

## REVIEW ARTICLE

# Negotiating the archive: Amnesty, justice and memory: Review article of Antje Du Bois-Pedain *Transitional Amnesty in South Africa*

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### ABSTRACT

This article represents an encounter between Antje Du Bois-Pedain's recent *Transitional Amnesty in South Africa* and Jacques Derrida's *Archive Fever*. I argue that Du Bois-Pedain's work is magisterial in the sense that relates it to the meaning of the archive identified in Derrida's text. Taking the Derridean argument a step further I aim to illustrate that this text-as-archive reveals a glimpse of its own death drive — it is conscious of its unconscious. I argue that the death drive of the archive is here ultimately resisted/countered precisely by Du Bois-Pedain's willingness to confront the outside of the archive that is this work.

### Preface

A book makes its way onto a desk and strikes up a conversation with one that has been there for a while. In this case, the books that spoke to each other did so, literally, from cover to cover, simply because the covers of both these books arrestingly represent a fire. (In what follows I hope the reader will see that the figuration of fire — force of destruction, of burning — is crucial — everything but coincidental — here.) The one book bears a fiery orange cover with a burning flame in the centre.<sup>1</sup> The other, the one that is the subject of this review, also depicts flames. It shows detail from a painting by Kim Berman entitled *Through the Wire: Lowveld Fire I*.<sup>2</sup> In a sense, both these books are burning, not least because of the burning issues they address. One afternoon, while a fire was raging through the mountains of Cape Town,

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<sup>1</sup> J Derrida *Archive Fever* (1995).

<sup>2</sup> A Du Bois-Pedain *Transitional Amnesty in South Africa* (2008).

I was fortunate enough to overhear a conversation between these two books. What follows is an account of what I heard.

## Epigraph

“The ethical limit of this vision is that it displays the limit of the “truth and reconciliation” idea: what if we have a perpetrator for whom the public confession of his crimes not only does not give rise to any ethical catharsis in him, but even generates an additional obscene pleasure?”<sup>3</sup>

## Introduction

It is by now common cause that the availability of amnesty for politically motivated crimes committed during the apartheid-era was a non-negotiable condition for the very possibility of a reconstituted South Africa. Consequently, the Commission for Truth and Reconciliation (TRC) became the home of South Africa’s apartheid-related amnesty process. The naming of this commission coupled with its designation as the body empowered to grant amnesty, of course revealed particular ideological commitments and established deliberate — but not necessary — connections between Truth, Reconciliation and Amnesty — the Three Musketeers of the South African transition. When critics of the TRC point to the ‘failures’ of the TRC, we often tend to neglect precisely this fact about the TRC: that it was a political instrument — a creation of a political will convinced that the way in which favourable circumstances for a successful transition is created is through encouraging (enjoining?) reconciliation amongst the members of the newly constituted body politic. A particular mode of reconciliation was envisaged: one that claimed to be linked to truth and that fore-grounded amnesty (and consequently implicated the entire genealogy and economics of the concept of pardon — apology, forgiveness etc — in politics) in exchange for such truth (and, by implication, reconciliation). The fertile ground for a successful reconciliation was, it was said, created when violators/perpetrators tell the truth (but as we shall see, only a particular kind of truth) about their horrific deeds (but only particular kinds of deeds, as we shall also see) and, in exchange for the truth (and nothing but the ‘truth’), are legally exonerated from their crimes.

Quite simply, the price for the truth, according to those who took responsibility for South Africa’s reconciliation model, is no price (at least not in the positivistic ‘legal’ or ‘economic’ sense of that word). The legal name of such a no-price is amnesty. And, as Antje Du Bois-Pedain

<sup>3</sup> S Žižek *How To Read Lacan* (2006) 97.

indicates in a magisterial new work,<sup>4</sup> this amnesty — this payment of no legal price — is transitional. It is what negotiated the transition; it is the price for the new South Africa. Is it possible to ask — here, anywhere — whether a price that is in fact no price — a price that does not register in legal terms — is too high a price? Can no price be too high a price? Whoever stands ready to accuse that we are already just playing here, should know that if this was a game, it would be a very treacherous one indeed.

### **The magistrate, the archive, memory and justice**

To state, as I just did, that someone's work is magisterial, immediately links it conceptually with the archival dimension of text and as such with the law. In his book, *Archive Fever*, Jacques Derrida argues that 'the meaning of "archive," its only meaning, comes to it from the Greek *arkheion*: initially a house, a domicile, an address, the residence of the superior magistrates, the *archons*, those who commanded.'<sup>5</sup> It is thus always that which carries the magisterial quality that acquires the right both to speak (interpret) the law and to call upon or to command the law.<sup>6</sup> This necessarily implies that the magistrate is, in fact, *magister*, that authority is referenced and located here. The etymology of course also indicates that the word 'archive' houses within itself two principles of order: topological and nomological, the principles of commencement — there where things begin — and commandment — the law is called upon from this place where things begin.<sup>7</sup>

To say, therefore, that a work is magisterial is to claim that the work is expertly/authoritatively archival, and as such acquires the right to call upon (justify/interpret) the law with such authority. As we know all too well in South Africa — it is the archive that harbours, but does not by itself speak, the law. The authoritative interpretation is what speaks the law. Expertly archival — magisterial — Du Bois-Pedain's text certainly is. Spanning over just under 400 pages, this work provides, as James L Gibson puts it in his review, 'the closest, most detailed, and most comprehensive look at the amnesty component of South Africa's truth and reconciliation process'<sup>8</sup> As such, it carefully, painstakingly, documents (records, archives) — as its principal task — the often fraught history of the amnesty scheme which played such a decisive role in South Africa's

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<sup>4</sup> A Du Bois-Pedain *Transitional Amnesty in South Africa* (2008).

<sup>5</sup> Derrida op cit (n1) 2.

<sup>6</sup> Derrida op cit (n1) 1.

<sup>7</sup> Ibid.

<sup>8</sup> JL Gibson 'Transitional amnesty in South Africa' by Antje Du Bois-Pedain' (2008) 18 (7) *Law and Politics Book Review* available at <http://www.bsos.umd.edu/gvpt/lpbr/sub-pages/reviews/dubois-pedain0708.htm>, accessed 2 June 2009.

transition from authoritarian rule to constitutional democracy. As such this archive is no doubt a work of memory and thus a work of justice.<sup>9</sup>

Following a brief but engaging introduction, the first two chapters provide the background to, overview of and practice in relation to the TRC-based amnesty scheme. Here the author vividly portrays the 'build up' to the amnesty provisions, situating them in the context of a history of various pieces of indemnity legislation passed in anticipation of the end of apartheid in South Africa. She exposes the contradictions and ironies that emerged during the judicial review of amnesty decisions and in chapter 2 the author takes a close and fascinating look at the practice of the committee by subjecting the applications in relation to the TRC's 1100 amnesty decisions to 'particular factual criteria, which, in view of the definition of the political offence in the Promotion of National Unity and Reconciliation Act 34 of 1995 (TRC Act), one might expect to have been relevant for the outcome of an amnesty application one way or another'.<sup>10</sup>

Admitting to the fact that there are inherent limitations in the chosen methodology, the author defends the use of the participation-act as a basic statistical unit for the analysis — 'one participation-act being one applicant's personal contribution to an incident which forms the subject matter of an amnesty application'.<sup>11</sup> Du Bois Pedain proceeds to set out the findings in relation to the participation acts according to the information recorded in the study. I will not spoil the interested reader's curiosity by providing a reductive summary of these findings. Suffice it to say that Du Bois-Pedain's findings are well-presented and often striking. The reader will no doubt get a glimpse of these findings in the discussion that follows.

In chapters 3 and 4 the author's empirical findings are put into the broader context of the work of the Amnesty Committee in order to explore what the findings in chapter 2 imply about the Committee's understanding of the main substantive requirements for a successful amnesty application. I mentioned in the introduction that only particular kinds of horrific deeds qualified for amnesty and that the truth (but only a certain kind of truth) about these particular kinds of deeds was required for an application for amnesty to succeed. This is the case because the TRC Act provides that an applicant for amnesty only qualified for such amnesty where the offence in respect of which amnesty is sought qualified as a 'political offence' (as defined) and where the

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<sup>9</sup> J Derrida op cit (n1) 77: 'Is it possible that the antonym of "forgetting" is not "remembering", but "*justice?*"'.

<sup>10</sup> Du Bois-Pedain op cit (n2) 62.

<sup>11</sup> Du Bois-Pedain op cit (n2) 66.

applicant made a full disclosure of the details of and circumstances surrounding such offense.<sup>12</sup>

Regarding the former, Du Bois-Pedain argues that the findings of her study suggest that the Committee was markedly generous in applying the 'political offence' requirement — almost 90% of *bona fide* applicants (that is, applicants whose activities had 'a political background in the broadest sense') were granted amnesty.<sup>13</sup> This generosity, argues Du Bois-Pedain, stemmed in part from the fact that the Committee followed a broad interpretation regarding the question whether an applicant had a sufficient political mandate in order to qualify for amnesty. In this regard, the author makes the point that, although proof of ordered deeds is a foolproof way of meeting the requirement of a political mandate, action on the basis of explicit orders was not a requirement for a successful amnesty application. The author also provides apt examples from the proceedings of the Amnesty Committee in order to illustrate this point and shows that this practice in relation to the significance of orders is also in line with international and local trends regarding orders in other legal contexts.

The practice of the Amnesty Committee did, however, diverge markedly from international trends when it considered the overall approach to and interpretation of 'the political'. The view of the political that is taken here proceeds from the point of view of the protagonists — the behaviour they viewed as politically driven.<sup>14</sup> This does not mean that what is political is necessarily subjectively determined. As the author indicates, both the labels 'terrorist' and 'freedom fighter' accept the political aspect of the behaviour. The disagreement lies in the moral quality of the agent and his deed.<sup>15</sup>

Ultimately, this chapter explains that the Committee's practice regarding the political offence requirement did not judge the moral quality of the political deeds, rather its practice was fuelled by a pragmatic, factual understanding of the political (characteristic of *Realpolitik*<sup>16</sup>):

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<sup>12</sup> Section 20(1) and (2) Promotion of National Unity and Reconciliation Act 34 of 1995.

<sup>13</sup> Du Bois-Pedain op cit (n2) 97.

<sup>14</sup> Du Bois-Pedain op cit (n2) 132.

<sup>15</sup> Du Bois-Pedain op cit (n2) 132-3.

<sup>16</sup> B Frankel 'Confronting neoliberal regimes: The Post-Marxist embrace of Populism and Realpolitik' (1997) 226 *New Left Review* 57 argues that the return to Realpolitik in political institutions marks the rise of neoliberalism in politics which is coupled with a denial of the old categories of Left and Right. The Committee's practice is in this sense perhaps also an indication of the Zeitgeist that prevailed at the time. MH Arsanjani 'The International Criminal Court and National Amnesty Laws' (1999) 93 *American Society of International Law Proceedings* 65-6, similarly, draws a link between controversial amnesty laws and 'the present condition of Realpolitik'. Also see K Ambos 'Prosecuting international crimes at the National and international level: Between justice and Realpolitik' in W Kaleck et al *International Prosecution of Human Rights Crimes* (2007) 55-68.

‘The Committee is content to accept for the purposes of the law what it finds to have been the case in the world of facts: that, in the circumstances prevailing at the time and place where the perpetrator committed his act, his crime had a political connotation or was an expression of his political beliefs.’<sup>17</sup> As the author argues, this interpretation of the political offence requirement was not an historical coincidence — it was, given the background and the stakes involved, a political necessity. With this argument Du Bois-Pedain dispels the myth that when it came to the interpretation of the political offence requirement, a certain restrictive political moralism operated in the collective (un)conscious of the Committee.

Chapter 4 builds on the link between the political offence requirement and the concept of full disclosure. Having argued in Chapter 3 that the recognition of a participation act as ‘political’ — from the vantage point of an empirical, factual interpretation of the term — greatly enhances the chances of full disclosure,<sup>18</sup> Du Bois-Pedain continues to argue that it is the concept of full disclosure that forms ‘the moral cornerstone of the amnesty process’.<sup>19</sup> Du Bois-Pedain admits that there is essentially a negotiation here, a negotiation, I would submit, in the sense of that word as Derrida uses it: ‘negotiation as a knot, as the work of the *knot*. In the *knot* of negotiation there are different rhythms, different forces’.<sup>20</sup> This negotiation is, in addition, never a simple negotiation as a calculation. It is a negotiation between the calculable and the incalculable, certainty and risk — negotiation between accepting a perpetrator’s submission that his deed was politically motivated (in accordance with the view the Committee took of the political) and running the risk that he or she may not have made a full disclosure.<sup>21</sup> This negotiation as a knot in the work of the committee exists between, on the one hand, the rife concessions to *Realpolitik* (or in favour of a realistic, pragmatic outcome) when it came to the interpretation of the political offence requirement, and, on the other, the full disclosure requirement which stood to countervail these concessions and provide the ethical defence of the amnesty scheme.

But what, then, constituted a ‘full disclosure’ in these circumstances? The answer to this question reveals that there is again much calculation (negotiation) involved between two extremes when it came to the interpretation of this aspect. Du Bois-Pedain points out that the TRC Act did not define full disclosure and that the Committee accordingly followed a middle way between an approach that would require the ap-

<sup>17</sup> Du Bois-Pedain op cit (n2) 135.

<sup>18</sup> Du Bois-Pedain op cit (n2) 136.

<sup>19</sup> Du Bois-Pedain op cit (n2) 139.

<sup>20</sup> J Derrida and E Rotenberg *Negotiations: interventions and interviews* (2002) 29.

<sup>21</sup> Derrida op cit (n17) 31.

applicant to disclose all facts of which he or she has knowledge, whether or not they relate directly or indirectly to the offence(s) for which the applicant applies for amnesty and an approach that would allow the applicant to essentially disclose only the strict *facta probanda* of the offence.<sup>22</sup> This middle way (the negotiated way) takes as its starting point 'the incident under consideration' and requires that all 'relevant facts' of which the applicant has knowledge in relation to this incident be disclosed — applicants were not allowed to break up the incident into different parts and only disclose *facta probanda* of the offence(s) for which he is applying for amnesty.<sup>23</sup>

The link between Chapters 4 and 5 is the difference/divergence between full disclosure and truth. Having stressed the fact that the amnesty committee's work represented a negotiation between the truth and the full disclosure requirement, Du Bois-Pedain indicates that this negotiation is in fact a negotiation between two non-negotiables. This involves another dimension of Derrida's sense of negotiation: '[t] here is negotiation when there are two incompatible imperatives that appear to be incompatible but are equally imperative. One does not negotiate between exchangeable and negotiable things. Rather, one negotiates by engaging the non-negotiable in negotiation.'<sup>24</sup> Why are the 'non-negotiables' that are being negotiated with here clearly the concepts of full disclosure and truth? Because full disclosure was from the vantage point of the Amnesty Committee non-negotiable as a requirement for amnesty, yet, as Du Bois-Pedain argues, the structural constraints in relation to the amnesty process — although requiring a full disclosure — necessarily limited the extent to which an incident under consideration could be further excavated for the discovery of 'the truth' in relation to it. Yet from the point of view of the victims, knowing (as much as possible of) 'the Truth' was not negotiable. The structural 'constraints' could thus not merely be accepted uncritically and put forward as a reason why more truth could not be expected to emerge. Such a gesture held the potential to insult victims and alienate them from the process.

However, the Amnesty Committee, in the author's words, 'engages in factual investigations not for the sake of historical clarification, but in order to resolve factual uncertainties on which its decision on the application hinges.'<sup>25</sup> Factual investigations thus had a severely limited field of application. Only when factual uncertainties were present and the committee's decision hinged on the resolution of these uncertain-

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<sup>22</sup> Du Bois-Pedain op cit (n2) 141-58.

<sup>23</sup> Du Bois-Pedain op cit (n2) 151-2.

<sup>24</sup> Derrida op cit (n17) 13.

<sup>25</sup> Du Bois-Pedain op cit (n2) 179.

ties, would it embark on such investigations. Other amnesty-related aspects that militated against truth recovery included the application of evidentiary privileges and the way in which the Committee dealt with implicated persons who were not victims. In this regard, Du Bois-Pedain concludes that it was the Committee's choice to make limited use of its investigative powers in this regard and not so much the applicable laws that limited truth discovery in this context.<sup>26</sup> To my mind this represents a significant failure of the Amnesty Committee in the negotiation between truth for the victims and full disclosure by the applicant. In addition, if it is accepted that the moral justification of the conditional amnesty process was to be located in the full disclosure requirement, then this failure represents a significant failure in relation to such justification.

The author argues, nevertheless, (and I agree with her) that the truth recovery that could be achieved during the amnesty process is decidedly more substantial than what could be achieved in a criminal trial: '[t]he amnesty scheme inspired many to participate who could never have been prosecuted successfully in a court of law.'<sup>27</sup> In conclusion of the chapter, Du Bois-Pedain highlights the kind of truth that one could expect from the TRC process as a 'dialogical' or 'shared truth'<sup>28</sup> which is not necessarily an objective truth — indeed, sometimes, far from it.

Chapter 6 focuses specifically on the question whether one could expect from a conditional amnesty process (such as that of the TRC), an empowering effect on victims from past conflict. Pointing out that '[t]he alleged victim-centredness of the truth and reconciliation process is the TRC's dominant justificatory theme', Du Bois-Pedain (with reference to the work of Stéphane Léman-Langlois) argues that when this is the centre of the endeavour, then the measure of its success is not retribution but victim's participation and benefits resulting from such participation.<sup>29</sup>

The link between amnesty and benefits/empowerment to victims is, at best, a controversial one. Many victims in fact deny such a link and some victims who participated in the TRC process similarly argued that, if anything, the Amnesty Committee was 'perpetrator friendly'.<sup>30</sup> The main reason for the perception that the amnesty process is perpetrator orientated is because the absence of punishment is perceived as constituting what the author calls a 'justice deficit'.<sup>31</sup> In the light of this, 'a full justification of the amnesty process ... must be able to iden-

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<sup>26</sup> Du Bois-Pedain op cit (n2) 189.

<sup>27</sup> Du Bois-Pedain op cit (n2) 208.

<sup>28</sup> Du Bois-Pedain op cit (n2) 216.

<sup>29</sup> Du Bois-Pedain op cit (n2) 217.

<sup>30</sup> Du Bois-Pedain op cit (n2) 218.

<sup>31</sup> Ibid.

tify some benefits of the amnesty process that criminal trials cannot provide, and show that these benefits are of such crucial importance for victims that they can (or at least ought to) override the victim's desire for prosecution and punishment of the offender.<sup>32</sup>

Following an incisive consideration of the meaning of the term 'victim' as well as the rights a victim is accorded by the TRC Act, the chapter proceeds to put forward three case studies of actual victim-perpetrator interaction — that between Jeffrey Benzien and his victims, Robert McBride and his victims and between Ginn Fourie and her daughter's murderers. These case studies vividly illustrate the complex dynamics of victim-perpetrator interaction, and show that while these victims' rights significantly expand the range of participatory options, their exercise does not necessarily ensure that victims will be satisfied with the process.<sup>33</sup> The case study that deals with the amnesty application of Robert McBride portrays most vividly how perpetrator-victim interaction can indeed be re-traumatising and disempowering, although this could be discerned also from aspects of the interaction between Benzien and Toni Yengeni.<sup>34</sup> Du Bois-Pedain concludes that 'the amnesty process offers victims valuable opportunities for participation — but since it imposes a cost in the form of the absence of punishment' it cannot be said that victims are more satisfied with the amnesty process than they are with the criminal trial.<sup>35</sup>

In chapter 7 the author identifies perpetrator accountability as one of the objectives that the TRC set out to achieve and analyses what this accountability meant and whether it was achieved. The notion of accountability obviously implies some conception of justice. Du Bois-Pedain focuses on two forms of justice, retributive and restorative.<sup>36</sup> She argues that the amnesty process fits neither of these justice scripts completely. This requires a justification of the amnesty process in terms of 'a new justice script for a transitional society in which a legacy of politically motivated violence needs to be addressed.'<sup>37</sup> This new

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<sup>32</sup> Ibid.

<sup>33</sup> Du Bois-Pedain op cit (n2) 225.

<sup>34</sup> Du Bois-Pedain curiously omits in her discussion of this interaction the moment when, after Benzien has illustrated the 'wet bag' method, he returns to his seat and re-addresses Mr Yengeni: 'Do you remember Mr Yengeni that it took you thirty minutes before you betrayed Jennifer Schreiner? Do you remember pointing out Bongani Jonas to us on the highway?' About this Antje Krog writes: 'And so continues the torture of Tony Yengeni. Yengeni broke in under thirty minutes, suffocating in a plastic bag that denied him air and burnt his lungs, under the hands of Benzien. In the mind of Benzien, Yengeni, freedom fighter and anti-apartheid operative is a weakling, a man that breaks easily.' A Krog *Country of My Skull* (1998) 73.

<sup>35</sup> Du Bois-Pedain op cit (n2) 337.

<sup>36</sup> Du Bois-Pedain op cit (n2) 257.

<sup>37</sup> Du Bois-Pedain op cit (n2) 259.

justice script morally condemns the resort to violence in political strife by labelling these acts of violence as ‘gross human rights violations’, while at the same time acknowledging perpetrators’ willingness to be part of the transitional process as something admirable.<sup>38</sup>

### Archive Fever — once more

At this point Derrida’s *Archive Fever* interjects once more and for good reason. The part of *Archive Fever* that interjects here is its particular discussion of the Freudian understanding of *thanatos* or death-drive.<sup>39</sup> Freud argued that the human drive to survive is at the same time at war with the unconscious death drive — the drive to leave no trace, or the drive to self destruction.<sup>40</sup> Derrida, following Freud argues that there is a death drive inherent in every archive as a hypomnesic device. Every archive harbours within it the force of its own destruction. In order to understand more fully what Derrida is saying here about the archive’s death drive it is necessary to quote him at length:

‘It is as if Freud could no longer resist, henceforth, the irreducible and originary perversity of this drive which he names here sometimes death drive, sometimes aggression drive, sometimes destruction drive, as if these three words were in this case synonyms. Second, this three-named drive is mute (*stumm*). It is at work, but since it always operates in silence, it never leaves any archives of its own. It destroys in advance its own archive, as if that were in truth the very motivation of its most proper movement. It works to *destroy the archive: on the condition of effacing* but also *with a view to effacing* its own “proper” traces — which consequently cannot properly be called proper. This drive, from then on, seems not only to be anarchic, anarchotic ... the death drive is above all *anarchivic*, one could say, or *archivolithic*.’<sup>41</sup>

To my mind, it is in chapter 7 of this work that we briefly get to see (veiled as it undoubtedly is) the death drive of this archive which is also the death drive of the TRC’s archive. But it is Du Bois-Pedain who frankly confronts the death drive in her/the archive and even ventures an explanation for its presence. Allow me to explain. In a work that attempts an overall justification of the conditional amnesty scheme and that I have already characterised as a work of memory and thus of justice, Du Bois-Pedain turns in this chapter to that which threatens to undermine her argument: the fact that offenders who are called to account for their deeds in political terms often fail to account for these deeds as moral wrongs: ‘Their explanations appear to deflect moral responsibility away from them, while falling short of any valid justifica-

<sup>38</sup> Du Bois-Pedain op cit (n2) 296.

<sup>39</sup> Derrida op cit (n1) 9-10.

<sup>40</sup> S Freud, J Reddick *Beyond the Pleasure Principle and other Writings* (2003) 43.

<sup>41</sup> Derrida op cit (n1) 10.

tion or excuse. The *normative* requirement for a satisfactory account ... is ignored in the amnesty context.’<sup>42</sup>

Here we clearly have what Žižek refers to in the quoted passage in the epigraph as ‘the limit of the “truth and reconciliation” idea’. What if the new justice script, for all its moral condemnations of the resort to violence during political strife, does not reach, impress or impact upon its intended addressees — the perpetrators — in the way Du Bois-Pedain argues? Even worse, what if there were perpetrators for whom the public confession of their crimes not only did not give rise to any ethical catharsis, but even generated an additional obscene pleasure? Was this not the risk inherent in the Amnesty Committee’s decision to interpret the political offence requirement in an almost ‘anything goes’ fashion? Du Bois-Pedain admits to this possibility (indeed probability) in her dismissal of the justification of the amnesty scheme in terms of a restorative justice script, when she shows that conformity with such an ideal of justice is clearly undermined by, for instance, the fact that amnesty applicants do not have to show remorse or contrition and the fact that the Committee failed to insist that applicants account for their deeds in moral terms. To quote the author:

‘the process is doomed to fail as a ritual of “re-integrative shaming”. For while such a ritual should involve, at some point, the realisation on the part of the perpetrator that he stands exposed for a shameful act, the amnesty process may instead be experienced by individual applicants as a site of moral triumph: a forum where they can explain what they did, for all to see that their actions were indeed political, and hence not morally wrong.’<sup>43</sup>

As regards the role of apology and forgiveness, the author (to my mind correctly) dismisses ‘[a]ny attempt to defend the amnesty process on the basis of an alleged capacity to ensure that perpetrators apologise and victims forgive.’<sup>44</sup> The inadequacy of justifying a conditional amnesty scheme on these terms is directly related to the fact that perpetrators were not forced to account for their actions as moral wrongs/violations. Du Bois-Pedain refers to the fact that the amnesty process did not require an apology and even when perpetrators apologised, the apology might in some cases have been insincere precisely because perpetrators do not regard their actions as morally wrong. This would be a further insult to victims. Moreover, as her account of Mrs Ginn Fourie’s engagement with the murderers of her daughters show, forgiveness can take place without reconciliation and, in addition, well outside the institutional parameters of the TRC.<sup>45</sup>

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<sup>42</sup> Du Bois-Pedain op cit (n2) 258.

<sup>43</sup> Du Bois-Pedain op cit (n2) 284.

<sup>44</sup> Du Bois-Pedain op cit (n2) 287.

<sup>45</sup> Du Bois-Pedain op cit (n2) 243-6.

I do not agree with the central contentions of the authorities on forgiveness that Du Bois-Pedain cites in this section. This is the case because I believe that the contradictory logic in our heritage on forgiveness is not adequately addressed by these authors. As Derrida points out, the Abrahamic tradition leaves us with two opposing notions of forgiveness, one unconditional or 'pure' as Derrida calls it, the other conditional and impure, starting with the insistence on apology and repentance.<sup>46</sup> The insistence on apology, followed by forgiveness, Derrida contends, is not pure forgiveness.<sup>47</sup> Apart from the fact that forgiveness is personal or intimate, it is also extraordinary and interruptive. Primarily because of the contradictory and unstable logic surrounding forgiveness it is improper/irresponsible to find a politics and a law on it (as so many role players in the TRC attempted to do).<sup>48</sup>

The flaws in the TRC's amnesty practice, argues Du Bois-Pedain, should not be confused with the justice script that the TRC Act lent itself to. This justice script condemns the actions of perpetrators as morally wrong while acknowledging the perpetrator's willingness to be involved in the amnesty scheme and to play according to its rules. I do not disagree that the TRC Act lent itself to such a justice script. The question remains though: how many perpetrators left the amnesty proceedings with the belief that their actions were morally unacceptable? How many perpetrators who refused to apply for amnesty or were not granted amnesty were smiling behind their hands and their handkerchiefs when the process was concluded — especially given the reluctance with which the post-amnesty phase of the TRC process is being addressed? Perhaps it is time to think seriously about the perpetrators and their role in the TRC process in the way suggested by Gillian Rose below:

'they are necessary and unwanted guests at the performance ... To mark their presence is to write as if the imaginary space of the master geographer was threatened from within and from without. It is to write as if the mirrors were not solid but permeable, as if the tain could move, as if the glass and silver were melting, as if there was an elsewhere. As if heroes were vampires ... It

<sup>46</sup> J Derrida 'On forgiveness' in J Derrida, M Dooley & M Hughes (trans) *On Cosmopolitanism and Forgiveness* 27-39.

<sup>47</sup> Derrida op cit (n46) 32.

<sup>48</sup> Derrida op cit (n46) 39.

is to write as if the mirrors had bled, bled their violence, bled their ancestry, as if blood could be beautiful, as if an elsewhere was possible.<sup>49</sup>

I am not suggesting here that a criminal trial process would have been less problematic in this respect, only that it should perhaps be admitted that the amnesty process could only really be justified not in terms of justice but rather in terms of injustice, or in terms of a justice that is always more or less unjust.<sup>50</sup> Perhaps it is necessary to continue acknowledging here the unjust sacrifices that were made for the birth of the new South Africa.

## Conclusion

In the final pages of *Archive Fever* Derrida writes that 'Nothing is less reliable, nothing is less clear today than the word 'archive'. Nothing is more troubled and more troubling ... the trouble of secrets, of plots, of clandestineness, of half-private, half-public conjurations, always at the unstable limit between public and private, between the family, the society, and the State, between the family and an intimacy even more private than the family, between oneself and oneself.'<sup>51</sup> Nothing is more troubled and more troubling. Antje Du Bois-Pedain's book illustrates many of the dimensions of the archival trouble regarding South Africa's transition. In this respect it is a uniquely insightful work.

I believe however that, in order to truly begin to grasp the significance of this work, one would have to invoke the principle of consignation, which, in its real sense, does not just refer to the assigning of residence or to the act of entrusting so as to put into reserve,<sup>52</sup> but also to 'the act of *con*-signing through *gathering together signs*.'<sup>53</sup> This gathering together of signs foregrounds the commanding (nomological) aspect of the archive, because it directly involves what Derrida calls the question of the archive: 'But where does the outside commence? This question

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<sup>49</sup> G Rose 'As if the mirrors had bled: Masculine dwelling, masculinist theory and feminist masquerade' in N Duncan (ed) *BodySpace* (1996) 56, 72. The author relies implicitly on the Lacanian theory of the mirror phase — the point of psychical formation when an infant recognises herself in the mirror. The phase which follows is the entry into the symbolic form of language. Those who do not successfully overcome the mirror phase often become self-obsessed narcissists (literally always only re-cognising themselves). Du Bois-Pedain's text reveals, to my mind, precisely how many accounts were given motivated purely by narcissistic self-aggrandisement. See in this regard particularly the account of the amnesty application of Robert McBride in Du Bois-Pedain op cit (n2) 232-42.

<sup>50</sup> See JWG Van der Walt *Law and Sacrifice* (2005) 15.

<sup>51</sup> Derrida op cit (n1) 90.

<sup>52</sup> Derrida op cit (n1) 3.

<sup>53</sup> Derrida op cit (n1) 3.

is the question of the archive. There are undoubtedly no others.<sup>54</sup> The principle of consignment thus turns us to the question of the archive as the question of the unstable limit between an inside and an outside of the archive — an outside without which there can be no archive. Du Bois-Pedain's archive has its own outside. I would go so far as to say that she is acutely aware of this troubling fact and cannot resist not to expose her archive to its outside. This is, no doubt, also a gathering together of signs. And this is also why her work is a work that seriously reckons with the death drive and thus succeeds in countering it.

The archive is always both revolutionary and traditional, institutive and conservative: 'it keeps, it puts in reserve, it saves, but in an unnatural fashion, that is to say in making the law (*nomos*) or in making people respect the law.'<sup>55</sup> *Transitional Amnesty in South Africa* — as a work of the gathering together of signs — offers the most detailed, self-critical and frank justification for South Africa's conditional amnesty scheme available in the literature. In this sense, it makes us (understand and) respect the law without falling into a complacent legal argument that is insensitive to the sensitivities that prevail on all sides of the debate. It is without a doubt still sensitive to the concept of a justice that is always already still to come — *à venir* — but still a justice that requires decision and therefore the law.<sup>56</sup> This is its legacy and its ultimate achievement.

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<sup>54</sup> Derrida op cit (n1) 8.

<sup>55</sup> Derrida op cit (n1) 7.

<sup>56</sup> J Derrida 'Force of law: The "Mystical Foundation of Authority"' (1990) 11 *Cardozo Law Review* 921.