

The Legal Basis of the Amnesty Process

■ INTRODUCTION

1. The legal basis for the amnesty process of the Truth and Reconciliation Commission (the Commission) is to be found in the legal instruments that emerged from the political negotiations that were initiated in 1990. The original provisions were recorded in the postscript (or what also became known as the 'postamble') to the Constitution of the Republic of South Africa Act No. 200 of 1993 (the Interim Constitution) in the following terms:

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.

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. 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.

2. These provisions were preserved in Schedule 6, section 22 of the Constitution of the Republic of South Africa Act No. 108 of 1996 (the Constitution), which provided that:

Notwithstanding the other provisions of the new Constitution and despite the repeal of the previous Constitution, all the provisions relating to amnesty contained in the previous Constitution under the heading 'National Unity and Reconciliation' are deemed to be part of the new Constitution for the purposes of the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995), as amended, including for the purposes of its validity.

THE COMMISSION'S FOUNDING ACT

3. These constitutional provisions formed the basis for the enactment of the Promotion of National Unity and Reconciliation Act No. 34 of 1995 (the Act). Chapter Four of the Act outlined the mechanisms and procedures of the amnesty process. These provided for the establishment of an Amnesty Committee (the Committee) as one of the components of the Commission and empowered it to consider and decide on applications for amnesty. The Act provided that the Committee could grant amnesty where it was satisfied that the application complied with the formal requirements of the Act; that the incident in question constituted an act associated with a political objective as envisaged in the Act, and that the applicant had made full disclosure of all the relevant facts.³ These requirements are considered in more detail below.
4. The Act also spelt out the fact that the granting of amnesty meant that the applicant was released from all criminal and civil liability arising from the incident, an indemnification that also extended to all institutions or persons who incurred vicarious liability for the incident.⁴ Successful applicants serving prison sentences in respect of an incident were, therefore, entitled to immediate release and the expunging of any relevant criminal record.⁵

³ Section 20(1)(a-c).

⁴ Section 20(7)(a).

⁵ Section 20(8) & (10).

POWERS, DUTIES AND FUNCTIONS OF THE COMMITTEE⁶

5. The Committee was a statutory body established in terms of the Act, from which it derived all its powers, functions and responsibilities. It was, in effect, a body with only administrative powers. Due to the adjudicative nature of its functions, the Committee's procedures soon started to resemble a judicial process. This stood in complete contrast to the non-adversarial hearings of the other two Committees of the Commission.

Applications for amnesty

6. Section 18 of the Act provided that any natural person could apply for amnesty on the prescribed form. Institutions and organisations could not apply. Application could be made in respect of any act or omission that amounted to a delict⁷ or offence, provided that it had to have been associated with a political objective and committed in the prescribed period (see further below).
7. The Committee was required to give priority to the applications of persons in custody. Regulations prescribing measures in respect of these applications were promulgated on 17 May 1996, after consultation with the Ministers of Justice and Correctional Services. These regulations provided mechanisms for informing prisoners of the procedures in respect of amnesty and how to complete the application form properly. They also provided for the recording of applications, the supplying of additional information and the hearing of such applications.

FORMAL REQUIREMENTS

8. Before an application could be considered, it had first to comply with the formal requirements of the Act.⁸ That is, the applicant was required to submit a written application on the prescribed amnesty application form. This application had to be made under oath and attested to by a commissioner of oaths.

⁶ Sections 16 to 22.

⁷ A wrongful act for which the injured person has the right to a civil remedy.

⁸ Section 18(1) requires applications to be submitted 'in the prescribed form'. The term 'prescribe' is defined in the Act as 'prescribe by regulation made under section 40' of the Act. The latter section empowers the President to promulgate regulations in respect of any matter referred to in the Act. In this context, the Committee took steps to have a prescribed amnesty application form produced in all official languages, to be promulgated for use by prospective amnesty applicants.

9. If the Committee received an incomplete application, the form would be returned to the applicant with directions to complete it properly. Many applications were not submitted on the prescribed form. In such instances, the matter was registered and a proper form was sent to the applicant for completion. A large number of forms were returned because they were unsigned and/or had not been attested to by a commissioner of oaths. In many instances, application forms had been completed without legal assistance or had been completed by third parties on behalf of illiterate applicants. In such cases, it was often necessary for the Committee to condone an applicant's failure to comply strictly with the formalities. It was sometimes possible to communicate with the applicants in question and place them in a position to cure the formal defects in the application. Where it was not possible to do this before the hearing, condonation⁹ for minor defects in the application¹⁰ was granted at the hearing itself. The Committee adopted the approach of allowing the applicant to present the merits of the application to the hearings panel. In all such instances, some of which were argued comprehensively, the granting of condonation did not result in prejudice to any other party. The hearing into the killings at Boipatong on the East Rand in 1992, for example, involved a substantial condonation application.
10. A further formal requirement was that the application had to be submitted to the Committee before the closing date for applications, as required by the Act.¹¹ The interpretation adopted by the Committee in this respect was that it had no statutory power to condone a failure to comply with this requirement. Thus the Committee did not consider applications submitted after the closing date. Although some late applicants petitioned the High Court for orders compelling the Committee to hear such matters, none was successful.
11. Some applicants attempted to amend their applications after the expiry of the deadline. Proposed amendments that attempted to introduce new incidents after the closing date for amnesty applications were normally refused. However, amendments that elaborated on incidents already expressly dealt with or alluded to in the original application were allowed. These included instances where applicants raised the possibility in the application of having been involved in further incidents, details of which they had been unable to recollect at the time of submitting the original application but which had subsequently come to mind.

9 A legal term meaning to pardon or overlook.

10 Such as a failure to date or attest a duly completed and signed application form.

11 Section 19(1) provided that the closing date was 14 December 1996. This was later extended to 30 September 1997 to cater for an extension of the cut-off date for amnesty from 5 December 1993 to 10 May 1994.

ACTS ASSOCIATED WITH A POLITICAL OBJECTIVE

12. The Act required that the incident forming the subject matter of the amnesty application had to have been associated with a political objective.¹² The latter term was defined in some detail in the Act and included the following components:

The actions of the applicant must have amounted to an offence or a delict

13. The Committee was required to assess the applicant's actions in order to ascertain whether she or he had complied with all the elements of the particular offence or delict. Where there had been a criminal prosecution and conviction based on the incident, this requirement was normally straightforward. Where, however, an applicant denied guilt for an incident, this requirement was not met and the application had to fail.
14. This highlights a significant limitation in the amnesty process. The patent injustice of this situation became clear where it applied to groups of co-applicants, some of whom denied guilt for incidents associated with political objectives for which all members of the group had been convicted and sentenced. Those who admitted guilt qualified for and were granted amnesty, and were released from custody. However, those who were innocent and also had, on the face of it, been wrongly convicted, were unable to benefit from the amnesty process. They were condemned to remain in custody pending the uncertain prospects of cumbersome and often prolonged administrative procedures that might lead to their eventual release (via, for example, a presidential pardon). The Committee had no powers to intervene in this kind of procedure. It did, however, wherever this kind of situation arose (as in the Boipatong case), include in its decision a recommendation that the cases of such 'innocent' applicants be referred to the President for his consideration.
15. The offence or delict requirement was also not met where the applicant successfully raised a defence that excluded legal liability, such as self-defence. In such instances, the fact that the application might comply with all the other requirements of the Act did not qualify the applicant for amnesty.

¹² Section 20(1)(b).

The incident must have occurred within the prescribed time period

16. The time period set by the Act was between 1 March 1960 (the month in which the Sharpeville massacre took place) and 5 December 1993 (the date the final agreement was reached in the political negotiations). This last date was subsequently extended to 10 May 1994 to coincide with the date of the inauguration of the first democratically elected President of the country.¹³

The applicant should fall within one of a number of prescribed categories

17. These categories essentially encompassed supporters, members or employees of the contending parties involved in the past political conflict in the country. It was a pertinent requirement that the incident in question should have related specifically to the South African political conflict.¹⁴

The incident in question should comply with stipulated criteria in order to constitute an act associated with a political objective¹⁵

18. One of the underlying purposes in this regard was to ensure that only conduct associated with the past political conflict in the country would qualify for amnesty. Common crimes were excluded.
19. In this respect, the Act relied heavily on the principles of extradition law and the concomitant definition of a political offence within the international context. A specific and significant influence was the approach followed when preparing for the United Nations-supervised democratic elections in Namibia in 1989. The wording of the Act leaned very heavily on what had become known as the 'Norgaard Principles': an approach formulated under the guidance of Professor CA Norgaard, the former President of the European Commission on Human Rights, and applied to guide the process of identifying Namibian political prisoners for release.
20. The Norgaard Principles were gleaned from a survey of the approaches followed by various state courts in dealing with what is known as the 'political offence exception' in extradition proceedings. In terms of the 'exception', a state that

¹³ The date was initially set in the Interim Constitution to serve as a deterrent to those who wished to continue to use violence to disrupt the elections. However, it was later extended because many of those who had been involved in continued violence later agreed to participate in the democratic process.

¹⁴ This was one of the grounds relied upon by the Supreme Court of Appeal in dismissing the application in the matter of Stopforth and Veenendaal. For further details, see Chapter Four, 'Legal Challenges', in this section.

¹⁵ Section 20(3).

has been requested to extradite an individual may refuse to do so where the crime for which the extradition is sought is political. It was thus necessary for states to formulate an approach to the question of whether a particular crime amounted to a political offence. The background principles, therefore, recorded the common features of the various states' approaches to the issue.

21. The criteria stipulated in the Act contained important guidelines for assessing whether an applicant's conduct would qualify as being politically motivated within the broad context of political offences referred to above. In this regard, the Committee was enjoined to consider a number of factors: the motive of the perpetrator; the context in which the incident occurred (for example whether it occurred in the course of a political uprising); the nature and gravity of the incident; the object or objective of the conduct and, in particular, whether it was directed against political enemies or innocent parties; the existence of any orders or approval of the conduct by a political organisation, and finally, the issue of proportionality. Moreover, the Act specifically provided that, where the perpetrator had acted for personal gain (except in the case of informers) or out of personal malice, ill-will or spite towards the victim, the conduct in question would not qualify as an act associated with a political objective.
22. The approach adopted by the Committee in applying the stipulated criteria was to avoid a piecemeal and mechanical application of the individual criteria. It chose, rather, to adopt a more holistic approach and to assess the totality of the particular facts and circumstances in the light of the criteria as a whole. Where, for example, an applicant had acted on the direct orders of a superior and the conduct in question seemed reasonable, the Committee would see this as going a long way towards satisfying the requirements of the Act. An applicant who had injured or killed an innocent bystander would be subjected to a more critical assessment than if his or her victim had been a clear political enemy. The reality is that each application presented its own peculiar circumstances, making it inappropriate to adopt hard and fast rules. Each case had to be approached with an open mind and decided on its own merits. In this way, the Committee used the criteria as a guide to help it decide whether a particular incident qualified as an act associated with a political objective.
23. The Committee was, moreover, specifically enjoined to take into account the criteria applied in terms of the repealed indemnity legislation that had preceded the Act. These criteria largely overlapped with those stipulated in the Act.¹⁶

¹⁶ See Volume One, Chapter Four, pp. 51–2.

FULL DISCLOSURE

24. The amnesty process had a critical role to play in helping establish the fullest possible picture of the past political conflict in the country. To this end, amnesty applicants were legally required to give a full and truthful account of the incidents in respect of which they were seeking amnesty.¹⁷ They were accordingly required to make full disclosure of all of the facts relevant to the incident in question.
25. It follows that, where an applicant's version was untruthful on a material aspect, the application was refused. It is important to stress, however, that the obligation to make full disclosure related only to relevant facts. This required that the Committee develop an interpretation of the phrase 'relevant facts'. The Committee concluded that the obligation in question related solely to the particular incident forming the subject matter of the application and did not extend to any incidents not raised in the amnesty application. The facts to be disclosed were, therefore, only those relevant to the incident in question. The interpretation adopted by the Committee required that applicants give a full and truthful account of their own role, as well as that of any other person, in the planning and execution of the actions in question. Furthermore, applicants had to give full details of any other relevant conduct or steps taken subsequent to the commission of the particular acts: for example, concealing or destroying evidence of the offence.
26. The interpretation adopted by the Committee has been criticised because it is perceived as having inhibited the potential of the amnesty process to contribute to the overall objective of the truth and reconciliation process, namely of establishing as complete a picture as possible of the political conflicts of the past. It has been argued that it was not conducive to the overall objective of the process to allow amnesty applicants to be selective about the information on past political conflicts they were prepared to share with the South African public. According to this argument, applicants were placed in a position where they were able to hold back information about incidents that were unlikely to be uncovered in the future, an attitude that frustrated the very intention of the overall process.
27. The Committee took note of these arguments, but remains satisfied that it gave a proper interpretation of its obligation as required by the law. The perceived

¹⁷ Section 20(1)(c).

limitations were inherent in the provisions of the Act itself and were accordingly beyond the Committee's control. It should also be pointed out that the Act gave the Commission certain general powers of investigation and subpoena, which allowed it to look further into any matters left unresolved by the amnesty process. The Committee accepts, however, that the criticism relating to possible shortcomings in the process as enacted is serious and substantial.

PROCESSING APPLICATIONS FOR AMNESTY

28. The Committee relied heavily on information furnished by its own investigators and obtained from the South African Police Services, the Department of Correctional Services, the National Prosecuting Authority and the courts of law. Generally only minimal investigation was necessary in respect of those applications completed with the assistance of a legal representative. Upon completion of such an investigation, the Committee would do one of several things:

Acts not associated with a political objective

29. The Committee would inform the applicant that, based on the particulars before it, his or her application did not relate to an act associated with a political objective and, in the applicant's absence and without holding a hearing, refuse the application for amnesty.

Where no gross violation of human rights had been committed

30. If it was satisfied that the formal requirements had been met, the Committee would inform the applicant that there was no need for a hearing as the act to which the application related did not constitute a gross violation of human rights. In such cases, it would grant the applicant amnesty without holding a hearing.

Notification of public hearing

31. Where the application related to a gross violation of human rights as defined in the Act, a public hearing had to be held. The Committee would notify the applicant, any victim and implicated person and any other person having an interest in the application of the date, time and place where such an application would be heard. These persons had to be informed of their right to be present and to testify at the hearing. The Committee could hear applications individually or jointly.

32. In anticipation of the fact that many of these acts, omissions or offences were the subject of court proceedings, the Act provided that:
- a where the act or omission was the subject of a civil claim, the court might, upon the request of the applicant and after proper notice to other interested parties, suspend proceedings pending the outcome of the application for amnesty, and
 - b in those instances where the applicant was charged with an offence to which the application related, or was standing trial on a charge of having committed such an offence, the Committee could request the appropriate authority to postpone the proceedings, pending the outcome of the application for amnesty.
33. In order to protect the identity of the applicants and the information contained in applications, the Act provided that all the applications, the documentation in connection with them, any further information obtained by the Committee before and during an investigation, as well as the deliberations conducted in order to come to a decision or to conduct a hearing, should be treated as confidential. This confidentiality lapsed only when the Commission decided to release such information or when the hearing into the application commenced.

THE ROLE OF PRECEDENT

34. The Act provided expressly for the establishment of subcommittees or hearings panels to deal with amnesty applications. This provision enabled the Committee to arrange for various hearings panels to hear different matters simultaneously and so expedite the finalisation of its work. The composition of these panels was not fixed, which resulted in different permutations of Committee members constituting hearings panels on different occasions. This situation created the potential for inconsistencies of approach between the different hearings panels. There were those who saw this as a risk and believed that it could be eliminated or limited only by introducing a system of precedent, as is followed in the courts, where, in defined circumstances, prior decisions on issues of law become binding in subsequent similar cases.
35. It is important to point out that the Amnesty Committee was an administrative tribunal, and that no formal system of precedent applied to its activities. Apart from certain broad determinations made by the Committee itself (for example the interpretation of what constituted 'relevant facts' for the purpose of full disclosure),

it would, in the Committee's view, have been inappropriate to attempt to establish a system of precedent.

36. In order to facilitate its proceedings, the Committee accepted the submissions made by the leadership of some of the structures involved in the past political conflict as duly established for the purposes of subsequent hearings. For example, according to the submissions of the Azanian People's Liberation Army (APLA) leadership, APLA operatives executed robberies in terms of a particular directive and policy decision on the part of the organisation in furtherance of its political struggle. Subsequent APLA amnesty applicants were able to rely on this fact without having to re-establish it. A similar situation applied to the submissions of the African National Congress (ANC) in respect of its role in establishing self-defence units (SDUs) in response to violent conflicts in certain townships during the early 1990s.
37. Apart from such instances, it would have been quite impractical to attempt to establish a system of precedent. The myriad different permutations of facts and circumstances that applied to the various applications resulted in no two being identical or sufficiently comparable to justify applying the principle of precedent. Each case had to be decided in the light of its own peculiar facts and circumstances. Each hearings panel was ultimately responsible for making an independent decision on the particular facts of the case to be decided, even though it was possible to engage in collegial discussions and consultations to elicit the views or draw on the experiences of other members of the Committee in particularly complex matters.
38. Although no formal system of precedent was followed, the Committee approached its work on the basis that every amnesty applicant enjoyed the constitutionally entrenched right to fair administrative action, equality and an even-handed approach. The Committee is ultimately satisfied that the absence of a formal system of precedent did not detract from the quality of decision-making, nor did it result in any patent injustice to any participant in the amnesty process.

GRANTING OF AMNESTY AND THE EFFECT THEREOF (SECTION 20)

39. Amnesty was granted where the Committee was satisfied that the application complied with the requirements of the Act: that is, the act, omission or offence to which the application related was an act associated with a political objective and committed in the course of the conflicts of the past, and the applicant had made a full disclosure of all the relevant facts (as defined above).
40. Where amnesty was granted, the Committee informed the applicant and the victim of the decision and also, by proclamation in the Government Gazette, published the full details of the person concerned as well as the specific act, offence or omission in respect of which amnesty was granted.
41. The granting of amnesty completely extinguished any criminal or civil liability arising from the act in question. Any pending legal proceedings against the applicant were likewise terminated. Where applicants were serving a sentence consequent upon a conviction for the act in question, they were entitled to immediate release from custody. The granting of amnesty also had the effect of expunging any criminal record relating to the offence in respect of which amnesty had been granted. It did not, however, affect the operation of any civil judgment given against the successful applicant based upon the act for which amnesty had been granted.

REFUSAL OF AMNESTY AND THE EFFECT THEREOF (SECTION 21)

42. When the Committee refused an application for amnesty, it notified the applicant and victims concerned of its decision and the reasons for its refusal. If criminal or civil proceedings had been suspended pending the outcome of the amnesty application, the court concerned was notified of this.
43. Where amnesty was refused, the law would take its course against the applicant. Any legal proceeding that might have been suspended pending finalisation of the amnesty application was free to continue. The applicant would, however, be protected against the disclosure or use of the record of the amnesty application in any subsequent criminal proceedings. The prosecution would, moreover, be precluded from relying on the facts disclosed in the amnesty application, or facts that had been discovered as a result of information disclosed in the amnesty application. The Act specifically provides that any

evidence obtained during the amnesty process, as well as any evidence derived from such evidence, may not be used against the person concerned in any criminal proceedings.

REFERRALS TO THE REPARATION AND REHABILITATION COMMITTEE (SECTION 22)

44. In line with the objectives of the Commission relating to reparation and rehabilitation, the Act provided that, where amnesty was granted and the Committee was of the opinion that a person was a victim of the incident in question, the matter should be referred to the Reparation and Rehabilitation Committee (RRC) for consideration. Where amnesty was refused and the Committee was of the opinion that the act constituted a gross violation of human rights and a person was a victim in the matter, it was also referred to the RRC.
45. In these instances, the hearings panel was obliged to endeavour to identify any possible victims. This was not, however, always possible, often due to a lack of sufficient information. In such an event, the hearings panels were compelled to make generic victim findings without identifying specific individuals. This was a particular drawback in the process, given the importance of catering for the needs of victims, particularly where the granting of amnesty obliterated the prospects of civil or criminal proceedings. There was some comfort in the fact that the reparation and rehabilitation process had the potential of dealing with these weaknesses.

REMEDIES

46. Any party aggrieved by a decision of the Committee had the right to approach the High Court for a review of the decision. The process of review of administrative decisions is regulated by the Constitution,¹⁸ which grants everyone the right to administrative action that is lawful, reasonable and procedurally fair.¹⁹ This constitutional provision has superseded the common-law rules relating to review, the latter having been subsumed under the Constitution.

¹⁸ Pharmaceutical Manufacturers' Association of SA and Another : In re Ex Parte President of the Republic of South Africa & Others 2000(2) SA 674 (CC) at para 33.

¹⁹ Section 33 of the Constitution, 1996.

47. A court reviewing a decision of the Committee does not consider whether the decision is correct, but rather whether it is *justifiable*. Thus the review court does not retry the matter, but simply concerns itself with the question of whether the decision the Committee has made is justifiable in the sense that there is a rational connection between the facts of the particular application and the decision arrived at by the Committee. The review court does not substitute its own views on the merits of the application for those of the Committee in matters where the rational connection referred to above has been established. The review court does, however, consider the merits of the application in order to decide whether the rational connection has actually been established (see also Chapter Four, 'Legal Challenges'). [\(...p17\)](#)