



**Transitioning societies: South Africa and Argentina.
How power dynamics impact the “contract for truth”**

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Abstract:

Both South Africa and Argentina have experienced tyrannical and oppressive periods of political leadership. Ultimately, this has led both nations to ask – how do we create a stable future, and how do we come to terms with the crimes of the past? This piece will look at the mechanisms that were employed by both countries throughout this process and the outcomes they achieved. More importantly though, it will frame the responses in a contract analogy. It will look at the “bargain” struck between victims and perpetrators. It will then critically analyse the way that existing power structures shape this “bargain” and how it impacts the extent and quality of truth, along with outcomes for victims.

Keywords:

Transitional justice, amnesty, reparations, truth telling, systems change, tools of analysis.

Resumen:

Tanto Sudáfrica como Argentina han vivido periodos tiránicos y opresivos de liderazgo político. En última instancia, esto ha llevado a ambas naciones a preguntarse: ¿cómo creamos un futuro estable y cómo nos reconciliamos con los crímenes del pasado? Este artículo analizará los mecanismos empleados por ambos países a lo largo de este proceso y los resultados obtenidos. Pero lo más importante es que enmarcará las respuestas en una analogía contractual. Examinará el “acuerdo” alcanzado entre víctimas y agresores. A continuación, se analizará críticamente el modo en que las estructuras de poder existentes configuran dicho “acuerdo” y cómo influye en el alcance y la calidad de la verdad, así como en los resultados para las víctimas.

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Palabras clave:

Justicia transicional, amnistía, reparaciones, decir la verdad, cambio de sistema, instrumentos de análisis.

1. INTRODUCTION

South Africa has a prolonged history defined by trauma. 200 years of colonial rule, followed by 40 years of oppression during apartheid (Pradier *et al.* 2018). As apartheid was officially coming to its end, the fledgling nation began a mission of reconciliation, begging the question - what was the way forward, and how could it be achieved? About a decade prior Argentina were asking themselves the same questions after the military rule in Argentina collapsed. The regime ruled in a period they coined La Guerra Sucia (“Dirty War”) from 24th March 1976. By calling the period a “Dirty war” the military was able to justify, through language, the use of state violence against “subversives” - anyone who disagreed with their rule (Scorer 2008, 45). The military acted with brutality through arbitrary detention, torture and enforced disappearances of its “political opponents” until their collapse in 1983 and subsequent democratic elections (Chisari 2022).

Despite not yet having the moniker of Transitional Justice (“TJ”), both countries engaged in strategies to move forward as a society, which we now consider core pillars of the field of TJ (Bell 2009, 7). Broadly, TJ includes a set of strategies whereby the use of criminal trials, truth-telling initiatives, reparations and institutional reform could be jointly implemented to heal the deep and defined divisions in society and forge a nation on new principles (Cohen 1995, 11-12).

This article seeks to look at these transitions, disparate in both context and outcomes, to contemplate how we may best analyse truth-telling mechanisms. It will look at the “Truth and Reconciliation Commission” (“TRC”) which was a chief response during the post-apartheid transition. The TRC was established through the Promotion of National Unity and Reconciliation Act 1995 which sought to engage in truth-telling to realise the aims of reconciliation established in South Africa’s 1993 Interim Constitution, which governed the shift from Apartheid. The commission produced a report of “as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during” the apartheid system from 1st March 1960 to 10 May 1994. To facilitate this process, the Act created The Committee on Amnesty and the Committee on Reparations. Put simply, the truth-telling process created a system that provided amnesty to members of the system of apartheid oppression in exchange for their truthful accounts, and reparations to victims who provided statements. It is contended that this arrangement is best understood as a “contract of truth”. This analogy aids analysis of the relevant strengths and weaknesses of the TRC (and indeed Truth Commissions in other jurisdictions) by allowing for analysis of the core notions of a contract, namely, what each party seeks to gain in the arrangement and the power dynamics that control the bargaining arrangement.

This analogy will then be applied to the Argentine experience, which is quite different from the negotiated solution in South Africa. Here, the power change arose from military

collapse. As a result, the reconciliation process was produced by the democratic government with little negotiation, in an attempt to restore stability and quickly transition into a new period of Argentine history. This article will look at the Comisión Nacional sobre la Desaparición de Personas (“CONADEP”), a truth-telling commission created on the 15th of December 1983, five days after Argentina’s shift to democracy. It will also consider the impact of novel “truth trials” in response to far-reaching amnesty laws from the democratic government. Again, the “contract of truth” analogy will seek to look at the competing priorities of the parties involved and the power dynamics that impacted the outcomes.

The first part of this article will detail the importance of Truth Telling in the context of transition. It will proceed to detail how the “contract of truth” was made explicit in the South African case, in contrast to other instances of truth-telling commissions where it exists at an implicit level. This will be elucidated through the case study of Argentina. The second part will address the exchange present for the oppressors and victims respectively, outlining the objectives of amnesty and reparations in exchange for truth within the South African context. The third part will look at Argentina and how one may seek to apply the “exchange” analogy when a negotiated solution has not emerged. Lastly, it will address the power dynamics that are essential to understanding how and why these exchanges were established in the first place.

Academia often contemplates the aspirational goals that aim to eventuate from TJ mechanisms. This is an important sentiment to hold on to. However, in the birth of these TJ mechanisms is a struggle for power. It is a struggle for a way forward, one that will aim to reconcile the trauma of the past and champion a more equitable future. This is unpalatable for those who must relinquish their power. As such, this article aims to look at the way in which this power must be assessed. This article ultimately contends that we demand too much from transitional justice. It will argue that academia looks at the application of transitional justice mechanisms in an abstract way, removing it from the context in which it stands – an immediate response of a nascent system coming to terms with mass human rights violations. As such, analysis can have a reductive quality, as it may argue for changes from a retroactive perspective, whereas the better approach is to understand the context in which approaches are developed (Crenzel 2016, 162). This is not to say that case studies should not be analysed, we should not aspire for better practices, and better outcomes cannot be achieved – but to note that a TJ response is merely one step from transition to consolidation.

2. PART ONE: TRUTH-TELLING AS A TENANT OF TRANSITIONAL JUSTICE

Truth-telling post-conflict is a common transitional justice tool utilised to uncover the atrocities of a past system—the theory underpinning truth-telling advocates its many benefits. Given state monopoly on violence, repressive tactics are often employed to mask the extent to which violence has been imposed (Cassin 2006). Thus, at its most basic form, truth-telling is a common demand from civil society to have an accurate account of the violence imposed. Priscilla Hayner (2011, 5-6) cautions against the broad generalisation of the benefits of truth-telling. However, when effectively implemented, these commissions have benefits, such as acting as a memory device, whereby an official record of abuses is contained (Hayner 2011, 6). Moreover, if victims feel heard and understood throughout the process, recognition of victimhood may help with healing and catharsis (Hayner 2011,

5). And despite no criminal implications attached to prosecution, truth-telling does establish a picture of the perpetrators of violations and the system that enabled or encouraged them (Hayner 2011, 6).

Ultimately, truth-telling must go beyond the symbolic nature described above to have an enduring impact - it is change that is necessitated (Naqvi 2006). As Lisa Laplante and Kimberly Theidon (2007, 231) posit, “there is an implicit contract established” when victim survivors relive their trauma, whereby redress is ultimately demanded. The authors frame this as “truth with consequences” and argue that this is central to the capacity for truth-telling to successfully achieve the aims of transitional justice, as the wrongs of the past are exposed and rectified to move forward as a nation. This analysis came from Peru where, like many other jurisdictions, there is no explicit exchange between victim-survivors and the truth commission, rather a mere hope that things will change. This has led to a disenfranchisement of victim-survivors who didn’t see the change that they required.

As will be discussed in more depth below, Argentina can provide a case study for this “implicit contract” analysis. Shortly after a shift to democratic rule, a truth commission sought to expose human rights violations that occurred through the years of military rule. This led to a tangible outcome - both a final report, and the commencement of criminal trials. When government-imposed amnesty blocked the path for further criminal redress, civil society demanded further exposure and accountability for crimes. Ultimately, processes that exposed atrocities committed by the military were driven by civil society, rather than a government looking to promote reconciliation. This process of demanding further accountability highlights the fact that truth must be followed by action because, without clarity on past atrocities, victim-survivors who have provided their experiences to a truth-telling body will not be satisfied with merely forgetting the past (Merrett and Grivil 1991).

In South Africa, however, a clear “contract” was formed. Victim survivors gave testimonies about gross human rights violations that were inflicted upon them in exchange for reparations, and perpetrators give truthful testimonies in exchange for amnesty (Gross 2004). Jacques Derrida understands this in the context of conditional and unconditional forgiveness (2001, 41-43). He argues that given the scale of abuse, unconditional forgiveness is “mad”, and you must have conditions in place if there is to be sustained change.

Central to this idea is that change, a transition, must have a mixture of restorative measures, as well as tangible change. Herein lies the crux of Transitional Justice theory - that a combination of tools may lead to more expansive and lasting outcomes, being both justice and stability. As such, a legal analysis is a necessary undertaking, but it must be bolstered by understanding of what justice means at a human level, understanding the complex emotional relationship with a process of transition (Barahona de Brito 2010).

This article will argue that having an explicit exchange is highly valuable as it sets clear expectations for both parties. The success or failure of these clear expectations will then have a tangible effect on the quality of justice produced. However, in all transitioning concepts, bargains are made, even if it is not expanded in the clarity of post apartheid South Africa. In these contexts too, as with any attempt to form a compromise, power is the core arbitrator. Thus, the power relations that established this bargain are core to the analysis of

South Africa's TRC and the truth-telling mechanisms in Argentina, and will attempt to be unravelled through this piece.

3. PART TWO: THE SOUTH AFRICAN EXCHANGE

3.1. THE OPPRESSOR - AMNESTY

A core pillar of the South African truth-telling model involved the granting of amnesty to perpetrators who gave fully truthful accounts to the commission. This amnesty procedure was implemented by the amnesty committee and was granted immediately after full and frank cooperation with the commission. Members of the apartheid system were encouraged to engage in this process as failure to do so would leave them open to criminal trials.

This approach is labelled the "restorative justice approach" by academics, whereby criminal and civil trials are forgone in exchange for the truth (Little 1999, Wilson 2001, Pityana 2018). The theory of restorative justice argues that justice can be gained outside of the courtroom in a manner that remains conducive to community healing (Tutu 2005). Moreover, many proponents posit that in post-conflict situations, criminal trials are harder to obtain, meaning that truth-telling can perhaps be the only way to uncover details of past atrocities and hold these perpetrators accountable by ensuring that their human rights violations are exposed (Pradier *et al.* 2018).

3.2. THE VICTIM - REPARATIONS

The Reparations and Rehabilitation Committee ("RRC") were charged with the responsibility of creating recommendations for the government for effective reparations for victims of the apartheid. Mr Van Boven's recommendations were given in 1993 and detailed five types of recommendations (Pradier *et al.* 2018);

1. Urgent reparations for those in acute need
2. Individual grants to victims of gross human rights violations
3. Symbolic reparations
4. Community rehabilitation programs
5. Institutional reform

Put simply, the reparations scheme was an entire failure. From the outset, the definition of who constituted "a victim" was highly restrictive. Reparations would only be granted to those who provided statements or were explicitly named in the statements of others. To provide a statement, you had to have suffered gross human rights violations. Of the estimated 80,000-100,000 estimated people that would fit this definition, only 21,000 statements were made (Pradier *et al.* 2018). This can be attributed to many factors, chiefly time and access to the processes of the commission.

Something should be said briefly about the process of giving testimony. In theory, as discussed above, catharsis comes from victim-survivors being able to tell their story and be heard (Hayner 2011, 162). Only a small number of the 21,000 victims who issued statements had the chance to be heard in person by the commission. The vast majority gave

their stories at arm's length, having minimal with the TRC, which inevitably undermines the cathartic effect that was aspired to (Jenkins 2000, 463).

Additionally, the delivery of the reparations was a logistical failure. The “acute” support wasn't seen for years after it was recommended, whereby effective programs such as mental health support for victim-survivors who told their stories were never implemented (Pradier *et al.* 2018). Moreover, a lack of political willpower meant that the institutional reform was far below what was recommended, and the individual grants were significantly reduced from the recommended program (Hayner 2011, 31). The result was a feeling of disenchantment within the community who ultimately never saw the reparations that were recommended (Pradier *et al.* 2018).

From the plethora of positive outcomes that were envisaged as possible from the reparation recommendations, all that eventuated was failed promises and disappointment. Whilst some benefits did flow (it cannot be said that no reparations were granted), they were far from what was bargained for.

4. PART THREE: ARGENTINIAN FIGHT AGAINST AMNESIA

While South Africa had a negotiated transition of power, the transition in Argentina occurred quite differently. The collapse of military rule stemmed from their failure in the Falkland Islands against the British Army and exposed weaknesses that prompted its collapse (Sikkink and Booth Walling 2006). As a government, the military was unstable, with factions and internal struggles for leadership and power – yet they still attempted to retain their influence over Argentine democracy. Between 1978 and 1982, the military attempted to develop a political system whereby transition to democracy would preserve significant power for the military. Despite a collapse of power between 1982–1983, the military took steps in self-preservation (Acuña and Smulovitz 1997, 97). They produced the Documento Final – a report on human rights, attempting to close further investigation. This was also followed by the Acta Institucional which purported that all military acts were acts of service, and thus not capable of being classed as criminal. In addition, the regime passed the Ley de pacificación nacional which provided self-amnesty for all acts performed by the army. In the final days before democratic rule, the military government ordered the destruction of documents that detailed their regime. Whilst the laws were considered unconstitutional and thus did not impact the truth-finding process, the destruction of documents ensured that core aspects of the institutionalisation and methodical use of state terror from the military were suppressed (Acuña and Smulovitz 1997).

In contrast to the “negotiated” transition in South Africa, Argentina experienced a “rupture” transition, which does not neatly lend itself to the same “exchange” analysis performed above. Instead, it is better framed as the government as a central actor, strained by the demands for justice and truth from the public, and the threat of violence and retribution from the army (Barahona de Brito and Sznajder 2010, 492). Instead of a structured response and a balancing of interests between these competing interests, the government attempted to appease both parties in a piecemeal manner, trying to balance the tension provided by those competing interests. Three key distinct phases of truth-telling occurred as a result, which will be outlined below.

4.1. STAGE ONE - CONADEP AND TRIALS

In 1984, shortly after the shift to democratic government, President Raúl Alfonsín created the Comisión Nacional sobre la Desaparición de Personas (“CONADEP”). CONADEP was created despite campaigns, particularly from human rights organisations, for a bicameral investigation commission that would investigate “all forms of state terrorism” (Acuña 2006, Crenzel 2016, 149). President Alfonsín, instead, avoided a commission that would have far greater political and legislative powers, to consolidate personal control over such an investigation and limit its investigative capabilities, thus preserving Alfonsín’s relationship with the military (Crenzel 2016, 159). Here, the “commission of notables” in the form of CONADEP was created, although nearly all representatives from human rights organisations refused to be involved (Crenzel 2015, 24). The expectation was for the commission to uncover the secrecy of clandestine detention centres in Argentina, collect testimonies from survivors, and discover the extent of enforced disappearances at the hands of the military, without investigating so far as to prompt retaliation from the military (Acuña 2006, 210; Maculan 2012). The commission was given a meagre 180 days to achieve this. This epitomises the approach of the newfound democratic leadership; that in the precarious nature of transition, it is best to quickly address and then set aside the problems of the past (Popkin and Bhuta 2012, 110). It must be appreciated that the final report *Nunca Más* (Never Again) was one of the first examples of truth-telling globally, however, it was met with widespread rejection from human rights activists (Crenzel 2016, 149).

The report uncovered 8,960 cases of enforced disappearance, yet in reality, it will never be known how many victims truly exist. Human rights organisations estimate that the number of disappeared persons is around 30,000 (Sikkink and Booth Walling 2006, 304). It is important to note, however, the fact that the practice of enforced disappearances was a pervasive tool of the military, used to intimidate the Argentine population. Moreover, it created not only a physical loss and victim, but also placed the disappeared person into a state between life and death which created significant harm to the psyche of the Argentine population (Crenzel 2016, 147). The report featured the experiences of victim-survivors and exposed many aspects of the nature of state violence. However, it was limited in its scope as it was not a wholesale investigation into military dictatorship and the atrocities that they implemented, nor the power of a bicameral investigation commission that was advocated for by human rights organisations.

Moreover, it did not come with any attached promises for change. Ultimately, the report was merely that – a report that would expose past atrocities, without the substance to provide restoration for those crimes committed. The report was a central piece of evidence in the “Trial of the Juntas” in 1985. The Trial of the Juntas represents, at once, a success and a failure in holding the military to account for the gross violations of human rights. The trial was essentially a political compromise between justice and stability. President Alfonsín made a secret agreement with the military to prosecute only the leadership of the military, rather than a wholesale investigation and prosecution of the military, where the violation of human rights was insidious and pervasive (Acuña 2006, 209). Such an investigation was met by opposition from the military, who threatened military action to cripple the newfound democracy, thus to placate this threat, a trial with minimal scope was agreed upon.

Importantly, however, this trial is the first prosecution of crimes against humanity in a national jurisdiction (Crenzel 2016, 148). Five of the nine prosecutions led to conviction

and importantly, military leadership was deemed responsible for the atrocities that they instigated (Sikkink and Booth Walling 2006). The myth that the military had been fighting “subversives of the state” was shattered, along with it the central justification of state terror imposed by the military (Galis 2015, 66). Subsequently, this led to the prosecution of further legal cases against many perpetrators of military violence. Despite Alfonsín’s political desire to limit the scope of judicial action, the success of the trial of the Juntas, alongside Nunca Más which represented an essential base of evidence, spurred human rights organisations into action, which was ultimately supported by a judiciary that was willing to hold the military to account (Acuña 2006, 237). By early 1985 650 military officers were being pursued in the courts (Galis 2015).

4.2. STAGE TWO - AMNESTY

The military, fearing legal accountability for their human rights violations, threatened to overthrow the newfound government. The government passed the Ley de Punto Final (the “Full Stop” law) in an attempt to place a 60-day time limit to bring prosecution, timed to coincide with the annual break taken by the Judiciary. Instead of the intended reduction of cases brought for prosecution, the judiciary worked through their usual break time, and prosecutions were brought with renewed vigour (Acuña and Smulovitz 1997, 107). Amnesty was then granted in 1987 to reduce prosecution through the Ley de Obediencia Debida (Law of Due Obedience). This granted near complete immunity for any military personnel under the rank of colonel (Maculan 2012). Despite the insistence from human rights organisations that prosecutions must be a response to prove that such flagrant abuses of human rights would happen “never again”, and the willingness of the judiciary to engage in these investigations, these laws essentially put a stop to the prosecution of atrocities that occurred during the military dictatorship (Gargarella 2003, 183).

4.3. STAGE THREE - TRUTH TRIALS

With the door largely closed to judicial action, victims sought a different path. Judicial refusal for the production of documents pursuant to a “right to truth” led to the Centro de Estudios Legales y Sociales (Center for Legal and Social Studies) taking action to the Inter-American Commission of Human Rights to assert the right to truth in Argentina (Maculan 2012, 109). On the 29th of February, the Inter-American Commission, in conjunction with the Argentine government, produced a report which accepted and guaranteed the right to truth (IACoMHR, Report 21/00, case 12.059). This was the birth of juicios por la verdad, “truth trials”, where the judiciary was central in uncovering the truth of instances of purported human rights violations. Essentially, the court provided “hybrid” court conditions, with criminal procedure and rules underpinning the process, but without the title of defendant and prosecution (Maculan 2012).

This process of exposing the truth of extensive human rights violations can be characterised as a dual form, through CONADEP and truth trials (Naqvi 2006). This highlights a struggle for dominance between civil society and the military. Here, when the truth led to criminal prosecution, the military threatened to overthrow democracy. Subsequently, when amnesty prevented access to criminal justice, civil society demanded and created a path to expose atrocities. This tension produced imperfect results. Here, the power dynamics between civil society, military, and government played an important role in the extent and quality of truth-telling that occurred. Similarly in South Africa, it is evident that power dynamics played an

essential role in the reconciliation process that was created in the negotiated solution. Thus, these power dynamics must be exposed in order to analyse and understand how they impact the strategies that are subsequently adopted to move forward as a nation.

5. PART FOUR: DETANGLING POWER DYNAMICS IN A TRANSITIONING SOCIETY

5.1. CONTRACT

In South Africa, a developed bargain emerged that facilitated a change of leadership. In Argentina, the Military government collapsed, but remained a resistant power, impacting the process of transition. On first glance, the two contexts appear not suited to comparative analysis, beyond truth telling, which has been covered elsewhere (Galis 2015). However, when looking at the omnipresent control of apartheid and dictatorial regimes, as well as the attempts to consolidate power beyond the transition, further comparisons between the nations can be made.

Moreover, the contexts provide a fruitful case study of how the contract analogy may be suited to both clear instances of negotiated transition, and circumstances of a rupture transition. Central to this analogy is the notion that various stakeholders will compete and bargain, whether at an explicit or implicit level. It is contended that analysis of power dynamics is central to the evaluation of the quality of transitional justice mechanisms, and whether sustained and positive change eventuates. It seeks to observe the process of justice being performed, through both legal and human mechanisms, and how this has an impact on the quality of justice that is produced. Important to this notion is the individual contexts to which the analysis pertains, however, broader themes throughout the comparative analysis are important,

5.2. IMPACT AND ASSESSMENT OF AMNESTY WITHIN TRANSITION

Both systems employed amnesty in order to transition - in South Africa, it was the price for the oppressors to relinquish their power; in Argentina, it was to placate the military who were threatening to overthrow the government.

As Aeyal Gross puts it, amnesty was a cornerstone for systems change in South Africa, whereby the white oppressive system began to let go of its power (2004, 60). Relinquishing this power and moving beyond the apartheid system should be celebrated, however, when analysing the TRC through a TJ lens, the transition of power is not the only measure of analysis. Using the contract metaphor, we assess that the “bargain” struck was amnesty for truth and ceding power, and reparations for truth. What is essential in assessing the strength of the TRC is understanding the underlying power relations that created this system, and the results that subsequently manifested.

It was proposed that the TRC would work in conjunction with criminal trials to create a “carrot-and-stick” approach to justice (Jenkins 2000). The hope was that the injustices committed during apartheid would be exposed as perpetrators either engaged in truth-telling for amnesty (the “carrot”) or felt the wrath of the law (the “stick”). In theory, this is a fantastic approach, yet assessing the success of this bargain relies on the extent to which

perpetrators who did not apply for amnesty, or who were refused amnesty, were actually prosecuted for their crimes. In essence, the prosecution, and the success of a retributive judicial policy did not eventuate in South Africa. In 1998, the TRC recommended approximately 300 names and cases they believed would be suitable for prosecution (Bubbenzer 2009, 18). Of this number, very few trials were initiated, with only two convictions emerging in the 1990s (Bubbenzer 2009, 22) This highlights a lack of political will to uphold the bargain promised, and thus the disproportionate power retained by the white oppressive group over the judicial process (Bubbenzer 2009). Indeed, from the inception of the structure of the TRC, core perpetrators from varying areas of the regime (police, intelligence forces, big business etc) never sought amnesty from the TRC and were, therefore, never brought to justice by the judiciary (Pedain 2005, 804-5). Yet, problems emerged elsewhere as prosecutors and human rights defenders lacked the competence to prosecute large and complex cases, and the power possessed by these actors was so pervasive that they escaped the justice system (Raleigh 2019).

This is further indicated by the extent to which the judiciary did not, itself, go through a transition until many years after the initial transition of apartheid (Galis 2015, 86). This is partly because the TRC was expected to provide transformative outcomes and deliver justice in and of itself. Despite the judiciary being an essential element in the enforcement and delivery of this process, it was neglected as a priority. As a result, the judiciary still represented judicial thinking that upheld the “legal” aspects of apartheid that maintained discrimination. The judicial system remained in the schema of the apartheid and was intent on upholding the status quo (Wesson and Du Plessis 2008, 200).

Ultimately, the core “justice” was done within the TRC, without the focus on the judiciary, which is a structural and systemic failure considering the importance of judicial exercise in the success of the TRC. From the structure of the TRC, it emerged that perpetrators could successfully behind the cloak of amnesty, whether they applied or not, because of the failure to enforce prosecutions. The point of noting this failure is to expose the power structures that ultimately enabled the perpetrators of the apartheid to largely escape accountability and, in turn, reduce the capacity for the TRC to effectively engage with its restorative justice aims. Conditional amnesty did not have sufficient support from established and reliable institutions, as ultimately, they were also in transition, and heavily influenced by the power of the oppressors. As Gibson asserts, there is an inherent injustice in the granting of amnesty (2002, 540). It places human rights abusers beyond the remit of the law, reduces the accountability of these perpetrators and can silence victims. South Africa attempted to remedy this through conditional amnesty and reparations – the asymmetrical power that influenced this remedy and led to significant shortcomings in practice which has been exposed above. In Argentina, however, amnesty was granted in an attempt to secure a stable democracy. The complexities of this decision must be noted – perhaps it is the “Faustian bargain”, the prioritisation of a newfound democratic order and the aspiration of political leadership rather than holding past leadership accountable for their terror. Perhaps this was a decision for the lesser of two evils (Gibson 2002, 541).

However, the power to instil violence through military action and leadership led to amnesty, and thus to a silencing of victims and a further burial of the truth. As Maculan notes, given the sweeping and unconditional nature of amnesty within Argentina, perpetrator involvement with the truth-telling process was negligible and heavily impacted the quality of truth provided (Maculan 2012, 112). The Junta trials, in contrast to South Africa, held central figures of leadership to account for their crimes. This is an important contrast, as

holding orchestrators to account plays an important role in ensuring that a past regime does not benefit from impunity for their actions. The judiciary played an essential role as an arbitrator of fact. Ultimately the judicial process gave legitimacy to the voices of victims and shattered the narrative asserted by the military that the oppressive action they took was to control a “subversive threat”. Throughout the military rule, the judiciary was subverted and replaced by military courts, who were severely corrupt and ultimately a proxy of the dictatorship, upholding their abuses of human rights. By taking the leaders to justice, the judiciary created a sense of legitimacy for the public, as they sought to reinstate the rule of law and uphold the standard of justice that it represented (Galis 2015, 101). In contrast to the judiciary in South Africa, which did not engage in the apartheid transition at the same rate as its government, the Argentine judiciary ultimately supported its transition to democracy.

However, this process can be seen to be undermined by the criticism mounted that the trials were, in some respects, show trials (Merrett and Grivil 1991). A political bargain was struck between the military and President Alfonsín, whereby the military would conduct a self-purge, selecting a small number of previous leaders to be prosecuted, under the condition that they would be granted a pardon, meaning that they would serve only six years imprisonment (Acuña and Smulovitz 1997, 103-4). This was to placate the military, who threatened to revolt if a wholesale judicial investigation would be taken, which was the demand from human rights organisations (Acuña 2006, 09). Emilio Crenzel describes the trial as exemplary justice, that is the selection of a small group to portray a criminal justice approach, rather than retributive justice, and ultimately this did not meet the demands of civil society (Crenzel 2016, 152). Yet this merely exposes the political foundations of the trial - the judiciary itself positioned itself as a robust institution of democracy, placing responsibility on the leaders of the Juntas, as well as opening the possibility of prosecution for mid to low-ranking military officials. Instead of allowing this path of retributive justice, the government quickly imposed amnesty in order to restrict accountability and subdue tensions created by the military. In essence, despite the campaigning of civil society the military held considerable power in the immediate transition, as they threatened that further action would lead to military action against the government and a return to tyrannical leadership. Here, the judiciary, despite promoting the reinstatement of a human rights-based order, was undermined by further power structures in the system (Galis 2015, 65).

Ultimately, amnesty played a large role in both South Africa and Argentina, and, despite the differences between them, for quite similar reasons. In South Africa, it was for the release of power, and in Argentina, to calm the military who were threatening democracy. Ultimately, the decision of amnesty becomes a nuanced debate, as ultimately it was a tool to achieve aims of stability and aspirations for a political order that is more just. However, amnesty, in both South Africa and Argentina meant that criminal justice was not served, and despite attempts to gain truth as a secondary option, human rights abuses and the systems that facilitated this abuse remained hidden.

5.3. QUALITY OF TRUTH THAT EMERGED THROUGH RESPECTIVE PROCESSES

The TRC did have an important role in exposing the underlying workings of the apartheid system. Indeed, the scope of the investigation was for the “investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights” (Promotion of National Unity and Reconciliation Act 1995).

However, “gross human rights violations” was defined far too narrowly, confined to “the killing, abduction, torture or severe ill-treatment”, whereby “ill-treatment” was further specified to be of a physical nature only (Dugard 1997, 278). Whilst this does cover violations of human rights that must be exposed and addressed, it missed the truly insidious nature of apartheid, being the legal mechanisms that upheld a system of white oppression. Aspects such as the denial of freedom of movement, stealing of land and denial of the right to vote were beyond the ambit of the commission, and thus the quality of truth suffered (Farbsein 2020, 456). John Dugard (1997) posits that the true nature of apartheid was not covered by the TRC, rather, merely discrete instances of human rights violations appeared. Along with the benefit of amnesty, and the failure of the judiciary to support this system, core perpetrators, and indeed core details of the system, remain in the shadows.

Similarly, a fragmented approach to truth emerged in Argentina. *Nunca Más* exposed important facts about the levels of enforced disappearance through military rule, along with details of clandestine camps. Yet, similar criticism was mounted as it looked to discrete instances of enforced disappearance, rather than the systematic approach from the military to consolidate their own power by eliminating political opponents (Maculan 2012). Moreover, given the extremely short time frame, it was inconceivable that the extent and complexity of the military rule and enforced disappearances could be exposed. This is especially true when important human rights organisations, and victims alike, felt divided as to whether they should involve themselves with the commission. On the one hand, it was not the bicameral investigation that they demanded. On the other hand, it may have been the only chance they had to obtain truth (Crenzel 2008, 180). Additionally, CONADEP and truth trials suffered from the same issue; that it was predominantly the perspective of the victim-survivors. Ultimately victims and human rights organisations demanded criminal trials – they were less interested in “reconciliation”, which was co-opted by the military in their “final document” as they sought to instil amnesia of their crimes under the guise of national reconciliation (Roniger 2011). Rather, civil society demanded that the military be brought to justice through the legal system, as they required accountability. Instead, the vast majority of the military were never exposed for their crimes, and ultimately the truth was obfuscated.

A key moment in the Argentine process was when a member of the Argentine Navy Adolfo Scilingo publicly admitted to dropping political opponents from a plane into the ocean (Acuña and Smulovitz 1997, 94). Exposure of this atrocity began to highlight the extent of human rights violations that were justified by the military. It also led to a formal apology by the Chief of Staff of the Argentine Army Lt. General Martín Balza who publicly stated that respect for the constitution is of paramount concern in democratic Argentina (Acuña and Smulovitz 1997, 95). However, this example is merely an outlier, as the vast majority of perpetrators hid behind the cloak of amnesty. Given the doctrine of self-incrimination, this meant that they were not compellable at the truth trials. As a result, whilst CONADEP and the trial trials allowed victim-survivors to have a platform to share the impact they experienced, it was essentially useless as an endeavour to hold the military to account, which was the aim and demand of civil society.

As such, both truth commissions developed an understanding of the extent to which human rights were violated in the periods of conflict, which is important to provide an accurate account in the public sphere. However, the quality of truth must be critically analysed. Both the TRC and CONADEP failed to truly interrogate the systems and structures of oppression that ultimately produced the environment in which abuses could occur.

5.4. REFLECTION OF POWER DYNAMICS AND THE CONTRACT OF TRUTH

Ultimately, as has been developed above, the granting of amnesty in South Africa and Argentina greatly benefited perpetrators of violence, oppression, and human rights violations. In contrast, civil society was granted a small, incomplete, picture in the form of “truth” from their respective commissions. This shows a clear imbalance between what is “gained” from both sides of the “deal”.

This analysis is not to establish a critique of restorative justice in favour of retributive justice. Whilst this debate is important to the theoretical underpinning of TJ, it shouldn't be the only point of analysis. For instance, authors have criticised the delay in giving reparations, and their lack of implementation of the commission's recommendations in South Africa (Hayner 2011, Pradier *et al.* 2018). This criticism has been framed as a failure in the aim of restorative justice (Pradier *et al.* 2018). Yet, when framed in the context of “the contract”, criticism can be instead addressed at the actual bargain in the first place. Amnesty was established within the commission's powers from the outset, whilst the RRC had no capacity to issue reparations, but rather to give non-binding advice to the government. Consequently, whilst perpetrators felt the benefits of amnesty immediately, it took victims many years to receive any form of reparations, never receiving what was recommended by the commission. This highlights a prioritisation of amnesty over reparations. In the power structures of the transition, the outgoing oppressive regime had the power to ensure protection through amnesty, whilst the lesser power from victims meant an unsecured promise of reparations. Indeed, whilst international law dictates a victim's “right” to reparations, Jenkins posits that it was instead framed by the government as an act of discretion to which victim communities should be thankful (Jenkins 2000, 459).

The reparations system could have had a significant transformative impact, however, the very nature that the RRC did not have access to the finances to grant them significantly curtailed their power to create change. Indeed, economic violence was a core pillar of the apartheid system, which resulted in poverty among Black populations, allowing for further oppression. It is estimated that 3.5 million people were forcibly removed from their houses between 1960 and 1983 through official apartheid policy (Gross 2004, 83). White oppressors profited from the system (Moyo 2015), with 20% of the population owning and controlling 87% of the land (Christopher 1995, 267). In response, the RRC recommended a wealth tax on perpetrators who benefited economically from the apartheid system. Moreover, businesses that collaborated, supplied goods and services used for oppressive purposes or simply benefited from apartheid were encouraged to make economic contributions to the reparations fund, to reflect that they benefited substantially from an oppressive system (Farbsein 2020 457-8). The tax was never implemented, and the company contributions produced a “paltry amount” (Farbsein 2020, 458), despite the capacity for these mechanisms to redistribute wealth that was obtained and deprived based on institutionalised racism and oppression. Central to this failure of the reparations system, from the outset, was the fact that the RRC did not have access to the funding. This core failure goes to the establishment of the TRC, and the power imbalance that did not value reparations given to the victims.

The TRC in South Africa elucidated the implicit contract of a truth commission and attempted to strike a deal between victim and perpetrator. *Prima facie*, making clear this agreement is beneficial to the success of a truth-telling objective, the expectations of the

deal must be realised to promote sustained change and reformation, successfully working towards a transition in society. It is important to emphasise that the division of power leading up to the transition from apartheid was far from fair (Dugard 1997, 286-287). White oppressive regimes had everything to lose and nevertheless had a grip on significant political, economic and military power that could not be effectively challenged by the Black minority (Mamdani 2015). As a result, agents of oppression escaped prosecution, either through amnesty or a lack of criminal convictions, and victims were not sufficiently aided through the granting of reparations. This is not to say there were no successes in this process, as has been outlined above, but the inherent disproportion of power in the creation of this agreement was unjust, leading to outcomes that are far from equal.

The Argentine example is harder to distil into a contract analogy. This is because, firstly, it did not have an exposed bargain, as was present in South Africa. Yet, it is evident that the restorative outcomes were highly impacted by the political decisions made in the transition from military dictatorship to democracy. CONADEP can be seen as a bargain from the Argentine government to both the people and the military. They promised to locate missing people, under the condition that this would appease the population, allowing for minimal challenge to the military and consolidate democracy. Indeed, this interpretation is supported by amnesty laws that limited the possible exposure of the human rights violations committed by the dictatorship and led to near wholesale impunity. Whilst the military was fragmented and inept and ruling the nation, they were the core arbiters of power, thus having an undue influence on the government to ensure that they remained beyond justice, whether from a restorative, or retributive analysis.

Secondly, and perhaps a more important difference between the countries, was the fact that human rights violations were exposed in Argentina over time, through a variety of measures, driven primarily by civil society. When faced with the asymmetrical power of the military, which relied on threats of force and totalitarian rule to escape accountability, human rights defenders and victim-survivors persisted by campaigning, and drawing on other powers independent of government, namely the judiciary. As such, power also belongs in the fight from human rights defenders and civil society. This process is not perfect; amnesty protected many offenders and the quality of truth was not extensive. This highlights how power will manipulate outcomes in transition – it will be used to protect the perpetrators, and with sustained fighting, it can lead to valuable, yet imperfect, solutions for victim-survivors. Indeed, power is the true arbiter of the quality and extent of truth.

As such, whilst the “contract of truth” may not fit as neatly, given that there was no exposed bargain, it can still be applied in the Argentine context. The process of unrolling truth-telling, through the phases of CONADEP, trials, amnesty and truth trials highlights the government as a core arbiter between the threat of the military to overthrow democracy, and civil society’s demands for truth and justice. Here, the government walked a sensitive line between the maintenance of a new democracy and justice for its people. They were torn between the power of the military and the power of civil society, and rather than choosing to back the wish of the people they were representing to find the truth and seek justice against past atrocities, they pandered to the power of the military. As such, whilst restorative aims were pronounced and acted upon in South Africa, it was only through the fight from civil society (namely victims and human rights organisations) that some semblance of restorative justice occurred in Argentina.

Herein lies a core issue of deficiency of TJ mechanisms, as elucidated in both the South African and Argentinian experiences – stragglers from previous regimes will hijack the transition process to ensure that they are least impacted, to the detriment of justice for victims (Barahona de Brito 1997, Beresford and Wand 2020). In Argentina, threats by the military to overthrow democracy led to an approach from the government to essentially forgive and forget. In South Africa, relinquishing of power was conditional on the provision of amnesty and the minimal capacity for victims to obtain restorative measures in the form of reparations. Here, the power to subvert the transition of a nation presented a threat that was a severely limiting factor on the quality of truth that could be provided, and the capacity of each nation to reconcile with their histories of trauma. Perhaps TJ can continue to expand to more revolutionary, rather than reformist agendas, as critiques of TJ posit (Moyo 2015, McAuliffe 2019, Evans 2021). This comes with inherent sensitivities and may not be perceived as a practical reality in the fragile context of post-human rights offending situations. It also comes with difficult judgment calls – for instance, could Argentina have truly had a restorative process if the pursuit of radical justice measures prompted a coup and subsequent loss of democracy? Yet, as displayed by the sustained campaigning from civil society in Argentina, barriers in the way of truth and justice will be toppled. Indeed, in 2005 the full stop and due obedience laws were declared unconstitutional, as a result of systems change in the judiciary, and enduring action from human rights campaigners (Galis 2015, 81-83). We must aspire for systems change. We must aspire for transformation, as well as transition and empower those who have been left voiceless to obtain this warranted change.

6. CONCLUSION

This article established the case that it is useful to analyse Truth Commissions within the analogy of contract. It posits that this is beneficial as it enables the core elements of the exchange of truth to be elucidated, and facilitates a critique of the power dynamics that underpin this bargain-striking process. Using South Africa and Argentina as case studies, this article first looked at the utility of truth commissions. It looked at how an unexpressed course of action will lead to the struggle over power and truth, as elucidated in Argentina. This was contrasted with the particular strength in South Africa of clearly identifying the “contract of truth” that was struck. Next, it considered the exchange of amnesty and reparations for truth in South Africa, and how that eventuated for perpetrators and victims respectively. In identifying and analysing the shifting power structures that informed the truth process in Argentina, the phases of truth-telling were outlined. Lastly, this article critically analysed the power dynamics present that established the process and quality of truth-telling. It looked at the bargains that were struck, the shifting and adaptation of power in transition, and how power, particularly from the previous abusers of human rights, will have a disproportionate impact on the reconciliation process.

Ultimately, it cannot possibly be posited that Transitional Justice provides a panacea following systematic human rights atrocities – this would demand far too much. Indeed, the term transition insinuates one step along the pathway to the recovery and stabilisation of a system (Barahona de Brito 2010, 364). In South Africa, there was a successful shift from the apartheid regime to a democratic nation, and Argentina has not reverted to a military government. However, in order to realise a full change in society, reconciliation must take many forms and be a concerted practice of the government and society. It must aim to heal

the trauma of the past but ultimately, it must seek to address the core imbalances of power – be it social, political or economic.

So what does this mean today? What does this mean for academia, and what does this mean for people across the globe who are subjects of state violence?

These are hard questions to answer. It is hard to conclude that Transitional Justice can only be one piece of the puzzle, and that power is an essential piece – when often people seek single solutions and feel powerless. For the academic space, this article seeks to orient the discussion of Transitional Justice and its outcomes to the analysis of power. It seeks to look at individual contexts, to understand the power dynamics, and critique the process of justice, rather than just the outcomes. Moreover, whilst it acknowledges the strength and positive possibilities stemming from a Transitional Justice approach, it reminds the field that we cannot demand too much from these tools in fragile contexts.

For those who suffer under state violence, and those demanding justice and change, voice matters, and change is an evolution. Justice and transition is not a quick process, yet through sustained exercise of power, quality change can emerge.

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