objectivity v. interpretation' is false, at least to the extent to which the very selection of events for investigation requires a certain interpretation. Still, it points to an important problem in the treatment of the truth: a commission is a state body

that is expected to offer an *official authoritative truth*. Some commentators believe that the ambition to attain the official truth represents an inherent threat for the community that wants to establish democratic pluralism (Gutmann and Thompson: 2000, 34). Others argue that the project is doomed due to the incapacity of such a body to attain historically relevant truth (Maier: 2000, 271). The latter objection can be overcome by an appropriate delimitation of a commission's tasks. The first objection is more serious, because it directly links the issue of a commission's legitimacy with the normative foundations of liberalism. I will devote some attention to this question.

Modern democracy, being based on the principle of individual autonomy and corresponding pluralism of worldviews, presupposes political neutrality, which leaves no space for the monopoly of the binding truth. Since our analysis deals with the society that has only started adopting democratic values and building democratic institutions, it seems apparent that the quest for the 'official truth' is the wrong choice. A possible answer that a commission's work towards the 'official truth' must be based on the principle of neutrality seems to be wrong for two equally obvious reasons. The first claim is that we cannot liberally think of an 'official truth', even if the procedure of coming to it could be regarded as neutral. The second objection will argue that the outcome of the work of a regime's commission will reflect the 'victor's truth'. Nevertheless, I will defend the thesis that commissions can seek the truth, without threatening to undermine political neutrality. I will also try to demonstrate that commissions cannot function without a clearly defined normative framework, identified both by a certain type of the moral attitude towards the past, and by a clear preference for a set of values identified as foundational of the new regime. Following Ruti Teitel, I will argue that the task of a commission is to arrive at a liberal narrative about the past (Teitel: 2003, 4). I will

also assert that the construction of such a narrative is potentially the most important contribution of a truth commission to transitional justice.

Truth commissions deal with the past, which brings their work close to historical research. Leaving aside the methodological question of whether the objective historical knowledge of the past is possible at all, it deserves to be noted that the establishment of the subject and method of a commission's work, as well as the way its results will be presented, are matters of the political decision of new authorities. The character of this decision will depend not only on the type of crimes and on the nature of the old regime, but also on the manner of the regime change (political compromise or radical change). In addition, such a decision will also imply the answer to the question of whether a commission needs a moral foundation. The question of whether a commission will be given a mandate to primarily focus on concrete events, or to deal with a general analysis aiming to situate criminal practices in a comprehensive historical narrative, is undoubtedly very important. However, of paramount importance is to politically formalize and make public the decision about the type of social knowledge that a commission will offer. The basic message that its founders should offer to the public, without any fear of breaching the principles of neutrality and pluralism, would be as follows: the social knowledge of the past is not merely a reconstruction of something that "really happened", but is rather a *construct*, i.e. the product of a public process of deliberation guided by clear normative preferences. Documents concerning concrete cases of human rights violations, testimonies given by the victims, perpetrators, witnesses, members of the old political elite and state apparatus, ought to offer a re-presentation, i.e. a re-interpretation of the facts. Such a re-interpretation is necessary because the same facts, interpreted in a substantially different way, constituted the official truth of the old

regime in the immediate past, serving as the legitimation basis for a systematic use of violence. In this sense, the task of truth commissions is to unmask as a lie the official truth of the previous regime (Teitel: 2000, 81), by demonstrating that its ideological formulas served to justify and normalize violence. At the same time, commissions should offer an alternative reading of those same facts, shaping them into a new truth, the political aspect of which cannot be denied. The truth formulated by a commission should be understood as a segment of social knowledge indispensable to the democratic transition (Teitel: 2000, 91).

The risk of politicization is evident here. However, the political status of the official truth should be distinguished from its possible abuse, which would reduce this body and its report to mere instruments of partial political goals. I agree that the capacity of commissions to offer socially relevant truth depends on the preceding consent about which interpretations of the past will be taken into consideration (Dwyer: 1999, 85). But, unlike the critics, I believe that a clear definition of the normative framework within which commissions will operate represents an efficient defense against the threat of politicization. If the task of the democratic transition is to affirm human rights and the rule of law, commissions should provide a liberal narrative on the past, by presenting and interpreting all data, documents and statements in a manner which will promote universal moral values crudely violated in the previous period. This would not imply giving up the request for documentary truth. On the contrary: only a liberal narrative makes it possible to fully explore and properly situate the facts of the past events, i.e. to identify all the crimes in a manner free from particularistic ideological rationalizations. The knowledge of what happened should be presented so that it 1) clearly reveals that the previous period was characterized by violations of universal rights to life,

freedom, equality, dignity and diversity, 2) affirms the adherence of the new polity to those values.

To the extent that these are the values that a civilized society should guarantee to each of its members, such a normative attitude in a commission cannot be evaluated as the imposition of a new ideological dictate. Still, it remains obvious that the purpose of affirming these values is to promote an alternative moral and political image of the society and polity, one that does not exist at the time of the publication of the report. This objective can be summarized as an intention to implement transformative justice (Allen: 1999, 335; Dyzenhaus: 2000, 492). The object of the transformation is the political culture inherited from the previous period. There are important elements of continuity between the political cultures before and after the regime change. Numerous empirical surveys reveal that the set of values developed in the previous period cannot, after the change of regimes, be reduced to a mere remnant of the past, something that would spontaneously disappear with a dynamic proportional to the institutional (political, legal, economic) reforms (Golubović/Spasić/Pavićević: 2003; Hodžić: 2003). If there is anything 'spontaneous' in the status of the authoritarian set of values after the political change, it is its transformation into an active alternative (illiberal) political culture. The 'culture of silence' is not simply a culture of oblivion. It is rather the culture of political affirmation of the bad past.⁵ The alternative to this condition ought to be a culture of reflective coming to terms with the past. The culture of silence has been developed as a mass defensive reaction and thus it should not be seen as a preference for a new beginning free of bad legacies. The problem lies in the fact that under the old regime the ideological rationalization of violence was coupled with the individual rationalization of silence. Many people were ready to accept the ruling ideology not because they were the earnest supporters of the regime, or only

out of fear for their individual existence. In addition, avoiding confrontation with the character and the proportion of the evil was by many perceived as crucially important for the preservation of individual and social identities.

Of course, the perils of dismantling such a culture should not be neglected (cf. next section). Furthermore, it should not be expected that mere publication of the commission's report would bring about a change in old value orientations. Nevertheless, it can be assumed that bringing down the wall of silence that surrounds the past would initiate public reflection not only about the crimes, but also about the widespread culture of tolerance of injustice, which decisively marked the preceding period (Allen: 1999, 337). The political culture of silence is not a by-product of historical processes, and its modification cannot be left to the course of history. Rather, it involves a set of problems that have to be overcome by actively thematizing their foundations and basic features.

2.2. Why Serbia and Montenegro needs a truth commission

Serious claims can be raised against the founding of a truth commission in Serbia and Montenegro. I shall list only three context-specific arguments.

Firstly, the legitimacy of the existence and activities of all known commissions has depended to an important extent on the imperative of correcting the injustice inflicted upon the victims. A public, documented statement about the victims and their suffering is supposed to reach the following goals: to reintegrate the victims - actually or symbolically - into the community from which they were excluded by the criminal practices; to reaffirm their human dignity; to offer a chance to the perpetrators, supporters and by-standers of the criminal regime to reflect upon their responsibility for the suf-

fering of victims; to transform private knowledge about crimes into their public acknowledgement and recognition, thus de-legitimizing the discourse of 'ignorance', and reducing the number of lies that can be used in public. In this regard, an obvious specificity is outlined by the fact that a large share of the criminal actions that can be linked to the Serbian regime were committed by persons who were, or still are, citizens of other countries. This seems to challenge the possibility of direct communication between victims and perpetrators. If the outlined dialogical attitude towards the victims represents an essential element of the moral justification of commissions, does it follow that the impossibility of such direct communication de-legitimizes the need for such a body? In addition, documents and other sources of information about many of the crimes are often to be found only outside Serbia and Montenegro. If a commission has the task of not only identifying, but also documenting breaches of human rights, does the impossibility of accessing data and listening to witnesses living in foreign countries present an obstacle that would challenge the very need for such a body (V. Dimitrijević: 2001, 72-73)?

Secondly, I have pointed out that both practical and principled reasons require that commissions be set up immediately after the regime change. In this regard, the State Union of Serbia and Montenegro is confronted with the problem of delay. The question is whether too much time has passed since the regime change, rendering pointless the formation of a truth commission. After the removal of Milošević's regime in October 2000, the problem of responsibility and guilt was addressed by a number of human rights organizations, some media and researchers,⁶ but no serious effort has been made for an authoritative reckoning with the past. It is true though, that in March of 2001 the President of Yugoslavia established the State Commission for Truth and Reconciliation, which initially drew a considerable attention.⁷ Still, this body never

enjoyed visible support from the state, and it only succeeded drafting a couple of highly questionable internal documents, ceasing to exist when the Federal Republic of Yugoslavia was transformed into the new State Union. So, it could be argued that this country already had a truth commission, that its work was not completed, i.e. that it ended in failure, and that today, four years after the regime change, there is no point in repeating the experiment.

The third objection invokes the thesis of the 'proper sequencing of steps'. It argues that an elementary institutional stabilization of a new democracy is a necessary precondition for systematic dealing with the question of responsibility for the past.

Upon reflection on these serious objections, I still want to maintain that Serbia and Montenegro needs a truth commission. My basic argument is that political, social and cultural dynamics in this country have been decisively shaped by the unmastered past. The assassination of the Serbian Prime Minister Zoran Đinđić in March, 2003 once again demonstrated that certain parts of Milošević's repressive apparatus have managed to preserve substantial power under the new regime. It also revealed that the attitude towards the past - towards its ideological basis, institutions, actors, and political culture - remains relevant as the fundamental point of divergence between the new political elites, and as the fundamental obstacle to the establishment of a liberal political identity. After the political change of 2000, the attitude towards the past has not been politically thematized. In consequence, worst legacies of that past have re-surfaced: denial of any involvement of the Serbian regime in crimes in Bosnia, Croatia and Kosovo, preservation of the destructive core of Serbian tribal nationalism disguised as affirmation of 'genuine traditions' and 'true identity', promotion of war criminals into national heroes, rise of xenophobic attitudes among population. In a word, refusal to reflect on the past has greatly contributed to the political and normative confusion, thus effectively

threatening any realistic prospect for the democratic transition. The tragic event of March, 2003 did not act as an incentive to try to change the direction of political and cultural processes. Rather, it only made it clear that both citizens and political elites are prisoners of the past. This is the fundamental reason to persist in insisting on the claim that there is no alternative to systematically dealing with legacies of the old regime.

The argument of the time delay rightly observes that the optimal moment for the establishment of a commission has been missed. Still, it should be noted that the Union of Serbia and Montenegro is confronted with the problem of a simultaneous delay in its democratic transition. Problems are especially grave in Serbia. The so-called Milošević's Constitution of 1990 is still in force, although this act never - neither before, nor after the change of regime - represented a set of binding rules for the behavior of the state authorities, nor an authoritative framework protecting human rights. Until June, 2004, Serbia was more than a year without a legitimate head of state. Parliamentary crisis takes ever new forms, and political parties have *de facto* become interest groups promoting their preferences outside political institutions. In Montenegro, the conflict between systemic and anti-systemic parties has for years been the basic characteristic of political life. Both republics are plagued by the endemic problem of the close relationship between political actors, privileged economic elites and organized crime. The new State Union, formed under considerable pressure of international actors, is facing the nearly open hostility of majority of political elites in both member states. Thus, from its inception, the Union has suffered from a legitimacy crisis, which at the very least makes it politically inefficient. I am not claiming that the cause of all these problems should be sought in legacies that have not been attended to, nor that the policy of dealing with the evil past is the principal instrument of the democratic transition. I merely wish to stress that

many essential elements of the transition process have not yet been addressed, and that their systematic thematization will only be possible if this takes place in parallel with the mastering of the past.

This also provides directions for dealing with the question of priorities. One particular aspect of this question deserves to be singled out. This is the statement that people immediately after the regime change are 'still not ready' to confront the past.⁸ The claim is that a certain time has to pass first, during which democratic institutions would be built and democratic practices would take hold. This would have a double positive effect. First, people would learn that to live in democracy implies not only enjoying the good things that democracy provides, but also learning to accept its built-in constraints and requirements. Second, the passage of time would help people to look at the past in a more detached way, enabling them to reflect upon sinister practices without defensive attitudes (Grunenberg: 2001, 119-122).

When approaching this argument in the Serbian context, one ought to start with the simple insight that grave injustices have been committed in the recent past: mass murders, abuses, expulsions, and devastation of property. Such injustices can be identified as crimes against the non-Serbian population, committed on the grounds of their non-belonging to the Serbian ethnic group. This is certainly a very painful and humiliating insight for each and every member of the Serbian nation. More often than not it generates defense mechanisms, ranging from refusal to know or to care, to false justification or relativization of crimes (Logar / Bogosavljević: 2001). Opponents of the idea of a commission thus insist that it would be counterproductive to 'open old wounds', because this would only lead to a further schism in a society still seeking a fragile democratic consensus. I can agree that confrontation with the past involves serious risks, most prominent being further political destabilization (Matić: 2001, 76). Still, I

believe that these risks do not call into question the need, but rather require direction for the right approach to dealing with the past. The society is already deeply divided in the direct result of the war, of its perception, and of the political abuse of its effects. The line between the truth and lies about the past is unclear, and lies are thus easily translated into a manipulative political discourse. Instead of recognizing the true victims of the crimes, we have preserved the old narrative about the Serbian nation being the victim. This ideology of self-victimization continues to serve as repository of right-wing political options, from the Serbian version of liberal nationalism to the Serbian version of street fascism.

This might yield a part of the answer to the most serious set of problems, identified by Vojin Dimitrijević. I agree with Professor Dimitrijević's conclusion that the objection about the inaccessibility of the victims and evidence does not challenge the need for a commission, but that it does require a redefinition of its tasks and objectives. A possible identification of the concrete tasks of the commission will be dealt with in Part Three. With regard to the general legitimacy basis of the commission objectives, I believe that our contextual constraints should be analyzed from the perspective of the normative stance presented in the previous section: the truth sought by the commission should be instrumental to the goal of reaching transitional justice. The commission should examine the nature and the justification of the violence committed by the previous regime in order to contribute to the transformation of the democratic political culture. It is possible today - without going beyond the borders of our country - to reconstruct an adequate number of facts about crimes. Current empirical research also makes it clear that a large number of citizens of this country are aware that crimes were committed 'on our behalf'. The only thing lacking is a political decision to make a step from this private knowledge to public acknowledgment and recognition.⁹ The truth

commission project must prove itself capable of offering sufficient motivation to the people to confront the past reality. The commission should make it clear that no discovery, document or testimony would constitute a condemnation of the Serbian nation, i.e. that its task would not be to attribute collective guilt. If it were made clear right from the start that individual events and organized mass violence as a whole would be treated as acts of the regime and not of the nation, then people might understand and accept, without automatically activating psychological and social defense mechanisms, that serious crimes committed in their name are at stake. The commission would not be exploring Serbian crimes, but rather crimes committed in the name of the Serbs. The difference is essential: the commission would aim at obliterating the still active ideological matrix that presented all these crimes as a 'legitimate defense of Serbian national interests'. Its task would be to promote a liberal narrative about the past, consisting in a factual demonstration that the old regime did not protect Serbian national interests, but that it was actually engaged in a serious, massive and systematic violation of human rights. The unmasking of the ideology of 'care for the nation' as an administrative massacre could act as a strong incentive for a viable dealing with the past, because it would release the ordinary people from the moralistic pressure of collective guilt, opening at the same time the possibility for everyone to face her own moral responsibility for supporting the old regime (Dimitrijević N.: 2000, 13).

3. Towards a new truth commission: outlining some controversial issues

When raising the question of which state body should form a commission, it is usually argued that a commission established by the parliament enjoys higher democratic legitimacy and, consequently,

more substantial authority than a commission established by the executive. This is not necessarily entirely accurate. First, given the specific character of this body, the best way to provide its legitimacy would be a public debate preceding its formation, which would deliberate the need for a commission, its character, mandate and modes of operation. Second, parliamentary formation could increase the risk of politicization of such a body, because its composition would most probably reflect the party composition of the Parliament. This is why I suggest that the commission be established by the head of state, after a carefully prepared and structured public debate.

The state document establishing a commission would need to provide for a detailed and unambiguous description of the composition of the commission, the subject of its investigation (the type of events and the time period that the commission will be covering), its authority (the rights granted to the commission during the investigation, including the duty of the state bodies, civil organizations and citizens to answer specific demands of the commission regarding access to documents, testimonies, etc.), the form of communication with the public, the timeframe for the work of the commission, the type of debate about the final report, the manner in which it is to be verified, and its validity. The internal organization of the commission should be only outlined, thus leaving it the possibility to autonomously regulate, by its internal rules, issues pertinent to the efficient performance of its tasks.

In shaping such a formative act, it would be useful to explore the experience of the failure of the 2001 Commission. This failure was partly caused by the formulation of the mandate of the Commission in the presidential Founding Decree. This Act practically made impossible an exact identification of the Commission's tasks and the manner of its operation. The Commission's efforts to specify its tasks through its internal documents merely exasperated the

confusion, turning this body into a surrogate of an institute for the study of contemporary history (cf. Yugoslav Commission for Truth and Reconciliation: Basic Documents). This is not to deny that a commission can interpret and evaluate the chain of past events. Still, it is crucial that a commission avoids systematic historical research, which would aim at a "comprehensive investigation and determination of the causes and of the course of conflicts that brought about the disintegration of the former state and the war" (Basic Rules of the Work of the Commission, 1.2.). The reconstruction of such a 'big narrative' exceeds both the cognitive capacity and the legitimate operative framework of a commission.

How should the tasks of a future commission be specified? First of all, it should deal with particular cases of violation of human rights in the period of war conflicts in former Yugoslavia. It is also indispensable that the authority of a commission be carefully demarcated from the question of criminal responsibility, because this body cannot assume the tasks of domestic and international criminal courts. Second, a future commission should focus only on crimes committed by the Serbian regime and its allies. Contrary to the formulation of the tasks of the previous Commission, which outlined the framework for a narrative based on the 'balance' of guilt and responsibility of all warring sides (cf. Draft Program of the Commission), an open and uncompromising confrontation with the crimes committed in the name of the Serbian nation is the only path to the liberation from the stigma of collective guilt. This would include, along with the investigation of crimes committed by the military and police units of Serbia, the investigation of crimes committed by various armed groups under the sponsorship, or with some other form of support of the state. Vojin Dimitrijević stresses the important objection that "such a body must not deal with events that occurred in what are now foreign countries, nor should it even investigate the responsibility of the Serbs and their leaders

for such events, because the state would once again usurp the right to represent Serbs beyond the borders of the current state" (V. Dimitrijević: 2001, 73). I believe that this objection can be overcome if the task of a future commission is limited to the investigation of exactly that share of responsibility for past events in what are now foreign countries, which can be directly ascribed to the Milošević's regime. For example, although the city of Sarajevo was not bombed or held under the siege by the Yugoslav army, there is sufficient body of evidence to presume that the Serbian regime actively aided the military machinery of the Bosnian Serbs who did so, and that in Serbia there are documents and witnesses to this effect.

Finally, I will merely note that the dilemma of whether the work of a commission should be public presents a serious problem that requires a comprehensive context-specific analysis. Unlike governmental bodies, where acting in public is a legitimacy issue, in the case of truth commissions it must be considered from the perspective of the tasks and of the objectives that are to be achieved. The problem is particularly sensitive with testimonies of the victims. Comparative analysis indicates that the decision will depend on the choice to either give preference to the documentary knowledge about a certain event (when the presence of the public may represent an obstacle in determining the facts), or to the therapeutic-educational effect for the victims and the members of the group on behalf of which the crime was perpetrated (when the presence of the public is to be insisted upon).

Notes

1 Moral and political questions raised by the confrontation with the bad past are addressed in Part Two.

2 Argentina and South Africa provide the best known examples of granting amnesty to members of the old regime. Arguments in favor of amnesty range from moral-political (reconciliation, the imperative of finding the post-authoritarian identity of the community and building the unity on new grounds), to more pragmatic ones (political compromise as means to achieve the regime change, the demand for amnesty being a condition of the outgoing elite to agree to a peaceful transfer of power). For a classification of "legitimate grounds for failing to prosecute", cf. Van Zyl: 2003, 54.

3 Criminal prosecution and truth commissions are not the only ways of confronting the past. Additional important forms of this process are lustration, official apology, restitution, public rehabilitation of victims, commemoration, etc. (Cohen: 2001, 227-240; Molnar: 2002, 153).

4 Civil initiatives and organizations may have an important role in creating an awareness of the importance of confronting the past, in collecting and presenting data, etc. Still, such bodies will not be analyzed here because they lack official authorization, which constitutes an important element of the definition of truth commissions (Hayner: 2001, 21). I am not implying that civil society does not have an important role in creating and implementing various initiatives focused on bringing about transitional justice. On the contrary, the cooperation of truth commissions with actors in civil society is in principal relevance for the success of the project. (Crocker: 2000, 109; Matic: 2001, 77).

5 For an analysis of the complex relationship between the psychological, cultural and political aspects of keeping silent about the past, cf. Cohen: 2001, 51; Schwan: 1998, 475; Adorno: 1986, 116.

6 Obviously, my intention is not to deny that the questions of guilt and responsibility have been dealt with by numerous actors in civil society even during Milošević's rule. However, the purpose of this paper is to deal with the past after the regime change.

7 The most important debate about the work of this Commission was organized by the Belgrade radio station B92 in May 2001. (Conference "In Search of the Truth and Responsibility. Towards a Democratic Future": 2001).

8 It is worth observing that opponents of dealing with the past identify this issue in a manner that directly challenges the argument of delay. While the latter argument claims that it is already too late to systematically deal with the past, the argument of the 'deficit of readiness' argues that before the past is addressed, people need to be 'made ready' for such a process.

9 The distinction between knowledge, acknowledgement and recognition is extensively used in literature on transitional justice, although the ways of interpreting these categories differ.

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