

Transition, Amnesty, and Social Trust: Lessons from South Africa

[Published in: *Trust and Transitions: Social Capital in a Changing World*, eds. J.

Lewandowski and M. Znoj, Newcastle: Cambridge Scholars Publishing, 2008, 83-104]

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“Self-government would have a thin meaning if it did not include the right of political communities to debate – and determine – the code of lawful behavior within their territorial jurisdiction, as well as the consequences that may attach to breaches [...] Whether a country tries to bury past depredations in a grave of silence and denial, examine and condemn them through the work of an officially sanctioned truth commission, purge from public office those determined to have been culpable for their roles in systemic repression, provide reparations to victims or punish the perpetrators, the path it chooses is constitutive of its political community.” –Diane Orentlicher

Transitional justice mechanisms in post-conflict democracies pursue an admixture of very different legal, political and moral goals, and much attention has been devoted to whether these goals are always or even in the normal case compatible. Decisions by new democratic governments on whether to offer some form of amnesty for perpetrators of crimes against humanity are generally framed in terms of a tough choice between peace and security – that is, between retributive justice for former perpetrators and the securing of an acceptable degree of political stability.

We should clearly separate the justice of retribution from the more diffuse but arguably more powerful form of procedural justice that is a possible benefit of criminal prosecutions. Due process in criminal procedures is a legal correlate of the political norm of accountability, the right and duty of citizens to participate in deliberations in which norms relevant for the public interest are justified by the giving and taking of reasons.

Trials under the norms of due process can serve as an important expression and even agent of the larger procedural norms of the rule of law in fragile constitutional democracies, and even acquittals of perpetrators can fulfill the expressive function of prosecution, by the imposition of procedural norms of fairness, impartiality, and equality under the law.

But the procedural and moral costs of amnesties are higher than generally assumed, since the harms amnesties make to principles of the rule of law, and public perceptions of the value of the rule of law, and the denial of victims' well-established strong rights to legal remedies, have to be weighed against the credible threats of potential democratic spoilers.

These considerations do not make tough choices any less tough. That is a matter for people involved, not from the comfortable detachment of political theory. But political theory can at least help in clarifying the terms of tough choices, and this may make the weighting of different policy options come out differently too.

Theories of justice are abstract and have to be applied to individual cases. Though conflicts are generally regional, sub-national, or indeed global, the subject matter of transitional justice cases has been and continues to be national in both form and content. The subjects of transitional justice are nation-states, and transition, as the name itself implies, captures the narrative dimension of significant foundational events and their subsequent collective interpretation. Why this is so, and whether the rise of new transnational or international courts is changing it substantially, will be the topic of the third of these lectures. But any political theory of transitional justice that wants to identify general features, problems, and mechanisms for justice in transition has to take

seriously the role of nationhood, national identity, and the dynamics of national solidarity in calculating what counts as success in transition.

Contextualization, the claim that different national contexts require different transitional justice approaches and that there is no cookie cutter arrangement of mechanisms that will “work” in every national context, can amount to either a very strong or a very weak claim. The weak claim is simply a prudential recommendation of flexibility in the design and implementation of justice mechanisms to accommodate local particulars. But the strong claim – and the one far more likely to be true, I think – is that the substantial and particular character of national histories, national experiences, national memory and national identity ramify so strongly in transitional justice procedures that what counts as justice, as national reconciliation, and as the successful outcome of dealing with past injustice will in the end be fully explicable as a narrative of the collective experiences of a national polity, of how a nation chose to respond to national crises and traumas, the shape that its appropriation of universal political norms took, and the substantial ethical life – the shared identity – that is woven from foundational national acts and their subsequent narration.

If this is so, then one of the primary goals of transitional justice, at the level of national recovery, must be the reconstruction of national solidarity. National solidarity certainly has strongly functionalist dimensions, and can be analyzed largely in terms of the efficiency of political institutions to integrate new members and contribute to social stability. But it also has a substantive and narrative dimension, one that the particular challenges of transitional justice foregrounds. Transitional justice policies are the outcomes of tough choices. But these tough choices also become foundational for the

subsequent development of a national narrative in which political solidarity will, or will not, be reconstructed.

Getting the right relationship between accountability and security is at heart a procedural question and for this reason is one that political theory is in a good position to clarify. But procedural challenges are only one part of the work of transitional justice. John Rawls describes what he calls ‘stability for the right reasons,’ by which he means, roughly, the capacity of citizens of a liberal democratic society to act on and realize their conceptions of political justice not just because they are compelled to do so by the rule of law, but because they have grown up in just political institutions, and have internalized political justice as right, and not just as expedient. This capacity of citizens to internalize justice as a set of motivating norms, instead of sanctioned external constraints, is for Rawls a psychological observation about the capacity of democratic societies to be stable over time.

Another way of putting Rawls’ point is to say that political solidarity cannot merely issue from the top down, from the decisions of political leadership to reform institutions, with the expectation that citizens will follow along. Rawls himself is not especially clear on whether such a “*modus Vivendi*” among individuals and groups in pluralistic societies is best seen as stability for the wrong reasons, or, at least in the long run, no stability at all. But he harmonizes with currents of political theory tracing back at least to Rousseau and possibly much earlier than that, in arguing that the executive manufacture of new bases of democratic solidarity has to be met halfway, by a bottom-up recovery of the popular bases of social trust.

By “trust” here I mean, in part, the psychological traits borne by citizens and groups that allow them to see themselves and each other as included in one single ongoing project of popular sovereignty, to accord themselves and one another equal identities as rights-bearing and symmetrically entitled, and their capacity as a result to include each others’ interests and needs in decisions about the best way to distribute social benefits and burdens. Solidarity therefore has a quite abstract and again procedural sense, in the capacity of any society to make decisions on the basis of a broad inclusion of otherwise differently situated and differently interested persons and groups. In this sense, what Rawls means by ‘stability for the right reasons’ is not unlike what Emile Durkheim had understood by distinctly modern or “organic” solidarity, the functional requirement of complex and diverse societies to integrate new members according to their different but coordinated roles in an ongoing social project.

Democratic solidarity is not just a functional requirement for social integration. It’s also a psychological fact about what people believe, how their beliefs can justify a certain form of political life, why they can justify including others in their calculation of their own interests, how they will understand the losses and defeats they will incur as an inevitable part of politics, what will motivate them to confine themselves to constitutional means to redress wrongs. As political trust, solidarity has a great deal to do with the conception of oneself as a fully included member in a single political community, and for this reason solidarity also corresponds to a form of substantial national identity.

National identity is not simply a matter of the right kinds of institutions. It has also crucially to do with the narrative construction and maintenance of a sense of shared belonging, of national history and of common national experiences. Solidarity in the

relevant sense then is not only a mode of inclusion based on collective identity; it *is* just this identity. It's thus analytically true that nations that have undergone devastation through divisive violence and massive injustices, where violence and injustice have left aggrieved and deeply wounded groups looking for acknowledgement and redress, where kinds and degrees of culpability are diffused throughout social groups, the loss of democratic solidarity is the destruction of national identity. And it follows that one way of making necessary repairs to democratic solidarity is to reconstruct the bases for national identity.

In transitional justice mechanisms, this reconstruction has often been defined not as solidarity but as reconciliation. And a widespread although usually vague political norm claims that reconciliation requires, in some form or another, truth. Truth commissions are of course tasked with the production of truth, under various definitions, but there is nothing uncontested about what, precisely, their political function should be, about what sort of truth the commission should pursue, or about how such truth or truths function in the larger recovery goals of which commissions are one part.

There has been surprisingly little speculation on how truth is supposed to further the recovery of solidarity. Instead, this claim usually appears hortative, as an encouragement to pursue a norm by describing it as a fact. But the empirical question of whether societies post-conflict do require truth as a necessary condition for the reconstruction of the bases of political solidarity is a very contentious one, and there is reason to suspect that the strong connection between truth and solidarity is a purely normative one. If that is so, then it is a norm that must be justified by argument, of which

a proven track record of truth to contribute to post-conflict solidarity would be the empirical support.

In South Africa, the Truth and Reconciliation Commission in the second half of the 1990s focused entirely on the manufacture of national reconciliation via truth, as its distinctive name implied, showing little if any interest in familiar conceptions of retributive justice. The amnesty that the TRC granted to some of the most notorious villains of the most savage years of apartheid was deeply controversial, and was – and I would argue remains – a deeply divisive foundational act for the new South African democracy. Divisiveness and exclusion are the opposites of national solidarity; if the measures that the TRC took in the pursuit of national reconciliation include an acknowledged harm to an already shattered national solidarity, then normative justification of the practice of amnesty granting in South Africa will require the consequentialist claim that some divisive acts are necessary, in the shorter term, in order to bring about conditions that will make the longer-term project of the reconstruction of national solidarity possible. In South Africa, this consequentialist argument, both at the time and continuing until the present, worked via the category of truth: it was necessary to grant amnesty to perpetrators in order to offer them sufficient incentive to recount the truth about their crimes, and this truth – in the form of sworn testimony before empanelled judges – like the testimonial evidence of victims and the forensic products of official inquiries – counts as one of the truths in whose absence no national reconciliation is possible.

This paper will not cast doubt on the sincerity, the courage, or the ultimate albeit qualified successes of the brave and dedicated people whose work made the South

African TRC possible. But it is critical. In my view, the consequentialist claim that only through amnesty could perpetrators be induced to offer their own truths encounters at least four serious problems. First, the consequentialist justification served largely as a way of compensating for what I would argue was the more accurate and less acceptable justification for the amnesty provision of the TRC, namely, the inclusion of an amnesty requirement in the South African Interim Constitution of 1993, a clause placed in the constitutional text without any democratic or parliamentary legitimacy, as a capitulation to threats of political violence imposed by the National Party and agents of the South African defense forces and police. The origin of amnesty in South Africa was compulsion in the face of threats, and not a collective normative decision, even a straightforwardly consequentialist one.

Second, even taking the consequentialist claim at face value, it is not at all clear that voluntary harms to national solidarity as serious as those generated by the amnesty process justify potential longer-term gains in national solidarity. The claim that it does overlooks the dynamics of the narrative construction of shared national identity based on foundational experiences of collective responses to crisis and trauma, meaning only that the decision to amnesty looms much larger in the collective memory and shared identity of South Africans, and continues as a divisive memory, far longer than its architects desired. The role of amnesty in South African national memory, ten years out from the event, significantly changes the pragmatic calculus about approaches to national reconciliation.

Third, the consequentialist formula itself, which sees perpetrator testimony as one of several kinds of truth in whose absence no national reconciliation is possible, is deeply

dubious given the nature and quality of the testimony that the amnesty hearings produced. Certainly there were elements of perpetrator testimony that were clearly and very dramatically part of a larger process of coming to terms with the national past, above all those testimonies that allowed the survivors and families of victims to know for the first time what had happened to their loved ones. And in many cases perpetrator testimony documented the full extent of command responsibility for atrocities that reached far higher into the ranks of national government than had previously been known outside of the ruling National Party. But in the larger context it's difficult to see the great majority of perpetrator testimony as having any direct bearing on the larger project of the reconstruction of national solidarity, in large measure because the perpetrators, with some significant exceptions, participated in the amnesty hearings in an entirely strategic manner, with an intent to disclose just that amount and kind of truth necessary for a successful amnesty application and no more.

This brings up the fourth and for me the most important drawback of the standard consequentialist justification of the 'individualized' amnesty process in South Africa: it is not at all clear whether the very formula, truth as a necessary condition for reconciliation, is coherent. While I will discuss this in more detail shortly, for now it's enough to claim that "truth," whatever else it might mean, is in fact not an especially politically valuable thing apart from the political procedures that were used to generate it.

The value of testimony of perpetrators lies less in the content of what culprits actually said to get out of or avoid jail, and more in the public forum in which they were induced to speak, to give reasons, even very bad ones, for their actions, to answer claims, and to be publically seen as equal citizens before the law. It's the embrace of procedural

democracy crystallized in the dramatic institutionalization of discourse, not the holding of some form of objectivity of truth, that provides the only, and indeed the quite frail, justification for amnesty procedures, a claim that embodies Richard Rorty's pithy saying that if we take care of democracy, then the truth will take care of itself.

(i) Between Fact and Norm: Justifications for Amnesty in South Africa

To put the work of the Amnesty Committee of the South African Truth and Reconciliation Commission in context it's important to recall what we might term the politically over-determined origins of amnesty in the TRC's mission. South African amnesty occurred at the point of collision of two radically different forces: from one side, the dynamic within the African National Congress to extend an internal truth commission model to the entire nation in the wake of a peaceful and democratic transition of power, and on the other, the decision to bow under threats and pressure from the National Party to use political violence to disrupt the first democratic election unless the negotiated transition included amnesty, and very preferably blanket amnesty, for National Party officials and members of the South African police and defense forces. The difficulties in reconstructing the various justifications for the amnesty policy, offered both at the time of the negotiations in the mid-1990s and subsequently, once the amnesty process had gotten underway, rest largely on this strangely dual motivation, in which the framers of the Truth and Reconciliation Commission found themselves under compulsion to find palatable ways to include amnesty mechanisms in their own work, with the additional requirement that the inclusion of amnesty in the larger project of reconciliation be

justified on other than purely instrumental terms. The solution to this problem, a separate amnesty committee running alongside the human rights and reparations committees, was at best an imperfect and awkward solution.

The idea of a commission to investigate and document past abuses in South Africa actually predated the handover of political power, and originated in the ANC's own internal investigations into abuses its members had perpetrated on recruits in its Angolan training camps. In preparation for the April 1994 elections that would remove the apartheid government and replace it with an ANC dominated parliament and Nelson Mandela as president, a strong commitment was already present to establish a truth commission for the whole of South African society, and indeed in the run up to the elections, South African non-governmental organizations had organized a series of influential international conferences to study the institutional design and goals of their truth commission.

At the same time, political negotiations with the outgoing white South African government had resulted in an interim constitution whose notorious "post-amble" provided for a legally unspecified amnesty "in respect of acts, omissions, and offenses associated with political objectives and committed in the course of the conflicts of the past." Elements of the outgoing regime, in both the National Party and the South African Defense Forces, had made it crystal clear to the ANC that a constitutional guarantee of amnesty was necessary for them to abide by any peaceful deal to transition of power. In effect they declared themselves prepared to take on the role of democratic spoilers unless they were offered some form of immunity from prosecution, facing their negotiation

partners with the classic tough choice between unjust amnesty under coercion or unjust assumption of risk of political violence.

It was a classic example of a tough choice. Bowing to the demands of potential spoilers required the ANC negotiators to weigh the relative risks and benefits of installing a dramatic injustice at the very legal and political centre of the new South African democracy, indeed at the heart of the new Republic's foundation. Such a choice would be fully justifiable only on the procedural condition that it was arrived at through participation and input from affected groups as broad as circumstances permitted, that the consultation process itself was as transparent as possible given the nature and stakes of the negotiation, and that the injustice of the policy was according to the best available information the only means possible to avoid a level of political violence that would be incompatible with basic security and the survival of the democratic state. Clearly, more abstract considerations about the role that amnesty might come to play in the self-understanding of citizens, attitudes toward the rule of law, good government, or tolerance and trust amongst former adversaries would have to take a back seat to the pressing need to ease the new government into place without tipping the entire country into disaster.

And yet records of the negotiation show both sides, the National Party and the ANC, not only astute strategic adversaries attempting to maximize their own political outcomes but also organizations that regarded themselves as carrying forward, and in some sense self-appointed stewards of, the process of national reconciliation. For many of those who opposed White rule in South Africa, the temptation and perhaps even the need to see the amnesty process as itself a part of this process – to see it, in other words, less and less as a concession to threats and more and more as an integral part of the larger

process of truth and reconciliation, was very high. But along with this justification of amnesty as a requirement for truth also came the tendency to see the pragmatic decision for amnesty as a concession to spoilers as no decision at all, as a political necessity imposed by circumstances. The recollection of Alex Boraine, the eloquent vice-Chairperson of the Truth and Reconciliation Commission, is repeated in different formulations over and over again in discussions about the tough choice for amnesty:

“Simply put, it was impossible for the ANC in particular to accept the protection of the security services throughout the negotiating process and then say to them, ‘Once the election is over we are going to prosecute you.’ If they had done so there would have been no peaceful election. It’s as simple as that. The generals of the old regime had made that abundantly clear. It follows that there would have been no democratic constitution and the country would have deteriorated into a state of siege with many more deaths and further destruction of property. We really had no choice but to look for another way of coming to terms with the past.”ⁱ

This standard argument obviously – and consciously – conflates a inductive prediction about a likely consequence of a decision with a logical inference (‘it follows that...’) from a set of premises, with the implication that the decision to grant amnesties was in fact no decision at all. In retrospect, with the amnesties as the cornerstone of the TRC’s political role in short-term crisis resolution now a historical fact, it makes little sense for outsiders to second-guess the political decision to forgo prosecutions under threat of systemic violence, and no historical science can evaluate the implications of

things that did not happen. But it is vital to remember that this political choice – and it was certainly that – was a foundational act, arguably the foundational act, of a new democratic order.

Despite claims about the value of truth, the prudential option to do what was necessary to secure a relatively peaceful election and transition of power was, and remains, the overarching justification for installing an act of injustice at the foundation of a new political order. And this decision was bound to have powerful consequences for the subsequent reconstruction of the bases of national solidarity. Considerations about the kinds of truths that only amnestied testimony might offer, and the value of such truths for national solidarity “for the right reasons” maintain a derivative status.

This tension is present from the very origins of the amnesty commitment, in the post-amble of the interim constitution itself, for this was thus a pre-commitment to post-conflict amnesty under pressure, and as the odd name implies the post-amble was a brokered compromise produced by closed-door negotiations between representatives of the National Party and the ANC, and was slipped surreptitiously into the draft of the interim constitution in the brief interlude following the conclusion of the official negotiation process and the submission of the draft to the South African parliament in December 1993. The constitutional commitment to the great experiment of amnesty was thus made in a procedure that excluded precisely those most directly involved – victims and their survivors – and under duress.

The post-amble’s language is worth noting here, since it echoes the older rhetoric of international treaties in decreeing amnesties between former combatants in the interests of reconciliation and reconstruction, thus also appealing to the amnesty

provision in The Second Protocol of the Geneva Conventions, which states in Article 6.5 that "at the end of the hostilities, the authorities shall endeavour to grant the broadest possible amnesty".

“In order to advance ...reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past.”

Some of the more technical aspects of the amnesty post-amble are particularly relevant, since they formed the basis of the specific amnesty mechanisms that would shortly appear in the Promotion of National Unity and Reconciliation Act of 1995, which created the South African Truth and Reconciliation Commission, including an Amnesty Committee charged with receiving and ruling on individual amnesty applications. The post-amble committed Parliament in constitutional law to enact legislation barring any state prosecution of persons who committed acts or offenses of a political nature associated with South Africa's ongoing political conflict.

Despite this undemocratic beginning, the enormous differences between South Africa's amnesty policy and all those that preceded it in other national contexts needs to be emphasized. Unlike the blanket amnesties of the past, the Committee would individualize the amnesty procedure, offering relief from both criminal and civil prosecution to individuals only if fairly demanding requirements were met. But even in the absence of these new mechanisms, amnesty's constitutional status, so different from

the Latin American examples of executive orders or simple de facto failures to prosecute, was bound to introduce contradictory elements into the letter and applicability of constitutional law itself. The most prominent of these elements is the clash between the requirement for legislation to shield certain otherwise illegal acts from prosecution, on the one hand, and on the other the constitutionally guaranteed right to legal redress for individuals whose rights have been violated, that is, the right to justiciability.

This divisive element, which I discussed in general last week, is the consequence that amnesty policies effectively create a new class of unequal citizens – victims who are affected by the amnesty by forfeiting, without their consent, their otherwise firmly grounded right to legal remedies for criminal or civil harms. And in fact the apparently unconstitutional implications of the amnesty provision was the subject of a serious legal challenge to the TRC even before it began its work. The suit brought by representatives of the widow of Steve Biko, the Azanian People’s Organization and others, generally known as the AZAPO case, brought this to light even before the work of the Amnesty Committee of the TRC began. Filed in July of 1996, the AZAPO suit claimed that the relevant section of the 1995 Promotion of National Unity and Reconciliation Act, which authorized amnesty both from criminal prosecutions and civil suits to members of the South African Defense Forces and the South African police responsible for the murder, kidnapping and torture of ANC activists, was in violation of Section 22 of the South African Constitution, which guaranteed that ‘every person shall have the right to have justiciable disputes settled by a court of law.’ [www.ejil.org/journal/Vol8/No1/arat4-06.html] Of course a key claim in the plaintiff’s case was that the Amnesty Committee of the TRC was not a court of law. ⁱⁱ

The unanimous decision by the South African Constitutional Court against the plaintiffs in the AZAPO case is also instructive. In its decision the court held that the larger national goal of reconciliation overrode the evident violation of rights that the amnesty provision both of the interim constitution and of the National Reconciliation Act. In the words of Chief Justice Ismail Mahomed, the “need for reconciliation and the rapid transition into a new future” trumped constitutional guarantees of legal remedies. Amnesty, Mahomed wrote, is not the same as a political act authorizing forgetting. “It is specifically authorized for the purposes of effecting a constructive transition toward a democratic order. It is available only where there is a full disclosure of all facts to the Amnesty Committee and where it is clear that the particular transgression was perpetrated during the prescribed period and with a political objective committed in the course of the conflicts of the past.”ⁱⁱⁱ The court ruled that without amnesty for perpetrators of crimes against humanity, law could offer no incentive for generating testimony from perpetrators, and that such testimony was so clearly necessary for national healing and reconciliation that extraordinary, even right-violating measures were justified in securing it.^{iv}

The overarching political value of truth-telling, and the requirement of truth-telling for the project of national reconciliation and recovery, is a remarkable judicial view in many ways. It is remarkable that a constitutional court could justify openly contradictory elements in constitutional language, and do so in ways establishing crucial precedent in domestic law, by appealing to the expediency of doing so, even if what is expedient here is the untested but attractive proposal that truthful disclosure of commissions of serious crimes by perpetrators themselves are a necessary condition for

the possibility of national recovery. And it's remarkable that judicial review could yield the view that negotiated political decisions could under certain circumstances assume the form of constitutional law. As Alex Boraine s stated explicitly: "The possible granting of amnesty," he concluded regarding the Court's decision,

"was based not on legal terms nor on the human rights argument, but on a political decision taken by the major political actors leading up to the settlement which had brought about the 1994 election and a new democratic government."^v

The postamble delegated the task of formulating an amnesty law to the incoming parliament. The Promotion of National Unity Act, which Parliament passed the following year, fulfilled this directive with the authorization for a South African Truth and Reconciliation Commission, divided into three autonomous committees, two dealing with violations of human rights and with reparations and restitution, and the third, the now-famous Amnesty Committee.

(ii) Amnesty as the Foundational Act of the New Republic

Rolling amnesty measures for perpetrators of crimes against humanity into the very same truth commission designed to expose them, hold them to accountability, and set the points for the deliberate reconstruction of national solidarity was an innovative, bold and in many respects ingenious response to remarkable circumstances. It was inevitable that such a choice, complex as it was, would be divisive. So it was, and so it remains. Debating the longer-term and in part unintended consequences of the amnesty

decision means asking whether that decision was, as was claimed at the time, an integral part of the larger reconciliation process *because of* the amnesty hearings' production of truth, of testimonial evidence from applicants, or whether the single compelling justification for amnesty remains the response to credible threats of political violence by spoilers.

The Promotion of National Unity and Reconciliation Act of 1995, which designed the structure of the South African Truth and Reconciliation Commission, famously designed the commission with three separate and largely autonomous committees: the Human Rights Violations and the Reparations Committees were largely victim-centered and were presided over by commissioners who were presidential appointees and who represented a wide spectrum of professional training and political convictions. The Amnesty Committee was initially presided over by a group of three judges and supplemented by only two commissioners, and its work and tone were in virtually every imaginable way in stark contrast to that of the other committees.

The Amnesty Committee introduced the radically new notion of individualized amnesties, which could be granted by the committee itself on condition that applicants make a full and honest confession of their criminal acts, though not apology or expression of wrongdoing or remorse. Human rights violations would receive amnesty only on condition that the applicants could document satisfactorily that the crimes they had committed fulfilled the "Norgaard principles" defining a political crime, including proof that the crime was in pursuit of political objectives, that it was committed in the context of a structure of command authority, and that the act was proportional to the political objectives.

Needless to say, the amnesty committee was by far the most contentious and unpopular aspect of the South African TRC. It was deeply unpopular among many white South African supporters of Apartheid, who had supported blanket amnesties, due to the perception of bias among the commissioners and the general view that due process would never be observed, that ANC atrocities would be amnestied while acts committed by the South African police and defense forces, or by the right wing parties, would not. And of course the prospect of amnesty for perpetrators of the worst atrocities of the final years of white rule in South Africa was denounced by many ANC supporters as a cowardly cave-in to the apartheid government. The Inkatha Freedom Party remained adamantly opposed to the amnesty provision and indeed the entire TRC from beginning to end. And the international community of human rights ngo's looked on in dismay as they perceived the TRC to be replicating the amnesty for peace model so familiar from Latin America.

The deep unpopularity of the amnesty committee never entirely dissipated, but the committee was nonetheless inundated with over seven thousand separate applications for amnesty. Most of these applications did not meet the criteria of political crimes, and by the time the committee finally finished its work in the work of the committee, far slower and longer than the other components of the TRC, and indeed the amnesty committee had come nowhere near finishing their rulings on submitted applications by the time the official mandate of the TRC expired in 1998, and it was years later, only in May of 2001. Even though the great majority of applications were rejected by the amnesty committee, among the successful applications were perpetrators of some of the most vicious and notorious crimes of the south African police and defense forces during the state of emergency

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(iii) The Problem of Perpetrator Testimony as a Condition of Reconciliation

In tone, composition, and procedure, the amnesty committee differed starkly from the work of the other committees. The most dramatic difference was the markedly legalistic and juridical aspect of the amnesty committee, in both style and substance, in stark contrast with the therapeutic and emotional storytelling of the TRC's other two committees. This is not surprising: the basic work of the amnesty committee was adversarial in nature; most presentations were made by the legal advocates of the applicants, in the inaccessible language of law, with little sense of urgency or of politics, and with virtually no trace of the highly visible practices of empathy and inclusion – often over-coated with religious ritual – that so marked the Human Rights Violations Committee under the chairmanship of Archbishop Desmond Tutu.

Even though perpetrator testimony made up only a small proportion of the committee's work, it was naturally the focus of intense scrutiny and media saturation. In cases of unsuccessful applications, perpetrator testimony became inadmissible for any subsequent criminal or civil action, and this protection against eventual self-incrimination was meant to lessen the burdens to full disclosure. There were certainly remarkable moments, including revelations of the techniques of torture, the extent of crime and spectacular violence in the testimonies of five former members of a secret police unit responsible for uncounted murders and kidnappings. Many relatives learned the fate of

their long-vanished loved ones for the first time. Some perpetrators even were capable of genuine displays of contrition and apology.

Nevertheless, for most of the former operatives and enforcers of apartheid rule, the mid-level rank of army captains to colonels, or the higher-level operatives in the police forces responsible for organizing and implementing government terror, there was little incentive for testifying to anything more than what they had reasonable grounds to believe were already well-established facts, and strong incentives for refusing to divulge information that might implicate colleagues and friends who had not yet faced any threat of criminal prosecution. Even as testimony indicated that command responsibility for some of the worst atrocities rose to very high levels of government and probably directly to the office of the President, the TRC's efforts to bring higher-level political and military figures to testify in front of the amnesty committee were, with a few notable exceptions, largely unsuccessful, with the result that the "real truth" of high-level government complicity and even criminal responsibility was never really established.

Without risking too much, I think it's fair to say that the testimony that the amnesty committee did manage to generate, while no doubt of great value in many ways, and especially for those survivors who learned the fate of their loved ones who perished under apartheid, was not, without a great deal of qualifications, especially crucial for the process of national reconciliation. It's difficult to read that testimony, ten years later, and see it as a necessary condition for the very possibility of a reconciled national future, the claim that the TRC and its defenders had made in justifying injustice as a means to reconciliation.

There are thus good grounds, both empirically and on principle, then, to regard with a lot of suspicion the central, consequentialist claim that amnesties were justified *because of* and *in exchange for* truth. For this justification of amnesty in exchange for truth to stand on its own, that is, even in the absence of credible threats of violence by spoilers, then (at least) three quite distinct conditions must hold: the truth that is generated by perpetrator testimony must be (a) not available by any other available means save in return for the promise of immunity from prosecution and civil liability, (b) sufficiently different from the kind of truth that is likely to be accessible through prosecution that testimony under prosecution cannot replace it, and finally (c) sufficiently important for the overall need for truth that in its absence, the truth necessary for the reconstruction of the bases of social solidarity will not result.

Regarding the first of these conditions, a factual argument must defend the claim that *only* by offering the incentive of amnesty would perpetrators, whether already convicted of offenses or not, be willing to offer testimony about the facts of their offense, the subjective motivations that they held in committing it, and their position in a command structure. Amnesty is certainly a very powerful incentive, especially for those already convicted and incarcerated or those who reckon the chances of a successful prosecution against them are high. But this argument certainly cuts both ways. The incentive of amnesty is indeed high, above all when it means immediate release from prison. In fact it may be so high that perpetrators would be rational in doing whatever possible to increase the likelihood of a successful application, regardless of whether this implied truth-telling or not. (Indeed this raised a dilemma for the amnesty committee very familiar from game theory, in which falsely-accused and wrongly-convicted prisoners

had a rational self-interest in confessing to political crimes they had not actually committed.)

Regarding the second condition justifying amnesty in exchange for truth, one would need to establish that the *kind* of truth-telling generated by amnesty applicants is sufficiently different, and better, than the truth generated by criminal trials. In evaluating this claim it's important to bear in mind the structural and procedural constraints that were placed on the amnesty committee, which made it and its work so strikingly different from the rest of the TRC.

Decisions about the composition of the committee membership and procedural guidelines were made with an eye to ensuring due process and the fairness and impartiality of the proceedings – a vital consideration but one that made the amnesty committee very like a court of law and very unlike the storytelling work of the Human Rights Violation Committee, with its persistent focus on forgiveness and healing. Applicants made short statements and were subjected to interrogation by judges. And while the committee's deliberations did from time to time result in dramatic and direct exchanges between victims and perpetrators, for the most part the deliberative interaction in the committee remained between legal representation for the applicants and their victims and the panel of judges.

Again, applicants' interest was a successful application, and not the production of politically valuable truths, let alone national reconciliation, which from their perspective could have only the status of an unintended consequence. Their interest was strategic and instrumental, not consensual, and this otherwise desirable procedural constraint meant that the interests of the applicant – a successful amnesty application – remained

extremely close to the rational interest of a criminal defendant – the determination of legal innocence or acquittal. The calculation of the likelihood of either outcome generates decisions on how best to maximize the odds of a good outcome and/or minimize the negative consequences of the worst possible outcome, and in this sense, the work of the amnesty committee bore very close parallels to that of a criminal court that has incorporated plea bargaining as part of its work. Last week’s lecture placed great weight on the potential normative benefits of criminal trials for perpetrators apart from the justice of retribution, focusing on the larger social benefits of the public enactment of due process and the accountability produced by perpetrators compelled to give and take reasons in a public forum. It may appear, and to many commentators it has appeared, that the strongly adversarial procedure of the amnesty committee, its structural similarity to a criminal trial, made South African amnesties approach criminal trials, and that this quasi-legal aspect of the amnesty committee’s work was an effective compensation for the injustice of amnesty, making it normatively far superior to blanket amnesties.

I think there is some truth to this claim. But it has to be balanced against a quite different interpretation, namely that the very analogy between amnesty procedure and criminal trial may work in a negative direction, insofar as the procedural norms of law are effectively appropriated by a body like the TRC that is, properly speaking, not a court, nor entirely a political body, nor a permanent part of the national political structure, but rather what Robert Wilson calls a ‘liminal’ body that is obliged to synthesize legal, political, and therapeutic goals. It is not at all clear to me that the appropriation of rule of law procedures under conditions of open constitutional tension and political expediency “borrows” the legitimacy of analogous juridical bodies at all, and may well be the

contrary. In this question, like so many others, the results of polling and other longitudinal studies in South Africa are ambivalent and can be interpreted very differently. But several of them – most notably research by James Gibson and long-term measures of attitudes of the rule of law included in the “South Africa Reconciliation Barometer” by the Institute for Justice and Reconciliation in Cape Town, paint a rather somber picture.

South African commission amnesties were *analogous to* plea bargains in that both the court and the applicants were expected to make rational calculations to maximize their respective interests by trading, essentially, one kind of good for another, rather than engaging in a collective and reciprocal mode of deliberation. Unlike plea bargaining, of course, amnesty removes the possibility of the determination of legal guilt, and in cases where guilt was already established, a successful amnesty application resulted in the perpetrator’s immediate release from prison and the expunging – the oblivion, in the older parlance – of any administrative record of the offense. This difference is important, since it supports the objection voiced in the AZAPO case that amnesties unconstitutionally deprived victims and their survivors of the right to legal remedy, both civil and criminal, an objection that would not be valid in cases of plea bargains.

The remaining question, then, is whether the perpetrators’ testimonies were sufficiently important for the overall need for truth that, without them, the truth necessary for the reconstruction of the bases of social solidarity and democratic trust would not be possible. This last question returns us to the opening theme of this evening’s paper, the notion of the reconstruction of national solidarity “for the right reasons” as the primary task of transitional societies, and I will end the paper reflecting on how answers to this

question comprise lessons, certainly ambivalent ones, about South Africa's brave experiment with amnesty for crimes against humanity.

(iv) Reconciliation beyond Truth

I argued earlier that the “top down” administrative effort to reconstruct the bases of social solidarity, as rights-protected inclusion into the institutions of democratic deliberation, must at some point or another be “met halfway” by the bottom-up dynamic in which ordinary citizens are able to repose enough trust in the legitimacy of good governance that they can appeal to their own normative convictions, and not just strategic calculations of self-interest, to justify their decisions for participation. The South African Truth Commission, like any other such extraordinary transitional body, had the function not only of contributing to national reconciliation but also, as Robert Wilson has powerfully argued, of nation-building, re-establishing the bases of hegemonic state legitimacy and the political authority of an emergent state bureaucracy. Human rights language, like the language of procedural justice, is also a tool for the construction of political legitimacy. Human rights talk, and justice talk, is a powerful medium whose abstract nature makes it especially well-suited to appropriation by political elites, who are capable of dragooning it into the service of nation-building, and this certainly includes the construction of a form of civic nationalism, capable of sustaining the extraordinarily multiple and conflicted factions that compose a diverse South African polity.

The TRC's re-signification of the language of procedural justice consisted in the substitution of substantial notions of truth and national identity – norms of *ubuntu*,

preferences for restorative justice, and above all the incessant declaration of the African-ness of forgiveness and restoration – for the procedural norms most appropriate to diverse democracies. While Archbishop Desmond Tutu’s insistence on an ethics of forgiveness and the rejection of legal retribution was most evident in the TRC’s human rights violations committee, it was finally in the amnesty committee, precisely because of rather than despite its strong analogies to a court of law, that the efforts to link solidarity with substantive truth production appeared most unjustifiable. Truth was, I would argue, never ultimately the appropriate goal of the collection of perpetrator testimony, not because perpetrators didn’t tell the truth, and certainly not because many survivors and families were able to find relief and satisfaction in learning of the ultimate fates of their loved ones. Instead, the amnesty committee installed a fundamental procedural wrong at the heart of the reconciliation process, and this ran the risk of conflating reconciliation with the production of a true narrative of national events, a narrative that ironically was rendered far more difficult and divisive by the procedural means, amnesty, that were chosen.

Solidarity, bottom up social trust ‘for the right reasons’ can neither be manufactured by institutional initiatives nor by appeals to an approved narrative of national forgiveness. It arises from the internalization of just those procedural norms, on the part of ordinary citizens, that make truth or rightness in democratic societies justifiable. Rorty’s slogan, take care of democracy and the truth will take care of itself, has in this context the sense that the normative weight of ‘truth’ in a procedural republic means constructing the institutional parameters where citizens can meet and interact, and can justify norms to each other under conditions of fair or just equal freedoms. The

substantive ‘truths’ that flow from fair procedures are ones that are justifiable to all those involved. The shift in emphasis from substantive truths to fair or just procedures – taking care of democracy so that truth will take care of itself – is the way that a ‘top-down’ construction of social solidarity can work in general, and its especially relevant in transitional situations where both the procedural outcomes and the public perception of the role of such procedures is being laid down for the first time.

ⁱ Boraine, 7.

ⁱⁱ See: *AZAPO and Others v President of the Republic of South Africa*, (1996) 8 B.C.L.R. 1015(CC). See also J. Hippler Bello and D.F. Wilhelm, “International Decisions,” (1997) 91 Am. J. Int. L. 360, at 63.

ⁱⁱⁱ Mervyn Bennun, Charles Villa-Vicencio and Erik Doxtader, editors, *The Provocations of Amnesty: Memory, Justice and Impunity*. Trenton, nj: Africa Wolrd Press, 2003, p 99.

^{iv} See Boraine, 119: “The court held that amnesty for criminal liability was permitted by the postamble, because without it there would be no incentive for offenders to disclose the truth about past atrocities. The argument went further that the need for reconciliation and reconstruction in SA was clear and without truth this would not be possible.”

^v Quoted in Boraine, 119. “The families of those whose fundamental human rights were invaded by torture and abuse are not the only victims who have endured ‘untold suffering and injustice’ in consequence of the crass inhumanity of apartheid which so many have had to endure for so long. Generation of children born and yet to be born will suffer the consequences of poverty, of malnutrition, of homelessness, of illiteracy and disempowerment generated and sustained by the institutions of apartheid and its manifest effects on life and living for so many. The country has neither the resources nor the skills to reverse fully these massive wrongs. It will take many years of strong commitment, sensitivity and labour to ‘reconstruct our society’ so as to fulfill the legitimate dreams of new generations exposed to real opportunities for advancement denied to preceding generationsl intially by the execution of apartheid itself and for a long time after its formal demise, by its relentless consequences. The resources of the state have to be deployed imaginatively, wisely, efficiently and equitably, to facilitate the reconstruction process in a manner which best brings relief and hope to the widest sections of the community, developing for the benefit of the entire nation the latent human potential and resources of every person who has directly or indirectly been burdened with the heritage of the shame and the pain of our racist past.” 119-20. [Judgment in case CCT/17/1996, p 35.]