

Forgiveness, Law and Politics

Considerations of the Truth and Reconciliation Commission

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Abstract

In the context of the process of transitional justice of South Africa, this paper focus on the non-legal character of commissions as the Truth and Reconciliation Commission to demonstrate their political character, and verify that they fit in perfectly in the exceptionality of the historical moment that is experienced by a political community in a transitional situation. This constituent and foundational exceptionality of such a community does not have insignificant consequences for the political and philosophical theory, and expounding them is the ultimate objective of this work. To this end, it first conduct a reflection from the point of view of the interaction between Philosophy and Law (and how it relates to these commissions) leading to another reflection which is more in line with the interaction between Philosophy and Politics.

Keywords: transitional justice, legal theory, political philosophy

1. Introduction

In the field of what is known as transitional justice, the concept of forgiveness has played a vital role. However, when dealing with phenomena such as forgiveness, no contemporary mentality can avoid the intuition that we are facing a reality that definitively belongs to the field of religion. For that reason, for an occidental mentality and from a purely philosophical perspective, it would be very useful to be in possession of research that completely dealt with the pagan senses of forgiveness in the classic Antiquity. A very recent monograph about forgiveness begins with the affirmation that such a study does not exist beyond some sectorial work about this question (Griswold 2007, 1). Thus, mentioning forgiveness along with processes of transition to democracy may seem odd at first sight. To be sure, it is far from clear which should be the role of forgiveness in a political and legal process. And yet some of the most characteristic processes of transition have incorporated commissions whose goal was that of reconciliation and forgiveness. The case of South Africa and its *Truth and Reconciliation Commission* is the most remarkable in this respect. The present paper aims to analyze if the search for forgiveness linked to processes of transitional justice makes any sense at all. The main contribution of this paper will lie in showing the limitations of law when confronted to forgiveness, as well as the extraordinary importance of transitional justice (and of forgiveness within it) for Political Theory. In order to achieve that, we will initially have to look at the academic debates arisen on account of the activity of the *Truth and Reconciliation Commission*. A first debate discusses whether a commission resembling a law court is actually the best way of obtaining reconciliation. A second debate considers both the political role and the legitimacy of the *Truth and Reconciliation Commission*.

When speaking about forgiveness in those situations, it is necessary to be very concrete. When using this word, one could be referring to political reconciliation among the parties in a conflict, amnesty for the perpetrators of certain crimes, or personal forgiveness that victims concede to those who have victimized them. In addition, these three senses are not necessarily contradictory because it is possible to speak about forgiveness in one, two, or all three senses at the same time. In the same way, it appears to be very evident that the processes of

transitional justice habitually deal with crimes that are more serious than we can imagine, and, therefore, we are talking about something that undeniably belongs to the area of criminal justice as we normally understand it, that is to say, justice that is an essential element of the law. However, it seems evident that any of aforementioned three senses of forgiveness in the processes of transitional politics seem to contradict the habitually understood sense of justice in the context of the law. While it may be an exaggeration to speak about a contradiction, at the very least, there are moments when we have to differentiate between forgiveness and the law. It does not seem like it should be the role of ordinary judges and the courts to achieve national reconciliation, award amnesty to the perpetrators of a crime, nor have the victims forgive the victimizers.

However, the process of transitional justice of South Africa, the most paradigmatic, and thus the most studied and at the same time the most complicated, chose to create a hybrid or para-judicial commission whose purpose was precisely reconciliation and forgiveness by means of truth and amnesty. And even in other processes, we find truth commissions that despite not having the same already mentioned objectives (reconciliation, forgiveness, amnesty), aspire to establish a certain degree of truth whose achievement appears to be on the basis of acting like the common courts of law. This combination is even more obvious when verifying that those commissions act in many cases as a substitute for the regular courts because of the enormous difficulties or the impossibility of them functioning at all or at least doing so in a reasonable amount of time. For this reason, there are those who have insisted that these commissions be assimilated by the regular courts, and, therefore, easily justifiable because they would be pursuing justice, although it wouldn't be the exact type of justice ordinarily realized by the law. On the other hand, there are those who have questioned the work of these commissions by emphasizing that their hybrid or para-judicial character manages to mix the law with other distinct purposes and realities and that tying them to the courts would be giving them a judicial appearance. In any case, this difference of opinion is understood to be in the context of the exceptionality of the situations where transitional justice is developed and which are characterized by being difficultly comprehensible and justifiable in the normal conditions of a democratic lawful state.

However, are these situations really exceptional? If we understand exceptional as being something that has not formed part of the majority of the political history of a community, then it seems obvious that they really are exceptional. We are not saying that there are not those who would like to always be in a continuous transition, only that history has demonstrated this exceptionality. However, because transitional politics do not occur every day or that they have appeared only once in the trajectory of many political communities, it should not be forgotten that we are dealing with one of the most important moments in the history of that community. It is precisely with this word "exceptional" that we characterize so many trivial situations (like mentioning "the exception that confirms the rule"), like with the maxim ("exceptional behaviour" that is to say exemplary). The exceptionality in this case means the second of the senses and also in a superlative degree, because we find ourselves precisely in a constituent moment (regardless of whether a constitutional text is approved or reformed, or neither one nor the other is done). If we focus on, as we are going to do with this work, the non-legal character of these commissions, it is to demonstrate their political character, and verify that they fit in perfectly in the exceptionality of the historical moment that is experienced by a political community in a transitional situation. This constituent and foundational exceptionality of such a community does not have insignificant consequences for the political and philosophical theory, and expounding them is the ultimate objective of this work. To this end, we will first conduct a reflexion from the point of view of the interaction between Philosophy and Law (and how it relates to these commissions) leading to another reflexion which is more in line with the interaction between Philosophy and Politics.

2. Forgiveness and the Scope of the Law

We will see how critics have tried to relate mercy and amnesty (two of the main goals of the *Truth and Reconciliation Commission*) to law, concluding that none of the latter really belongs to the realm of law, and so the Commission would be mixing up fields inappropriately. Some other scholars, however, have defended a broader concept of law and justice and therefore support the legal nature of the *Truth and Reconciliation Commission*. A careful reflection about the ends of law will help us to devise a third, distinctive position of our own and show that not only the notions of mercy and amnesty are alien to law, but also that of forgiveness. As a result of the former, we will also maintain that a broadening of the concept of justice only moves this concept away from the realm of law.

Looking at the concrete case of South Africa and the *Truth and Reconciliation Commission* established in that country in relation to the process of transition after the *apartheid* regime, Christodoulidis has attempted to demonstrate some of the paradoxes and incongruences that, according to his opinion were derived from the objectives and the nature of that commission. The provisional Constitution indicated as one of the functions of

the Commission to facilitate the granting of amnesty to persons who make a complete confession of all the relevant deeds. In this way, the recognition of the deeds on the part of the victimizers (the truth) and the regret about having committed them were tied to grant amnesty. What Christodoulidis found particularly interesting is precisely this direct linkage of mercy for the repenter to amnesty. But forgiveness, which is necessary in order to obtain mercy, is a personal response that belongs to the realm of ethics and thus in tension with formal justice. In addition, with regard to the law, the expression of remorse can only be considered an indication of remorse (Christodoulidis, 1999), something that is inappropriate in granting political forgiveness and mercy. The *Truth Reconciliation Commission* incorporated mercy as a structural and symbolic element, but as far as the law is concerned, it is posterior to justice. If this were not so, there would be confusion between the two concepts and it would not be a different virtue. When, for example, elements related to mercy appear in the context of extenuating circumstances, we remain in the realm of justice and not of clemency or mercy (Christodoulidis, 1999).

Mercy does not appear in the law in the area of being something special that is having a unique character in a concrete case. Introducing mercy in the judicial universe would jeopardize law's own normativeness and certainty (Christodoulidis, 1999: 223-224). If we take the law's own exclusionary character into consideration, it can be better observed that mercy does not occupy a place in the law precisely because this exclusionary condition of the rules impedes even its mention. The law has everything to do with expectations, functions, previously established rules, suppressions and abstractions of reality, certainties, simplifications, etc. This is exactly the opposite of what happens in the sphere of mercy (Christodoulidis, 1999: 225-234). The exclusionary and abstract logic of the law makes it impossible to achieve the particularity of mercy. On the contrary, introducing mercy in the judiciary would undo the essential sense of the law. It should not appear at the moment of application because it would cause a reflexivity that the law is unable to accommodate. For this reason, only ethical rationality can accommodate mercy, because it is reflexive and not exclusionary: The comprehension of the other one is not carried out by means of abstract categories (Christodoulidis, 1999: 238).

On one hand, the *Truth and Reconciliation Commission* was a commission having a judicial character which interpreted concepts of the rules that guided its function and which also had procedural powers. But, on the other hand, it went much further than the normal rules and procedures and for this reason it lacked the guarantees demanded of a court of law until the point that it had powers to create its own procedures (Christodoulidis 2000: 186). However, it was also obligated to respect procedural principles: this complicated the achieving of those objectives that had been proposed because the clearing up of some events in the context of the law were impossible because of the considerable lapse of time in their occurrences or the difficulty in obtaining evidence (Christodoulidis, 2000: 187). Christodoulidis insisted on the fact that the dual nature of the *Truth and Reconciliation Commission*, halfway between a court of law and a public confessional, made it impossible to achieve its objectives, especially with the reconciliation side bearing its name, because the law subverts and it disrupts the reflexiveness that reconciliation requires (Christodoulidis, 2000: 183).

What Christodoulidis indicates about the relationship between mercy and the law, Veitch makes more specific by linking amnesty and the law. It's that amnesty is at the meeting point between the law and politics. Moreover, it supposes extending or we can say stretching the political wishes by means of legal categories. However, such a thing challenges the habitual understanding of the morality and the temporality of the law (Veitch, 2001: 34). This is precisely what happened with one of the committees of the *Truth and Reconciliation Commission*: it was a judicial commission subject to *judicial review*, formed by professional lawyers and judges that had to apply *statutory sections* (Veitch, 2001: 35). Taking into account that applying the standards supposed passing judgement on the deeds by reconstructing them according to these same standards, the problem was that the real objective of that committee was to promote national reconciliation by means of amnesty, in other words it really was dealing with a political objective. In this way, the Commission had to pass judgement on those people who requested amnesty at the same time as judging them as individuals who had committed particular crimes and also as members of a class that were seeking political objectives (Veitch, 2001: 38-39).

But this is not the only problem in relation to the law. In order to achieve the kind of truth that the Commission needed, it fell back on the law even when the same type of truth was not being looked for. Fittingly, the Commission did not seek to establish the truth, but instead establish a memory that would serve the proposed goal. The truth that was searched for was the truth of the memory, or, stating this in a different way, it was not the truth that was searched for, but instead the memory so that all the transgressors would recognize what they did. This simple deed would convert the crime into something political, which would make it eligible for amnesty (Veitch, 2001: 42). In this way, the *Truth and Reconciliation Commission* intended to have justice be derived from the truth, when they were actually different concepts. What the law seeks is justice, and in this

effort, the truth will come out. For this reason, it does not make any sense to claim that a jury (or committee in this case) is “legal” in the strict sense of the word because it looks to the future in a particularly political way, instead of looking at the past (Veitch, 2006: 163). The error is not so much looking for an objective with a political nature but in using judicial mechanisms.

When considering this perspective, in the first place, one must look at how the Commission itself explained its work. This is especially relevant because it indicated that its objective was the achievement of a restorative justice, something that would be more than the mere sense of justice as retribution. In its *Final Report*, the Commission affirmed that restorative justice is meant to correct imbalances and restore broken relationships by means of healing, harmony, and reconciliation. It focused, therefore, on the experience of the victims (Truth and Reconciliation Commission, 1999: vol. I, ch. I, par. 36). The use of criminal justice would have only caught a few of the many perpetrators and in that way, only a few victims would have been able to recount their personal experiences. It is this public expression of pain that gives a wider vision to the human right violations and that permits the victimizers to reintegrate themselves back into society (Truth and Reconciliation Commission, 1999: vol. I, ch. V, pars. 98 and 99).

Along this line, Kiss sustained that restorative justice shares with retributive justice to affirm and restore the dignity of those whose human rights have been violated, the holding of perpetrators accountable and the creation of the proper conditions for respecting human rights (Kiss, 2000: 79 ff.). In the same way, Llewellyn and Howse affirm that restorative justice achieves in a much better way than retributive justice the recuperation of the equality between the victims and their perpetrators in such a manner that they both can live as equal members of society and the victimizers can be socially integrated to the degree that they are actively involved in the process (Llewellyn & Howse, 1999: 374-375).

As to Allen, he has defended the work of the commission, claiming that it tried to put an agreement in place that balanced the principles of justice, social unity, and reconciliation. To that end, he would have taken something from each one of them without denaturalizing them (Allen, 1999: 325). In the case of justice, what we are dealing with here is justice “as recognition” that made it possible to respect the *Rule of Law* on the part of those who only had experience with the type of *law* experienced in the *apartheid* regime. In this way, the victims reintegrated into the public life as authentic actors (Allen, 1999: 329-332). Similarly, the justice that was pursued by the Commission can be seen as a justice like *ethos*, understanding this *ethos* as the implied educational element in showing the corruption of the sense of justice in *apartheid*. Such an educational element helped to regain confidence in politics and to promote the sense of justice and equality before the law (Allen, 1999: 336-337). To that end, as Dyzenhaus affirms, in reality it was neither a *re-tributive* nor a *re-storative* justice, but rather a real transformative justice (Dyzenhaus, 2000: 485). Seen from the point of view of a more mouldable concept of justice, susceptible of being ordered in different structures, it is possible to understand the performance of the Commission (Dyzenhaus, 2000: 493).

This same defence of justice “as recognition” present in the work of the *Truth and Reconciliation Commission* can be found in Du Toit. It deals with the justice involved in the respect for other people as equal sources of truth and bearers of rights. This sense of such a justice can be understood if we take into account that we are not facing a consolidated democracy but a situation where the dignity of the victims was radically violated (Du Toit, 2000: 135-136). For this reason, justice as recognition has a relationship with the different types of respect: basic confidence in oneself, moral respect for oneself, and socially recognized self-esteem (Du Toit, 2000: 138-139).

Aside from the evaluation of the success or the failure of the *Truth and Reconciliation Commission* (an aspect which fully exceeds the scope of these pages and to which we will make collateral reference later on), the interest of this discussion for Legal Philosophy is that it brings up once again the question about the sense of the law. Such a problem in all its intensity exceeds even more the scope of this work, but at the same time, it is inevitable to give some kind of answer if we want to evaluate the *Truth and Reconciliation Commission*, and, in general, the truth commissions that are characteristic of transitional justice processes. In other words: our understanding of the law has to be manifested precisely in situations like this, which are so unconventional and where the law itself risks either losing its most habitual sense or not being up to the challenge.

In my opinion, the objectives proposed by the *Truth and Reconciliation Commission* and which are proposed by other commissions of truth as well as other similar ones are not the objectives of the law, and in this sense, the law does not really serve the purpose for which it was used. Even more so, in some cases, we are obliged to remember the most classical elements that differentiate morality from the law. Going even beyond that, we are obliged to be aware of the differences between the morality having a religious basis and the law. Christodoulidis and Veitch have demonstrated it with respect to mercy and amnesty using arguments somewhat different from

what is going to be presented next. Specifically, I am going to talk about the impossibility of using the law to achieve forgiveness.

Forgiving crimes requires a relationship having at least two individuals, such as in the case of the law. However, we are not talking about a legal relationship because the law is only interested in those types of proper behaviour that always correspond to it in a mediate or immediate way. It is behaving in a certain way with regards to the rights of others. A type of behaviour is relevant to the law when it is proper behaviour with regard to others, which obliges precisely because it is proper to the others. On the other hand, the law is not concerned with those obligations that one has that do not constitute in any way the rights of the other people (for example, understanding, being friendly, loving one's own parents, not wishing evil on anyone, etc.). However, forgiveness, because it is supererogatory, does not constitute any kind of obligation. It is purely a gift, where it is conceded according to generosity, not according to any kind of justice. Outside of this, forgiveness can be considered an obligation in the context of a certain moral behaviour having a religious foundation. We are not even in the area of obligation and we are much less so in the area of rights. In addition, it should not be forgotten that forgiveness belongs to the area of the inner self of human beings. If we consider that the law only reaches this area when it is manifested and it is only interested in this area to the extent that it helps to evaluate external actions, it therefore has nothing to say about forgiving victims. In effect, the inner self that should be evaluated is never that of the victim, but instead always that of the aggressor. We are dealing here with that area of thoughts, emotions, desires, and sentiments that can be judged according to a moral sense but not according to the law.

If we look at the objectives of the commission itself and also those that were assigned by its defenders, we find once again a disparity between what the law can offer us and what we ask of it. Some of those objectives such as regaining self-respect, the establishment of the foundations for the future respect of the victims, and the achievement of self-respect by means of others' appreciation do not have even an indirect relationship to the law. Some others such as the restoration or the beginning of the inclusion of the victims as political entities, the achievement of equality in the participation of the victims in public life, and the listing of human rights violations can be seen as being favoured indirectly by the law. But what is or is not achieved will depend on many other elements, which ultimately depend on the victims' ability to confront their own feelings and emotions. All of the elements evaluated here are not legal objectives, and more concretely, they are not the objectives of the procedures in a judicial process.

It does not help to think that we are in porous situations where what is legal and what is moral or even religious are interlinked. It is not enough to ask the law to be more flexible. The sense of the law, what is expressed by means of its own objectives, is not something that is externally constituted. We are not referring either to the personal motives of the officials or the sense which has historically been bestowed on the law as if it were something added or arbitrary. The question that is the foundation of the sense of the law is more radical, and it is where it is manifested that the law does not serve the purpose that is intended by these types of commissions. In other words, the essence of the law, what it is ultimately, is determined by putting it in connection with human existence. As with all human production, its most profound reality is determined by its *raison d'être*, and access to it is by investigating not in what it consists of but why it exists. In my opinion, it is Cotta who is the most accurate by stating that the question about the law is an anthropological question. According to this author, the question about the law cannot be answered from either an investigation into its objectives in a practical sense (what the objectives of the legislature are), or from Sociology (what its social necessity is), or from History (what the culture of a certain group at a certain time is), or from the sum of all them. In the author's opinion, there are two ideal ways: what is known as ontogenesis, or the analysis of the birth, in the ontological sense, of the law; and the analysis of the presence of the law in human existence. Both of them constitute a contemplation of the law as a dimension of human activity and they are directed at trying to make us understand why the law exists relative to the tendencies, necessities, and the ontological structures of mankind (Cotta, 1985: III).

We are interested in the second of the two ways mentioned, insofar as it demonstrates in a better way the irreducible character of the law in relation with other dimensions of human activity close to it. There, the law appears as a form of coexistent organization together with other types, since human existence unfolds in numerous situations that respond to different needs, and it makes possible different forms of human realization. Concretely, together with the law, Cotta analyzes friendship, politics, and charity. The law, in this approach, would be a form of coexistence that presents distinctive characteristics. Its *human field extension* would potentially include all of mankind, differing from the dual field (you-I) that characterizes friendship (where the other one is seen as unrepeatable and irreplaceable, meaning that it deals with a disjunctive, singular, and closed relationship that marginalizes those who do not participate), as well as the group (we) having a specific supra-individual political identity (that requires creating a group and establishing an exclusive relationship with

the other as an outsider). The *constitutive principle* of legal coexistence is the existence of a rule about the foundation of a common truth; in the case of friendship, this constitutive principle is friendliness, just as the common good is in politics, and the sense of participation in anything related to charity. The *direction of the integrating movement* is centripetal in friendship, centripetal-associative in politics, and diffusive in the law and in charity. Finally, the *regulating principle* that assures the permanency of the co-existential relationship is loyalty in friendship, solidarity in politics, the acceptance of others in charity, and respect for the rules, which Cotta refers to as legality, in the law (Cotta, 1985: VI-VIII). Therefore, if we look for where forgiveness fits in among these forms of human coexistence, it seems that it can be no other than charity. In the first place, with respect to its human field extension, that although the forgiveness that is sought supposes a dual relationship in many cases (such as in friendship, between two people), it is intended to be open to everybody, including strangers. In fact, the *Truth and Reconciliation Commission* was not a complete forum of the crimes during the period of *apartheid* because of the mere impossibility of time, and, despite this fact, it aspired to achieve the forgiveness of all the victims and the most universal reconciliation. In the second place, the constitutive principle can only be that of charity, well understood as the common condition of the victim and the aggressor in front of God (if is given a religious sense), or the common human condition of the victim and the aggressor (in a secular sense). In the third place, charity and the law coincide with the diffusive character of the integrating movement. Lastly, in relation to the regulating principle, forgiveness just like charity does not assure human relationship beyond the mere respect for the rules, as with the law, but only by means of the acceptance of the other.

If the law is not the proper instrument for either mercy, or the truth as memory, or accordingly for amnesty linked to the recognition of the truth and mercy, it should even be less so for forgiveness in a personal sense and for national reconciliation that would follow all of the above. An instrument is being used, apparently functioning as all legal instruments do, for something for which it is not intended. In other words, it should not be expected that an institution created for one objective be used for a completely different one. If they wanted to obtain the benefits associated with using an institution of the law, they should have been prepared for the results that such an institution could give. I consider that it was an attempt to cloak the performances of the *Truth and Reconciliation Commission* in the benefits associated with the law, or at least the benefits symbolically associated with it. There is the impression that nobody wants to let go of these benefits that are present in the law, and perhaps for this reason, para-judicial, semi-judicial, or pseudo-judicial commissions are created. Deep down inside, the benefits which are characteristic of the law and which are not readily renounced are sought after in some way: impartiality, equal treatment, security, and ultimately justice. However, these commissions will or won't act according to classic principles of due process depending on their volition. In any case, if the subject considers that the commission's work has been lacking, there won't be anyone to appeal to: after all, it is not a court of law.

For this reason, this urge to add qualifiers to the word justice in order to justify the actions of the *Truth and Reconciliation Commission* (transformative justice, justice as *ethos*, justice as recognition) ends up calling justice something that belongs to other worlds. What these *justices* seek can, in all cases, be part of the world of political justice. However, in truth, it is not even clear that the objectives that the defenders of these kinds of *justice* assigned to the *Truth and Reconciliation Commission* can be achieved. For example, intending that respect for the *Rule of Law* be achieved by means of the activity of a commission that is not a court of law is clearly contradictory. Similarly, it seems contradictory to believe that it is possible to reintegrate victims as political subjects or to regain confidence in politics by means of the activities of a commission that is not formed by parliamentarians, members of a government or distinct political parties, but instead by personalities above or outside politics. In this sense, the *Truth and Reconciliation Commission* is in itself more coherent when it formulates objectives that really do appear within reach or at least in direct relation to their action. In some way, its intention is to restore a moral order. But even the debatable retributive function of the law seeks to restore judicial order, not moral order. For this reason, the questions that the objectives of the *Truth and Reconciliation Commission* obliges us to formulate are strictly political: Until what point can the world of political justice, of the classic distributive justice, be extended to? Is it to the extreme intended by the *Truth and Reconciliation Commission*?

However, as was stated before, did the *Truth and Reconciliation Commission* and the other truth commissions do something wrong working like this? The answer does not depend at all on what we have been saying. The only conclusion that can be arrived at up to now is that these kinds of commissions were organisms that had a political make-up, without this epithet meaning some kind of criticism or an attempt to show it erred in some way. In fact, when things are qualified as political, it is not done in a pejorative way (such as the expression

“political trial”), but instead because they respond perfectly to what is truly political. Demonstrating this and coming to some relevant conclusions are the objectives of the next section.

3. Transitional Justice and the Sense of Politics

Here we find another on-going scholarly discussion. Some have criticized the *Truth and Reconciliation Commission's* activity from the premises of deliberative democracy. Likewise, the work of the Commission has been rejected by proponents of agonist democracy (which have simultaneously criticized the deliberative approach). The present paper defends the role of the *Truth and Reconciliation Commission* against these two views, presenting an original, threefold approach to the topic. On one hand, it points out to the situation the *Truth and Reconciliation Commission* is going through, a situation that clearly shows the shortcomings of the theories of deliberative democracy. Our defense of the *Truth and Reconciliation Commission's* role, on the other hand, proves that the agonist democracy approach has also limitations and inconsistencies. Finally, the paper concludes affirming that both the process of transition in South Africa and the *Truth and Reconciliation Commission's* role in it allow a better understanding of Politics, and so open new ways to Political Theory.

Some of the criticism that the *Truth and Reconciliation Commission* has received comes from those who consider the essence of political reconciliation from the assumption of a deliberative democracy associated with the habermasian ideal of intersubjective communication, oriented towards consensus, among free and equal subjects. The proposal of a deliberative democracy has come to mean that collective decisions are more legitimate to the degree in which they are the result of the public discussion among free and equal subjects (Gutmann & Thompson, 1996). The participants are called to justify their political preferences in terms that can be reasonably accepted by those who are affected by them. In this way, the citizens not only have to assert their own interests but also be capable of formulating them in terms of general moral principles which others can potentially agree with (Gutmann & Thompson, 1996: 55). Thus, the deliberation is oriented towards the achievement of consensus, although rarely is it achieved in reality (Gutmann & Thompson, 1996: 42). For that reason, in spite of the fact that disagreement ultimately leads to a majority election, the decision will be more legitimate, and, therefore, more morally binding for the minority, to the degree that the perspectives, values, and interests of everyone affected by the decision have been justly represented and taken into account. Only presupposing the possibility of arriving at a consensus can the conflict and disagreement be dealt with by the parties in conflict in a horizon of shared perspectives. The fundamental value in which such a democracy exists is that of reciprocity, which requires the citizens to seek fair terms of social cooperation for their own benefit (Gutmann & Thompson, 1996: 52-53). Reciprocity requires that the citizens are willing to justify their positions to the others and to treat respectfully those who are making an effort in good faith to do the same, even if in the end it is not possible to reach an agreement (Gutmann & Thompson, 2000: 36). That is to say, that they should give not only contingent reasons based on their interests, but general moral ones so that those who are in disagreement have to accept the results of the negotiation (Rawls, 1996: 146 ff.). However, reciprocity does not demand impartiality or altruism of the participants. Citizens do not have to transcend their own interest, but only represent (formulate) their particular positions in terms of general principles that others can reasonably accept (Gutmann & Thompson, 1996: 53-63).

Then this should be the same for the truth commissions, according to the exposition of Gutmann and Thompson: reciprocity, that is to say giving a moral justification. It is not simply trying to arrive at an agreement in order to avoid a war, which is ultimately as much as not giving reasons to those who do not have ordinary trials. It is neither an intent that everyone act out of altruism, such as in the case of Christian forgiveness that guided the work of the *Truth and Reconciliation Commission*, which also supposed a comprehensive doctrine of goodness (Gutmann & Thompson, 2000: 26-33). Without consensus, reciprocity consists of seeking and achieving a rational foundation that minimizes the rejection of the contrary side. In other words, look for points of agreement and not insist on what is contained in a non-pluralistic comprehensive doctrine. That is to say, recognize sincerity and commitment in the other in order to achieve fair terms of social cooperation (Gutmann & Thompson, 2000: 37-38).

On the contrary, for the defenders of the agonistic democracy, this is one *ethos* that affirms the contingency and the opening of political life. The political us is a difficult achievement, fragile and contingent. Mouffe sustains that the defenders of deliberative democracy are mistaken because they lack previous moral consensus about the terms in which the conflict makes sense: and this consensus is always arrived at politically. Everything begins with politics; discussions are always in a form of life, in a shared tradition. If there is a political conflict, then there is not even that form of living, that tradition: there is rather a conflict between identities, and not between reasonable comprehensive doctrines (Mouffe, 2000: 26-32).

Applying those theses to divided societies, Schaap sustains that in reality in such situations various traditions coexist, and it is the hegemony that establishes the conceptual terms. Consensus will not be produced from anything ordinary, but rather it will be a result dependent on political interaction. For that reason, what does not belong to the dominant tradition appears not to be very reasonable, so that the dominant tradition ends up neutralizing what does not belong to it (Schaap, 2006: 263); hence its criticism of the approach of Gutmann and Thompson. In effect, in a divided society what is lacking is precisely what they assume as given: respect, recognition of the other, and reciprocity. The conflict is more radical; it is about identities (Schaap, 2006: 266). He supports, on the contrary, an agonistic democracy that does not believe in either consensus or that conflicting sides can come closer together or change (Schaap, 2006: 269-272). However, this perspective has also supposed criticism of the work of the *Truth and Reconciliation Commission*. For example, Christodoulidis sustains that the *Truth and Reconciliation Commission* considered that it would be sufficient to create a forum where the victims could express themselves in order to convert a destructive conflict into an integrating one. For this, there was an assumption that there already existed an authentic community of objectives among the members of the society. In Christodoulidis's opinion, in reality there was neither one community then nor one now. On the contrary, there were and there are at least two communities, with different narratives, and this cannot be resolved with a forum that narrates the past, in such a way as was intended (Christodoulidis, 2000: 192-194; Christodoulidis & Veitch, 2008: 9-36).

Trying to resolve the principles of political theory in the context of the question of this work would not only be impossible but also pretentious. Nevertheless, in my opinion, the situation of the transition of the *apartheid* regime to a true lawful democratic state demonstrates the inanity of the theories of deliberative democracy. Without sharing the agonistic vision, it has to be said that the ones who are right are those who show the inability to construct a political community after *apartheid* following the principles formulated by Gutmann and Thompson. In effect, it is not only that there is no common starting point, a shared identity which would make it possible to propose general moral reasons and achieve a rational basis that minimizes the rejection of the minority positions. In my opinion, there is something more radical involved. That is, to evaluate the performance of the *Truth and Reconciliation Commission* and come to some conclusions about political philosophy, it is important to remember a fundamental fact. The peculiarity of *apartheid*, for the case that we are talking about, is that the white population had the rights and liberties befitting a lawful democratic State. In other words, it does not seem that criticizing the *apartheid* regime, or fighting actively and without violence against it, or simply voting for a party "for whites" that is willing to end *apartheid*, would somehow cause harm to this population in terms of a reduction of rights, persecution, threats, physical danger, etc. This is so because as was just stated, a white citizen enjoyed all the rights and common liberties of modern democracies. The problem, therefore, is that an enormous majority of the white population either supported the *apartheid* regime or did nothing to terminate it. Thus, the most characteristic anti-*apartheid* party had only one representative for many years and achieved its best result in the parliamentary elections of 1981 and 1989 in which it won barely 20% of the vote. Citing another example which demonstrates what is being talked about, Dyzenhaus has demonstrated that judgements applying laws characteristic of the *apartheid* regime were dictated by judges from all walks of life and from all political ideologies (Dyzenhaus, 1998: chapter 2). Ultimately, the opposition and resistance to *apartheid* among the white population, or at least its critics, were a minority and easily identifiable. This distinguished the *apartheid* regime from other transitional situations. For the whites, there was not a regime of terror that would make mere criticism a reason for the physical elimination or imprisonment of the dissident. It was also not a regime that impeded the freedom of information or had resources for hiding the truth from its own citizens. It also did not oblige the collaboration of the citizens under threats of serious harm for them or their families. The white population was also not at the end of a war, when the weakness of the lawful state is taken advantage of by some members of both sides to commit crimes with impunity, and without being able to consider the common citizens responsible even indirectly of such crimes whether or not they knew about them or were mobilized militarily.

In this situation, what sense is there to talk about consensus, public deliberation, fair terms of social cooperation, reciprocity, use of general moral reasons, seeking a basis for minimizing the rejection of the opposing side, intent of finding points of agreement that do not belong to a common comprehensive doctrine, and recognition of sincerity and commitment in the other to achieve fair terms of social cooperation? It is not a question here of defending revenge, but simply that there was no reason for the black population to hope for this from the majority of the white population. Even if this hope actually existed, the question remains: why would the black and coloured population want to construct a political community with the majority of the white population, the same one that maintained or permitted *apartheid*? In other words, is it reasonable to form part of the same community with those, without any kind of coercion, permitted the crimes of *apartheid*? When trying to achieve

a consensus, first it is necessary to consider the other part to be worthy of pursuing it. Is it not abundantly clear that during all the *apartheid* years, the majority of the white population did not want to have a consensus with anyone belonging to another race? How can sincerity and commitment be acknowledged with those who, with total liberty, supported or permitted the regime of apartheid? In my opinion, this problem could be also referred to the employ of sympathy, i. e. considering the actions of others from their point of view, as the solution to this kind of conflicts (Eisikovits, 2004: 39).

In my opinion, this situation could have been coherently resolved in only two ways: the first one, according to what had transpired before, with the expulsion of that majority of the white population of South Africa; the second one, with the solution contributed by the *Truth and Reconciliation Commission*. This was completely contrary to what was intended from the beginnings of the deliberative democracy, since it was based precisely and in an explicit way in a comprehensive doctrine of goodness. In this sense, one has to agree with the critics that the ideal of deliberative democracy is arrived at from an agonistic approach, and not agree with them when their criticism is directed at the performance of the *Truth and Reconciliation Commission*. Because if there is no other possible alternative to what is stated here, the only coherent action from the agonistic democracy would be to admit and defend the option of expulsion. From the moment that this does not happen, the criticism directed towards the performance of the *Truth and Reconciliation Commission* lacks coherence. The alternative that is presented is not an exaggeration but the immediate consequence of considering the political situation of the South African transition. It is clear that things could have been done in various ways as an alternative to the dilemma that is stated here, but in no way would they be coherent solutions. What is the most interesting, in my opinion, is showing the need to carry out a set of value judgements about human goodness that goes much farther than was intended by the deliberative ideal. The *Truth and Reconciliation Commission* formulated such judgements with complete clarity when it determined the objectives that they were pursuing and it had no problem in pointing out that this dealt with comprehensible goodness from a concrete religious doctrine (the Christian) and from a particular cultural tradition (*Ubuntu*).

Up to this point, one might have the impression that the exceptionality of the South African situation, with the peculiarity of *apartheid* made reference to, limits the achieved conclusion to a specific case that cannot be extended to the rest of political transitions. However, this peculiar character should not make us forget something common: the tragic character of the political past. Each tragedy has its distinctive conditions (in this case, the role played by the actors of the drama), but all of them coincide in some painful and bitter acts in the past. This reality did not only occur in the most recent processes (the Eastern European transitions and the military regimes of the Southern Cone, for example), but also in others further in the past: from the revolutions of the XVIII century through the national revolutions of the XIX century to the Spanish transition (to cite only a few cases). We always find situations preceded by wars, battles, and authoritarianism, even if in distinct intensity and sense. Without the tragic deeds being comparable, in all these situations, there is a consciousness of emerging from a painful past and constructing a different political reality. In other words, that common tragic character reveals the foundational, original, and inaugural character. This has been experienced by each present political community at least once in its history and in many cases, various times. That is to say, that we are not dealing here with the exception, but rather the rule. It is precisely in those foundational moments, when the political community really defines itself. For that reason, the way of defining itself is never abstract, and it does not consist of finding points of agreement outside a comprehensive doctrine. On the contrary, it consists of making sure the virtues we all desire are present in our society and they are characterized by a close relationship to the acts of the immediate past that were just suffered. What else is, for example, the sense of the First Amendment to the American Constitution, or the 1^o article of the Fundamental Law of Bonn, or the inclusion of political pluralism as a higher value in the Spanish Constitution? In the case we are talking about, the *Truth and Reconciliation Commission* did nothing but obey a constitutional mandate.

Another consequence of what has been discussed is that only this recent past explains the political identity that emerges. For that reason, it is understood when the defenders of the agonistic democracy refer to the inexistence of a common identity in South Africa not only during *apartheid* but also when it terminated. What they cannot seem to accept is that the *Truth and Reconciliation Commission*, on the basis of that constitutional mandate, would precisely help create a new identity. In any case, what it tried to emphasize was that this new identity could not be created with the abstract and purely strategic values that is presented to us by the deliberative ideal. The reason is that such values (that also respond, whether it is desired or not, to a doctrine about goodness, even though its supporters deny it) hardly contribute anything to political community that faces up to a tragic past. Even if it does not have the intensity of the South African case, each foundational process to the extent that it is transitional has to equally face up to a tragic past. The identity of the political communities is always formulated

precisely in relation to that past and therefore demands concrete positive actions, affecting everyone of course, that propose a complete form of human fulfilment in politics. That is why the processes of transitional justice should permit, in my opinion, the authentication of the political community contributing an identity that fruitfully realizes the human identity (Prados, 2003: 102-104). Basically, the deliberative ideal responds to a conception of politics as a mere instrument to search in private for its own identity and from there it is formulated in terms of pure strategy. However, in the really important moments of the political communities, in the primary and foundational situations which are manifested in the processes of transition, those deliberative values prove to be insufficient, although they are only so because they are not capable of facing up to the tragic past and creating an identity that meets the expectations of the members of those communities.

Apparently, every transitional moment has some foundational aspect to it. If the transitional moment cannot leave aside the comprehensive conceptions of goodness, then the foundational moment that we have been talking about (that of a transition) will necessarily have to incorporate comprehensive conceptions of goodness. In the transitional process the utmost depths of understanding such as political community are reached. The recent situation experienced obliges each and every one of us to face up to the political community that we happen to live with at this particular time and place, and consider together which principles we want upheld, which common assets are the most prized, what is the best way to look at the past, and ultimately, the people and the things that are truly appreciated. In truth, this happens with every foundational process, but in the case of the transitions, there is also a tragic component (the recent past) which very clearly manifests that what is at stake is the basic understanding of who we are as members of concrete political community. This leads us to the most fundamental questions about our common human condition.

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