

*Antje Du Bois-Pedain*

**Transitional Amnesty in South-Africa**

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The amnesty scheme of the Truth and Reconciliation Commission in South-Africa has attracted more scholarly attention than any other instance of amnesty in contemporary times. Did the amnesty scheme in South Africa work? Is the grant of amnesty in exchange for full disclosure by perpetrators of acts of gross violations of human rights ethically defensible? The initiators of the South Africa Truth and Reconciliation Commission (TRC) certainly thought so. What should be the proper approach to a dispassionate evaluation of these thorny questions? *Antje Du Bois-Pedain* offers a commendably robust approach that has been largely missing in the literature. This book will of special interest to advanced students and scholars of transitional justice, human rights, sociology of law, international law as well as legal and political theory.

Amnesty remains an emotive issue. For, how can amnesia, the act of 'forgetting,' be imposed? How can those who have suffered untold, sometimes indescribable pain and loss be required or told to accept that the acts of their persecutors have been consigned to oblivion? Writers have wondered whether suffering can be legitimately extinguished through a proclamation, almost invariably made by those not directly affected by it. It has generally been treated with suspicion by most writers. Given that emotions like pain, suffering and forgetting that partly underlie objections to the practice of amnesty are themselves contentious and relative at best, it is surprising that the literature on the issue has remained essentially normative in outlook. Few have adopted the empirical approach. It is logical to expect that more productive analyses can be achieved through a robust approach that combines normative considerations with victim perspectives of the issue within specific contexts.

In engaging the foregoing questions, du Bois-Pedain, argues that the proper approach to analyses of the amnesty process in South Africa (and presumably elsewhere) is one that combines empirical and normative analysis of the amnesty process. This approach, rather than the topic, sets the book apart in the transitional justice literature on the forever expanding volumes on the TRC. The book evaluates the results of the work of the Amnesty Committee (one of three specialised committees) of the TRC, against the declared aims of the initiators of the process. It engages the issue whether the amnesty process in South Africa can be regarded as a 'model' for achieving the designed objective of securing accountability for gross violations of human rights. Can granting amnesties for full disclosure of participation in violent crimes of a political nature 'contribute to, and in fact, be crucial for, the moral and political reconstruction of society'? Du Bois-Pedain answers this question in the positive. The volume is set out in eight chapters. Chapter 1 presents the background to the TRC and the amnesty process but the thrust of the author's arguments are articulated in chapters 2-6 of the book.

As a prelude to the discussion of the key argument of the book, the author rightly notes that a critical measure of the success or otherwise of any process is the response of the targeted audience. Thus, chapter 2 of Transitional Amnesty provides empirical data on the work of the Amnesty Committee of the TRC (the Committee). This empirical data on the practice of the Committee stands out as a superior feature of the book in the way it grounds the normative perspectives canvassed by the author in the experiential account of the amnesty scheme. The author's presentation of facts and figures on the amount and outcome of the applications registered by the Committee, clearly demonstrates there was a remarkable acceptance of the offer of amnesty among the targeted constituency.

Most of those who applied for amnesty were the 'foot-soldiers' on all sides of the conflict in the years of apartheid in South-Africa. The offer of amnesty was in fact largely ignored, rebuffed even, by the leadership on both sides of the struggle. The most obvious reason for this according to the author appears to be the larger number of the former than the latter in the common run of things. But the notable gap may also be a direct result of the technicalities of linking specific acts of gross human rights violations to particular directives given by politicians, generals and other leaders on both sides of the divide. Perhaps surprisingly though, leaders who submitted to the process had the highest rate of success 94.5% compared to their followers' 88.0%. Crucially the analysis also disclose that the nature of the gross violations of human rights involved did not play a significant part in the high success rate (88.3%) of the amnesty applications.

The central argument of the book, that amnesty was a 'pragmatic' option in the South Africa transition experience is well developed and set out in Chapters 3 and 4 of the book. They present a thorough analysis of the Committee's interpretation of the key elements of Section 20 of the TRC Act, on what constitutes a 'political offence' and 'full disclosure' respectively to merit amnesty. The author navigates several decisions of on amnesty to identify a largely consistent albeit not flawless conceptualisation of the two key requirements by the Committee. The reader is presented a systematised picture of the sometimes surprisingly intricate process that was the work of the Committee. Contrary to general practice, the Committee adopted a practical rather than normative approach to what constitutes a political offence. This approach is an important factor in its 'generous' grant of amnesty to applicants. In endorsing the approach, the author argues that a restrictive normative approach to the political question would have failed to meet with 'public expectations' of the process and was, in any event, inevitable outcome in view of the origin of the TRC itself; product of a negotiated transition. The position that full disclosure of acts of gross human rights violations by perpetrators, 'truth-for-forgiveness,' serves as a substantial measure of accountability and presumably ethical validation of the amnesty scheme, has attracted some criticism. But as du Bois-Pedain points out (like others), it is a proposition that receives substantial validation in the South Africa Constitutional Court's decision in *Azanian People's Organisation (AZAPO) and others v. President of the Republic of South*

*Africa and others*.<sup>1</sup> Whether the position of the court is in retrospect normatively sound in international law has remained (and probably will remain) highly debatable. Though upholding validity of the Committee's approach to the amnesty scheme, the author maintains a critical stance on it by scrutinising the justificatory arguments of the TRC in general and the Committee's work in particular. These are best reflected in the evaluation of truth recovery and victim empowerment in chapters 5 and 6 respectively. In chapter 5, taking the reader through the process of the amnesty hearings, du Bois-Pedain observes that getting at the 'whole truth' or obtaining a complete historical record was not in fact, the practice of the Committee. Rather, it concerned itself with the more restricted objective of investigating factual cases brought before it in order to enable it decide the applications for amnesty. In the process, important evidence with obvious potential of generally shedding light on aspects of the conduct of key players in the conflict period were sometimes shut out. While conceding that the Committees' findings fall short of historical truth, the author nonetheless stoutly defends the approach as being 'communicatively more accurate' and superior to the forensic truth of the courts.

Similarly in chapter 6, through an account of some notable amnesty hearings, the author advances the position that on the whole the needs of victims are better served by the amnesty scheme than could criminal trials. In particular, du Bois-Pedain contends that the critical need for closure by victims of crimes is one that strongly commends the amnesty scheme over trials. Here, it is apt to take issue with the author's proposition that the willingness of many victims of crimes of the apartheid conflict is an indicator of its value. This may well be so. But it is also logical to question whether this willingness to engage in the scheme is not driven purely by the need for closure and desire for justice which the TRC process was presented as the solution rather than one in a number of possibilities? At the least, the strong disapproval of the attitude of some applicants for amnesty by their victims suggests the latter may well have proceeded to explore other options like insistence on criminal trials in complete disregard of or despite the amnesty scheme.

The contribution of this book to the field of transitional justice lies in how the author strikes a remarkable balance between empirical evidence and normative principles in analysing a decidedly emotive topic. There is much to be said for the critical but practical approach that scrutinises the process of amnesty in the context of the realities of the society in transition. It is important after all (no matter our ethical preferences) that prime attention ought to be accorded to the experience and perceptions of those directly affected by the amnesty scheme in assessing its legitimacy.

Du Bois Pedain's thorough analysis of the contentious issue of transitional amnesty in South Africa points scholarly discourse of amnesty in a new direction, highlighting the need for transformation of the nature of the discourse. Analysis of the propriety (or otherwise) of transitional amnesty ought to be embedded in specific experiential accounts. In the light of this book it may now be insufficient to address the issue through a univocal

<sup>1</sup> 1996 (4) SA 671 (CC). Naturally, the author refers to this case in several parts of the book.

approach, entrenched in either purist (ethical) theoretical arguments or purported victim-based perspectives. For this, Transitional Amnesty in South Africa commends itself as a must-read on the topical issue of amnesty practice in transitional societies.

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**The Independence of the Judiciary in Namibia**

Konrad Adenauer Foundation, Macmillan Education, Windhoek 2008, 325 pp.,  
EUR 38,00; ISBN 978-99916-0-807-5.

Fast 20 Jahre nach der Unabhängigkeit Namibias und dem Inkrafttreten der namibianischen Verfassung bietet dieses Buch einen Überblick über aktuelle Fragestellungen und Herausforderungen der richterlichen Unabhängigkeit in Namibia. Das Buch enthält Beiträge von Wissenschaftlern und Praktikern, welche im Rahmen eines Forschungsprojekts der Konrad-Adenauer Stiftung in Zusammenarbeit mit der Universität Windhoek entstanden sind. Unterteilt in die sieben Themenschwerpunkte, vermittelt das Werk die Strukturen des namibianischen Justizsystems und untersucht die Verankerung des Prinzips unabhängiger Rechtsprechung sowie Mechanismen zu seiner Sicherung in der neuen verfassungsrechtlichen Ordnung Namibias.

Die Beiträge beschreiben das Verfassungsprinzip der richterlichen Unabhängigkeit im afrikanischen Kontext sowie vor dem Hintergrund der historischen Ereignisse, welche zur Unabhängigkeit Namibias im Jahre 1990 geführt haben. Ein Schwerpunkt der Untersuchung liegt auf den Sicherungsmechanismen, die Gesetz und Rechtsprechung zur Vermeidung unsachgemäßer Einflüsse auf die Rechtsprechung vorsehen. Weitere thematische Schwerpunkte bilden die Unabhängigkeit der Magistrates Courts gegenüber den oberen Gerichten (High Court und Supreme Court), die Eingliederung der traditionellen afrikanischen Stammesgerichte in das staatliche Gerichtssystem und die Praxis der Ernennung von sog. Acting Judges. In die Untersuchung einbezogen werden auch nichtrichterliche am Rechtsprechungsprozess Beteiligte wie der namibianische Prosecutor General als unabhängige Strafverfolgungsinstanz, der Ombudsmann sowie die Anwaltschaft. Die Beitragsammlung schließt mit einem kritischen Blick auf die juristische Ausbildung in Namibia.

In seinem einleitenden Beitrag "The paradigm of an independent judiciary: Its history, implications and limitations in Africa" stellt *Joseph B. Diescho* das Prinzip einer unabhängigen Judikative im Kontext afrikanischer Traditionen vor, welche die Umsetzung und Akzeptanz der ursprünglich in Europa entstandenen Idee der Gewaltenteilung vor eine besondere, „afrikanische“ Herausforderung stellen.

Daran anschließend zeichnet *Nico Horn* in seinem Beitrag "The independence of the judiciary in pre-independent Namibia: Legal challenges under the pre-independence Bill of Rights (1985-1990)" die Loslösung der namibianischen Rechtsprechung von der südafrika-