CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 17/96

THE AZANIAN PEOPLES ORGANIZATION (AZAPO)	First Applicant
NONTSIKELELO MARGARET BIKO	Second Applicant
CHURCHILL MHLELI MXENGE	Third Applicant
CHRIS RIBEIRO	Fourth Applicant

versus

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent
THE MINISTER OF JUSTICE	Third Respondent
THE MINISTER OF SAFETY AND SECURITY	Fourth Respondent
THE CHAIRPERSON OF THE TRUTH AND RECONCILIATION COMMISSION	Fifth Respondent

Heard on: 30 May 1996

Decided on: 25 July 1996

JUDGMENT

MAHOMED DP:

[1] For decades South African history has been dominated by a deep conflict between a minority which reserved for itself all control over the political instruments of the state and a majority who sought to resist that domination. Fundamental human rights became a major casualty of this conflict as the resistance of those punished by their

denial was met by laws designed to counter the effectiveness of such resistance. The conflict deepened with the increased sophistication of the economy, the rapid acceleration of knowledge and education and the ever increasing hostility of an international community steadily outraged by the inconsistency which had become manifest between its own articulated ideals after the Second World War and the official practices which had become institutionalised in South Africa through laws enacted to give them sanction and teeth by a Parliament elected only by a privileged minority. The result was a debilitating war of internal political dissension and confrontation, massive expressions of labour militancy, perennial student unrest, punishing international economic isolation, widespread dislocation in crucial areas of national endeavour, accelerated levels of armed conflict and a dangerous combination of anxiety, frustration and anger among expanding proportions of the populace. The legitimacy of law itself was deeply wounded as the country haemorrhaged dangerously in the face of this tragic conflict which had begun to traumatise the entire nation.

[2] During the eighties it became manifest to all that our country with all its natural wealth, physical beauty and human resources was on a disaster course unless that conflict was reversed. It was this realisation which mercifully rescued us in the early nineties as those who controlled the levers of state power began to negotiate a different future with those who had been imprisoned, silenced, or driven into exile in consequence of their resistance to that control and its consequences. Those negotiations resulted in

an interim Constitution[1] committed to a transition towards a more just, defensible and democratic political order based on the protection of fundamental human rights. It was wisely appreciated by those involved in the preceding negotiations that the task of building such a new democratic order was a very difficult task because of the previous history and the deep emotions and indefensible inequities it had generated; and that this could not be achieved without a firm and generous commitment to reconciliation and national unity. It was realised that much of the unjust consequences of the past could not ever be fully reversed. It might be necessary in crucial areas to close the book on that past.

[3] This fundamental philosophy is eloquently expressed in the epilogue to the Constitution which reads as follows:

> "***National Unity and Reconciliation***
>
> This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.
>
> The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.
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> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

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1 Act 200 of 1993, which is referred to in this judgment as "the Constitution".

> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.
>
> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. 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 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.
>
> With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country."

Pursuant to the provisions of the epilogue, Parliament enacted during 1995 what is colloquially referred to as the Truth and Reconciliation Act. Its proper name is the Promotion of National Unity and Reconciliation Act 34 of 1995 ("the Act").

[4] The Act establishes a Truth and Reconciliation Commission. The objectives of that Commission are set out in section 3. Its main objective is to "promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past". It is enjoined to pursue that objective by "establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights" committed during the period commencing 1 March 1960 to the "cut-off date".[2] For this purpose the Commission is obliged to have regard to "the perspectives

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[2] Described in the epilogue to the Constitution as "a date after 8 October 1990 and before 6 December 1993". "Cut-off date" is defined in section 1 of the Act to mean "the latest date allowed as the cut-off date in terms of the Constitution as set out under the heading 'National Unity and Reconciliation' ".

of the victims and the motives and perspectives of the persons responsible for the commission of the violations".[3] It also is required to facilitate

> "... the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective ..."[4]

The Commission is further entrusted with the duty to establish and to make known "the fate or whereabouts of victims" and of "restoring the human and civil dignity of such victims" by affording them an opportunity to relate their own accounts of the violations and by recommending "reparation measures" in respect of such violations[5] and finally to compile a comprehensive report in respect of its functions, including the recommendation of measures to prevent the violation of human rights.[6]

[5] Three committees are established for the purpose of achieving the objectives of the Commission.[7] The first committee is the Committee on Human Rights Violations which conducts enquiries pertaining to gross violations of human rights during the prescribed period, with extensive powers to gather and receive evidence and

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3 Section 3(1)(a).

4 Section 3(1)(b).

5 Section 3(1)(c).

6 Section 3(1)(d).

7 Section 3(3).

information.[8] The second committee is the Committee on Reparation and Rehabilitation which is given similar powers to gather information and receive evidence for the purposes of ultimately recommending to the President suitable reparations for victims of gross violations of human rights.[9] The third and the most directly relevant committee for the purposes of the present dispute is the Committee on Amnesty.[10] This is a committee which must consist of five persons of which the chairperson must be a judge.[11] The Committee on Amnesty is given elaborate powers to consider applications for amnesty.[12] The Committee has the power to grant amnesty in respect of any act, omission or offence to which the particular application for amnesty relates, provided that the applicant concerned has made a full disclosure of all relevant facts and provided further that the relevant act, omission or offence is associated with a political objective committed in the course of the conflicts of the past, in accordance with the provisions of sections 20(2) and 20(3) of the Act.[13] These sub-sections contain very detailed

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8 Sections 3(3)(a), 12 and 14.

9 Sections 3(3)(c), 23 and 25. The recommendations of the committee are themselves considered by the President who then makes recommendations to Parliament. This is considered by a joint committee of Parliament and the decisions of the joint committee, after approval by Parliament, are implemented by regulations made by the President. Section 27.

10 Section 3(3)(b).

11 Section 17(3). It is common cause that the Committee on Amnesty, in fact appointed by the President, includes three judges of the Supreme Court.

12 Section 19.

13 Section 20(1).

provisions pertaining to what may properly be considered to be acts "associated with a political objective". Sub-section (3) of section 20 provides as follows:

> "Whether a particular act, omission or offence contemplated in subsection (2) is an act associated with a political objective, shall be decided with reference to the following criteria:
>
> (a) The motive of the person who committed the act, omission or offence;
>
> (b) the context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto;
>
> (c) the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence;
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> (d) the object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals;
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> (e) whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter; and
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> (f) the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued,
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> but does not include any act, omission or offence committed by any person referred to in subsection (2) who acted-
>
> (i) for personal gain: Provided that an act, omission or offence by any person who acted and received money or anything of value as an informer of the State or a former state, political organisation or liberation movement, shall not be excluded only on the grounds of that person having received money or anything of value for his or her information; or

(ii) out of personal malice, ill-will or spite, directed against the victim of the acts committed."

[6] After making provision for certain ancillary matters, section 20(7) (the constitutionality of which is impugned in these proceedings) provides as follows:

"(7) (a) No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence.

(b) Where amnesty is granted to any person in respect of any act, omission or offence, such amnesty shall have no influence upon the criminal liability of any other person contingent upon the liability of the first-mentioned person.

(c) No person, organisation or state shall be civilly or vicariously liable for an act, omission or offence committed between 1 March 1960 and the cut-off date by a person who is deceased, unless amnesty could not have been granted in terms of this Act in respect of such an act, omission or offence."

Section 20(7) is followed by sections 20(8), 20(9) and 20(10) which deal expressly with both the formal and procedural consequences of an amnesty in the following terms:

"(8) If any person-

(a) has been charged with and is standing trial in respect of an offence constituted by the act or omission in respect of which amnesty is granted in terms of this section; or

(b) has been convicted of, and is awaiting the passing of sentence in respect of, or is in custody for the purpose of serving a sentence imposed in respect of, an offence constituted by the act or omission in respect of which amnesty is so granted,

the criminal proceedings shall forthwith upon publication of the proclamation referred to in subsection (6) become void or the sentence so imposed shall upon such publication lapse and the person so in custody shall forthwith be released.

(9) If any person has been granted amnesty in respect of any act or omission which formed the ground of a civil judgment which was delivered at any time before the granting of the amnesty, the publication of the proclamation in terms of subsection (6) shall not affect the operation of the judgment in so far as it applies to that person.

(10) Where any person has been convicted of any offence constituted by an act or omission associated with a political objective in respect of which amnesty has been granted in terms of this Act, any entry or record of the conviction shall be deemed to be expunged from all official documents or records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place: Provided that the Committee may recommend to the authority concerned the taking of such measures as it may deem necessary for the protection of the safety of the public."[14]

[7] What is clear from section 20(7), read with sections 20(8), (9) and (10), is that once a person has been granted amnesty in respect of an act, omission or offence

(a) the offender can no longer be held "criminally liable" for such offence and no prosecution in respect thereof can be maintained against him or her;

(b) such an offender can also no longer be held civilly liable personally for any damages sustained by the victim and no such civil proceedings can successfully be pursued against him or her;

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[14] Sub-section 6 which is referred to in sub-sections 8 and 9 simply provides that the Committee must by proclamation in the Gazette make known the full names of any person to whom amnesty has been granted, together with sufficient information to identify the act, omission or offence in respect of which such amnesty has been granted.

(c) if the wrongdoer is an employee of the state, the state is equally discharged from any civil liability in respect of any act or omission of such an employee, even if the relevant act or omission was effected during the course and within the scope of his or her employment; and

(d) other bodies, organisations or persons are also exempt from any liability for any of the acts or omissions of a wrongdoer which would ordinarily have arisen in consequence of their vicarious liability for such acts or omissions.

[8] The applicants sought in this court to attack the constitutionality of section 20(7) on the grounds that its consequences are not authorised by the Constitution. They aver that various agents of the state, acting within the scope and in the course of their employment, have unlawfully murdered and maimed leading activists during the conflict against the racial policies of the previous administration and that the applicants have a clear right to insist that such wrongdoers should properly be prosecuted and punished, that they should be ordered by the ordinary courts of the land to pay adequate civil compensation to the victims or dependants of the victims and further to require the state to make good to such victims or dependants the serious losses which they have suffered in consequence of the criminal and delictual acts of the employees of the state. In support of that attack Mr Soggot SC, who appeared for the applicants together with Mr

Khoza, contended that section 20(7) was inconsistent with section 22 of the Constitution which provides that

> "[e]very person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent or impartial forum."

He submitted that the Amnesty Committee was neither "a court of law" nor an "independent or impartial forum" and that in any event the Committee was not authorised to settle "justiciable disputes". All it was simply required to decide was whether amnesty should be granted in respect of a particular act, omission or offence.

[9] The effect of an amnesty undoubtedly impacts upon very fundamental rights. All persons are entitled to the protection of the law against unlawful invasions of their right to life, their right to respect for and protection of dignity and their right not to be subject to torture of any kind. When those rights are invaded those aggrieved by such invasion have the right to obtain redress in the ordinary courts of law and those guilty of perpetrating such violations are answerable before such courts, both civilly and criminally. An amnesty to the wrongdoer effectively obliterates such rights.

[10] There would therefore be very considerable force in the submission that section 20(7) of the Act constitutes a violation of section 22 of the Constitution, if there was nothing in the Constitution itself which permitted or authorised such violation. The

crucial issue, therefore, which needs to be determined, is whether the Constitution, indeed, permits such a course. Section 33(2) of the Constitution provides that

> "[s]ave as provided for in subsection (1) or any other provision of this Constitution, no law, whether a rule of common law, customary law or legislation, shall limit any right entrenched in this Chapter."

Two questions arise from the provisions of this sub-section. The first question is whether there is "any other provision in this Constitution" which permits a limitation of the right in section 22 and secondly if there is not, whether any violation of section 22 is a limitation which can be justified in terms of section 33(1) of the Constitution which reads as follows:

> "The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation-
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> (a) shall be permissible only to the extent that it is-
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> (i) reasonable; and
>
> (ii) justifiable in an open and democratic society based on freedom and equality; and
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> (b) shall not negate the essential content of the right in question,
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> and provided further that any limitation to-
>
> (aa) a right entrenched in section 10, 11, 12, 14(1), 21, 25 or 30(1)(d) or (e) or (2); or
>
> (bb) a right entrenched in section 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity,
>
> shall, in addition to being reasonable as required in paragraph (a)(i), also be necessary."

[11] Mr Marcus, who together with Mr D Leibowitz appeared for the Respondents, contended that the epilogue, which I have previously quoted, is indeed a "provision of this Constitution" within the meaning of section 33(2). He argued that any law conferring amnesty on a wrongdoer in respect of acts, omissions and offences associated with political objectives and committed during the prescribed period, is therefore a law properly authorised by the Constitution.

[12] It is therefore necessary to deal, in the first place, with the constitutional status of the epilogue. In the founding affidavit in support of the application for direct access to this court made by the deputy president of the first applicant, reliance was placed on the Constitutional Principles contained in schedule 4 to the Constitution and it was submitted that

> "[the] Constitutional Principles in Schedule 4 enjoy a higher status to that of other sections of the Constitution, in that, in terms of Section 74(1) of the Constitution, it is not permissible to amend the Constitutional Principles and they shall be included in the final Constitution.
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> To the extent that, therefore, the post-end clause is in conflict with Constitutional Principle VI, the latter should prevail."

Constitutional Principle VI provides that "[t]here shall be a separation of powers between the legislature, executive and the judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."

[13] During oral argument before us this submission was wisely not pressed by counsel for the applicants. Even assuming in favour of the applicants that there is some potential tension between the language of section 20(7) of the Act and Constitutional Principle VI, it can be of no assistance to the applicants in their attack on the status of the epilogue. The purpose of schedule 4 to the Constitution is to define the principles with which a new constitutional text adopted by the Constitutional Assembly must comply.[15] The new constitutional text has no force and effect unless the Constitutional Court has certified that the provisions of the text comply with these Constitutional Principles.[16]

[14] The Constitutional Principles have no effect on the status of the epilogue. That status is determined by section 232(4) of the Constitution which provides as follows:

> "In interpreting this Constitution a provision in any Schedule, including the provision under the heading *'National Unity and Reconciliation'*, to this Constitution shall not by reason only of the fact that it is contained in a Schedule, have a lesser status than any other provision of this Constitution which is not contained in a Schedule, and such provision shall for all purposes be deemed to form part of the substance of this Constitution."

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15 Section 71(1) of the Constitution. *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at para 41; *Premier, KwaZulu-Natal, and Others v President of the Republic of South Africa and Others* 1996 (1) SA 769 (CC); 1996 (12) BCLR 1561 (CC) at para 12; *The Azanian Peoples Organisation and Others v The Truth and Reconciliation Commission and Others,* (CPD) Case No 4895/96, 9 May 1996, not yet reported, at 20-1 ("the *AZAPO* case").

16 Section 71(2) of the Constitution.

The epilogue, therefore, has no lesser status than any other part of the Constitution. As far as section 22 is concerned it therefore would have the same effect as a provision within section 22 itself which enacted that:

> "Nothing contained in this sub-section shall preclude Parliament from adopting a law providing for amnesty to be granted in respect of acts, omissions and offences associated with political objectives committed during a defined period 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."

What is clear is that Parliament not only has the authority in terms of the epilogue to make a law providing for amnesty to be granted in respect of the acts, omissions and offences falling within the category defined therein but that it is in fact obliged to do so. This follows from the wording in the material part of the epilogue which is that "Parliament under this Constitution shall adopt a law" providing, inter alia, for the "mechanisms, criteria and procedures ... through which ... amnesty shall be dealt with".

[15] It was contended that even if this is the proper interpretation of the status of the epilogue and even if the principle of "amnesty" is authorised by the Constitution, it does not authorise, in particular, the far-reaching amnesty which section 20(7) allows. In his heads of argument on behalf of the applicants, Mr Soggot conceded that the wording of the epilogue provides

> "... a clear indication that the Constitution contemplates the grant of amnesty in respect of offences associated with political objectives and committed in the course of the conflicts of the past, including offences involving gross violations of human rights."

At the commencement of oral argument Mr Soggot informed us, however, that he had been instructed by his clients to withdraw this concession and he therefore did not abandon the submission that section 20(7) was unconstitutional in all respects and that Parliament had no constitutional power to authorise the Amnesty Committee to indemnify any wrongdoer either against criminal or civil liability arising from the perpetration of acts falling within the categories described in the legislation.

Amnesty in respect of criminal liability

[16] I understand perfectly why the applicants would want to insist that those wrongdoers who abused their authority and wrongfully murdered, maimed or tortured very much loved members of their families who had, in their view, been engaged in a noble struggle to confront the inhumanity of apartheid, should vigorously be prosecuted and effectively be punished for their callous and inhuman conduct in violation of the criminal law. I can therefore also understand why they are emotionally unable to identify themselves with the consequences of the legal concession made by Mr Soggot and if that concession was wrong in law I would have no hesitation whatsoever in rejecting it.

[17] Every decent human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity, protected in their freedom by an amnesty immune from constitutional attack, but the circumstances in support of this course require carefully to be appreciated. Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously and most of them no longer survive to tell their tales. Others have had their freedom invaded, their dignity assaulted or their reputations tarnished by grossly unfair imputations hurled in the fire and the cross-fire of a deep and wounding conflict. The wicked and the innocent have often both been victims. Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law. The Act seeks to address this massive problem by encouraging these survivors and the dependants of the tortured and the wounded, the maimed and the

dead to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible. That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosures and to reveal the truth which persons in the positions of the applicants so desperately desire. With that incentive, what might unfold are objectives fundamental to the ethos of a new constitutional order. The families of those unlawfully tortured, maimed or traumatised become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the "reconciliation and reconstruction" which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue.

[18] The alternative to the grant of immunity from criminal prosecution of offenders is to keep intact the abstract right to such a prosecution for particular persons without

the evidence to sustain the prosecution successfully, to continue to keep the dependants of such victims in many cases substantially ignorant about what precisely happened to their loved ones, to leave their yearning for the truth effectively unassuaged, to perpetuate their legitimate sense of resentment and grief and correspondingly to allow the culprits of such deeds to remain perhaps physically free but inhibited in their capacity to become active, full and creative members of the new order by a menacing combination of confused fear, guilt, uncertainty and sometimes even trepidation. Both the victims and the culprits who walk on the "historic bridge" described by the epilogue will hobble more than walk to the future with heavy and dragged steps delaying and impeding a rapid and enthusiastic transition to the new society at the end of the bridge, which is the vision which informs the epilogue.

[19] Even more crucially, but for a mechanism providing for amnesty, the "historic bridge" itself might never have been erected. For a successfully negotiated transition, the terms of the transition required not only the agreement of those victimized by abuse but also those threatened by the transition to a "democratic society based on freedom and equality".[17] If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming, and if it had, the bridge itself would have remained wobbly and insecure, threatened by fear from some and anger from others. It was for this reason that those

[17] Sections 33(1)(a)(ii) and 35(1) of the Constitution.

who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu[18] over victimisation.[19]

[20] Is section 20(7), to the extent to which it immunizes wrongdoers from criminal prosecution, nevertheless objectionable on the grounds that amnesty might be provided in circumstances where the victims, or the dependants of the victims, have not had the compensatory benefit of discovering the truth at last or in circumstances where those whose misdeeds are so obscenely excessive as to justify punishment, even if they were perpetrated with a political objective during the course of conflict in the past? Some answers to such difficulties are provided in the sub-sections of section 20. The Amnesty Committee may grant amnesty in respect of the relevant offence only if the perpetrator of the misdeed makes a full disclosure of all relevant facts.[20] If the offender does not, and in consequence thereof the victim or his or her family is not able to discover the truth, the application for amnesty will fail. Moreover, it will not suffice for the offender merely to say that his or her act was associated with a political objective. That issue must independently be determined by the Amnesty Committee pursuant to the criteria set out in section 20(3), including the relationship between the offence

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18 The meaning of that concept is discussed in *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 224-7; 241-51; 263 and 307-13.

19 See the fourth paragraph of the epilogue to the Constitution.

20 Section 20(1)(c) of the Act.

committed and the political objective pursued and the directness and proximity of the relationship and the proportionality of the offence to the objective pursued.

[21] The result, at all levels, is a difficult, sensitive, perhaps even agonising, balancing act between the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a new future; between encouragement to wrongdoers to help in the discovery of the truth and the need for reparations for the victims of that truth; between a correction in the old and the creation of the new. It is an exercise of immense difficulty interacting in a vast network of political, emotional, ethical and logistical considerations. It is an act calling for a judgment falling substantially within the domain of those entrusted with lawmaking in the era preceding and during the transition period. The results may well often be imperfect and the pursuit of the act might inherently support the message of Kant that "out of the crooked timber of humanity no straight thing was ever made".[21] There can be legitimate debate about the methods and the mechanisms chosen by the lawmaker to give effect to the difficult duty entrusted upon it in terms of the epilogue. We are not concerned with that debate or the wisdom of its choice of mechanisms but only with its constitutionality. That, for us, is the only relevant standard. Applying that standard, I am not satisfied that in providing for

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[21] Immanuel Kant paraphrased in Isaiah Berlin's essay on "Two concepts of Liberty" in *Four Essays on Liberty,* (Oxford University Press, Oxford 1969) at 170. See also Ackermann J in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 53.

amnesty for those guilty of serious offences associated with political objectives and in defining the mechanisms through which and the manner in which such amnesty may be secured by such offenders, the lawmaker, in section 20(7), has offended any of the express or implied limitations on its powers in terms of the Constitution.

[22] South Africa is not alone in being confronted with a historical situation which required amnesty for criminal acts to be accorded for the purposes of facilitating the transition to, and consolidation of, an overtaking democratic order. Chile, Argentina and El Salvador are among the countries which have in modern times been confronted with a similar need. Although the mechanisms adopted to facilitate that process have differed from country to country and from time to time, the principle that amnesty should, in appropriate circumstances, be accorded to violators of human rights in order to facilitate the consolidation of new democracies was accepted in all these countries and truth commissions were also established in such countries.

[23] The Argentinean truth commission was created by Executive Decree 187 of 15 December 1983. It disclosed to the government the names of over one thousand alleged offenders gathered during the investigations.[22] The Chilean Commission on Truth and Reconciliation was established on 25 April 1990. It came to be known as the Rettig

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[22] Pasqualucci "The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System" 12 *Boston University International Law Journal* 321 (1994) at 337-8.

Commission after its chairman, Raul Rettig. Its report was published in 1991 and consisted of 850 pages pursuant to its mandate to clarify "the truth about the most serious human right violations ... in order to bring about the reconciliation of all Chileans".[23] The Commission on the Truth for El Salvador was established with similar objectives in 1992 to investigate "serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth".[24] In many cases amnesties followed in all these countries.[25]

[24] What emerges from the experience of these and other countries that have ended periods of authoritarian and abusive rule, is that there is no single or uniform international practice in relation to amnesty. Decisions of states in transition, taken with a view to assisting such transition, are quite different from acts of a state covering up its own crimes by granting itself immunity. In the former case, it is not a question of the governmental agents responsible for the violations indemnifying themselves, but rather, one of a constitutional compact being entered into by all sides, with former victims being well-represented, as part of an ongoing process to develop constitutional democracy and prevent a repetition of the abuses.

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23 Id at 338, quoting the National Commission on Truth and Reconciliation "Report of the Chilean Commission on Truth and Reconciliation" Berryman (trans) (1993).

24 Id at 339, quoting the Report of the Commission on the Truth for El Salvador "From Madness to Hope: The 12-Year War in El Salvador" United Nations s/25500 (1993).

25 Id at 343.

[25] Mr Soggot contended on behalf of the applicants that the state was obliged by international law to prosecute those responsible for gross human rights violations and that the provisions of section 20(7) which authorised amnesty for such offenders constituted a breach of international law. We were referred in this regard to the provisions of article 49 of the first Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, article 50 of the second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, article 129 of the third Geneva Convention relative to the Treatment of Prisoners of War and article 146 of the fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War. The wording of all these articles is exactly the same and provides as follows:

> "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches ..."

defined in the instruments so as to include, inter alia, wilful killing, torture or inhuman treatment and wilfully causing great suffering or serious injury to body or health.[26] They add that each High Contracting Party shall be under an obligation to search for persons

[26] Article 50 of the first Geneva Convention; article 51 of the second Geneva Convention; article 130 of the third Geneva Convention and article 147 of the fourth Geneva Convention.

alleged to have committed such grave breaches and shall bring such persons, regardless of their nationality, before its own courts.[27]

[26] The issue which falls to be determined in this Court is whether section 20(7) of the Act is inconsistent with the Constitution. If it is, the enquiry as to whether or not international law prescribes a different duty is irrelevant to that determination. International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, relevant only in the interpretation of the Constitution itself, on the grounds that the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms of international law. International conventions and treaties do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment.[28]

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27 Article 49 of the first Geneva Convention; article 50 of the second Geneva Convention; article 129 of the third Geneva Convention and article 146 of the fourth Geneva Convention.

28 *R v Secretary of State for the Home Department, Ex parte Brind and Others* [1991] 1 AC 696 (HL) at 761G-762D; *Pan American World Airways Incorporated v S.A. Fire and Accident Insurance Co. Ltd.* 1965 (3) SA 150 (A) at 161C; *Maluleke v Minister of Internal Affairs* 1981 (1) SA 707 (B) at 712G-H; *Binga v Cabinet for South West Africa and Others* 1988 (3) SA 155 (A) at 184H-185D; *S v Petane* 1988 (3) SA 51 (C) at 56F-G; Hahlo and Kahn, *The South African Legal System and Its Background,* (Juta & Co Ltd, Kenwyn 1968) at 114; Dugard, *International Law: A South African Perspective* (Juta & Co Ltd, Kenwyn 1994) at 339-46.

[27] These observations are supported by the direct provisions of the Constitution itself referring to international law and international agreements. Section 231(3) of the Constitution makes it clear that when Parliament agrees to the ratification of or accession to an international agreement such agreement becomes part of the law of the country only if Parliament expressly so provides and the agreement is not inconsistent with the Constitution. Section 231(1) provides in express terms that

> "[a]ll rights and obligations under international agreements which immediately before the commencement of this Constitution were vested in or binding on the Republic within the meaning of the previous Constitution, shall be vested in or binding on the Republic under this Constitution, unless provided otherwise by an Act of Parliament."

It is clear from this section that an Act of Parliament can override any contrary rights or obligations under international agreements entered into before the commencement of the Constitution. The same temper is evident in section 231(4) of the Constitution which provides that

> "[t]he rules of customary international law binding on the Republic, shall unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic."

Section 35(1) of the Constitution is also perfectly consistent with these conclusions. It reads as follows:

> "In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall,

> where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law."

The court is directed only to "have regard" to public international law if it is applicable to the protection of the rights entrenched in the chapter.

[28] The exact terms of the relevant rules of public international law contained in the Geneva Conventions relied upon on behalf of the applicants would therefore be irrelevant if, on a proper interpretation of the Constitution, section 20(7) of the Act is indeed authorised by the Constitution, but the content of these Conventions in any event do not assist the case of the applicants.

[29] In the first place it is doubtful whether the Geneva Conventions of 1949 read with the relevant Protocols thereto apply at all to the situation in which this country found itself during the years of the conflict to which I have referred.[29]

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[29] The Geneva Conventions of 1949 apply only to cases of "declared war or of any armed conflict which may arise between two or more of the High Contracting Parties". (No High Contracting Parties were involved in the South African conflict.) The Conventions were extended by article 1(4) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted on 8 June 1977) to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against regimes in the exercise of their rights of self-determination". Even if the conflict in South Africa could be said to fall within this extension (this was not accepted by the Cape Supreme Court in the *AZAPO* case referred to in footnote 15 supra), Protocol I could only become binding after a declaration of intent to abide thereby had been deposited with the Swiss Federal Council in terms of article 95 as read with article 96 of this Protocol. This Protocol was never signed or ratified by South Africa during the conflict and no such "declaration" was deposited with that Council by any of the parties to the conflict. As far as Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (also adopted on 8 June 1977) is concerned, it equally cannot assist the case of the applicants because it is doubtful whether it applies at all (see article 1(1) to Protocol II) but if it does, it actually requires the authorities in power, after the end of hostilities, to grant amnesty to those previously engaged in the conflict.

[30] Secondly, whatever be the proper ambit and technical meaning of these Conventions and Protocols, the international literature[30] in any event clearly appreciates the distinction between the position of perpetrators of acts of violence in the course of war (or other conflicts between states or armed conflicts between liberation movements seeking self-determination against colonial and alien domination of their countries), on the one hand, and their position in respect of violent acts perpetrated during other conflicts which take place within the territory of a sovereign state in consequence of a struggle between the armed forces of that state and other dissident armed forces operating under responsible command, within such a state on the other. In respect of the latter category, there is no obligation on the part of a contracting state to ensure the prosecution of those who might have performed acts of violence or other acts which would ordinarily be characterised as serious invasions of human rights. On the contrary, article 6(5) of Protocol II to the Geneva Conventions of 1949 provides that

> "[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."

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30 See, for example, Dugard, supra n 28 at 333; and see further the references contained in footnotes 31, 32 and 33, infra.

[31] The need for this distinction is obvious. It is one thing to allow the officers of a hostile power which has invaded a foreign state to remain unpunished for gross violations of human rights perpetrated against others during the course of such conflict. It is another thing to compel such punishment in circumstances where such violations have substantially occurred in consequence of conflict between different formations within the same state in respect of the permissible political direction which that state should take with regard to the structures of the state and the parameters of its political policies and where it becomes necessary after the cessation of such conflict for the society traumatised by such a conflict to reconstruct itself. The erstwhile adversaries of such a conflict inhabit the same sovereign territory. They have to live with each other and work with each other and the state concerned is best equipped to determine what measures may be most conducive for the facilitation of such reconciliation and reconstruction. That is a difficult exercise which the nation within such a state has to perform by having regard to its own peculiar history, its complexities, even its contradictions and its emotional and institutional traditions. What role punishment should play in respect of erstwhile acts of criminality in such a situation is part of the complexity. Some aspects of this difficulty are covered by Judge Marvin Frankel in a book he authored with Ellen Saideman.[31]

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[31] Frankel *Out of the Shadows of the Night: The Struggle for International Human Rights* (Delacorte Press, New York 1989) at 103-4.

> "The call to punish human rights criminals can present complex and agonising problems that have no single or simple solution. While the debate over the Nuremberg trials still goes on, that episode - trials of war criminals of a defeated nation - was simplicity itself as compared to the subtle and dangerous issues that can divide a country when it undertakes to punish its own violators.
>
> A nation divided during a repressive regime does not emerge suddenly united when the time of repression has passed. The human rights criminals are fellow citizens, living alongside everyone else, and they may be very powerful and dangerous. If the army and the police have been the agencies of terror, the soldiers and the cops aren't going to turn overnight into paragons of respect for human rights. Their numbers and their expert management of deadly weapons remain significant facts of life. ... The soldiers and police may be biding their time, waiting and conspiring to return to power. They may be seeking to keep or win sympathisers in the population at large. If they are treated too harshly - or if the net of punishment is cast too widely - there may be a backlash that plays into their hands. But their victims cannot simply forgive and forget.
>
> These problems are not abstract generalities. They describe tough realities in more than a dozen countries. If, as we hope, more nations are freed from regimes of terror, similar problems will continue to arise.
>
> Since the situations vary, the nature of the problems varies from place to place."

The agonies of a nation seeking to reconcile the tensions between justice for those wronged during conflict, on the one hand, and the consolidation of the transition to a nascent democracy, on the other, has also been appreciated by other international commentators.[32] It is substantially for these reasons that amnesty clauses are not infrequent in international agreements concluded even after a war between different states.

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[32] See Orentlicher "Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime", 100 *Yale LJ* 2537 (1991) at 2544 and by the same author "A reply to Professor Nino" 100 *Yale LJ* 2641 (1991). See also a recent interview with the same author commenting on the South African Truth Commission in *Issues of Democracy*, published by the United States Information Services, Johannesburg, Vol 1, No 3, May 1996 at 33.

> "Amnesty clauses are frequently found in peace treaties and signify the will of the parties to apply the principle of *tabula rasa* to past offences, generally political delicts such as treason, sedition and rebellion, but also to war crimes. As a sovereign act of oblivion, amnesty may be granted to all persons guilty of such offences or only to certain categories of offenders."[33]

[32] Considered in this context, I am not persuaded that there is anything in the Act and more particularly in the impugned section 20(7) thereof, which can properly be said to be a breach of the obligations of this country in terms of the instruments of public international law relied on by Mr Soggot. The amnesty contemplated is not a blanket amnesty against criminal prosecution for all and sundry, granted automatically as a uniform act of compulsory statutory amnesia. It is specifically authorised for the purposes of effecting a constructive transition towards a democratic order. It is available only where there is a full disclosure of all facts to the Amnesty Committee and where it is clear that the particular transgression was perpetrated during the prescribed period and with a political objective committed in the course of the conflicts of the past. That objective has to be evaluated having regard to the careful criteria listed in section 20(3) of the Act, including the very important relationship which the act perpetrated bears in proportion to the object pursued.

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[33] Bernhardt (ed) *Encyclopedia of Public International Law*, (North-Holland, Amsterdam, London, New York, Tokyo 1992) Volume I at 148 and Bernhardt (ed) *Encyclopedia of Public International Law*, (North-Holland, Amsterdam, New York, Oxford 1982) Volume 3, "Use of Force, War and Neutrality, Peace Treaties (A-M)" at 14-15.

Amnesty in respect of the civil liability of individual wrongdoers

[33] Mr Soggot submitted that chapter 3 of the Constitution, and more particularly section 22, conferred on every person the right to pursue, in the ordinary courts of the land or before independent tribunals, any claim which such person might have in civil law for the recovery of damages sustained by such a person in consequence of the unlawful delicts perpetrated by a wrongdoer. He contended that the Constitution did not authorise Parliament to make any law which would have the result of indemnifying (or otherwise rendering immune from liability) the perpetrator of any such delict against any claims made for damages suffered by the victim of such a delict. In support of that argument he suggested that the concept of "amnesty", referred to in the epilogue to the Constitution, was, at worst for the applicants, inherently limited to immunity from criminal prosecutions. He contended that even if a wrongdoer who has received amnesty could plead such amnesty as a defence to a criminal prosecution, such amnesty could not be used as a shield to protect him or her from claims for delictual damages suffered by any person in consequence of the act or omission of the wrongdoer.

[34] There can be no doubt that in some contexts the word "amnesty" does bear the limited meaning contended for by counsel. Thus one of the meanings of amnesty referred to in The Oxford English Dictionary is "... a general overlooking or pardon of

past offences, by the ruling authority"[34] and in similar vein, Webster's Dictionary gives as the second meaning of amnesty "a deliberate overlooking, as of an offense".[35] Wharton's Law Lexicon also refers to amnesty in the context "by which crimes against the Government up to a certain date are so obliterated that they can never be brought into charge.[36]

[35] I cannot, however, agree that the concept of amnesty is inherently to be limited to the absolution from criminal liability alone, regardless of the context and regardless of the circumstances. The word has no inherently fixed technical meaning. Its origin is to be found from the Greek concept of "amnestia" and it indicates what is described by Webster's Dictionary[37] as "an act of oblivion". The degree of oblivion or obliteration must depend on the circumstances. It can, in certain circumstances, be confined to immunity from criminal prosecutions and in other circumstances be extended also to civil liability. Describing the effects of amnesty in treaties concluded between belligerent parties, a distinguished writer states:

> "An amnesty is a complete forgetfulness of the past; and as the treaty of peace is meant to put an end to every subject of discord, the amnesty should constitute its first article. Accordingly, such is the common practice at the present day. But though the treaty should

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34 *The Oxford English Dictionary*, 2nd Ed, Vol I at 406.

35 *Webster's New Twentieth Century Dictionary*, 2nd Ed at 59.

36 *Wharton's Law Lexicon*, 14th Ed at 59.

37 Supra n 35.

make no mention of it, the amnesty is necessarily included in it, from the very nature of the agreement.

Since each of the belligerents claims to have justice on his side, and since there is no one to decide between them (Book III, § 188), the condition in which affairs stand at the time of the treaty must be regarded as their lawful status, and if the parties wish to make any change in it the treaty must contain an express stipulation to that effect. Consequently all matters not mentioned in the treaty are to continue as they happen to be at the time the treaty is concluded. This is also a result of the promised amnesty. All the injuries caused by the war are likewise forgotten; and no action can lie on account of those for which the treaty does not stipulate that satisfaction shall be made; they are considered as never having happened.

But the effect of the settlement or amnesty can not be extended to things which bear no relation to war terminated by the treaty. Thus, claims based upon a debt contracted, or an injury received, prior to the war, but which formed no part of the motives for undertaking the war, remain as they were, and are not annulled by the treaty, unless the treaty has been made to embrace the relinquishment of all claims whatsoever. The same rule holds for debts contracted during the war, but with respect to objects which have no relation to it, and for injuries received during the war, but not as a result of it." (My emphasis)[38]

[36] What are the material circumstances of the present case? As I have previously said, what the epilogue to the Constitution seeks to achieve by providing for amnesty is the facilitation of "reconciliation and reconstruction" by the creation of mechanisms and procedures which make it possible for the truth of our past to be uncovered. Central to the justification of amnesty in respect of the criminal prosecution for offences committed during the prescribed period with political objectives, is the appreciation that the truth

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38 De Vattel *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* trans by Fenwick (Carnegie Institute of Washington, Washington 1916) at 351, paras 20-2, quoted by Friedman JP and Farlam J in the *AZAPO* case, supra n 15 at 24.

will not effectively be revealed by the wrongdoers if they are to be prosecuted for such acts. That justification must necessarily and unavoidably apply to the need to indemnify such wrongdoers against civil claims for payment of damages. Without that incentive the wrongdoer cannot be encouraged to reveal the whole truth which might inherently be against his or her material or proprietary interests. There is nothing in the language of the epilogue which persuades me that what the makers of the Constitution intended to do was to encourage wrongdoers to reveal the truth by providing for amnesty against criminal prosecution in respect of their acts but simultaneously to discourage them from revealing that truth by keeping intact the threat that such revelations might be visited with what might in many cases be very substantial claims for civil damages. It appears to me to be more reasonable to infer that the legislation contemplated in the epilogue would, in the circumstances defined, be wide enough to allow for an amnesty which would protect a wrongdoer who told the truth, from both the criminal and the civil consequences of his or her admissions.

[37] This conclusion appears to be fortified by the fact that what the epilogue directs is that

> "amnesty shall be granted in respect of acts, omissions and offences ...".

If the purpose was simply to provide mechanisms in terms of which wrongdoers could be protected from criminal prosecution in respect of offences committed by them, why

would there be any need to refer also to "acts and omissions" in addition to offences? The word "offences" would have covered both acts and omissions in any event.

[38] In the result I am satisfied that section 20(7) is not open to constitutional challenge on the ground that it invades the right of a victim or his or her dependant to recover damages from a wrongdoer for unlawful acts perpetrated during the conflicts of the past. If there is any such invasion it is authorised and contemplated by the relevant parts of the epilogue.

The effect of amnesty on any potential civil liability of the state

[39] Mr Soggot contended forcefully that whatever be the legitimate consequences of the kind of amnesty contemplated by the epilogue for the criminal and civil lability of the wrongdoer, the Constitution could not justifiably authorise any law which has the effect of indemnifying the state itself against civil claims made by those wronged by criminal and delictual acts perpetrated by such wrongdoers in the course and within the scope of their employment as servants of the state. Section 20(7) of the Act, he argued, had indeed that effect and was therefore unconstitutional to that extent.

[40] This submission has one great force. It is this. If the wrongdoer in the employment of the state is not personally indemnified in the circumstances regulated by the Act, the truth might never unfold. It would remain shrouded in the impenetrable

mysteries of the past, leaving the dependants of many victims with a grief unrelieved by any knowledge of the truth. But how, it was argued, would it deter such wrongdoers from revealing the truth if such a revelation held no criminal or civil consequences for them? How could such wrongdoers be discouraged from disclosing the truth if their own liberty and property was not to be threatened by such revelations, but the state itself nevertheless remained liable to compensate the families of victims for such wrongdoings perpetrated by the servants of the state?

[41] This is a serious objection which requires to be considered carefully. I think it must be conceded that in many cases, the wrongdoer would not be discouraged from revealing the whole truth merely because the consequences of such disclosure might be to saddle the state with a potential civil liability for damages arising from the delictual acts or omissions of a wrongdoer (although there may also be many cases in which such a wrongdoer, still in the service of the state, might in some degree be inhibited or even coerced from making disclosures implicating his or her superiors).

[42] The real answer, however, to the problems posed by the questions which I have identified, seems to lie in the more fundamental objectives of the transition sought to be attained by the Constitution and articulated in the epilogue itself. What the Constitution seeks to do is to facilitate the transition to a new democratic order, committed to "reconciliation between the people of South Africa and the reconstruction of society".

The question is how this can be done effectively with the limitations of our resources and the legacy of the past.

[43] The families of those whose fundamental human rights were invaded by torture and abuse are not the only victims who have endured "untold suffering and injustice" in consequence of the crass inhumanity of apartheid which so many have had to endure for so long. Generations of children born and yet to be born will suffer the consequences of poverty, of malnutrition, of homelessness, of illiteracy and disempowerment generated and sustained by the institutions of apartheid and its manifest effects on life and living for so many. The country has neither the resources nor the skills to reverse fully these massive wrongs. It will take many years of strong commitment, sensitivity and labour to "reconstruct our society" so as to fulfill the legitimate dreams of new generations exposed to real opportunities for advancement denied to preceding generations initially by the execution of apartheid itself and for a long time after its formal demise, by its relentless consequences. The resources of the state have to be deployed imaginatively, wisely, efficiently and equitably, to facilitate the reconstruction process in a manner which best brings relief and hope to the widest sections of the community, developing for the benefit of the entire nation the latent human potential and resources of every person who has directly or indirectly been burdened with the heritage of the shame and the pain of our racist past.

[44] Those negotiators of the Constitution and leaders of the nation who were required to address themselves to these agonising problems must have been compelled to make hard choices. They could have chosen to direct that the limited resources of the state be spent by giving preference to the formidable delictual claims of those who had suffered from acts of murder, torture or assault perpetrated by servants of the state, diverting to that extent, desperately needed funds in the crucial areas of education, housing and primary health care. They were entitled to permit a different choice to be made between competing demands inherent in the problem. They could have chosen to direct that the potential liability of the state be limited in respect of any civil claims by differentiating between those against whom prescription could have been pleaded as a defence and those whose claims were of such recent origin that a defence of prescription would have failed. They were entitled to reject such a choice on the grounds that it was irrational. They could have chosen to saddle the state with liability for claims made by insurance companies which had compensated institutions for delictual acts performed by the servants of the state and to that extent again divert funds otherwise desperately needed to provide food for the hungry, roofs for the homeless and black boards and desks for those struggling to obtain admission to desperately overcrowded schools. They were entitled to permit the claims of such school children and the poor and the homeless to be preferred.

[45] The election made by the makers of the Constitution was to permit Parliament to favour "the reconstruction of society" involving in the process a wider concept of "reparation", which would allow the state to take into account the competing claims on its resources but, at the same time, to have regard to the "untold suffering" of individuals and families whose fundamental human rights had been invaded during the conflict of the past. In some cases such a family may best be assisted by a reparation which allows the young in this family to maximise their potential through bursaries and scholarships; in other cases the most effective reparation might take the form of occupational training and rehabilitation; in still other cases complex surgical interventions and medical help may be facilitated; still others might need subsidies to prevent eviction from homes they can no longer maintain and in suitable cases the deep grief of the traumatised may most effectively be assuaged by facilitating the erection of a tombstone on the grave of a departed one with a public acknowledgement of his or her valour and nobility. There might have to be differentiation between the form and quality of the reparations made to two persons who have suffered exactly the same damage in consequence of the same unlawful act but where one person now enjoys lucrative employment from the state and the other lives in penury.

[46] All these examples illustrate, in my view, that it is much too simplistic to say that the objectives of the Constitution could only properly be achieved by saddling the state with the formal liability to pay, in full, the provable delictual claims of those who have

suffered patrimonial loss in consequence of the delicts perpetrated with political objectives by servants of the state during the conflicts of the past. There was a permissible alternative, perhaps even a more imaginative and more fundamental route to the "reconstruction of society", which could legitimately have been followed. This is the route which appears to have been chosen by Parliament through the mechanism of amnesty and nuanced and individualised reparations in the Act. I am quite unpersuaded that this is not a route authorised by the epilogue to the Constitution.

[47] The epilogue required that a law be adopted by Parliament which would provide for "amnesty" and it appreciated the "need for reparation", but it left it to Parliament to decide upon the ambit of the amnesty, the permissible form and extent of such reparations and the procedures to be followed in the determination thereof, by taking into account all the relevant circumstances to which I have made reference. Parliament was therefore entitled to decide that, having regard to the resources of the state, proper reparations for those victimised by the unjust laws and practices of the past justified formulae which did not compel any irrational differentiation between the claims of those who were able to pursue enforceable delictual claims against the state and the claims of those who were not in that position but nevertheless deserved reparations.

[48] It was submitted by Mr Soggot that the reference to the "need for reparation" in the epilogue is contained only in the fourth paragraph of the epilogue and does not

appear in the directive to Parliament to adopt a law "providing for the mechanisms, criteria and procedures, including tribunals, if any, through which ... amnesty shall be dealt with ...". He argued from this that what the makers of the Constitution must have contemplated was that the ordinary liability of the state, in respect of damages sustained by others in consequence of the acts of the servants of the state, remained intact, and was protected by section 22 of the Constitution. In my view, this is a fragmentary and impermissible approach to the structure of the epilogue. It must be read holistically. It expresses an integrated philosophical and jurisprudential approach. The very first paragraph defines the commitment to the "historic bridge" and the second paragraph expands on the theme of this bridge by elevating "the pursuit of national unity, ... reconciliation between the people of South Africa and the reconstruction of society." It then goes on in the third paragraph, in very moving and generous language, to "secure" the "foundation" of the nation by transcending "the divisions and strife of the past, which generated gross violations of human rights" and elects, in eloquent terms in the next paragraph, to make the historic choice in favour of understanding above vengeance, ubuntu over victimisation and "a need for reparation but not for retaliation." This philosophy then informs the fifth paragraph which directs Parliament to adopt a law providing for amnesty and is introduced by the words "[i]n order to advance such reconciliation and reconstruction, amnesty shall be granted ...". The reference to "<u>such</u> reconciliation and reconstruction" embraces the continuing radiating influence of the preceding paragraphs including the reference to "the need for reparation". Approached

in this way, the reparations authorised in the Act are not alien to the legislation contemplated by the epilogue. Indeed, they are perfectly consistent with, and give expression to, the extraordinarily generous and imaginative commitment of the Constitution to a philosophy which has brought unprecedented international acclaim for the people of our country. It ends with the deep spirituality and dignity of the last line:

> "Nkosi sikelel' iAfrika - God seën Suid-Afrika"

The indemnity of organisations and persons in respect of claims based on vicarious liability

[49] It was not contended by Mr Soggot that even if the state was properly rendered immune against claims for damages in consequence of delicts perpetrated by its servants, acting within the scope and in the course of their employment, individuals and organisations should not enjoy any similar protection in respect of any vicarious liability arising from any unlawful acts committed by their servants or members. He was correct in that attitude. Apart from the fact that the wrongdoers concerned might be discouraged from revealing the truth which implicated their employers or organisations on whose support they might still directly or indirectly depend, the Constitution itself could not successfully have been transacted if those responsible for the negotiations which preceded it and the political organisations to which they belonged, were going to remain vulnerable to potentially massive claims for damages arising from their vicarious

liability in respect of such wrongful acts perpetrated by their agents or members. The erection of the "historic bridge" would never have begun.

Conclusion

[50] In the result, I am satisfied that the epilogue to the Constitution authorised and contemplated an "amnesty" in its most comprehensive and generous meaning so as to enhance and optimise the prospects of facilitating the constitutional journey from the shame of the past to the promise of the future. Parliament was, therefore, entitled to enact the Act in the terms which it did. This involved more choices apart from the choices I have previously identified.[39] They could have chosen to insist that a comprehensive amnesty manifestly involved an inequality of sacrifice between the victims and the perpetrators of invasions into the fundamental rights of such victims and their families, and that, for this reason, the terms of the amnesty should leave intact the claims which some of these victims might have been able to pursue against those responsible for authorising, permitting or colluding in such acts, or they could have decided that this course would impede the pace, effectiveness and objectives of the transition with consequences substantially prejudicial for the people of a country facing, for the first time, the real prospect of enjoying, in the future, some of the human rights so unfairly denied to the generations which preceded them. They were entitled to choose

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[39] In paragraphs 44 and 45 supra.

the second course. They could conceivably have chosen to differentiate between the wrongful acts committed in defence of the old order and those committed in the resistance of it, or they could have chosen a comprehensive form of amnesty which did not make this distinction. Again they were entitled to make the latter choice. The choice of alternatives legitimately fell within the judgment of the lawmakers. The exercise of that choice does not, in my view, impact on its constitutionality. It follows from these reasons that section 20(7) of the Act is authorised by the Constitution itself and it is unnecessary to consider the relevance and effect of section 33(1) of the Constitution.

Order

[51] In the result, the attack on the constitutionality of section 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 must fail. That was the only attack which was pursued on behalf of the applicants in this Court. It accordingly follows that the application must be, and is, refused.

Chaskalson P, Ackermann, Kriegler, Langa, Madala, Mokgoro, O'Regan and Sachs JJ concur in the judgment of Mahomed DP.

DIDCOTT J:

[52] I concur in the order that Mahomed DP proposes to make. I also agree in general with, and wish to add nothing to, the comprehensive and lucid reasons given by him for the conclusions to which he has come that the Promotion of National Unity and Reconciliation Act (34 of 1995) is not unconstitutional in absolving:

(a) all those to whom amnesties have been granted from personal liability, either criminal or civil, for their unlawful activities that are covered;

(b) everyone else and all bodies and organisations besides the state from civil liability, incurred vicariously or otherwise, for such activities on the part of persons who have obtained their own amnesties in respect of those.

After much hesitation, and without managing to shed altogether some doubts that linger in my mind even now, I feel persuaded on balance that the same must go for the civil liability of the state. Both my approach to that troublesome issue and the line I take in endeavouring to resolve it are narrower than and, in their emphasis, different from the ones preferred by Mahomed DP. I shall therefore explain separately why, at the end of that particular journey, I nevertheless find myself arriving rather reluctantly at the same destination as his. The considerations which account largely for those qualms of mine will emerge too from the explanation.

[53] That the discharges from civil liability are all incompatible with section 22 of the interim Constitution (Act 200 of 1993) is clear beyond question. For they deny to a class of persons the right bestowed by it on everyone -

> "... to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum".

Both the Committee on Amnesty and the Committee on Reparation and Rehabilitation which the statute establishes appear to be rateable for those purposes as independent and impartial tribunals, and I shall assume that they fit that bill. But the determination of justiciable disputes is hardly a function of either. That leaves the courts of law as the only avenue that would have been open to those asserting the right had they still enjoyed it. Subject to an obvious qualification, the class to whom it has instead been denied consists of people pursuing or wishing to pursue contested claims against any of the parties now protected which are based on a liability alleged for some unlawful activity of the kind encompassed. The qualification is this. Such claims are confined, firstly, to those intrinsically cognizable by a court according to the laws in force at the time when the causes of action arose and, secondly, to the ones not yet extinguished or barred by prescription or the like in terms of a scheme consistent with the Constitution. The rider must be added because, once a claim is unenforceable for the want of either attribute, it can never generate a justiciable dispute over its substantiation and the right does not then enter the reckoning. The relevance to my thinking of that consequence will become apparent in a moment or two.

[54] Whenever the right arises but is denied, on the other hand, the validity of the denial depends on the permissibility of that under section 33 of the Constitution. Its familiar sub-section (1) is not the sole component that counts in the context of this case. So does sub-section (2). The combined effect of the two sub-sections is that the denial will pass constitutional muster if we find it to be reasonable, justifiable in an open and democratic society based on freedom and equality, and not a negation of the essential content of the right or, should we make no complete finding along those lines, if we are satisfied that some other provision of the Constitution allows it independently.[1] The only further provisions which may have such an import, as far as I can see, are the ones contained in the postscript to the Constitution or its epilogue, as Mahomed DP has called that, which under section 232(4) forms part of the Constitution and ranks equally with the rest of it.[2]

[55] In investigating the tolerability of the denial I do not set the store that Mahomed DP does by the impossibility of compensating all the countless victims of apartheid in any adequate measure or form for the incalculable damage done to them during that era, and by the unavailability of legal redress to a large majority of the victims either because the harm suffered was not in the first place the type for which the law could

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1 The full text of both sub-sections will be found in the judgment of Mahomed DP at para 10.

2 The complete text of the postscript has been reproduced in para 3 of the same judgment and of section 232(4) in para 14.

offer some remedy or because, though it fell within that restricted field, their claims had lapsed with the passage of time. Such harm, the scale and horror of which Mahomed DP has described so vividly, is highly pertinent to the political and social policy animating the statute, indeed of crucial importance there. It has scant bearing that I can see, however, on the constitutional issue now under discussion, since the lack of a right by the many can scarcely provide a sound excuse for its denial to others, be they relatively but few, whose title to it is clear. Nor do I attach great weight to the cost that the state would inevitably incur in meeting not some obligations foisted freshly on it, but ones endured all along from which the legislature has now seen fit to release it. We have no means of assessing that cost, even approximately. But, unless perhaps its amount unbeknown to us is prohibitively high in relation to our national revenue and expenditure, it does not strike me as a strong reason for depriving the persons to whom the obligations are owed of their normal and legal due.

[56] Much the same may be said no doubt about the civil amnesties tendered to parties other than the state. A major factor in each of those distinguishes it sharply, however, from the immunity that the state has been granted.

[57] The amnesties made available to individuals are indispensable if an essential object of the legislation is to be achieved, the object of eliciting the truth at last about atrocities committed in the past and the responsibility borne for them. The primary

sources of information concerning those infamies, the perpetrators themselves, would hardly be willing to divulge it voluntarily, honestly and candidly without the protection of exemptions from personal liability, civil no less than criminal. The emergence of the truth, or a good deal of that at any rate, depends after all on no fear of the consequences continuing to daunt them from telling it, on their encouragement by the prospect of amnesties to reveal it instead. The shroud of silence that has enveloped their activities for too long would otherwise go on doing so. And that would have put paid effectively to the bulk of legal claims against them, I mention in parenthesis, had their escapes from liability not disposed of the lot in any event. For enough evidence to substantiate the claims would then have seldom come to light. The immunity awarded to the state does not serve the same cardinal purpose. Having made a clean breast of their own misbehaviour and obtained personal amnesties in respect of it, the wrongdoers are unlikely to feel inhibited in disclosing such role as the state may have played in their activities. To absolve them but not it from liability would have furnished the people then suing it, what is more, with an additional advantage. They would have been helped to prove the unlawful conduct alleged, and its vicarious responsibility for that, by calling as witnesses and relying on the testimony of those very wrongdoers.

[58] The amnesties that shield bodies and organisations besides the state and persons apart from the actual offenders, to turn next to that category, appear to have had a different though equally cogent explanation. We all know that the agreement reached

ultimately on the Constitution was the culmination of protracted and intense negotiations over its tenor and details alike, in which the main protagonists were organisations, bodies and individuals with a history of participation in the bitter political struggle that had preceded the process. It seems highly improbable that, when the postscript to the Constitution came up for discussion, the negotiators would ever have entertained the idea of amnesties which did not cover both their own organisations or bodies and persons found within their political ranks, including themselves. Any such suggestion, if pressed with vigour on a point so delicate, might well have jeopardised the entire negotiations. One has no reason to suppose and can scarcely imagine, however, that a comparable protectiveness or loyalty towards an entity as impersonal as the state would have been sentiments cherished by any significant number of negotiators.

[59] The cluster of amnesties share, on the other hand, a common denominator. I refer to one of the basic objects promoted by the statute, as seen from its provisions, and the effect to that which the amnesties are meant collectively to give. The object that I have in mind is this. Once the truth about the iniquities of the past has been established and made known, the book should be closed on them so that the catharsis thus engendered may divert the energies of the nation from a preoccupation with anguish and rancour to a future directed towards the goal which both the postscript to the Constitution and the preamble to the statute have set by declaring in turn that -

> "... the pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society".

The book would not be closed while litigation against the state proceeded throughout the land, accompanied by a constant fanfare of publicity and lasting much longer in all probability than the strictly limited period which, in the interests of putting an early end to unfruitful recriminations, the statute fixes for the work that it requires.

[60] All the considerations canvassed in the three preceding paragraphs of this judgment have a bearing, to a greater or lesser extent, on both of the alternative enquiries that arise under section 33. They thus introduce the particular one to which I now turn, the question whether the postscript to the Constitution, rightly construed, encompasses the notion of an immunity operating in favour of the state.

[61] The postscript does not differentiate between the various beneficiaries of the amnesties that it envisages. Indeed it identifies none. Any number of dictionaries, lay and legal, define the word "amnesty". But no definition has come to my attention which throws light on that specific question. We must therefore deduce the answer, as best we can, from the postscript read as a whole. Friedman JP and Farlam J decided in *Azanian Peoples Organisation and Others v Truth and Reconciliation Commission and*

Others[3] that the "broadest possible" meaning should be given to the word where it appeared within the setting of the postscript thus read. They said so, to be sure, in the context of an argument which had been addressed to them about the applicability of the word to civil wrongs in addition to crimes, and when their minds were not attuned to the narrower issue of state immunity. No stricter construction seems to be warranted once that issue confronts us, however, in the absence at any rate of some recognised usage attributing to the word a sense which suggests that the state may be intrinsically ineligible for such protection. The circumstances that I discussed a moment ago in ascribing a common denominator to all the amnesties tend on the contrary to call for an interpretation equally wide, and no less so in themselves on account of the separate factors distinguishing those granted to the state from the ones dispensed elsewhere. Liabilities incurred by the state would otherwise fall outside the ambit of the "integrated philosophical and jurisprudential approach" to the treatment of liability in general which Mahomed DP sees, and I too accept, as significant characteristic of the postscript.[4] Such a construction and the reasons for it which I have mentioned tell in favour of amnesties embracing all bearers of liability, amnesties that consequently include the state among their beneficiaries.

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3 Their joint judgment has not yet been reported. It was delivered in the Cape Provincial Division of the Supreme Court on 9 May 1996.

4 See para 48 of his judgment.

[62] The scales are tipped further that way, in my final estimation, by an aspect of the matter which I have not yet touched. It concerns the homage that the postscript pays to the "need for reparation". Reparations are usually payable by states, and there is no reason to doubt that the postscript envisages our own state shouldering the national responsibility for those. It therefore does not contemplate that the state will go scot free. On the contrary, I believe, an actual commitment on the point is implicit in its terms, a commitment in principle to the assumption by the state of the burden.

[63] What remains to be examined is the extent to which the statute gives effect to the acknowledgment of that responsibility. The question arises because it was said in argument to have done so insufficiently.

[64] The long title of the statute declares one of the objects which it promotes to be -

> "... the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights".

Section 1 defines "reparation" in terms that include -

> "... any form of compensation, *ex gratia* payment, restitution, rehabilitation or recognition".

The word "victims" is said in the same section to cover -

> "... persons who ... suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights ... as a result of a gross violation of human rights or ... as a result of an act associated with a political objective for which amnesty has been granted".

The section continues by adding to the "victims" thus described a further class consisting of "such relatives or dependants" of the ones already listed "as may be prescribed" by regulation. Sections 26 and 27 provide for the process of awarding reparations. Everyone professing to be a "victim" may apply for an award to the Committee on Reparation and Rehabilitation after the matter has been referred there. It must decide in the first place whether the applicant is truly a "victim". Its next task, having accepted him or her as one if it does so, is to consider the application and recommend to the President what should be done "in an endeavour to restore the human and civil dignity of such victim". The President is required in turn to submit to Parliament his own recommendations on the case and all others like it. A joint committee of both houses has to consider those. Its decision, should Parliament approve of that, must then be implemented by regulations emanating from the President that "determine the basis and conditions upon which reparation shall be granted". All reparations are payable ultimately, in terms of section 42, from a special fund stocked mainly with money allocated by Parliament to that purpose.

[65] The statute does not, it is true, grant any legally enforceable rights in lieu of those lost by claimants whom the amnesties hit. It nevertheless offers some *quid pro quo* for

the loss and establishes the machinery for determining such alternative redress. I cannot see what else it might have achieved immediately once, in the light of the painful choices described by Mahomed DP[5] and in the exercise of the legislative judgment brought to bear on them, the basic decision had been taken to substitute the indeterminate prospect of reparations for the concrete reality of legal claims wherever those were enjoyed. For nothing more definite, detailed and efficacious could feasibly have been promised at that stage, and with no prior investigations, recommendations and decisions of the very sort for which provision is now made.

[66] Such are the reasons for my eventual agreement with the full range of the order dismissing the present application. But for one problem posed by section 33(1), which strikes me as wellnigh intractable, I would probably have come to the same conclusion, and could no doubt have reached it more easily, by treading the path indicated there. Negating the essential content of a constitutional right is, however, a concept that I have never understood. Nor can I fathom how one applies it to a host of imaginable situations. Baffled as I am by both conundrums, I would have been at a loss to hold that the denial of the right in question either had or had not negated its essential content. It is therefore with a sigh of relief that I find myself free to say, as I end this judgment, that my reliance on sub-section (2) of section 33 dispenses altogether with the need for me to bother about sub-section (1).

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5 See para 50 of his judgment.

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