BOOK REVIEW

ANTJE DU BOIS-PEDAIN *Transitional Amnesties in South Africa*. CAMBRIDGE UNIVERSITY PRESS, 2007.

There are at least three reasons that policy makers, academics and activists concerned with issues of transitional justice should seriously engage with Antje du Bois-Pedain's excellent review and analysis of the South African transitional amnesty scheme. First, the quietly-amended National Prosecutions Authority (NPA) guidelines relating to the prosecutions of apartheid-era political crimes[1] constitute a betrayal of the underlying principles behind the Truth and Reconciliation Commission (TRC) as well as the trade-offs agreed to during the transition. As the Khulumani Support Group[2] ('Khulumani') has argued:

> This policy [amended NPA Prosecutions Guidelines] creates a 'back-door amnesty' (virtually a back-door indemnity) for apartheid criminals without full disclosure and without any of the safeguards contained in the Truth and Reconciliation Commission (TRC). It strikes at the very heart of an increasingly fragile reconciliation, perpetuates a culture of impunity and destroys the remaining credibility of the TRC process … A culture of impunity can only be reversed when those who shunned the generous TRC process are charged using the 'bold prosecution policy' recommended by the TRC. The parallel rehabilitation of and redress to victims and survivors is essential.[3]

Second, there is an increasing tendency to refer to amnesties which were granted during the TRC process in order to legitimise calls for amnesty or indemnity of politically powerful individuals accused of criminal offences. More pointedly, these transitional amnesties have been evoked to argue for the quashing of investigations relating to two significant post-apartheid criminal investigations: the notorious 'arms deal' and the prosecutions of the president of the ruling party, Mr Jacob Zuma.[4] Those who support such indemnities or amnesties argue that because South Africans were able to forgive and allow amnesties for perpetrators of atrocious human rights violations, they should be equally willing to forgive and grant amnesties to those accused of

1 *Prosecutions Policy and Directives Relating to Prosecutions of Offences Emanating from Conflicts of the Past and which were Committed on or before 11 May 1994*, promulgated on 1 December 2005.

2 Khulumani Support Group is the national membership-based organisation for victims and survivors of human rights violations committed during apartheid. For more information, see <http://www.khulumani.net>.

3 M Jobson & T Madlingozi 'Reject NPA Prosecutions Guidelines' *Mail and Guardian* 25 August 2007. Also see J Klaaren & H Varney 'A Second Bite at the Amnesty Cherry? Constitutional and Policy Issues around Legislation for a Second Amnesty' (2000) 117 *SALJ* 572.

4 Professor Sipho Seepe has been quoted as arguing that: 'Parliament must order all investigations related to the arms deal to be shut down and then we must look at the lessons we should learn from the whole saga to make sure it is not repeated ... It is like the TRC [Truth and Reconciliation Commission]. A lot of people who should have been convicted were let go'. See M Rossouw, S Brummer, S Sole & SS Alcock 'Triple Play to Save Zuma' *Mail and Guardian Online*, 11 July 2008 <http://www.mg.co.za/article/2008-07-11-triple-play-to-save-zuma>.

being involved in post-apartheid criminal activities in order to avoid 'political instability'.

Third, as the International Criminal Court (ICC) continues to use Africa as a laboratory for parachuted international criminal justice, questions are being asked whether the involvement of the ICC in indicting or threatening to indict African leaders accused of committing crimes against humanity, war crimes and genocide actually does more harm than good. Some commentators have argued that by indicting or threatening to indict leaders of warring factions in Sudan,[5] Uganda[6] and Zimbabwe,[7] the ICC has worked against efforts aimed at peace building, reconciliation and nation building.

Bois-Pedain asks whether the South African transitional amnesty scheme provides a model to other societies in transition confronted with a legacy of widespread human rights atrocities. The uniqueness of this study lies in the fact it is the first ever comprehensive empirical and normative analysis of the South African transitional amnesty scheme. On an empirical level, Bois-Pedain asks two questions. First, did the South African transitional amnesty scheme work? Second, how did it work? On the normative level, she asks whether the scheme is ethically defensible. Bois-Pedain pertinently cautions that whatever view one adopts in relation to the comparative importance of justice, peace, reconciliation, truth and other transitional goals, 'transitional mechanisms cannot contribute to legitimising a new government or regime if they are presented and perceived as a mere consequence of political expediency or bargaining' (10–11).

Chapter 1 provides a comprehensive background to the TRC-based amnesty scheme as well as an analysis of the amnesty provisions of the TRC Act. In this chapter, the author neatly unpacks the operations of the Amnesty Committee and looks back at the unsuccessful constitutional challenge against the amnesty provisions in *AZAPO v President of South Africa*. In light of the government's failure to engage in any meaningful social justice program for victims, a revisit of *AZAPO* is important, as it reminds us that the South African amnesty scheme was supposed to be part of the broader goals of truth

5 Regarding the ICC's prosecutor's move to indict the Sudanese President, the United Nations Secretary General reportedly said that he was worried that the indictment 'would have very serious consequences for peacekeeping operations including the political process'. See 'Sudan Leader Accused of War Crimes' *Al Jazeera*, 14 July 2008 <http://english.aljazeera.net/news/africa/2008/07/200871412447265736.html>. Also see 'Sudanese President Charged with Darfur War Crimes' *The Guardian* 14 July 2008 <http://www.guardian.co.uk/world/2008/jul/14/sudan.warcrimes1>.

6 Bryn Higgs, Uganda Program Development Officer for Conciliation Resources, argued that: 'ICC has committed a terrible blunder ... to start war crimes investigations for the sake of justice at a time when northern Uganda sees the most promising signs for a negotiated settlement of the violence risks having in the end neither justice nor peace delivered'. See J. Volqvartz 'ICC under Fire over Uganda Probe' <globalpolicy.igc.org/intljustice/icc/2005/0223iccfire.htm> (accessed 10 July 2008).

7 President Robert Mugabe is said to have been ready to negotiate with the Movement for Democratic Change but was dissuaded when the Special Court of Sierra Leone indicted and arrested former Liberian president, Charles Taylor, even though he had been offered asylum in Nigeria. See 'When Peace and Justice Collide' *Financial Mail* 8 July 2008. <http://www.ft.onet.pl/0,12123,when_peace_and_justice_collide,artykul_ft.html>.

recovery, reconciliation, reparations and social justice. However, for many victims, the TRC process was an overly perpetrator-friendly process meant to facilitate an elite transition. In the words of Dr Marjorie Jobson, Khulumani's acting director:

> The motivation was getting as many people as possible to participate in the TRC process because the trade-off had been that victims would give up the right to prosecute and in return they would receive reparations ... and there was a contract they felt with government. It was established through an Act of parliament and the undertaking and the promise was that: giving up that right to prosecute will invoke a right to reparation. And I think that is where the deepest betrayal of people is. That basically the amnesty process occupied people far more than the reparations question and it is widely perceived as being a process that benefited perpetrators and will probably continue to benefit perpetrators.[8]

Chapter 2 focuses on the practice of the Amnesty Committee when making decisions. Here the author points out that the amnesty process managed to attract applications from perpetrators across the political divide — its intended constituency. In evaluating the practice of the Amnesty Committee, Bois-Pedain delves into an impressive empirical study of over 1 000 amnesty decisions. This chapter provides a superb reference resource for anyone looking for specific information on any aspect of the applications themselves. Using easily understood figures and tables, the author highlights interesting statistics such as the proportion of applicants of different hierarchical positions; the proportion of incidents for which applicants from different perpetrator groups applied for amnesty; as well as the success rate of amnesty applications according to various categories. These figures refute a number of canards which are often sold in South Africa. One such canard is one that says that there is no need for beneficiaries of apartheid to apologise for atrocities committed in their name because their leaders came before the TRC and took part in the reconciliation process. Bois-Pedain's figures remind us that the majority of amnesty applicants were from the African National Congress (ANC) or ANC-related organisations. Another myth that these figures destroy is the one that says that anti-apartheid activists who contributed to the fall of apartheid by rendering townships ungovernable were simply acting on the orders of ANC structures. This legend is responsible for the pervasive representation of the liberation struggle as one that was commandeered mainly by the ANC. Bois-Pedain shows that many of the applicants, 30 per cent, reveal that they had acted on their own initiative.

Chapters 3 and 4 take up the issue of the Committee's interpretation of the political offence requirement and the concept of full disclosure. Regarding the political offence requirement, Bois-Pedain argues strongly in support of the Committee's preparedness to accept every strategy adopted by political organisations as 'political', irrespective of the repugnancy of that strategy in moral terms. In Bois-Pedain's words: 'The inclusiveness of the scheme would be jeopardised if the Committee were forced to sit in judgement of the political strategies endorsed by the different parties during the conflict, and had to

8 Interview June 2007 Pretoria.

exclude applicants from the process in view of the inherently disproportionate character of the policies which their organisation formulated and endorsed.' (137–138) Therefore, what makes an applicant 'morally deserving' of amnesty is not what he did — it is his willingness to make full disclosure (138). Turning to the requirement of 'full disclosure' — the 'moral cornerstone' of the amnesty process — we are reminded that 40 per cent of unsuccessful applicants failed on this information. Bois-Pedain demonstrates that this requirement entailed a complex interaction between legal principles, evidential standards and human fallibility. More importantly, through a detailed assessment of a number of case studies, the author urges us to revisit the assumption that the requirement of full disclosure — which may still be capable of providing a moral pillar for the amnesty scheme — leads to 'more or better truth' than would be the case in criminal trials.

Together, chapters 5, 6 and 7 constitute the heart of this book. To what extent did the South African amnesty process contribute to the establishment of a full picture of the atrocities of the past? Having shown in chapter 4 that the requirement of full disclosure does not necessarily lead to 'more or better truth', chapter 5 reviews the strengths and limitations inherent in the practices and procedures of the Committee which might have directed and restricted 'truth' recovery. The key question addressed in this chapter is whether 'more or better truth' results from a conditional amnesty process as compared to a process which merely relies on criminal procedures. Bois-Pedain suggests that this could indeed be the case. Not only do conditional amnesties lead to a recovery of some 'truth'; amnesty hearings lead towards what Bois-Pedain terms 'dialogue truth':

> To the extent that amnesty hearings provide a space for perpetrators to present their perspectives on the necessity of using violence and their attitudes to their past crimes, and for victims to challenge, not just the accuracy of the event description, but also any attempt by amnesty applicants to defend their deeds as politically and morally justified, amnesty hearings also work towards a 'dialogue truth'. (216)

Bois-Pedain points out that the claimed-victim-centredness of the TRC process is its dominant justificatory theme. (217) One can even argue that the claim was not only that the TRC process is victim-centred, but also that through the recovery of truth, official recognition of victims' pains as well as reparation for that pain, the TRC process would lead to the empowerment of victims. Chapter 6 therefore investigates the range of participatory options available to victims in amnesty hearings which might make amnesty hearings superior to criminal investigations and trials. It is important to point out here that the TRC is often held up as a forum where victims and perpetrators could encounter each other in a 'common table of humanity' which could therefore lead to possibilities of reconciliation. However, by way of a thorough analysis of case studies of some (in)famous encounters — including those with police officer Jeffery Benzien and with MK cadre Robert McBride — Bois-Pedain shows how these encounters sometimes led to secondary victimisation of victims. Elsewhere I have argued that at the core of any transitional justice process — embedded as it is within the human rights ideology — is the production of a

Good Victim; a victim who is satisfied with moral victory alone, a victim who is happy to have 'discovered' finally the 'truth' and unlike the Bad Victim — who is 'bitter' and 'unreconciled' — does not asks nagging questions about benefits and advantages accrued by beneficiaries of the past evil system.[9] Bois-Pedain goes some way to confirm this:

> The ideal victim before the Amnesty Committee values 'truth' over conventional justice, legitimises the Committee's efforts through attendance at amnesty hearings, participates if possible in the truth-seeking endeavour and formulates objections to amnesty 'helpfully' in terms of an alleged lack of full disclosure on the part of the applicant, rather than 'unhelpfully' in terms of a persisting desire for punishment. Victims are not expected to be willing to reconcile with amnesty applicants. But the Committee finds it difficult to accommodate victims who do not want to play the 'truth' game. It tolerates, but hardly engages with, expressions of dissatisfaction by victims that are essentially challenges to the legitimising 'truth for amnesty' discourse on which the moral justification of the Committee's work rests.

The issue of perpetrator accountability — which the author contends is the most important as it is linked to the question of justice — is tackled in chapter 7. This is where Bois-Pedain is at her most creative. She argues that while apologies were not forced and were sometimes not forthcoming, the fact that applicants showed their respect to victims by explaining their actions to them in terms which stress the absence of personal malice can lead to possibilities of forgiveness even in the absence of a clear apology. The author contends that while it is true that applicants are not punished — in a traditional sense anyway — the fact that they respond to a 'call to account' ensures that some important tenets of accountability are upheld.

Central to her defence of the South African conditional amnesty scheme is the author's brilliant contention that this scheme does not undermine the ideals of the rule of law because it communicates a 'new justice script' which says that all violence — whether for a 'just cause' or not — is condemned, and that those individuals who commit themselves to this process have proved themselves as being worthy of being allowed into the 'new' society. In this regard, the South African conditional amnesty scheme constitute 'a "rite of passage" into citizenship unencumbered by the past for those who are willing to commit themselves to the new political order, in which any resort to violence as a means of (domestic) politics is characterised as wrong.' (298) Impressive as this argument is, it gives rise to a few questions. First, the fact is that this scheme managed to attract only a few apartheid foot-soldiers who were branded as over-zealous bad-apples: to what extent did these schemes manage to constitute a 'rite of passage' for those who gave orders, and more importantly, for those who benefited from apartheid? It is worth recalling Mahmood Mamdani here: 'Isn't one objective of the TRC's televised hearings in fact to invite beneficiaries to be so outraged at the evil that was perpetuated

9 T Madlingozi 'Good Victim, Bad Victim: Apartheid's Beneficiaries, Victims and the Struggle for Social Justice' in W le Roux and K van Marle (eds) *Law, Memory and the Legacy of Apartheid: Ten Years after AZAPO v President of South Africa* (2007) 107–126.

in their name as to denounce perpetrators, and thereby isolate them?'[10] Second, to what extent does the fact that thousands upon thousands of otherwise qualifying 'victims' were left out of the TRC process affect the construction and sustainability of the new political order?

Of relevance to other societies in transitions on the African continent including Kenya, Uganda and Zimbabwe is Chapter 8, which juxtaposes the South African conditional amnesty scheme against the requirements of international law and asks whether the South African amnesty process is a model for other societies in transitions. Here the author looks at some prescriptive international standards which restrict sovereign grants of amnesty. In line with Bois-Pedain's conclusion in this chapter, the recently passed amnesty law in the Democratic Republic of Congo applies only in respect of acts of 'war and rebellion' which occurred in Nord-Kivu and Sud-Kivu since 2003, but does not extend to 'acts of genocide, war crimes and crimes against humanity'.[11]

In the concluding chapter, while not trying to come up with a 'model' of a legitimate transitional justice mechanism, as this is 'deeply contextual', Bois-Pedain nevertheless outlines factors that can contribute to making an amnesty scheme practically feasible, legally permissible, and a morally defensible alternative to a prosecution-based reaction to politically-motivated serious violations of human rights.

At the international level, the indictment of the Sudanese President by the ICC prosecutor has again re-ignited the prosecution versus amnesty, justice versus peace debates. Closer to home, the announcement by President Mbeki that individuals convicted of politically-motivated offences committed before 16 June 1999 would be eligible to apply for presidential pardons has sparked a lot of debate. These debates will become more pointed when the case challenging the amended NPA guidelines commences in a few months time.[12] In this regard Bois-Pedain is instructive:

> These guidelines raise serious questions about the extent of the South African government's commitment to post-TRC prosecutions. They also bear testimony to the continuing influence and importance of those groups and individuals — mainly former state officials who acted in support of the former NP government — who would like to see a second amnesty ... Non-prosecution of those who evade the amnesty process makes a mockery not only of the rights

10 M Mamdani 'When does Reconciliation Turn into a Denial of Justice?' Sam Noluntshungu Memorial Lectures (1998) 16.

11 'DRC Passes Amnesty Law' 13 July 2008 <http://www.news24.com/News24/Africa/News/0,,2-11-1447_2356698,00.html> (accessed 15 July 2008).

12 On 18 July 2007, soon after Adriaan Vlok and his co-accused had been given a suspended sentence pursuant to a behind-closed-doors plea bargain, the sister of Nokuthula Simelane and the widows of the Cradock Four as well as the Khulumani Support Group, the Centre for the Study of Violence and Reconciliation (CSVR) and the International Center for Transitional Justice (ICTJ) launched a challenge against these guidelines, requesting the court to strike down the amended policy as being unconstitutional, in breach of international law, in breach of the principle of the rule of law, and in breach of the principles of administrative fairness and justice. For an excellent collection of wide ranging perspectives on the question of post-apartheid prosecutions of apartheid-era crimes, see *Prosecuting Apartheid-Era Crimes: A South African Dialogue on Justice* International Human Rights Clinic — Harvard Law School (2008).

> of victims, but also of those amnesty applicants who voluntary exposed themselves to public scrutiny, trusting the integrity of the process. (58–59)

Transitional Amnesties in South Africa is an expansive analysis of transitional amnesties. Bois-Pedain has offered all of us concerned with issues of transitional justice a comprehensive framing of issues and debates in the field of transitional amnesties. It is certainly a must-read for policy makers, consultants, academics and activists.

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