

Truth

Terms of Reference for Truth and Reconciliation Commission

1. The Concept

The concluding section of the Constitution contains the following words:

"In order to advance.....reconciliation and reconstruction amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed with in the course of the conflicts of the past. To this end, Parliament... shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed."

It now becomes necessary to establish the mechanisms and procedures through which amnesty shall be dealt with. In the balanced spirit of the Constitution a Truth and Reconciliation Commission shall be established so as to ensure that the processes of amnesty and reconciliation go hand in hand.

The Commission will be a tribunal with the power on a case by case basis to grant amnesty. In order to further the process of national reconciliation, this amnesty will be granted in a way that balances out the interests and expectations both of those who were injured in the course of the conflicts referred to and those who were responsible for inflicting the injury.

As far as those who were injured are concerned, the Commission will give them the opportunity to testify as to what happened to them so that the extent of their suffering can be revealed and publicly acknowledged. The Commission will have the power to recommend appropriate forms of apology, moral and symbolic reparation and, in appropriate cases, compensation from public funds.

As far as the perpetrators are concerned, they will have the the opportunity to lift the burden of their past misconduct from their shoulders and to receive legal indemnity against criminal or civil liability. They too will have the chance to testify and will have the guarantee that they will be indemnified in respect of all matters that they reveal. They will also have a guarantee that nothing that they say

to the Commission shall be used in court proceedings against them.

The Commission will make recommendations of amnesty on a case by case basis to the President. Such amnesty will be granted to the extent that the person concerned has disclosed his or her participation in any act or omission which may have constituted an offence. The amnesty will protect the person concerned against civil or criminal liability.

2. OBJECTIVES OF THE COMMISSION

2.1 To establish, in accordance with the principles of international law and the Constitution, as complete a picture as possible of the most serious human rights violations committed during the period of apartheid.

2.2 To gather evidence both in relation to patterns of violation and individual violations so that the victims and the nature of their injuries are identified.

2.3 To recommend appropriate measures of apology and moral symbolical and material compensation to the victims of such human rights violations.

2.4 To receive and process applications for amnesty in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past.

2.5 To recommend to the President amnesty in relation to all offences revealed in testimony offered in relation to amnesty applications.

2.6 To recommend legal, administrative and other measures which should be adopted in order to prevent further violations of human rights in the future.

AMNESTY BILL
EXPLANATORY MEMORANDUM

INTRODUCTION

1 The Indemnity Act No. 35 of 1900 as amended by the Indemnity Amendment Act, No. 124 of 1992 and the Further Indemnity Act No. 151 of 1992 have been used to grant both permanent and temporary indemnity to a number of persons. The temporary indemnities have been extended to ... May 1995 by Proclamation No. ... of 1994. There are some 150 applications for indemnity which are pending.

2 The main reason for granting indemnity was:

"... for the promotion of peaceful constitutional solutions in South Africa or the unimpeded and efficient administration of justice."
(Section 1 of the 1990 Act)

3 After the last section of the Constitution of the Republic of South Africa (Act 200 of 1993) and under the heading of National Unity and Reconciliation the following paragraph appears:

"In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall

adopt a law determining a firm cut off date which shall be a date after 8 October 1990 and before 6 December 1993, and providing for such mechanisms, criteria and procedures, including if any, through which such amnesty shall be dealt with at any time after the law has been passed."

- 4 Difficulties have arisen in relation to the provisions of the two Indemnity Acts and more particularly the secrecy provided for in the 1992 Act.
- 5 The Minister of Justice in his speech on 27 May 1994 said:

"I have been entrusted with the task of preparing appropriate legislation providing for amnesty. I want to give an assurance to those who may have perpetrated human rights violations and want to join in reconciliation. That in respect of politically motivated crimes, there will be no Nuremberg-type trials, no vengeance, no witchhunts, no revenge and no humiliation of any person.

But I am also duty bound - for the sake of the moral integrity of our country - to give the assurance so far as it is in my power to do so - particularly to the victims and their loved ones - that there will be no cover up, no sweeping under the carpet and no suppression of the truth. There will be no amnesty without disclosure. We seek to create a process which will make it possible for us all South Africans - come to terms with our painful past - with dignity and in a spirit of forgiveness but with due consideration for acknowledgement and the need to provide reparation or compensation for victims."

- 6 Prior to the unbanning of the liberation movements and suspension of the armed struggle, statutory and common

law offences were committed by both sides with different objects. Members of the liberation movements to put an end to apartheid and the security forces to uphold it.

7 It is generally accepted that members and active supports of the liberation movements who committed statutory crimes such as membership or active support of unlawful organisations, leaving the country without permission, undergoing military training within or outside South Africa, etc, who have already received temporary indemnity should as a group be granted permanent indemnity, preferably in terms of the new statute rather than by proclamation in terms of the 1990 or 1992 Acts. If any statutory offences were committed by members of the security forces they too should be indemnified en masse. Preferably the statutory offences should be identified to avoid uncertainty or ambiguity.

8 Members of either side should not, however, be indemnified en masse for common law offences particularly murder, attempted murder, conspiracy or incitement to murder, nor perjury or defeating the ends of justice in relation to murder nor for statutory offences not associated with political objects as defined. (Reference to "murder" hereafter will

include the lesser offences). They must apply in a prescribed manner to be indemnified for the acts committed by them.

Acts with a political object

9 The President has said that indemnity of those who fought against apartheid and those who reacted in support of it must be granted on the same basis. This does not mean that murders committed by persons after the cessation of hostilities nor the indiscriminate killing of innocent people on trains, taxi ranks or along the roadside because of racial hatred or killings by warlords or assassins should be indemnified.

10 The Minister in his speech to Parliament said:

"As to mechanisms, the Constitution mentions the possibility of tribunals. Some people fear the idea of a truth commission though the support for it seems overwhelming. The advantage of a commission (whatever its name) is that it can facilitate disclosure and acknowledgement within a framework which provides amnesty with acknowledgement, justice and dignity. Far from being an instrument of vengeance or humiliation, it has the advantage of forestalling a multiplicity of criminal prosecutions and civil claims. We are therefore thinking along the lines of a Commission.

As to criteria and procedure, legislation would:

- (a) fix clear time limits within which applications for indemnity may be submitted;

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- (b) there should be disclosure and acknowledgement;
- (c) ordinary crime will not be covered;
- (d) perpetrators would be indemnified against both criminal and civil actions;
- (e) there should be reparation/compensation for victims. South Africa owes a debt of enormous proportions to victims - the families of Iman, Haroon, Steve Biko, Matthew Goniwe, David Webster, Anton Lubowsky and others. Their stories and their suffering must be heard and acknowledged."

11 Having regard to the provisions of the Constitution, Parliament is obliged to pass an Amnesty Act. The Bill defines "act with a political object" as any act or omission constituting a criminal offence or delict which has been advised, directed, commanded, ordered or performed -

"(a) by a member of a political organisation or liberation movement on behalf of and with the express or implied authority of such organisation or movement, bona fide in furtherance of a struggle being waged by such organisation or movement to overthrow the State by civil war, insurrection or political commotion provided that such organisation or movement has abandoned such struggle and renounced the use of violence.

(b) by a member of the security forces in the course and scope of his or her duties and within the scope of his or her express or implied authority or at the instance of such member acting as aforesaid which was directed against a political organisation or liberation movement engaged in a political struggle to overthrow the State by civil war, insurrection or political commotion, or against members or supporters of such

organisation or movement, and which was committed bona fide with the object of countering or otherwise resisting such struggle;

but shall not include any act of omission performed by any person referred to in (a) and (b) above who has acted:

- (i) for personal gain; or
- (ii) out of personal malice directed against the victim of the acts performed;
- (iii) with the intention of disrupting the negotiations for a political settlement or prevent or undermining the holding of democratic elections; or
- (iv) in a manner and in circumstances which constitute indiscriminate and gratuitous terrorism."

Indemnity and Amnesty

12 A distinction ought to be drawn between indemnity, amnesty, parole and the exercise of the prerogative of mercy. Indemnity is to be given to persons who have not yet been tried for any offence committed with a political object.

13 Amnesty is granted to persons who have been convicted of an offence and who are serving or have served a period of imprisonment.

14 Parole is given to individuals who have served a portion of their sentence and who in the opinion of the

Parole Board may be released conditionally and are subject to supervision. Parole is granted and supervised by a Parole Board in terms of the Prisons Act.

15 The prerogative of mercy is reserved to the Head of State to commute a sentence of death to a term of imprisonment, usually for life.

16 The proposed Bill deals only with amnesty and indemnity.

17 It is necessary to keep these distinctions in mind in the quest for the solution to the problems the country is facing. In the case of amnesty, the courts have heard evidence, delivered judgment and have passed a sentence. Often appeals have been heard and dismissed. Except in rare cases, the trial has been open to the public and those called upon to make the decision to grant relief to the prisoners, have easy access to the record from which the gravity of the offence, the motivation and whether or not the sentence was appropriate may be considered.

18 Applications for indemnity made before a trial has been held may also be granted to a group or class of persons who were part of a movement or organisation whose

declared policy was to commit offences in order to bring about political change. A prerequisite for such blanket indemnity would be an acknowledgement by both the organisation and the individuals that the offences were committed to bring about political change. The offences committed by the members of the liberation movements were acknowledged, numerous trials were conducted in which the motivation for the commission of the offences was established.

The Amnesty Commission

- 19 The Bill establishes an Amnesty Commission. The objects of the Commission are, inter alia:
- (a) to grant or refuse indemnity to applicants;
 - (b) to decide whether or not applications for amnesty should or should not be granted by the President;
- 20 The Commission is composed of not less than five and not more than nine persons who shall be impartial, respected and suitably qualified. The chairperson is to be a judge, retired judge or senior lawyer experienced in the administration of justice.
- 21 Applications for indemnity must be submitted within a

stated period and must fully disclose the facts and circumstances of the offence in respect of which indemnity or amnesty is sought.

- 22 An application for indemnity or amnesty may be heard behind closed doors but no indemnity or amnesty shall be granted without publication of the persons's name and the crime/s for which he or she has been indemnified. If the application for indemnity is refused, the name of the person shall not be disclosed. The evidence given by the person may not be used against him or her nor disclosed to any person.

Compensation

- 23 The Bill makes provision for the compensation of those who have suffered financial loss as a result of the offences for which applicants have received amnesty or indemnity. The violation of human rights is not a private matter. In circumstances where the State deprives people of their rights to claim compensation by the grant of amnesty or indemnity, it is a fundamental requirement of justice that the State ensure that those who have suffered are compensated. For that reason, the Bill makes provision for the grant of compensation.