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978-0-521-88205-7 - Justice and Reconciliation in Post-Apartheid South Africa

Edited by Francois du Bois and Antje du Bois-Pedain

Excerpt

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## INTRODUCTION

FRANÇOIS DU BOIS AND ANTJE DU BOIS-PEDAIN

*Justice and Reconciliation in Post-Apartheid South Africa* takes stock of the transitional processes which have been under way in South Africa since the early 1990s to transform the country into a stable and just society – a transformation which is still ongoing. The epithet ‘post-apartheid’ hints at a specific period of South African history, designating both a beginning and – though perhaps less obviously so – an expected ending. The start of this period can, roughly, be connected with the irreversible decision to dismantle apartheid as a form of social and political organisation, taken by the National Party government in early 1990 and manifested in the release of Nelson Mandela and the unbanning of the ANC and other political organisations. When on 2 February 1990 the then state president, F.W. de Klerk, announced his government’s intention to free the best-known leader of its most prominent political foe and to commence negotiations with hitherto outlawed opposition groups regarding South Africa’s constitutional future, the ending of the old order became official policy. To be sure, this was neither fully a beginning nor truly an end: it followed on several years of behind-the-scenes contact between leading figures in the apartheid government and Mandela, as well as exiled ANC leaders; and more years of negotiations were to ensue in which the government tried its hardest to minimise the extent of change. Nevertheless, February 1990 marked a turning point in official discourse and policy, and, perhaps unintentionally, set in train the series of events that were to lead to the negotiated interim Constitution of 1993, the democratic election on 27 April 1994 of a

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Constitutional Assembly and interim government of national unity, and, eventually, the coming into force in 1996 of the Constitution of the Republic of South Africa, creating for the first time on South African soil a political system based on full – social and political – equality of all her citizens.

Throughout this period, South Africa saw itself as being in the process of leaving behind the old order and constructing the new. In that sense, ‘post-apartheid’ designates a specific moment in South African political culture – the period of transition. This sense of being post-apartheid, already somewhat dated, is bound to fade with time. But it certainly looks as if the socio-economic devastation bequeathed by apartheid is clinging on and will remain for quite some time to come, ensuring continued significance to a different sense of the country being post-apartheid. The label ‘post-apartheid’ therefore also hints at the intersection of the transitional and the apparently enduring, drawing attention to the extent to which the immediate post-apartheid period succeeded or failed to set the country on a course in a new direction. And it is this that provides the point of engagement of this book – its authors explore the impact of specific choices made and strategies adopted during the transitional period on the project of consigning apartheid to history. This book, then, is about post-apartheid South Africa in the sense of the period during which South Africa, as a political entity, defines itself as being post-apartheid; but it is also about post-apartheid South Africa in a descriptive, historical sense. In engaging critically with developments set in motion during the transitional period, this book also offers reflections on continuities and disruptions with the past.

Justice and reconciliation were the key themes during the transitional period. They at once articulated goals and identified means. The ideal captured in Archbishop Desmond Tutu’s image of ‘the rainbow people of God’, and made concrete in photographs of many an election queue in 1994, was an arresting one that repudiated a history of injustice wreaked in the name of separation. At the same time, it was an image of faith, not of fact. As Alex Boraine later put it, ‘the call for a Rainbow Nation . . . embodies a promise of what is possible in the future’; it ‘challenges society to become what it is called to be’.<sup>1</sup>

<sup>1</sup> Alex Boraine, ‘The Language of Potential’ in Wilmot James and Linda van de Vijver (eds.), *After the TRC: Reflections on Truth and Reconciliation in South Africa* (Athens: Ohio University Press, 2001) 73 at 80.

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The moral impetus behind the transition from apartheid gave rise to a commitment – often pressed upon negotiators rather than spontaneously generated – that the deals struck would amount to more than a compromise and would help bring succour to victims and harmony to enemies. But the complexities of the relationship between justice and reconciliation were just as prominent. In particular it was clear that they were frequently in tension with one another, with the promotion of reconciliation threatening to inhibit the pursuit of justice and vice versa. South Africa's attempt to mediate this tension, trying to put it to creative use, became one of the hallmarks of the transitional period and one of the main reasons for the intense international interest in it. This attempt is, as its title indicates, at the core of this book's exploration of the transition from apartheid. In reflecting on the implications of transitional choices and strategies for the longer-term project of leaving apartheid behind, it takes the complex relationship between these ideals as its focus, and investigates how various permutations of the conflict between justice and reconciliation were managed in a variety of settings.

As a distinct and highly visible transitional justice institution, the South African Truth and Reconciliation Commission (TRC) occupied a central place in the management of this tension. The post-apartheid transition is therefore often identified with, and credited to, the efforts of the TRC. But the TRC's work does not necessarily represent a distinctive phase, capable of isolated analysis, in the country's transition. With regard to the key themes of the transformative period – how to bring about justice and reconciliation in South Africa after the end of apartheid – an isolated focus on the TRC threatens to cut the strands of the 'transformative narrative' in which the work of the TRC forms but a facet of a much broader picture, and sometimes more concretely a distinctive link in a much longer chain of measures directed at social change and transformation. This book therefore broadens the perspective beyond the TRC. Historically, it contextualises the TRC by looking at the steps towards transformation which preceded and accompanied its work, such as criminal prosecutions, land restitution and institutional reforms, and the measures taken to deal with the 'unfinished business' (reparations and – still – prosecutions) after its dissolution. Thematically, it interlinks the TRC's concerns over truth and reconciliation with an analysis of the concepts of justice, accountability, harm and reconciliation and with competing perceptions of what these notions entail in the South African context.

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In doing so, the book brings together scholars from different disciplines – criminology, law, psychology, political science and literary studies – whose work has focused on these issues. Their chapters are grouped around the themes of responsibility and accountability, harm and reparation, and cultural and political transformation. In different ways, every chapter uses the example of South Africa to reflect on the interaction between justice and reconciliation in the interpersonal, political and cultural spheres, while drawing on broader debates in order to illuminate the specifics of the South African experience. Read together, they provide a cohesive, theoretically well grounded and inspiring analysis of South Africa's response to its unjust past that sharpens the outlines of the complex relationship between justice and reconciliation in transitions to democracy.

'Reconciliation' as a social and political project stands at the forefront of several chapters. Emilios Christodoulidis's and Scott Veitch's discussion of 'Reconciliation as surrender: configurations of responsibility and memory' (Chapter 1) draws attention to its risks, especially when such a project is given an institutional home in a body like the TRC. For them, the TRC process has facilitated the disavowal of responsibility especially for the large scale economic injustices which still persist, and the organising of memory along the axis of reconciliation has much to do with this. In treating the ideal of reconciliation as a given – rather than risking the disruption of asking the reflexive question: 'Why reconcile?', as a fully political engagement with the notion of reconciliation would have done – the TRC process turned it into an ideology of surrender to the forces of economic exploitation. The relationship between reconciliation and politics is also picked up by Pumla Gobodo-Madikizela's argument in 'Radical forgiveness: transforming traumatic memory beyond Hannah Arendt' (Chapter 2), but developed in a very different direction. Taking issue with the claim that there are atrocities which are morally beyond forgiveness, she argues that forgiveness is appropriate in a society previously divided by hatred and marked by social divisions between victims and beneficiaries. Processes such as the TRC help reanimate empathic sensibilities damaged by violence and thus foster the mutual recognition of each other's humanity that is a precondition for relating through politics rather than violence. In light of this debate it is striking that a close empirical analysis of the 'hailing out' of forgiveness in TRC hearings by Stéphane Leman-Langlois and Clifford Shearing (Chapter 8: 'Transition, forgiveness and citizenship: the TRC and the

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social construction of forgiveness') finds that it produced variable results: the production of citizens suited to the new socio-political discourse coexists with the empowerment of victims; conformity to a given narrative is encouraged, but differences can also be hardened. Although forgiveness was deployed as a tool of transitional governance, its actual operation was highly complex, and it may not be possible to reduce its role to either a 'negative' or a 'positive' one.

The intricate reality of institutions is also clearly evident in James Gibson's study of 'The evolving legitimacy of the South African Constitutional Court' (Chapter 9). This reports that although the Constitutional Court enjoys gradually increasing legitimacy among South Africans generally, it has not been able to differentiate itself in the public's eyes from Parliament, the institution of representative democracy. This is in itself highly significant for an understanding of the role of institutions in transitions, for the Constitutional Court was very much designed to be a creature of transition that would moderate (but also stimulate where necessary) transforming political initiatives. But perhaps most important for an understanding of South African reality and claims about the impact of the TRC is Gibson's finding that white South Africans are not only alienated from political institutions generally but also differ markedly in their views about them from other social groups. This certainly raises questions about the extent of reconciliation achieved.

Theunis Roux's analysis of 'Land restitution and reconciliation in South Africa' (Chapter 6) may provide part of the explanation in highlighting the institutional separation of the treatment of 'gross human rights violations', inflicted by and in the struggle against the apartheid state, and the restoration of land dispossessed by apartheid measures. Whereas the former was made the concern of the TRC, the latter was assigned to a separate specialised commission and court, which, as Roux shows, are subject to an institutional dynamic flowing from an underlying commitment to restitutionary justice that leaves little space for reconciliation. Different institutions seem to mediate justice and reconciliation in different ways and in a setting where land is of enormous symbolic importance for both sides this institutional separation seems to have undermined both processes to an extent. But here, again, the complex reality does not go only one way. For as François du Bois's discussion of 'Reparation and the forms of justice' (Chapter 5) stresses, there is also a noteworthy similarity in practice that lurks behind this institutional division: neither process offered full

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correction of historical injustices. Instead, they left much harm to be dealt with through the social policies of the post-apartheid state; a commendable strategy in principle, Du Bois argues, for it reflects the character of apartheid harms as being breaches of distributive justice, although its implementation leaves much to be desired.

This resonates with the concern shown by Christodoulidis and Veitch with the persistence of economic injustice, but locates the failures elsewhere than in the TRC. Jaco Barnard-Naudé (Chapter 7: 'For justice and reconciliation to come: big business, the TRC and the demand for material reparation in South Africa'), on the other hand, finds that the role of big business in particular was not adequately brought out in the TRC process. Noting the apartheid reparations claims being pursued in American courts, he calls for a creative legal activism and identifies several avenues by which this might be pursued. Active citizenship is, indirectly, also a theme of Antje du Bois-Pedain's discussion of 'Communicating criminal and political responsibility in the TRC process' (Chapter 3). Focusing in particular on the charge that the lack of criminal responsibility undermines South Africa's claim to pursuing reconciliation with justice, she emphasises the distinctive character of politically motivated crimes and of political responsibility, and argues that the very injustice of amnesty enabled the TRC process to ascribe responsibility for politically motivated crimes in a fair and effective manner. This approach signals that the responsibility to put things right remains with those implicated therein, directly or indirectly, and cannot be hived off to a handful of individuals labelled as 'perpetrators', or to institutions like the TRC or courts. That argument must be read alongside the explanation by Volker Nerlich of 'The contribution of criminal justice' (Chapter 4). This explores what prosecutions *can* do, especially how they may support a strategy of responsibility-ascription through conditional amnesty as described by Du Bois-Pedain. In a systematic analysis of the interaction of prosecutions with the amnesty process, before, during and after the life of the TRC, Nerlich shows the interwoven and mutually supportive operation of justice and reconciliation in practice.

But what does it actually mean for citizens to search for justice and reconciliation? What is it they are to search for? Each of the chapters mentioned so far works with an implicit answer to this, but it is Carrol Clarkson's engagement with 'Justice and the art of reconciliation' (Chapter 10) that really foregrounds this question. Her evocative

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analysis of post-apartheid art draws our attention to the re-drawing of lines, specifically ‘lines that reconfigure the margins of exposure of one to the other’. Clarkson’s discussion illuminates several strands of other chapters in thought-provoking ways. There is, of course, a clear connection between the words just quoted and the concerns of Gobodo-Madikizela, but she also offers a description of the architecture of the Constitutional Court that adds to Gibson’s discussion of its functions, and puts forward an analysis of Nelson Mandela’s famous speech from the dock that suggests much about the relationship between the criminal justice process and its political context.

The relationship between justice and reconciliation features again in the final chapter by François du Bois and Antje du Bois-Pedain on ‘Post-conflict justice and the reconciliatory paradigm: the South African experience’ (Chapter 11). Building on the insights developed by the contributors to this book, they address directly the feature of South Africa’s transition that has brought so much attention to it: the attempt to combine justice and reconciliation. This chapter stresses the importance of a reconciliatory conception of politics in a society divided not only by a legacy of direct and horrifying violations of many people’s physical and moral integrity, but also split starkly into ‘haves’ and ‘have nots’ of life chances, material resources, and educational and professional opportunities. Despite the ever-present risk that talk of reconciliation may mask a joining-of-forces of the old and new political and economic elites to defend their privilege and wealth at the expense of those still in truth viewed and treated as ‘surplus people’, they argue that such dangers may be deflected precisely through an engagement with the ideal of reconciliation. Reconciliation comes into view only once political community is successfully imagined (though, of course, not yet successfully realised); the goal of reconciliation with others presupposes that *these others matter*, and this is why it matters to be reconciled with them. Reconciliation, as a political paradigm, can powerfully ground the pursuit of social justice, based on a realisation that others are owed life chances too, and owed by those who already have them, simply because – and precisely because – they belong to the same community. Reconciliation is fundamentally about citizenship, belonging, and while it is true that in presupposing the political community that it is meant to bring into being, it certainly removes the question whether ‘we really all belong together’ from view, this is perhaps not the worst elision on which to found a polity.



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The artwork on the cover of this book symbolises the quest for belonging and acceptance, for citizenship and reconciliation in the new South Africa.<sup>2</sup> Modern San artists like Andry Kashivi are not part of any cultural avant-garde, reflectively engaged in provoking their audiences into a personal reorientation in a changed political and social landscape. Their communities, the !Xun and Khwe, hover on the margins of who is accepted as a true South African, and on the brink of poverty. The history of these artists' communities epitomises contested questions of membership in the newly inaugurated nation. The !Xun and Khwe are 'new' South Africans in a very literal sense. Originally from Angola, they worked as trackers, cooks, servants, for the South African military in Angola and Namibia. When the South African Defence Force left these regions, they were no longer safe. Obvious targets for retaliation after the 'real culprits' had retreated behind the safety of their borders, where could they turn? To its great credit, the South African government did not abdicate its moral responsibility towards those who had in subordinate functions weaved their livelihood around serving the old apartheid state. But resettlement in South Africa still meant poverty, and there remains a sense of the precariousness of their foothold in a place so recently won: do they, or don't they, now belong here?

But the connection of the San with South African territory and South African history does not end there. 'Bushmen' were early targets of racist attitudes and racist discrimination. Visceral revulsion at their way of life translated into the cold, self-righteous contempt with which many Europeans reacted to the indigenous populations they encountered. Few of this community survived the colonial conquest. But – and this is the third connecting strand – out of this history of discrimination, and of diminishing space in which to take forward the culture of their forebears, new ways of life have grown. Adaptation has not only produced losses. It has also unleashed remarkable creative energies. Their art merges past with present, tradition with new experience and opportunity. It already is that elusive thing that many other South African artists strive towards – an art of transformation.

<sup>2</sup> On this artwork and its history, see generally Hella Rabbethge-Schiller, *Memory and Magic: Contemporary Art of the !Xun & Khwe* (Johannesburg: Jacana Media, 2006) and Marlene Sullivan Winberg, *My Eland's Heart: A Collection of Stories and Art. !Xun and Khwe San Art and Culture Project* (Claremont: David Philip, 2001).



# RECONCILIATION AS SURRENDER: CONFIGURATIONS OF RESPONSIBILITY AND MEMORY

EMILIOS CHRISTODOULIDIS AND SCOTT VEITCH

## INTRODUCTION

‘Why reconcile?’ In this chapter we attempt to reclaim this foundational, if too often ignored, question and re-situate it at the heart of the theorisation of reconciliation. To ask this question anew, and insistently, is to understand reconciliation as only properly the *contingent* response, rather than the unconditional outcome, of a society’s endeavour to do justice to a past of severe injustice. In a time characterised by what one Nigerian scholar calls the ‘fever of atonement’,<sup>1</sup> where the discourse of reconciliation is deployed as regulative ideal, as corrective and even as substitute of politics, we want to draw attention to the social, historical and institutional contexts within which the call for reconciliation is articulated, and through which that call might be heard, in order to make sense of what is engaged with and of what is elided.<sup>2</sup>

This chapter thematises these engagements around two interpretative axes, responsibility and memory. In essence, our claim is that

<sup>1</sup> Wole Soyinka, *The Burden of Memory, the Muse of Forgiveness* (New York: Oxford University Press, 1999) at 90.

<sup>2</sup> Andrew Schaap writes: ‘[R]econciliation becomes ideological when its meaning is overdetermined. For it then tends to function as a meta-political ideal that disciplines conflict: it interpellates subjects in a way that renders their disagreement resolvable in terms commensurate with the new regime. . . . [As politics, in contrast, reconciliation would involve] an overlapping dissensus . . . the bringing into view of the fundamental wrong that would unite the parties to reconciliation as members of the same political unity in the first place, which would be disclosed through an agonistic politics’ (Andrew Schaap, ‘Reconciliation as Ideology and Politics: An Exercise in Conceptual Retrieval’ (2008) *Constellations: An International Journal of Democratic and Critical Theory* (forthcoming)).

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in the context of the processes of ‘truth and reconciliation’ in South Africa, responsibility is under-determined while memory over-determines. At the intersection of what is thus over-determined and what is under-determined, a *reflexivity* that is specific to reconciliation is lost sight of. It is this reflexivity that the pivotal question ‘Why reconcile?’ aims to bring back into view.

As regards responsibility, we consider the conditions under which it may be attributed or established, denied or disavowed, by whom and for what. In doing this, we pay particular attention to the ways in which social structures and modes of organisation, including those associated with legal institutions, are involved in instantiating or dismissing responsibilities, and what role these modes and structures play in creating the – more or less favourable – conditions for reconciliation. As regards the question of memory, we argue that reconciliation invokes a specific mode of recall and recollection of the past. Reconciliation summons the past as commensurate to the overcoming of divisions that have ravaged it; however deep those divisions, they are called forth as accommodated within a communal ‘fund’ of sorts, a common horizon. Our concern is with what ‘pasts’ are disavowed in the process, with what is silenced, or as one might put it in terms of Jean-François Lyotard’s notion of the ‘immemorial’, with what is remembered as forgotten.<sup>3</sup>

While these issues raise broader questions about the nature of social, political and legal relations across time, we develop our analysis in the context of the particular and significant struggles over reconciliation in South Africa since 1994. These times have been marked by widespread poverty, ill health and severely limited life chances for millions of black South Africans – a state of affairs easily recognisable as the continuation of their colonial and racialised immiseration. The question that reconciliation presses us to ask, the question that ‘Why reconcile?’ reintroduces at each step, is whether certain conflicts and consequences are, or can be, recognised and addressed within a reconciliatory politics. This question must be insisted on so that surrender of the experience of continuing harms and conflicts does not become the condition of any possible ‘common’ future.

<sup>3</sup> Jean-François Lyotard, *Heidegger and ‘the Jews’*, trans. Andreas Michel and Mark S. Roberts (Minneapolis: University of Minnesota Press, 1990).