

The Globe and Mail (Canada)
October 27, 1992 Tuesday

FIFTH COLUMN
LAW AND SOCIETY

When you do a deal with the devil you can end up getting scorched, warns Bryan Schwartz

SHOULD honourable people make deals with tyrants, traitors or terrorists? Should courts uphold the bargains? Surprisingly, sometimes the answer is yes.

The least bloody way to remove a vicious regime from office may be offer its leaders a promise of immunity from retribution. Some tyrants may be allowed to leave for safe havens abroad; others may be granted immunity at home. Offering amnesty can speed the process of democratization; if a promise to an ousted dictator is not honoured, reactionary forces may try to seize power again. Amnesty may also encourage neighbouring dictators to leave peacefully.

But the utilitarian calculations are not all on the side of granting amnesty, or honouring it later on.

Experience in Latin America suggests that the best policy for emerging democracies can never be a simple "forgive and forget." Some crimes are too grievous to be forgiven; forgetting only ensures that they will recur. At times, however, the best policy is "forgo but remember."

To persuade them to surrender power, tyrants may be granted amnesty. But thorough public inquiries should be conducted into what happened, and why. Friends and relatives are assured that the victims of an oppressive regime are not forgotten; the fate of those who have "disappeared" is often determined; the society as a whole is given more hope that the lessons of history have been learned.

Sometimes, democratic regimes must make deals with potential tyrants who would depose them. The U.S. Constitution expressly allows a president to pardon people even before they are charged with offences. In *The Federalist*, American statesman Alexander Hamilton explained "in seasons of insurrection . . . a well-timed offer of pardon to insurgents may restore the tranquillity of the commonwealth."

Hamilton's theory has been quoted in at least two notable cases. In 1975 a U.S. federal court upheld Gerald Ford's pardon of Richard Nixon; the judge likened Mr. Nixon to a rebel against the Constitution. Last year, the British Privy Council considered a remarkable case from Trinidad. Rebels had seized the Prime Minister and other government officials. To end the hostage-taking, the acting President pardoned them. But the rebels were then seized and thrown in jail. The British court (which still acts as the supreme court for various colonies and Commonwealth members) held that the rebels could use the pardon to challenge their imprisonment.

Sometimes, coerced deals are cut between sovereign states. The United States ended the U.S. embassy hostage-taking in Iran by entering into a complicated diplomatic and financial agreement. In

international legal theory, treaties made under duress are invalid. In the real world, it may be desirable to promote and honour agreements made under fierce and unjust pressure.

Although the Serbs may be the aggressors in the Bosnian conflict, the best outcome might be a negotiated and permanent settlement - even if the terms allow aggression a limited reward - rather than allowing the killing to continue.

If deals must be made, they should be made as honestly and openly as possible. The Colombian government was not necessarily wrong to offer drug lord Pablo Escobar a light sentence in return for his surrender. But if the government indeed allowed Mr. Escobar to turn his "prison" into a comfortable place in which to continue doing business, it undermined the credibility of the anti-drug war and democracy itself.

The Reagan administration entwined itself in governing secretly and a series of cover-ups when it tried to negotiate for the release of U.S. hostages in Lebanon - despite its public posture of not making deals with terrorists.

Even here in Canada, governments have sometimes made deals with hostage-takers or terrorists. The FLQ crisis ended with a deal allowing the kidnappers of James Cross to flee the country.

In 1978, by contrast, federal authorities negotiated a deal in which prison inmates were granted concessions in return for ending a hostage-taking. As soon as the hostages were released, the federal government reneged on the deal. In many circumstances, authorities are not obliged by strict law to honour an agreement made under duress; but what if there is a further crisis, in which it is crucial that a government's promises be credible?

In dealing with the devil, you cannot be guided strictly by abstract moral notions. You have to make some very uncertain and worldly calculations. No matter what you do, you may discover that the encounter has cost you a piece of your soul.

Bryan Schwartz is a professor of law at the University of Manitoba.