

■ BOOK REVIEW

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**Antje du Bois-Pedain:
Transitional Amnesty in South Africa,
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The South African truth and reconciliation process has been studied widely and many publications have emerged since the completion of volumes 1 to 5 of the report of the Truth and Reconciliation Commission (TRC) in 1998 and after 2003 when volumes 6 and 7 also appeared. It is probably the best known such process since it was the first of this specific kind and is publicly often seen as a big success story. However, the book "Transitional Amnesty in South Africa" by Dr. Antje du Bois-Pedain takes a closer look and examines critically, in a detailed way and comprehensively, the method of granting amnesties to perpetrators who fully disclose the facts of their politically motivated deeds within the framework of South Africa's truth and reconciliation process. This is done in an interdisciplinary way, the most reasonable one when discussing an issue such as transitional justice.

Before reading this book, it is advisable to have knowledge about the South African political history of the past few decades. This is because the book directly starts with describing the amnesty scheme, including its preconditions and the effects of amnesties, the history of the TRC Act as well as its predecessors, and the interpretation of the respective provisions. It might be complicated at the beginning without having the respective background knowledge. Furthermore, du Bois-Pedain describes, on the basis of the decisions of the Cape High Court and the Constitutional Court on a famous case regarding five prominent apartheid victims, the constitutional challenge of the amnesty provisions. Also, some general remarks are made about the work of the Amnesty Committee including problems it faced and the issue of judicial review of amnesty decisions – a rare but interesting phenomenon. Finally, the problem of post-TRC prosecutions regarding persons who did not take part in the TRC process or whose applications were unsuccessful is highlighted.

In order to conduct an in-depth analysis of the practice of the Amnesty Committee, du Bois-Pedain based her study on all 1100 published amnesty decisions released by the Committee from 1996 until 2001. Other primary sources, such as the TRC Report and transcripts of amnesty hearings, are also used. The inclusion of all of these decisions makes the research outstanding and very useful. Although most decisions do not contain full reasoning – limited instead to a description of the conduct of the amnesty applicant, the statement that the applicant has fulfilled the amnesty requirements, and the specific offence for which amnesty is granted – the author found a methodological approach on

which defensible conclusions on the little available information could be made. She analysed the potentially relevant criteria for the success of an application for amnesty and measured the indicative value of the outcome of an application regarding these criteria. The considerable amount of identified detailed statistical data should be pointed out. Within these interesting findings one can find data regarding the political and organisational background of the applicants, the deeds for which amnesty was sought, the hierarchical status of the applicants within their organisations (it shows, for example, that the proportion of applications from commanding persons and leadership figures was very low), the high success rates of applications and similar statistics, numbers and explanations and reasons for them. This information is interesting for those who do thorough research on the topic. However, for others these parts are probably not the most exciting ones.

The following chapters thoroughly highlight the two main elements for receiving amnesty as laid down in the TRC Act: 1) the offence must be of a political nature, and 2) the applicant must comply with the condition of full disclosure.

The first important requirement to receive amnesty was that the applicant must have conducted an "act associated with a political objective". This political offence condition has been interpreted by the Committee widely. In a legal analysis, du Bois-Pedain explains two approaches of the precondition of political purpose – the subjective and the objective understanding – i.e. the consideration of the presence of this element from an *ex ante* or *ex post* perspective. She shows that the political mandate of the applicant was crucial for the Committee's assessment of his or her amnesty application and discusses elaborately the view of the Committee regarding the issue of orders, since it was far more complicated than simply assuming that acting on orders was conditional for receiving amnesty. The author furthermore shows that the Committee's view was a rather pragmatic one, focusing on the political offence condition without a moral evaluation of the applicant's conduct. This is based on the idea that a restrictive interpretation of the conditions for amnesty would not be productive for the whole transitional amnesty scheme, with the consequence that amnesty within the legal framework of the TRC Act does often not correlate with moral deservingness. The moral justification of this amnesty scheme is hence exclusively based on the willingness of full disclosure rather than the moral legitimacy of the deeds committed.

The Committee's understanding of the concept of full disclosure is discussed subsequently; its legitimacy, its important practical role (more than 40% of unsuccessful applications fail due to reasons which are related to information), its object and scope, and the Committee's principles when assessing testimony. Finally, possible reasons are offered for the fact that many applications do not comply with the full disclosure condition, respective of the temptation of applicants to lie. Regarding the question of what it means to make full disclosure, the author offers diverse views ranging from a reductionist one to a very wide view. The reductionist approach only includes disclosure of all relevant facts which are necessary for the Committee to decide whether an offence was politically motivated. The widest view argues that anything in the knowledge of the applicant, irrespective of the deeds he or she committed and which could be of help for the Committee in investigating the injustices of the past is part of full

disclosure, has to be said. Based on case studies, du Bois-Pedain shows that the Committee chose a middle way which starts at "the incident under consideration" (p. 152) but does not leave the applicant the option to split it into separate acts. Furthermore, it is made clear that full disclosure cannot be equalised with the full discovery of the truth, since full disclosure remains within the applicant's knowledge and memory. This shows the incompleteness of the truth which can be achieved in an amnesty process.

The book further deals with the aims of the amnesty process, which are: revealing the truth, empowering victims, and holding perpetrators accountable. When explaining these notions, the author also compares the normal criminal procedures regarding the achievement of these aims. Although du Bois-Pedain does not give the illusion that a disclosure based voluntary amnesty procedure does not have its gaps in achieving these aims, she finds that it does have several advantages which cannot be found in a criminal process. However, she does not stick to final statements that one way was better than another. This seems credible and comprehensible, since such an answer in general terms cannot be given. The reader therefore does not get indoctrinated by specific arguments, but is rather encouraged to form continuative thoughts for him or herself.

Starting with the assumptions that "full disclosure leads to the revelation of important facts..", "that these are the facts that victims care about and are satisfied with knowing, and that to be forced to disclose these facts publicly is in itself a mechanism by which individual accountability for serious human rights violations is ensured" (p. 174), the author shows that an amnesty process does not reveal "more and better truth" (p. 175) but that a lot of uncertainty, incompleteness and unreliability remain. She discusses the concept of truth, the Committee's procedural practice, limitations, and identifies possible dangers of these practices such as the use of accomplice or hearsay evidence. Keeping in mind the importance of truth-finding and its limits, du Bois-Pedain shows that the Committee does not have the claim to reveal the whole and real truth, but it confines itself to receiving what it understands under full disclosure by the applicants.

An extremely interesting and important part of the study is the issue of victim participation in amnesty proceedings. This is crucial since victims should play the central role in transitional justice processes which is unfortunately often not the case. Reconciliation has to start from a victim's point of view, if they themselves do not forgive the perpetrators, how should the general public forgive them? Du Bois-Pedain found a very fruitful way to approach this issue by introducing and analysing three disparate case studies. These cases very clearly show the different wishes of victims in direct confrontation with the perpetrator, as well as different perpetrator-victim dynamics and different stages of satisfaction in the outcome. In depicting some of the original testimonies of the perpetrators in the process, the author manages to bring forward the feelings of both perpetrators and victims and to show the enormous difficulties, but also the intensity of the reconciling aspects of such a process. This is important since such a big issue as reconciliation cannot be solved by discussing theoretically and objectively; to find a solution it is necessary to listen to the victims' voices and understand them and their requests.

Perpetrator accountability may be the most important objective of an amnesty process – this is argued at the beginning of the respective chapter, followed by an examination to which extent amnesty procedures can fulfil this aim. After explaining the notion of accountability, du Bois-Pedain discusses the advantages and disadvantages of the fact that in the amnesty process the applicants primarily have to avouch their actions as political acts, not as moral wrongs. Retributive and restorative justice theories are discussed and it is shown that the amnesty process does not completely fit into either of those theories. The author therefore suggests a new justice script for transitional societies, stating that politically motivated crime is wrong but through the participation in a reconciliation process perpetrators can redeem themselves. It is furthermore shown that an amnesty process does not ensure apology and forgiveness. However, these notions do influence the process, since explanations by the applicants that their deeds have not been personally motivated by malice can facilitate forgiveness even without the existence of definite apologies.

Du Bois-Pedain also discusses international law obligations to prosecute perpetrators of gross violations of human rights arising from humanitarian, international human rights, and international criminal law and their compatibility with amnesty schemes. She concludes with the statement that in a strictly legal sense, the amnesty scheme of South Africa is not incompatible with international law and leads to the establishment of a human rights culture and is committed to the rule of law.

Finally, the practical success of the conditional amnesty scheme is highlighted. After a phase of winning confidence, it managed to attract large numbers of applicants. The author states that conditional amnesty provides a legitimate and credible response to past injustices without being synonymous with prosecution and examines the practical feasibility, moral defensibility, and legal permissibility of this alternative. Besides a stable political situation and other factual requirements, the most interesting question is the moral one: Is conditional amnesty a morally preferable accountability mechanism compared with the trial-based approach? The major thought for the preferability of the amnesty scheme is based on the idea that a prosecutorial approach could lead to a wrong political message since political and criminal responsibility often do not coincide in such situations.

It seems that all important issues of the South African amnesty process are raised and critically discussed in this book. The changes from one chapter to the next are very comprehensible and follow a logical order. Due to the plenitude of detailed information, this research doubtlessly provides a helpful tool for a deeper understanding of the South African amnesty process. The lecture of this volume definitely leads to a comprehensive knowledge of how the amnesty process in South Africa worked and also more generally of the costs and benefits of such an approach.

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