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**South Africa 20 Years Later: for a political concept of reconciliation
(África do Sul 20 anos depois: por um conceito político de reconciliação)**

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There is no simple formula to consolidate peace and guarantee that justice will prevail. To combine both is a political task. In this paper I will try to show that amnesty and accountability are not mutually exclusive. In some cases, South Africa being the most notorious one, amnesty means the lack of punishment, but it does not necessarily prevent perpetrators to be held responsible for their crimes. As I will try to argue, the reconciliation that follows any political transition should be able to guarantee that citizens are treated as peers of the same political community. In this sense, it is their duty to address past violations as well as define, in cooperation with one another, the grounds of accountability.

Are there limits to amnesty? I think the answer is yes. The normative theory outlined here states that a legitimate amnesty should not prevent citizens from defining the grounds on which misdeeds are rationally attributed to offenders. According to this formulation, citizens are responsible for defining those acts they consider to be illegal. Furthermore, they are also responsible for establishing the limits in which counterreasons and countermotives can be used as a justification to the violation of the norm. Citizens can enlarge those limits in order to accept a broader set of counterreasons and countermotives – such as “I violated the norm because I was following orders” or “I was compelled to act this way” – in order to punish only “big fish,” if they decide so. On the other hand, they can set very tight limits and ask for a very strict form of justification from those who did not observe the norm. For this reason, blanket amnesties, namely, those total amnesties granted to groups of perpetrators (state agents, the military, and the like) are discarded from the very outset. They violate the idea that citizens are peers by picking out one (or sometimes more) specific group and relief its members of that justificatory burden.

The paper begins with (1) a brief explanation of the South African case. This is not intended to be an exhaustive description. I will simply lay out the most relevant facts and the accountability mechanisms of South Africa’s Truth and Reconciliation Commission (TRC). In the next section, I will make (2) a further discussion of the TRC’s legitimacy. Departing from Hegel’s concept of punishment and how it is necessary to achieve “reconciliation,” I want to suggest an interpretation of what I believe is more consistent with Hegel’s intersubjective account. After that, I will (3) develop this idea as it appears in recent discussion regarding punishment, amnesty and transitions. Finally, (4) back to

the South African case, I want to raise some considerations to clarify whether the institutional mechanisms of accountability and reconciliation were open enough to a full range of different (and conflicting) narratives. This is an important step to understand where the TRC's legitimacy stemmed from and whether it was able to achieve "stability for the right reasons."

South Africa's Truth and Reconciliation Commission

The year 1948 will be remembered by an unfortunate paradox in world history. On the one hand, the United Nations General Assembly adopted the Universal Declaration of Human Rights, an attempt to guarantee human dignity and equality by means of the establishment of universal principles and rights. On the other, the National Party came into power in South Africa and started to implement apartheid's legislation. The Nationalists transformed a *de facto* oppression, whose origins date back the British rule, into a *de jure* segregation, responsible for some of the most egregious violations of the very rights that Declaration aimed to protect.

The apartheid regime was accountable for racial segregation, executions, tortures, and other forms of repression. Under the Population Registration Act (1950) inhabitants of South Africa were classified as blacks, whites, coloured (mixed) and Indians. The Group Areas Act (1950) restricted residence by racial group. Millions of blacks who were considered "superfluous" in urban areas had to be forcibly resettled. The government created what they called Bantustans (tribal "homelands") where blacks were supposed to live. Millions of people were prosecuted as criminals for infringement of pass laws, which restricted freedom of movement, place of residence and choice of occupation. Every black over age 18 had to carry a document providing he or she was eligible to live and work in a particular area. Moreover, racial groups did not have access to the same opportunities.¹ Under the Immorality Act (1957), sex between a white person and a person of another race was prohibited. On top of that, the Nationalists smashed all militant political organizations under the Suppression of Communism (1950) and Terrorism (1967) Acts. No oppositionist party was allowed and resistance leaders were sentenced to life imprisonment, such as Nelson Mandela, who served 27 years in

¹ In 1969, for instance, university enrollment was 68,500 whites in a population of 3.5 million and under 4,000 blacks out of 13 million (Times 1970).

prison.

Every transition is unique for the balance it tries to reach between attempts of stabilization and claims for justice. Nevertheless, South Africa's distinctive experience is marked not only by the inventiveness of the solutions it was able to create in order to reach that balance, but also by the accentuated democratic character of the political decisions made during that process. The negotiations among several political groups led, for instance, to a two-stage process of constitution making.² The so-called Multi-party Negotiating Process passed an interim constitution (Act 200 of 1993) in November 1993, which allowed a Government of National Unity and the power sharing among the strongest parties for a period of five years. It was only on 8 March 1996 that a final constitution was enacted.

The interim constitution addressed the issue of "National Unity and Reconciliation" in its epilogue. The document aimed to establish a "secure foundation for the people of South Africa" in order to "transcend the divisions and strife of the past." During the negotiation process to approve the interim constitution, the former government led by Frederik de Klerk and the National Party, as well as the security forces, called for a blanket amnesty. Notwithstanding, many prominent jurists and human rights organizations were against any sort of amnesty. To avoid stalling the transitional process, a so-called "sunset clause"³ postponed that decision and guaranteed job security for civil servants, police and army included, for the next years (De Lange 2000, 22). Accordingly, the interim constitution established that "to advance such reconciliation and reconstruction," amnesty should be granted in agreement with the terms to be defined by a parliament-enacted law regarding the "acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past." Following the resolutions of the interim constitution, the South African parliament passed in 1995

² For an overview of this process, see Andrews and Ellmann (2001).

³ In constitutional negotiations, some outcomes may be of crucial importance to one part, but unacceptable to the other. In order to solve such dilemmas, a sunset proviso is a condition that will lapse after a certain time. A sunrise clause is, conversely, a stipulation that will become effective within a determined period. Besides the amnesty clause, South Africa's interim constitution provided, for instance, that any party holding at least 20 seats in the National Assembly could claim a seat in the Cabinet (Act 200 of 1993, §88).

the Promotion of National Unity and Reconciliation Act,⁴ which shaped the legal framework for the implementation of the Truth and Reconciliation Commission.

The objective of the TRC was to address the legacy of the past and provide a picture, as complete as possible, “of the nature, causes and extent of gross violations of human rights” (TRC Act, preamble) committed from 1 March 1960 to 10 May 1994.⁵ The TRC was constituted by 17 members, appointed by President Nelson Mandela, who opened up the nomination process by promoting public hearings and allowing civil society to appoint candidates. None of the commissioners were active politicians, there were representatives from all racial groups, and despite some members were lawyers, the majority was drawn from church or community service backgrounds (Dugard 1998, 293). It was presided over by the former Archbishop of Cape Town, Desmond Tutu. Compared to other truth commissions, South Africa’s most prominent characteristic was the power to grant amnesties to individual perpetrators. As pointed out by Priscilla Hayner (2000), it integrated both a quasi-judicial power with the investigative tasks of an administrative truth-seeking body, a far greater improvement over the unconditional blanket amnesties, so common in other countries, especially in Latin America. The powers of the TRC included the power of search and seizure,⁶ and the power to subpoena.⁷ The hearings were public unless this condition was in opposition to the interest of justice or there was a likelihood that harm would result as the proceedings were open.⁸ Hayner also highlights that the investigative powers were also strengthened by “a fairly sophisticated witness protection programme”⁹ and “its budget was several times larger than any other truth commission before it” (2000, 36–7). Moreover, the TRC was one of the few commissions worldwide to publish in their final report the names of those perpetrators

⁴ Act 34 of 1995 (hereinafter TRC Act). This Act was amended several times. Here I am using the version updated until the Promotion of National Unity and Reconciliation Amendment Act 23 of 2003, which can be found online at: <http://www.justice.gov.za/legislation/acts/1995-034.pdf> (last access on 9/29/2015).

⁵ The starting date coincides with the time of Sharpeville massacre. Initially, the interim constitution established that the cut-off date was 6 December 1996. Later, the Constitution First Amendment Act of 1997 changed the cut-off date to 10 May 1994 to cover the events related to the Bophuthatswana coup d’état.

⁶ TRC Act §32.

⁷ *Id.*, §29.

⁸ *Id.*, §33.

⁹ *Id.*, §35.

responsible for gross violations.

The TRC was assisted by the following committees: the Amnesty Committee, the Human Rights Violations Committee (HRVC), and the Reparation and Rehabilitation Committee. Combined they provided an institutional arrangement capable of giving an account of the facts and holding individuals responsible. It relied on the “amnesty-carrot” incentive for perpetrators to fully acknowledge their crimes. In addition, the “investigation-stick” for those violators who remained silent and could face investigations once named by victims. Finally, the “judicial sledgehammer,” or the justice-driven possibility of ongoing prosecutions until amnesty is bestowed (De Lange 2000, 26).

The Amnesty Committee was almost a judicial body. It was originally composed of five members, but due to the workload it increased to nineteen. In fact, it would be more accurate to say Amnesties Committees, since they worked as several committees of three members each, all of them chaired by an active or retired judge.¹⁰ The “amnesty-carrot” mechanism worked as an incentive for perpetrators to make a full disclosure of all politically motivated violations. The Amnesty Committee was in charge of receiving amnesty applications and later to submit them to a preliminary screening process, which could exclude those referring to circumstances lacking any political connotation or afford applicants the opportunity to explain gaps or make a further submission.¹¹

After the foregoing examination, the Committee could grant amnesty for those actions which did not constitute a gross human right violation¹² without holding a hearing. By contrast, gross human rights perpetrators could only be provided amnesties after public hearings of which their victims were notified.¹³ The violator should make a full disclosure of their deeds. Such acts had to be associated with a “political objective.”

¹⁰ Id., §17.

¹¹ Id., §19. For a comprehensive study of the Amnesty Committee, including the analysis of its decisions and reasons to grant or deny amnesty to applicants, see Bois-Pedain (2007).

¹² Gross violations of human rights are “the violation of human rights through (a) the killing, abduction, torture or severe ill-treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a)” resulting from conflicts occurred within the temporal jurisdiction of the TRC. Such violations should also be associated with a political motive (TRC Act §1).

¹³ TRC Act §19.

The criteria employed to classify an act as “political” were drawn from the principles used in extradition law, and they included: the motive of the offender, the context where the act took place, the gravity of the act, and whether the act was committed in the execution of an order.¹⁴ Consequently, crimes committed for personal gain or out of personal malice, ill-will or spite against the victim were not susceptible to be granted amnesty.

The Committee had discretion to evaluate whether the acts met the statutory requirements for amnesty. It is worth noting that despite the Committee could consider jointly individual applications in respect of any particular event,¹⁵ responsibility was hold on an individual basis.¹⁶ After being granted amnesty, no person was criminally or civilly liable in respect of such violation.¹⁷

The Human Rights Violations Committee aimed to inquiry into gross violations of human rights and refer the victims to the Committee on Reparation and Rehabilitation.¹⁸ The HRVC worked as a “stick mechanism,” that is, in those cases where a perpetrator took a “wait and see” attitude regarding the “amnesty carrot,” he or she could be targeted by a victim-driven investigation. Moreover, the HRVC “had to allow vicitims to tell their

¹⁴ Id., §20(3).

¹⁵ Id., §19(5)(b).

¹⁶ The definition of responsibility on individual, rather than collective, basis sparked controversy over the Commission. Some authors argue that when responsibility turns to be so fragmented, it fails to address injuries that cannot be “‘carved out’ of the past, individuated as such, attributed to a sequence, rationalised as such, initiated by an actor, initiated at all,” as a consequence, there is “‘damage without injury.’” This is the way violence of economic structures, for instance, “‘find no register,” and no perpetrator can be named (Christodoulidis and Veitch 2009, 26). Another critique adds that the Commission reduced apartheid from a relationship between the state and whole communities to one between the state and individuals. In this sense, Mahmood Mamdani (2007) points out some of gross violations that do not fit the perpetrator/victim scheme such as forced removals, pass laws, coerced labor, killing of entire communities, and argued for collective remedies. Although I agree that reconciliation should include also redistributive measures, it is necessary to keep in mind that collective attribution of guilt may run the risk of being irrational (I will come back to this point later). To be sure, governments that followed the transition were able to implement, although still in an insufficient way, policies to change those structures, including affirmative actions.

¹⁷ TRC Act §20(7). Despite amnesties prevented violators to be sent to prisons, to assume responsibility publicly, most times before the victims themselves, may be considered a sort of punishment. Robert John McBride, for example, was a member of *Umkhonto we Sizwe* (MK), the armed wing of the African National Congress, and received amnesty for the bomb attack of Magoo’s Bar in Durban in 1986, when several civilians were killed and injured. After apartheid, McBride sued a local newspaper for opposing his appointment for a senior police post under the argument he was a murderer. In *The Citizen 1978 (Pty) Ltd and Others v. McBride (CCT 23/10)*, the South African Constitutional Court ruled that, despite the amnesty, the newspaper’s articles were not defamatory for calling McBride a criminal.

¹⁸ TRC Act §§14-5.

stories in the language of their choice, the aim being to record not only the truth... but, more importantly, to restore the human and civil dignity of those victims” (De Lange 2000, 27).

While the HRVC dealt with victims, the Amnesty Committee handled perpetrators. As the former director of the Centre for the Study of Violence and Reconciliation points out, the TRC process was rooted in the almost bi-polar roles of, on the one hand, a “fact-finding” and quasi-judicial enterprise, and, on the other, a psychologically sensitive mechanism for story telling and healing (Simpson 1999, 19). The Amnesty Committee operated to a great extent within the boundaries of the due process. Furthermore, it sought the “formal” truth which usually stems from legal process, testimonies constrained by the legal rights of others, and objective criteria, excluding any information which cannot be proved (Simpson 1999, 20). The HRVC, conversely, was accredited for grasping information from victims’ and survivors’ stories and the recount of past abuses. In this sense, it sought the “substantive” truth related to sociological, psychological or historical investigation, always taking into account the context where those stories had arisen, even when they produced competing versions. Thus, the result was often “a process in which either the fact-finding mission of this Committee...[was] sacrificed in the name of being psychologically sensitive to the testifying victim, or alternatively, a process in which sharp cross examination by Commissioners...appeared to completely negate the ‘story telling’ objectives of the Committee” (Simpson 1999, 19).

The Committee on Reparation and Rehabilitation was invested with the power of making recommendations regarding reparations as well as measures to rehabilitate and restore the dignity of victims.¹⁹ These recommendations were then considered by the President, who then finally made recommendations to Parliament. As it could be expected, victims’ demands varied immensely. While some aspired for symbolic reparations, such as a tombstone to remember a loved one, others demanded financial support, and finally there were victims who rejected any kind of reparation (Simpson 1999, 22).

Despite the TRC’s efforts to redress past crimes, many families and victims of the agents of the apartheid regime protested that they must have brought to trial and be

¹⁹ Id., §25.

punished. At the Constitutional Court, the validity of the TRC Act was challenged by the Azanian Peoples Organization and the relatives of some of the apartheid's most known victims – Steve Biko, Griffith and Victoria Mxenge, Dr. Fabian Ribeiro and his wife, Florence. In the *AZAPO v. President of the Republic of South Africa*,²⁰ the applicants argued that section 20(7) of the TRC Act²¹ was inconsistent with section 22 of the interim Constitution, which provides individuals with the right of access to justice.²²

The Court held the TRC Act constitutional. Chief Justice Ismail Mahomed, who delivered the opinion of the Court, acknowledged that amnesty impacts fundamental rights, since it obliterates the “right to obtain redress” for crimes. However, the Court held the constitutionality of the TRC Act and the amnesties granted to perpetrators basically on two main assumptions. First, it stated that the epilogue of the interim Constitution gave Parliament authority to make a law providing for amnesty. In fact, the epilogue declares that the Constitution promotes a “historic bridge” between “the past of a deeply divided society” and “the future founded on the recognition of human rights and peaceful coexistence.” Thus, the decision acknowledged that without amnesty such bridge “might never have been erected.”²³ The epilogue also determines that the “pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society,” and adds:

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation.

In order to advance such 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. (Act 200 of 1993, epilogue)

²⁰ *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996), hereinafter *AZAPO* Decision. Available at: <http://www.saflii.org/za/cases/ZACC/1996/16.html> (last visit on 9/29/2015).

²¹ As already mentioned (see fn. 17 above) the TRC Act §20(7) establishes that the offender who was granted amnesty would not be “criminally or civilly liable” for such offence. In addition, in case the wrongdoer was a state servant or member of any organization, the state and the organization were equally discharged if the amnesty were granted.

²² Section 22 of the interim Constitution reads: “Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.”

²³ *AZAPO* Decision §19.

According to the Court, the negotiators of the interim Constitution sought to facilitate the transition to a democratic order, and they had to make “hard choices” and gave preference to “the reconstruction of society.”²⁴

The other basis for the decision rested on the definition of amnesty. Whether the amnesty should cover only criminal prosecutions or civil liability depends on the circumstances.²⁵ At the present case, Justice Mahomed argued, the circumstances are that the interim Constitution provides amnesty as “a facilitator of reconciliation and reconstruction.” Evoking a consequentialist argument, he remembered that without the amnesty incentive covering also civil liability wrongdoers would not be encouraged to reveal the whole truth.²⁶ It is worth noting the decision made clear the solution provided both by the interim Constitution and the TRC Act rejected a “blanket amnesty,” which is “granted automatically as a uniform act of compulsory statutory amnesia.”²⁷ Since the Amnesty Committee granted amnesty only for those who were held responsible, South Africa’s experience shows how amnesty, combined with a specific form of accountability, can serve “the purposes of effecting a constructive transition towards a democratic order.”²⁸

Reconciliation

In this section, I want to discuss why South Africa’s TRC was endowed with legitimacy. The work of a truth commission, as its name suggests, could be understood as merely that of “fact finding.” However, as Priscilla Hayner argues, its real task is “acknowledging the truth rather than finding the truth” (1994, 607). In other words, its function is to point out which facts and actions (and consequently those responsible for them) ought to be acknowledged by the state. For those who suffered from gross

²⁴ Id., §44-5.

²⁵ Id., §35.

²⁶ Id., §36.

²⁷ Id., §32.

²⁸ Id., §32.

violations, a truth commission offers an opportunity “to remove the possibility of a continued denial” (Hayner 2010, 21).

Hayner, the author of the most comprehensive comparative study on truth commissions, inferred some common features from the cases she analyzed. A truth commission, she says,

(1) is focused on past, rather than ongoing, events; (2) investigates a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population, gathering information on their experiences; (4) is a temporary body, with the aim of concluding a final report; and (5) is officially authorized or empowered by the state. (2010, 11–2)

In addition, there are no prosecutions in a criminal sense, even when the identities of those who committed atrocities are revealed. Truth commissions are not empowered to punish individuals. To what extent is the work of a truth commission legitimate? Is it possible that a truth commission can attribute responsibility in a satisfactory way, despite any punishment?

There are two main arguments in favor of criminal trials over truth commissions, reminds Ronald Slye (2000). First, trials contribute to rehabilitate and socially integrate the accused by means of including them in a deliberative process. The accused are given the opportunity to explain or justify their actions, which grants even to those responsible for the most heinous crimes the dignity due any person. Second, trials are to produce better information because they are subject to the rigors of legal process and the rules of evidence. Thus, trials are, allegedly, more reliable.

According to Slye, one of the lessons of the South African transitional process is the demonstration that formal trials are not the only forums where those aims can be met, actually, they are maybe not even the best ones (2000, 173). In the public audiences promoted by the South African Truth and Reconciliation Commission, there was a considerable participation of the “accused,” who applied to amnesty. While in ordinary trials the accused are placed in a defensive position, since their goal is to escape liability, in the TRC they were driven by the amnesty-carrot to make full disclosure of their deeds. For this reason, most part of the information made public by the Commission came from the perpetrators themselves.

The assertion that facts and actions investigated by criminal trials match reality better than truth commissions should take into account the purposes of both. To avoid punishing an innocent person, it is crucial for criminal justice to have well structured and very rationalized procedures. For Slye, “the purpose of such a highly structured process is to minimize the danger of producing a false positive,” at the cost of an “increased possibility of a false negative” (2000, 174). In other words, criminal procedures may lead to the conclusion that something did not happen in the eyes of law when, in fact, it did. The purpose of the TRC hearings was not to minimize the possibility of punishing an innocent, since this alternative was excluded from the very outset. Conversely, their aim was to obtain from the applicant the full disclosure of crimes, otherwise the amnesty could be denied.

I think the question whether truth commissions engage offenders in a deliberative process and give them the opportunity to explain or justify their actions is a good starting point to discuss the normative grounds of South Africa’s experience. The first condition truth commissions have to meet is to treat offenders as responsible agents. In other words, they have, just as ordinary trials, to assume that perpetrators are free and responsible agents, so they can be called to account for their deeds.

In response to utilitarian views according to which punishment has to promote some good for the criminal or society, Kant was the first to argue that the offender “must previously have been found *punishable* before any thought that can be given to drawing from his punishment something of use for himself or his fellow citizens” (Kant 1996, 105). For Kant, therefore, no human being can be treated “merely as a means,” and there is an absolute duty to punish the guilty. Following Kant, Hegel also justified punishment in retributive terms as a measure due to the offender. In the following passage of the *Elements of the Philosophy of Right*, Hegel states this idea more clearly:

The injury which is inflicted on the criminal is not only just *in itself* (and since it is just, it is at the same time his will as it is *in itself*, an existence of his freedom, *his right*); it is also a *right for the criminal himself*, that is, a right *posited* in his *existent* will, in his action. For it is implicit in his action, as that of a *rational* being, that it is universal in character, and that, by performing it, he has set up a law which he has recognized for himself in his action, and under which he may therefore be subsumed as under *his right*. (*PhR*, §100)²⁹

²⁹ I am using the Cambridge edition (1991) of Hegel’s *Elements of the Philosophy of Right*, hereinafter *PhR*.

How can an injury be one's own right? This is so, for Hegel, because only by means of punishment "the criminal is *honored* as a rational being" (*PhR*, §100).

To be sure, it is not punishment per se, or any form of physical coercion, the main concern for Hegel. Only under strong metaphysical assumptions one could argue that punishment makes the criminal actually "free." Furthermore, the critique of modern state apparatuses of surveillance and incarceration (of course, Foucault comes to our mind here) offers enough empirical reasons to doubt that punishment can fulfill that reformatory function. I do not want to deny that Hegel occasionally relies on strong metaphysical hypothesis; but, at least regarding this point, he says that "the laws of the state cannot claim to extend to a person's disposition" (*PhR*, §94). Thus, I think to assume that Hegel aims the change of the criminal's internal disposition by means of harsh treatment, as some authors presuppose,³⁰ is highly controversial.³¹

Most orthodox interpretations that portrait Hegel as a retributivist rely on the passages of the *Elements of the Philosophy of Right* in the section "abstract right."³² In fact, Hegel himself states that "the cancellation of crime is *retribution* (*Wiedervergeltung*) in so far as the latter, by its concept, is an infringement of an infringement" (*PhR*, §101). However it is necessary to remember that in the "abstract right," Hegel says that a crime corresponds to his logical category of a *negatively infinite*

³⁰ Notably Antony Duff, who stresses that the sanction ought to cause some harm in order to accomplish its communicative function: "by imposing on him some material injury which can be seen as injurious even through the eyes of egoistical self-interest, we hope to represent, and to force on his attention, the harm he has done both to others and to himself; by imprisonment, which separates him physically from the rest of the community, we give material and symbolic expression to the spiritual separation created by his crime" (1991, 260).

³¹ Hegel states elsewhere that only peoples whose feeling of honor has not yet developed can equal punishment with corporal chastisements. They adopt corrective rather than retributive punishment, and citizens are treated like children, "for *corrective* punishment aims at improvement, that which is *retributive* implies veritable imputation of guilt. In the *corrective*, the deterring principle is only the fear of punishment, not any consciousness of wrong; for here we cannot presume upon any reflection upon the nature of the action itself" (2010, 128). Aside the prejudice against some peoples (the quote refers to punishment among the Chinese), Hegel points out the relation between the "imputation of guilt" by means of punishment and the "consciousness of wrong" that stems from that.

³² Probably the most notorious example of such interpretation is that of Cooper (1971). Brooks (2012) offers a good overview of those theorists who interpret Hegel as a retributivist, but adds that despite Hegel does not reject the retributivist core presented in the section "abstract right," he determines the value of punishment in explicitly social terms, instead of individual desert, in "ethical life." For a critique of interpretations of Hegel in Germany that reduce his theory to the formula "the negation of the negation," see Wolfgang Schild's paper (2007).

judgment since it negates not only the particular (a property that was violated, for instance), but also the universal, that is, one's capacity for rights (*PhR*, §95). To be sure, *crime* contrasts with other forms of "wrong," namely, *unintentional wrong*, when the universal is respected, but the particular negated (*PhR*, §§86) and *deception*, when the particular will is respected, because the deceived person has the false impression of receiving his or her right, but universal right is not (*PhR*, §§ 87). When Hegel talks about retribution, he has in mind the logical relation between two determinations which are different in appearance, but have an inner connection and identity: "the punishment is merely a manifestation of the crime, i.e., it is one half which is necessarily presupposed by the other" (*PhR*, §101). Thus a breach of law committed by the criminal is self-contradictory and contains its own nullification since through the crime the perpetrator denies him or herself the right, as if by stealing someone I am denying myself the right not to be robbed.

Moreover, Hegel embraces retributivism because punishment has an intrinsic value for him. This is the reason he discards punishment as a means of prevention, deterrence, correction, and the like. Hegel affirms that one who bases punishment on threat presupposes that "human beings are not free, and seeks to coerce them through the representation of an evil" (*PhR*, §99). To justify punishment this way, adverts Hegel, is identical to raising a stick to a dog. The offender is treated with respect when the crime is repudiated for the right reasons, namely, when he or she receives punishment as a result of his or her own choice, not as an external harm. In this sense, Hegel, and Kant before him, upholds the view that criminals should be treated as responsible agents.

Hegel's self-declared retributivism has led interpreters to dismiss "the necessity of distinguishing between the *concept* (the essence) of punishment and the specific *modalities* of conviction and sentencing" (Schild 2007, 173). As a concept, punishment is understood as a retribution for a crime that accounts criminals as responsible agents. However, this concept says too little regarding particular punishment in a concrete situation. Here we have to move from "abstract right" in Hegel's formulation towards "ethical life." In this section, Hegel argues that "property and personality have legal recognition and validity in civil society," therefore, their violation is a danger to society. In this sense, "an injury to *one* member of society is an injury to *all* the others" (*PhR*, §218 Remark). Then society or, as he calls it, "the injured universal" actualizes itself in

the court of law taking over the prosecution and punishment to transform them into “the genuine reconciliation of right with itself” (*PhR*, §220). This notion of reconciliation (*Versöhnung*) has both an objective and a subjective aspect:

Objectively, this reconciliation applies to the *law*, which restores and thereby *actualizes itself as valid* through the cancellation (*Aufheben*) of the crime; and subjectively, it applies to the criminal in that *his law, which is known by him* and is *valid* for him and *for his protection*, is enforced upon him in such a way that he himself finds in it the satisfaction of justice and merely the enactment of what is proper to him. (*PhR*, §220)

In this passage, it is clear that for Hegel punishment is important insofar as it can achieve reconciliation. By means of punishment, the political community annuls the crime and reaffirms the validity of its laws, while the individual is recognized as a free agent.

As employed by Hegel, the word ‘reconciliation’ refers both to a *process* and a *state* that results from it.³³ The process could be generally described as “overcoming conflict, division, enmity, alienation, or estrangement,” and the result as “the restoration of harmony, unity, peace, friendship, or love.” Thus, the basic pattern is that of “unity, division, and reunification.” The outcome is a new relationship that could be described as ‘higher’ or more stable than the unity that preceded it (Hardimon 1994, 85).³⁴

Nevertheless, as the term ‘reconciliation’ could suggest, Hegel does not equate this self-consciousness of our social world with resignation.³⁵ To become *versöhnt* means to

³³ In this interpretation, I follow Michael Hardimon (1994).

³⁴ In his early theological writings, Hegel affirms that crime makes the criminal depart from a “unified life,” and punishment is experienced as fate: “When the trespasser feels the disruption of his own life (suffers punishment) or knows himself (in his bad conscience) as disrupted, then the working of his fate commences, and this feeling of a life disrupted must become a longing for what has been lost. The deficiency is recognized as a part of himself, as what was to have been in him and is not. This lack is not a not-being but is life known and felt as not-being” (1971, 230–1). Reconciliation here means to reestablish the unity that was sundered. For Habermas, Hegel could have relied on the unifying power of the intersubjectivity of relationships based on mutual understanding, but, instead, “he had developed the idea of an ethical totality along the guidelines of a popular religion in which communicative reason assumed the idealized form of historical communities, such as the primitive Christian community and the Greek polis” (Habermas 1990, 30).

³⁵ As Hardimon points out, *Versöhnung* is much less frequently used in German than ‘reconciliation’ in English, and, besides that, it sounds “churchy.” Whereas Germans are more used to employ *sich vertragen* to speak of reconciliation in a neutral way. “The root of *Versöhnung* is *Sühne*, which means ‘expiation’ and ‘atonement’” (Hardimon 1994, 86). Still according to Hardimon, the English word ‘reconciliation’ has a connotation of *submission* or *resignation*, especially when used with the preposition ‘to,’ as in: “One becomes reconciled to the loss of a child.” For Hardimon, “[o]ne can become *reconciled* to a circumstance that is completely contrary to one’s wishes, but one cannot (grammatically) become *versöhnt* to it. German does have a word for this sense of ‘reconciliation’ – reconciliation as resignation – but it is *abfinden*” (1994, 86–7).

accept one's situation as good in its own right, not as something bad but unavoidable: "to be *versöhnt* to something is to *embrace* it" (Hardimon 1994, 87). To be sure, Hegel does not conceive the modern social world as a perfect harmony. Our obligations as family members may conflict with our interests as members of civil society, and so on. A reconciled world, however, will be able to promote the actualization (in the sense of *wirklich*) of individuality and social membership. Thus, when Hegel says that by means of punishment reconciliation applies to the criminal he means that it treats him or her as a free and responsible agent, independently that he or she may have acted otherwise. From the objective perspective, punishment promotes the reconciliation of "right with itself," since it is not merely private revenge, but the application of the law of a community the criminal belongs to. In this sense, the criminal can reunite to the community from which he or she departed when the crime was committed.

In Hegel's formulation, punishment acquires an intersubjective dimension it never had before. Furthermore, it is only within a concrete civil society that, for instance, the quality and magnitude of punishment can be determined.³⁶ But, contrary to conventional views that see Hegel as an orthodox retributivist, I believe that a more coherent understanding places the attribution of guilt – not punishment per se – at the normative core of his formulation. In this sense, accountability is, on the one hand, a non-negotiable element of justice, which is necessary to guarantee both the criminal's standing as a free and responsible agent and the actualization of the laws of the political community. On the other hand, punishment, understood as harsh treatment that can be used to accomplish a specific aim (deterrence, for instance), is a contingent outcome of practices of accountability, and is up to the citizens to decide whether and how it should be applied.

³⁶ Crime and punishment have an inner and logical connection. Hegel remarks they are comparable in terms of *value*, but are not equal in the specific character of the injuries they cause to victim and offender. Contrary to value, *specific equality* means the likeness in external aspects of two things. "The qualitative and quantitative character of crime and its cancellation," reminds Hegel, "thus falls into the sphere of externality, in which no absolute determination is in any case possible" (*PhR*, §101). On the one hand, theft and robbery are totally different from fines and imprisonment. On the other, i.e., regarding their universal character as injuries, they are comparable. This demonstrates that, despite attributing an inherent value to punishment as the cancellation of a crime, Hegel rejects *lex talionis* or a Draconian criminal system. For him, "[w]ith punishment, we must make qualitative and quantitative distinctions among crimes that are reflected in our penal practices" (Brooks 2012, 48).

Since Hegel also reverberates the legal system of his time, he has a difficulty to state the dissociation of accountability (by means of which one recognizes the agent as free and responsible) from punishment (i.e., harsh treatment) more clearly. This can be noted regarding his idea of “clemency” (*Gnade*). According to him, clemency involves the “grounds for relaxing the punishment” (*PhR* §132, Remark). Psychological conditions, momentary loss of control, passion, moral considerations, mistakes, and so forth may be used to excuse the crime somehow. “In modern terminology, we would describe these as attenuating circumstances that might provide grounds for exculpation or the reduction of punishment and that would affect the process of conviction and sentencing” (Schild 2007, 172). Notwithstanding, according to Hegel, such attenuating circumstances do not belong to the sphere of right (*PhR* §132, Remark). To take those circumstances into account means to deny the criminal inherent nature as an intelligent being (*PhR* §132, Remark).³⁷ This is so because for him any attempt to mitigate punishment compromises accountability.

The only exception is the “right to pardon” (*Begnadigungsrecht*), which can be exercised by the sovereign. In fact, at this point he does not differ from absolutist theory³⁸ in stating that the sovereign has the prerogative to pardon criminals.³⁹ According to Hegel’s formulation, however, a pardon can suspend punishment, but it does not have

³⁷ As Hegel points out in his first lectures on the philosophy of right: “we must always assume, we must pay humans the honor of assuming, that they were aware of the universal aspect of their crime. The punishment may be mitigated on the ground that the criminal was not aware of the true value of the action. But the whole gamut of mitigating circumstances should not lie within the competence of the courts; the main responsibility in this regard must belong to a higher power, the ruler” (1996, §56)

³⁸ For Jean Bodin, one of the marks of sovereignty is “the power of granting pardons [*grace*] to the condemned, ignoring verdicts and going against the rigor of the laws to save them from death, loss of goods, dishonor, or exile” (1992, 236).

³⁹ Surprisingly, Kant too is indebted to the absolutist tradition and conceives the right to pardon as an important mechanism to be used in exceptional moments, that is, to be used when the state is under risk: “If the state still does not want to dissolve, that is, to pass over into the state of nature, which is far worse because there is no external justice at all in it (and if it especially does not want to dull the people’s feeling by the spectacle of a slaughterhouse), then the sovereign must also have it in his power, in this case of necessity (*casus necessitatis*), to assume the role of judge (to represent him) and pronounce a judgment that decrees for the criminals a sentence other than capital punishment, such as deportation, which still preserves the population. This cannot be done in accordance with public law but it can be done by an executive decree that is, by an act of the right of majesty which, as clemency, can always be exercised only in individual cases” (1996, 6:334).

the power to cancel right itself. In his lectures, he pointed that the offender remains a criminal, despite not being punished:

Pardon is the remission (*Erlassung*) of punishment, but it is not a cancellation of right (*das Recht nicht aufhebt*). On the contrary, right continues to apply, and the pardoned individual still remains a criminal; the pardon does not state that he has not committed a crime. (*PhR* §282, Addition)

To be sure, Hegel provides a metaphysical justification to the sovereign's right to pardon when he compares this power to "a determination from a higher sphere" (i.e., religion). Moreover, he adds the sovereign's decision is totally arbitrary, namely, "ungrounded" (*PhR* §282, Addition).

One could ask then how is it possible to assert that a criminal still remains a criminal and right stands irrespective of punishment? Without punishment, according to Hegel's view, a criminal is not treated as a free and responsible agent and cannot reconcile with the community he or she belongs to. So how is it possible that pardon neither amounts to "raising a stick to a dog" nor impairs reconciliation? I think the only way to answer this question is by differentiating accountability from punishment (understood as harsh treatment). Hegel was right when he stated that criminals ought to be "honored as rational," and, therefore, deserve to be treated as free and responsible agents. He was also right when he pointed that law has to actualize itself as valid when a crime is committed. However, today we know both can be accomplished by forms of accountability (ranging from criminal procedures to truth commissions) and not by the suffering punishment provides.

Democratic grounds for accountability

If one conveys Hegel's idea to a democratic constitutional State,⁴⁰ it is correct to say that by means of processes of public justification, citizens are themselves responsible for what they consider to be the relevant individual or contextual attributions to count in criminal liability. Thus, for instance, when a judge convicts an individual of first-degree

⁴⁰ Although I am aware that in some aspects Hegel's philosophy may be conflict with the framework I use to discuss accountability and human rights, I do not think they are totally incompatible. Rawls (2000) himself considers Hegel "an important exemplar in the history of moral and political philosophy of the *liberalism of freedom*."

murder, he or she has to consider first those elements – such as malice, mental capacity, legal age etc. – the law regards as relevant for his or her decision.

At this “meta-level,” accountability has not only legal but also strong political character. I would like to propose that amnesties, such as those granted by the Truth and Reconciliation Commission in South Africa, can be understood as decisions of the same kind. They are not purely political, in the sense of a sovereign decision located above the law, because those procedures of justification are morally and legally constrained. They are not purely legal either, since they cannot be reduced to operations of mere application of norms.

To say that one is “responsible” for something or someone may indicate very distinct phenomena. They range from public wrongs, such as crimes, to private ones, as torts, including social roles an individual is expected to play in relation to another person, as when we say: “he is a responsible father.” Nevertheless, these different phenomena have a similar formal structure. According to Klaus Günther (2000), this general frame can be understood as an attribution of actions, omissions or consequences to someone. Indeed, this is true especially when those actions are negatively evaluated by a norm. In this case, to hold someone accountable means to attribute (*zurechnen*) the violation of the norm to a person’s actions, omissions or their consequences (Günther 2000, 468–70).

Practices of responsibility are of extremely importance and without them a society would be so profoundly different from our own that “it would be difficult to recognise as a human society” (Duff et al. 2007, 288). Commonly associated with punishment, which is indeed an important instantiation of the more general practice of holding one another responsible for a wrongful conduct, such practices reflect how citizens interact with one another. During the Occupy Movement, for instance, a usual form of protest was to carry signs stating simply “We are the 99%.” More than showing dissatisfaction with the increasing gap separating the poor and the rich, these signs indicated that there was something wrong with the other 1%. In fact, protesters implicitly blamed them for the economic crisis.

As already indicated by Hegel, citizens should be able to reflexively define the grounds of accountability. In this sense, Günther says citizens hold responsibility for the

accountability (*Verantwortung für die Verantwortlichkeit*)⁴¹ they expect from one another. One way to understand how accountability works at this communal level is to relate some shared prepolitical goods with the protection of the law. According to Duff's communitarian approach, "the central goods of the community are shared goods, so attacks on those goods are wrongs in which we share with the victim as fellow citizens" (2003, 63). Thus, the main function of criminal law is to "declare" which conducts are *mala in se* ("wrongs in itself") and violate the common good. The problem, however, with this view is that it has to assume that there are some prelegal and prepolitical values citizens should respect. Conversely, I think shared goods are politically defined and, therefore, whatever conducts that violated them are *mala prohibita* ("wrongs because prohibited"). Before we turn to more specific questions regarding political transitions and accountability, we need to briefly analyze how mechanisms of public justification generate shared expectations and motives for action.

In linguistic utterances, whenever a speaker performs an illocutionary act, he or she raises a validity claim against the hearer. The speaker claims, for instance, that what was just said is true or correct. From the hearer's perspective, the validity claim can be accepted if there are reasons that both share. In case they share them, there are no convincing counterreasons that would justify taking a negative position toward the validity claim.⁴² As a consequence, intersubjectively accepted reasons justify a shared expectation of an action for those who have accepted the validity claim. This expectation, Günther says, refers to the motive for a singular action that counts as the fulfillment of the valid proposition (1998, 241).

It is the violation of the illocutionary obligation that holds a subject accountable to the community.⁴³ And this accountability is also extended to actions insofar as the

⁴¹ Günther borrows this expression from Bauman (1997, 46). I employ both terms interchangeably along the text, although here "responsibility" refers to citizens as the *authors* of what counts or not to draw the line of the "accountability" they are *subject* to whenever they infringe their own rules. Bauman's translator preferred to repeat the terms: "responsibility of its responsibility." Maybe an alternative would be to employ the neologism "responsibilization" for *Verantwortlichkeit*.

⁴² The allegedly perpetrator has to provide justifications insofar as he or she is a peer, i.e., a member of the political community. In no way the perpetrator should be treated as an "enemy." For an account of the "criminal law of the enemy" Günther opposes to, see Jakobs (2004).

⁴³ Admittedly, the basis of the accountability of persons' actions rests on the intersubjective relations already present in language. As Habermas points out: "We have presupposed that ego can take up these different relations to himself only by confronting himself as a communicatively acting subject, by adopting

subject acts against the propositional content of the shared conviction. As Günther explains:

If I acted according to my countermotives, then I would be asked for my reasons and I would have to answer these questions for the other members who legitimately share the expectation. Being responsible means that my actions will be judged from the point of view of the shared expectation by the other members of the community – as well as by myself, who accepted the valid proposition and the illocutionary obligation inherent in the acceptance. (1998, 243)

This means that whoever is held accountable has to provide justifications, such as a convincing counterreason to violate the shared expectation. Or, in addition, that he or she could not recognize that it was the shared expectation the one violated in a specific situation or that there were stronger countermotives that are acceptable (Günther 1998, 243). As I will try to show later, the justification of counterreasons and countermotives is of special interest for us in order to evaluate the legitimacy of democratic transitions.

Moreover, for Günther, accountability also plays an important social function. Accountability is imputed in social communications – someone holds a person accountable for something, or the person herself assumes accountability to another person. By means of this social practice of imputing responsibility to oneself or to others, an infinite flux of facts is structured and then these events can be attributed either to an *individual* or to a *situation*. Because of its structural function, accountability is a key concept in different contexts. The conception of responsibility structures social communication in terms of social problems, conflicts, risks, and damages as long as these events can be credited to a person or to some circumstances.

Criminal trials are a particular form of legal attribution, and due to criminal procedures those who are liable for violating the norm are informed about their guilt by means of the judge's sentencing. Antony Duff has argued that criminal punishment

should communicate to offenders the censure they deserve for their crimes and should aim through that communicative process to persuade them to repent those crimes, to try to reform themselves, and thus reconcile themselves with those whom they wronged. (2003, xvii)

Although Duff is correct in highlighting the communicative function at stake here, he associates that with punishment, i.e., harsh treatment. Conversely, it is the trial itself that performs the communicative function of accountability. In this sense, the conviction is more important than punishment for accountability to fulfill its social function: the

toward himself the attitude of another participant in argumentation. He encounters himself just as he adopted a performative attitude... The reflective relation to self is the ground of the actor's accountability" (1984, v. II, 75-6).

violation is informed about his or her own responsibility, exempting society or other external factors from having breached the law. Consequently, the victim is able to attribute his or her loss, suffering and pain to someone.⁴⁴

Historically, Nuremberg marks the watershed for the individualization of the attribution of guilt. Since then, the ascription of responsibility to individual perpetrators has become a fundamental task of the international law of human rights. Nonetheless, sometimes the sharp distinction between perpetrator and victim may cover complex structures of social interaction in which crimes are embedded (Bois-Pedain 2009, 64). What will count as a reason or motive to hold someone responsible? Economic conditions, the involvement of organizations such as companies, political parties, the educational system, professional associations, the role of beneficiaries and bystanders, and so on, should be taken into account when this is the case. The challenge is to make rational accountability effective, which is a political task for citizens themselves.⁴⁵

Although legal attribution corresponds to the most ordinary form of accountability, other forms of attribution may occur. Non-legal or informal attribution results from the work of specialists, such as historiographers, for instance. There can also be irrational – and very problematic – forms of attribution, such as “collective guilt,” or conspiracy theories. Irrational attribution of collective historical guilt was at the very heart of the conflict in the former Yugoslavia, as Günther argues (2001, 7).

Regarding the institutional form accountability may take, Jon Elster makes an interesting analytical distinction which, although not explicitly, takes into account different degrees of rational attribution. He says we can conceptualize the institutions of justice as a *continuum*, “with pure legal justice at one end and pure political justice at the

⁴⁴ In other words, the law has an expressive function, which is “to communicate to a polity of citizens the force of the law and the law’s status as a legitimate set of norms that govern one another’s behavior” (Pensky 2008, 20). Pensky also agrees that the rule of law must be understood to deliver justice independent of its sanctioning power.

⁴⁵ Antje du Bois-Pedain raises a very good point by arguing that the TRC succeeded in ascribing responsibility to politically motivated crimes by “breaking through the criminal-law responsibility paradigm that can so easily ground denials of responsibility by anyone beyond the reach of *this* paradigm. In this context, the very injustice of amnesty served an important communicative function. Amnesty reminded people of the fact that the human rights violations committed by the amnesty applicants took place in a social context which legitimated these acts of violence; that they were done in (many of) our names. They were therefore injustices in which others were powerfully – politically, though not criminally – implicated” (2009, 66).

other” (Elster 2004, 84). “Pure political justice” takes place when the executive branch of the new government unilaterally and without the possibility of appeal appoints the perpetrators and decides what shall be done with them. As an example, he mentions the British suggestion, after World War II, to draw up a list of fifty or a hundred Nazi leaders who could be shot at sight. Furthermore, pure political justice usually takes the form of *show trials*, since the outcome can be predicted with certainty (Elster 2004, 84–5). Thus, pure political justice is not genuine rational accountability, but a sort of victor’s justice, in which one is declared guilty disregarding his or her standing as a responsible citizen.⁴⁶

At the other end of the spectrum, Elster continues, there is “pure legal justice,” which has four features. First, the laws should be as *unambiguous* as possible in order to restrain judicial discretion. Second, the judicial body should be *insulated* from the other branches of government. Third, judges and jurors should be *unbiased* and, fourth, principles of *due process*, such as the right to appeal, respect for statutes of limitations, determination of individual guilt, and so on, ought to be followed (Elster 2004, 86–8). Why does Elster believe these criteria are relevant? I think it is accurate to say that it is because they make accountability rational and, more important, guarantee that offenders and victims will be treated as fellow citizens.

Finally, in the middle of the *continuum*, Elster places “administrative justice,” which he equals with purges in the public administration. This indicates that, besides criminal trials followed by punishment, other forms of accountability and remedies may address past wrongs. Wherever located in the spectrum, the way transitional justice is framed results from “a series of legislative, administrative, and legal decisions” (Elster 2004, 116). As one could add, it is up to citizens or their representatives to make these choices (who will be held accountable for what, whether there will be punishment or other measures stemming from accountability, the procedures, and so forth), granted that perpetrators and victims will be treated with due respect.

To be sure, during political transitions the attempt to promote legal attribution and punishment can promote a spiral of guilt and retribution. In these cases, amnesties have

⁴⁶ As an example of irrational collective guilt, Elster mentions the Morgenthau Plan. According to him the former US Secretary of Treasury, Henry Morgenthau, blamed the German people collectively for the war, and intended to set the living standard of Germany back to that of 1810 (Elster 2004, 94).

been used as a means to exchange retributive justice for peace. The waiver of legal attribution may become, for Günther, “the more pacifying solution when both parties have gone through the circle of escalation, revenge and counter-revenge, have totally exhausted themselves and the enemy, and when ‘gain’ and ‘loss’ are more or less evenly balanced” (2001, 7). This could be the case in which “a national government’s decision to grant amnesty clearly reflects an overwhelming public sentiment” (Freeman 2009, 96). As Mark Freeman points out, this happened in Lebanon’s 1991 amnesty, which ended the civil war, and in Portugal and Spain⁴⁷ in the 1970s to facilitate the return to democracy.

On the other hand, in a very divided political community, where there is a sharp distinction between perpetrators and victims, winners and losers, says Günther, “an official amnesty can be the catalyst for self-help and uncontrolled vengeance by the victims” (2001, 7). This was the case of Argentina and Chile,⁴⁸ where the military enacted blanket self-amnesty laws before leaving office.

Despite our focus on the juridical aspects, legal attribution, as already stated, is not the only manner to hold someone accountable. An amnesty for the crimes in the former GDR, reminds Günther, would not end the process of public attribution of guilt. There are other non-legal forms of attribution that are equally rational. Historical attribution, for instance, can be found in different contexts in which there is some shared tradition or memory. However, historical attribution does not deal with normative judgments. “It stops with the attribution of causal responsibility.” Conversely, legal attribution is

⁴⁷ Despite the fact the existence of the “overwhelming public sentiment” is controversial at least in Spain. The judge Baltasar Garzón, the same who requested Pinochet’s extradition from Britain, started in 2008 to investigate the killings of 114,000 people at the hands of Franco’s supporters during the 1936-1939 civil war. Later, Judge Garzón dropped the case under strong political pressure and was charged with ignoring a 1977 amnesty law (Burnett 2008).

⁴⁸ Blanket amnesties, such as those granted in Chile and Argentina in the 1970s, put a stop to any attempt to hold dictators, torturers and other human rights violators accountable. Thus, they fail the legitimacy test we are presenting here because they force citizens to accept the lack of punishment and, most important, they rule out any form of justification. Moreover, blanket amnesties may foster irrational attribution and deepen the cleavages of already divided societies. In essence, illegitimate amnesties constrain the self-legislation of citizens in new founded democracies. For this reason, limits to domestic amnesties have been settled by international law and by the establishment of international jurisdiction to punish those who have committed crimes against human rights.

“directed towards the individual actor, and more specifically, towards his core personality” (Günther 2001, 7).

Furthermore, cases such as South Africa’s TRC bring something new to this categorization. Located somewhere in Elster’s *continuum*, between administrative and pure legal justice, the TRC suspended punishment for serious crimes, as usually happens with any amnesty law. But it would be a mistake to affirm that these amnesties prevented rational individualized attribution. Despite not being taken to court in the ordinary sense, perpetrators who were granted with amnesty had to make full disclosure of facts and to face their victims.

Stability for the right reasons

Our discussion on Hegel has already indicated the connection between politics and accountability. Hegel was the first to claim that the polity actualizes itself and reaffirms the validity of its norms by means of accountability. However, during transitions, “the condition of a genuine political community might be lacking” (Duff et al. 2007, 299). So, what kind of polity one may assume in order to call perpetrators into account? In this section, I will try to show how the construction of accountability mechanisms is intertwined with the formation of a reconciled polity. Moreover, I will briefly discuss the role competitive narratives played in South Africa’s transition.

Once again, the TRC provides an interesting precedent. Similar to other societies in transition, it is hard to assert that both South Africans who suffered from apartheid and their perpetrators constituted a political community. “No such community existed under apartheid,” and it was precisely one of the aims of the TRC “to help to constitute a public that would have normative standing to hold citizens to account” (Duff et al. 2007, 300). In other words,

Public institutions, of which the criminal trial is one, in this sense forge the public on which they (normatively) depend. The South African case is special only in that the public, normatively understood, is nascent. This polity-creating role might be thought to justify some of the TRC’s compromises of accountability: sacrificing full accountability, of the kind that is sought through a criminal trial, was thought acceptable for the sake of constituting a public with the standing to call the perpetrators to account, a public born out of reconciliation through mutual recognition of wrongdoing. (Duff et al. 2007, 300)

With the TRC, South Africans began to create a political community of free and equal citizens anew. By calling individual perpetrators to account and giving voice to victims, the TRC bound citizens together as *peers*.⁴⁹

What is more, no Sophie's choice had to be made between "corrective justice" and a "constitutional project" (Ackerman 1992, 70). In other words, South Africans had to choose neither an exclusive backward-looking and individualistic attitude regarding past wrongs, following the example of the Nuremberg trials, nor an exclusive forward-looking and systematic action towards the building of a new country, as happened in most societies along with the Third Wave. Restorative justice, namely, a form of non-retributivist justice, allowed them to attain state building and to come to terms with the past at the same time.

How may a truth commission have contributed to that task? To answer this question, we have first to look at the effects gross violations of human rights provoke among those who suffer and those who perpetrate them. In a famous study on the structure of torture, Elaine Scarry observes that physical pain is language-destroying. Quoting Virginia Woolf,⁵⁰ she states pain causes a split between one's sense of one's reality and the reality of other persons. To have pain is to be inevitably aware of one's own condition. On the other hand, to hear that someone is in pain leads to uncertainty, to the impossibility of grasping the exact meaning of the other's pain. In torture, such split is absolute, and the lack of reciprocity, total. According to Scarry, the torturer's questions objectify the fact that "he has a world," for instance, the regime or the protection against an external enemy, "a world whose asserted magnitude is confirmed by the cruelty it is

⁴⁹ I am using Nancy Fraser's notion of *parity of participation*, which requires "social arrangements that permit all (adult) members of society to interact with one another as peers." In order for this condition to be fulfilled, it requires that material resources to be such in order to ensure participants' independence and voice. Secondly, it demands that institutionalized patterns of culture value express equal respect for all participants and that they have equal opportunity for achieving social esteem (2003, 36). More recently, besides *redistribution* and *recognition*, Fraser added a third condition, namely, *representation* (Fraser 2005). This third element has obvious implications for societies in transition, where entire groups struggle to have access to spheres of political decision-making. For a similar approach inspired by Fraser, see Verdeja (2008).

⁵⁰ The quote is from Woolf's *On Being Ill*: "English, which can express the thoughts of Hamlet and the tragedy of Lear has no words for the shiver or the headache...the merest schoolgirl when she falls in love has Shakespeare or Keats to speak her mind for her, but let a sufferer try to describe a pain in his head to a doctor and language at once runs dry" (*apud* Scarry 1987, 4).

able to motivate and justify” (1987, 36). The prisoner, conversely, has nothing, he or she “has almost no voice,” and the confession is “a halfway point in the disintegration of language.” By means of the “betrayal” his or her world, namely, “friends, family, country, cause,” and everything else one’s self is made up for disappears (Scarry 1987, 29).

Thus torture has a “compensatory” function for authoritarian regimes: since the physical pain it promotes is so enormous, it confers the status of “incontestable reality” to their “highly contestable” legitimacy. Scarry also points out very perspicaciously the reason why torture has not only a *physical* but also a *verbal* aspect:

The verbal act, in turn, consists of two parts, “the question” and “the answer,” each with conventional connotations that wholly falsify it. “The question” is mistakenly understood to be “the motive”; “the answer” is mistakenly understood to be “the betrayal.” The first mistake credits the torturer, providing him with a justification, his cruelty with an explanation. The second discredits the prisoner, making him rather than the torturer, his voice rather than his pain, the cause of his loss of self and world. These two misinterpretations are obviously neither accidental nor unrelated. The one is an absolution of responsibility; the other is a conferring of responsibility; the two together turn the moral reality of torture upside down. Almost anyone looking at the *physical* act of torture would be immediately appalled and repulsed by the torturers. It is difficult to think of a human situation in which the lines of moral responsibility are more starkly or simply drawn, in which there is a more compelling reason to ally one’s sympathies with the one person and to repel the claims of the other. Yet as soon as the focus of attention shifts to the *verbal* aspect of torture, those lines have begun to waver and change their shape in the direction of accommodating and crediting the torturers. (Scarry 1987, 35)

Despite being a very inefficient means to gather reliable information, interrogation is crucial to invert the “moral reality of torture.” It allegedly changes the nature of sheer violence by providing the torturer with a justification at the same time it creates a fiction in which the burden of responsibility lies on the victim’s shoulders.

It is this twisted reality of “absolution” and “conferring of responsibility” created by the violence of an illegitimate regime that reconciliation has to transform. First of all, reconciliation has to settle victims and perpetrators in their right places. Of course this will vary according to each case and will depend on the context. Sometimes the distinction between those fighting against authoritarian rule and perpetrators of human rights is not crystal clear. So, it is a political task to draw that line and to hold “responsibility for the accountability,” as Günther says. Secondly, the reconciliation of a transitional society requires that, while dealing with the past, citizens assume the roles they will play in a newly constituted polity. They have to think of themselves as peers in

order to allow the widest participation of all as possible in that political task. This is why it is not only important to hold perpetrators accountable, but also *how* this is done.

Was South Africa's TRC able to accomplish that? In addition, was it open enough to different and, to a large extent, conflictive narratives and justifications? In a very elucidative inquiry, anthropologist Richard Wilson shows how the TRC used human rights discourses to create a narrative of forgiveness and nation-building (as Archbishop Tutu portrayed it, of a post-apartheid "rainbow nation"). He compared different towns in the Vaal region in order to know whether local forums and courts, known as *imbizo* and which worked on a retributive basis, helped to adjudicate conflict. Where no such local courts exist, as in Sharpeville, violence spread out and private revenge escalated considerably. On the other hand, he describes Boipatong's local court as being able to "channel vengeance into a more mediated (although still violent) form of retribution" (Wilson 2001, 199). The TRC was commonly referred by Boipatong's residents not only as an "external" structure, together with the police and the magistrates' courts, but also as "weak, ineffectual and a sell-out." According to Wilson, "whereas elite Africans on the Constitutional Court see the 'African community' as a site of forgiveness and benign generosity, township residents see the African community as punitive and unyielding" (2001, 208).

According to Wilson, the TRC was engaged in the definition of the community by integrating its narrative on the reconciliation of the unified nation to local witnesses' narratives of community and the liberation struggle (2001, 157). He argues that reconciliation discourses and *ubuntu*⁵¹ were part of ANC government's efforts to centralize authority and re-establish the rule of law. A representative of the Center for the Study of Violence and Reconciliation (CSVr) expressed a similar concern during the

⁵¹ Religious and political leaders were not only referring to Christian values, such as forgiveness, but also to *ubuntu*, which they considered "a central feature of the African *Weltanschauung*." According to Tutu, "*Ubuntu* is very difficult to render into a Western language. It speaks of the very essence of being human. When we want to give high praise to someone we say, 'Yu, u nobuntu;' 'Hey, he or she has *ubuntu*.' This means they are generous, hospitable, friendly, caring and compassionate. They share what they have. It also means my humanity is caught up, is inextricably bound up, in theirs. ... A person with *ubuntu* is open and available to others, affirming of others, does not feel threatened that others are able and good; for he or she has a proper self-assurance that comes from knowing that he or she belongs in a grater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed, or treated as if they were less than who they are" (Tutu 2000, 34–5). For the similarities and differences between *ubuntu* and the notion of dignity, see Cornell (2010).

work of the TRC by stating that “true reconciliation in South African society can only be achieved by integrating the anger, sorrow, trauma and various other complex feelings of victims, rather than by subtly suppressing them” (Simpson 1999, 21). The CSVR together with other NGOs claimed the TRC should not presume that all victims were willing to forgive. Instead, they asserted that victims had to be heard irrespective of their demands for punitive justice.

In contrast, the president of the TRC, Archbishop Desmond Tutu, was the most notorious public figure to utter the view that the truth commission was part of common efforts to unite the country. Due to his religious background, he frequently depicted the transitional process in spiritual terms, as saying that it has been “God’s intention that we should live in friendship and harmony” (2000, 212) or, to state that South Africa’s experience could be replicated, that “God chose such an unlikely place deliberately, to show the world that it can be done anywhere” (2000, 228). By means of religious discourses, Tutu translated abstract moral and legal concepts, such as equal standing before the law, accountability, justice, and the like, into more ordinary notions.⁵²

To be sure, the question one has to ask is whether religious discourses compromised the TRC’s legitimacy. I believe they did not. During transitions, mechanisms of accountability, such as trials and truth commissions, should strengthen the rule of law and democratic procedures according to which citizens of a new and reconciled political community are treated as peers. It is very likely that in this reconciled polity, where citizens will be able to review their past and build their future, new conflicts regarding competitive narratives will emerge. As a matter of fact, discourses regarding one’s conception of the good are an integrant part of the public sphere and the citizens’ political life. This is why the appeal for values that are shared by some citizens, such as forgiveness and *ubuntu*, is part of public discourses by means of which participants define the grounds of their political existence.

⁵² In contrast, while in Argentina the idea that perpetrators from both the military and left-wing groups should be held accountable was pejoratively labeled as the “two devils” theory, Tutu insisted, echoing Gandhi and with the help of his own religious account, that perpetrators ought to be respected as citizens: “Theology reminded me that however diabolical the act, it did not turn the perpetrator into a demon. We had to distinguish between the deed and the perpetrator, between the sinner and the sin: to hate and to condemn the sin whilst being filled with compassion for the sinner. The point is that if perpetrators were to be despaired of as monsters and demons then we were thereby letting accountability go out the window by declaring that they were not moral agents to be held responsible for their deeds” (Tutu 2000, 73–4).

This is not to say, however, that the state should endorse one of those values and make it binding for the rest of citizens. Or, in John Rawls's terms, it is unreasonable "to use political power to enforce our own comprehensive view" (Rawls 1993, 138). So, we have to reformulate our question: Can religious discourses from an "official" source, such as those employed by the president of the TRC, Archbishop Tutu, compromise legitimacy?

I think the answer depends on how "official" the source is and what sort of constraints it imposes on citizens. During transitions, the line that separates "weak" (informal) from "strong" (within the state) publics (Fraser 1992) may become blurred due to the necessity of draining legitimacy from civil society.⁵³ As a consequence, some formal publics may be designed to be very porous to opinion-formation and less oriented towards decision-making. Truth commissions have a hybrid nature insofar as their work may result not only in a decision (amnesties, recommendations, accountability for perpetrators, and so forth) but also in becoming a forum, where they can accomplish their reconciliation task by giving victims their voice back.⁵⁴ In the TRC, the Amnesty and the Reparation and Rehabilitation Committees had a pivotal decision-making role while the Human Rights Violations Committee worked also as a resonance box for the victims' hearings.

Apart from this, some critics have characterized the work of the TRC as a form to pressure victims to forgive their perpetrators. Moreover, these commentators have emphasized the role played by statement-takers, who allegedly pre-structured the narrative of victims before public hearings, so they could frame their stories in terms of a narrative of forgiveness (Wilson 2001, 133). Other studies, however, concluded that "commissioners did not generally seem inclined to raise the topic of forgiveness in the absence of deponents first doing so" (Chapman 2008, 77). Even Wilson acknowledges that although in the first six months, when victims were asked in some of the HRV

⁵³ For an explanation of how political legitimacy is generated out of an influx of communicative power from civil society, see Habermas (1996, chap. 8).

⁵⁴ Some nongovernmental enterprises worked as truth commissions by documenting the patterns of abuse of authoritarian regimes and then contributed to affirm victims' suffering. This was the case in Brazil and Uruguay, where both projects were created on the initiative of church members (Hayner 2010, 21). In these cases, the outcome generated by weak publics may call for subsequent state acknowledgement.

hearings whether they had forgiven the offender, later “victims were more subtly pressed by Commissioners to testify, to forgive and to reconcile” (2001, 119). All in all, the hearings and the accountability process were *not conditional* on forgiveness or on the acceptance of any particular worldview.

Maybe as a symptom of how different views informed this process, it is hard to find a single and monolithic definition of ideas such as “reconciliation,” “truth” and “forgiveness” within the final report of South Africa’s TRC. Reconciliation may demand “private encounters between victims and perpetrators”⁵⁵ and the reconciliation of victims is depicted as a “deeply personal, complex and unpredictable process.”⁵⁶ But reconciliation is needed also “within and between communities and the nation as a whole.”⁵⁷ At the same time, the report says, reconciliation should not be equated with forgiveness; in fact, the TRC concludes that reconciliation “does not necessarily involve forgiveness. It does involve a minimum willingness to co-exist and work for the peaceful handling of continuing differences.”⁵⁸ The report also had a section entitled “Reconciliation without forgiveness,” where it brought two testimonies of a “weak or limited” form of reconciliation, i.e., “without apologies by those responsible or forgiveness by victims.”⁵⁹ Regarding forgiveness, the report acknowledged that it is sometimes “unrealistic” to expect for it too quickly, but it also praised those who displayed a “remarkable magnanimity and generosity of spirit” for their “willingness to forgive.”⁶⁰ On the one hand, the report says, there were people who “warned against expecting too much,” and argued that the TRC should hope only for “peaceful coexistence.” On the other, the same report observes, others “cautioned against a too limited notion of reconciliation,” and supported the idea that the TRC “should not underestimate the vital importance of apologies.”⁶¹ Finally, the report itself warned “the

⁵⁵ See (South Africa 1998, v. 1, chap. 5, §6), hereinafter TRC Report.

⁵⁶ Id., v. 1, chap. 5, §14.

⁵⁷ Id., §23.

⁵⁸ Id., v. 5, chap. 9, §150. Other statements that support the same idea can be found on v.1, chap. 5, §50, §52.

⁵⁹ Id., v. 5, chap. 9, §§94-7.

⁶⁰ Id., v. 1, chap. 5, §49.

potentially dangerous confusion between a religious, indeed Christian, understanding of reconciliation, more typically applied to interpersonal relationships, and the more limited, political notion of reconciliation applicable to a democratic society.”⁶² All things considered, the final report reflected the plurality and diverse backgrounds of TRC’s members, without stating the last word in how citizens ought to feel and come to terms with their own experiences in the past.

In a proper way, religious views did not prevent angered victims to be heard and perpetrators to face accountability. Besides that, they carried out an important task in South Africa. As Rawls’s *Political Liberalism* reminds us, “reasonable comprehensive doctrines,” such as religious or metaphysical views, can help to generate an important asset, especially during transitions, namely, political stability.

According to Rawls, the stability of a well-ordered society involves two problems. First, the question whether people who grow up under just institutions can acquire a sufficient sense of justice and then comply with those institutions. This is clearly not the case when millions of people live in a segregated society, as South Africa during the apartheid regime. Although some leaders who had a crucial role in ending apartheid hold an incredible sense of fairness, democratic transition in South Africa was the result of a common effort to *create* just institutions. Second, the question whether the fair terms of cooperation among citizens can be the focus of an “overlapping consensus” (1993, 141).⁶³ Or, in other words, stability has also to do with how the abstract (or “freestanding,” to use Rawls’ terms) conception of justice can be embedded into citizens’ worldviews.

Intellectual and legal versions of national reconciliation, as Wilson points out, were “too abstract, cerebral and bloodless” (2001, 122). Conversely, the religious-redemptive approach was “the only version of reconciliation with any pretensions to reshaping

⁶¹ Id., §§20-1.

⁶² Id., §19.

⁶³ By an overlapping consensus, Rawls means “all the reasonable opposing religious, philosophical, and moral doctrines likely to persist over generations and to gain a sizable body of adherents in a more or less just constitutional regime, a regime in which the criterion of justice is that political conception itself” (1993, 15).

popular legal and political consciousness” (Wilson 2001, 122). Archbishop Desmond Tutu, as well as other religious leaders, translated the necessity of reconciliation to constitute a political community of peer citizens as follows:

I contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern is not retribution or punishment but, in the spirit of *ubuntu*, the healing of breaches, the redressing of imbalances, the restoration of broken relationships. This kind of justice seeks to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he or she has injured by his or her offence. This is far more personal approach, which sees the offence as something that has happened to people and whose consequence is a rupture in relationships. Thus we would claim that justice, restorative justice, is being served when efforts are being made to work for healing, for forgiveness and for reconciliation. (Tutu 2000, 51–2)

When compatible with the institutional framework of a community where members enjoy participatory parity, citizens’ worldviews may help to create or maintain their allegiance to such arrangements. South Africa’s TRC was to a large extent legitimate due to realizing political (as Rawls would employ the term) rather than purely religious values. Reasonable worldviews may strengthen the newly born democratic public culture, so why not?

One last thing has to be said about how “comprehensive doctrines” may enter into public discussions during transitions. The more the public political culture develops, the less stability and the “common currency of discussion” (another of Rawls’s expressions) will have to rely on those comprehensive views. As he framed in one of his last works:

reasonable comprehensive doctrines, religious or nonreligious, may be introduced in public political discussion at any time, provided that in due course proper political reasons – and not reasons given solely by comprehensive doctrines – are presented that are sufficient to support whatever the comprehensive doctrines introduced are said to support. (Rawls 1997, 783–4)

According to this proviso, political principles – which are consistent with the notion of accountability that has been outlined here, such as equal standing before the law, reciprocity, equal respect, and the like – have to be presented *in due course*⁶⁴

⁶⁴ For Habermas, Rawls’s proviso puts an unreasonable burden for religious citizens insofar as it allegedly demands they have the epistemic ability to reflexively consider their own religious views. Conversely, Habermas draws a line separating informal public spheres, where religious discourses form a “Babel of voices,” from parliaments, courts, and other political institutions. In this case, religious discourses have to be “translated” in order to enter into the institutionalized practice of decision-making (Habermas 2008, 114–47). Although some translations do happen, I think Habermas’s criticism misses an important point raised by Rawls. The proviso shows a concern not only with the role comprehensive doctrines may play in public justification, but also how this role may change *in the course of time*. Rawls, pace Habermas, is much more aware of the challenges the establishment of a new polity posits to political stability. In *Political Liberalism*, Rawls’s explanation takes into account how principles of justice may be first

independently from comprehensive doctrines. How much time is needed? Rawls's answer is that it has to be worked out in practice.⁶⁵

Maybe the role of theological and other worldviews was so significant in South Africa because citizens faced there the challenge to bring former colonizers and colonized into a single political community for the first time ever in history.⁶⁶ Contrary to other transitions in Latin America, for instance, political adversaries could not look back and see a time when they were members of the same polity. Thus, people had to rely on the closest examples of forms of association they had at hand. Nevertheless, reconciliation in transitions refers less to “shaking hands with perpetrators,” than treating people as free and equal citizens of the same polity. It has an egalitarian basis insofar as it reverts the unequal standing of perpetrators and victims in the previous regime. It also hands over to citizens the decision to freely determine how to deal with their wounds. In this sense, it is up to them to forgive or not.

reluctantly accepted as a *modus vivendi* and then as a constitutional consensus, which is neither deep (i.e., not grounded in certain ideas of society and person) nor wide (i.e., narrow in scope, including only the political procedures of a democratic government). Thereafter, the forces that push this constitutional consensus towards an overlapping consensus, says Rawls, occur when, for instance, political groups must enter the public forum of political discussion and appeal to other groups. In this case, they have to adjust their own comprehensive doctrines and formulate political conceptions of justice. Interestingly, Rawls mentions the Reconstruction following the Civil War as an example of how such competing groups have to work out political conceptions. See Rawls (1993, 165).

⁶⁵ Rawls alludes to the Civil Rights Movement as an example of how the proviso can be fulfilled, insofar as “they emphasized the religious roots of their doctrines, because these doctrines supported basic constitutional values – as they themselves asserted – and so supported reasonable conceptions of political justice” (1997, 786).

⁶⁶ This is pointed out by Mamdani, although he criticizes the work of the TRC as a wrongly historical account of apartheid as a “drama played out within a fractured political elite: state agents against political activists” (2007, 358).

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