CHAPTER 7
JETTISONING JUSTICE.
THE CASE OF AMNESTY IN SOUTH AFRICA (1)

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"The role of South Africa's courts of law and prosecutional authority remains firmly in place...The role of the criminal justice system is unaffected by the bill". (2) Dullah Omar

"Obviously, the Truth Commission already interferes with our work, so any extensions will have far-reaching implications". Jan d'Oliveira

"Justice should not become the victim of our compromise". Saki Macozoma

"What we are doing is to let perpetrators off the hook, scot-free. We are dispensing with formal justice instead of dispensing it". Dene Smuts

"We must deliberately sacrifice, as this bill does, formal trappings of justice, the courts and the trials for an even higher good: Truth. We sacrifice justice because the pains of justice might traumatise our country or affect the transition. We sacrifice justice for truth so as to consolidate democracy, to close the chapter of the past and avoid confrontation". Kader Asmal

Introduction

Should the perpetrators of heinous crimes be brought to justice? It is a common enough expression of moral intuition that they ought to be prosecuted. However, in the context of political compromise, things are not quite as straightforward. Expediency, more often than not, may subvert justice in the interests of an acceptable settlement. In a sense then, justice may be the inevitable casualty of compromise. There can be few more brutally bald examples of this than Kader Asmal's statement above. A number of further questions are suggested in this regard. Should the perpetrators of violence in defence of and in resistance to apartheid be treated equally? What are the long term effects of granting criminals a reprieve for their offences? Given the uneven nature of the judiciary in South Africa, the manner in which the legal system tolerated or colluded with manifestly unjust institutions and disregarded human rights abuses, does it make sense to call for prosecutions by an unreformed legal system? Are we in a position to prosecute? What evidence

exists against the perpetrators? (3) Which offences could be classified as constituting gross violations of human rights? Where and with whom should does responsibility for the violence of Apartheid rest? Does individualising violence relieve entire institutions of culpability? Broadly, these questions can be collapsed into four categories: moral questions on what ought to happen, political questions concerning the consequences of particular choices, pragmatic questions on what is possible within the constraining might of circumstances and questions about individual and social justice.

This paper is unashamedly interrogative. It is stimulated by a broad Sociological interest in the nature and explanation for human violence, particularly of the politically-inspired variety..

Violence provides the backdrop for this paper. My presupposition is that we need to have some sociological doubt about the concept of human violence if we are to gain a firmer purchase on its repercussions in the South African context, specifically on how to deal with the perpetrators of violence in defence of and in the struggle against apartheid. I will attempt to answer some these questions by simply posing further questions, since I have not, in my own mind, reached a reasonable degree of certainly on these issues. What I do have, as anybody else, are some commonsense notions about justice, informed by an experience of injustice. I believe that subjecting these to sustained interrogation may reveal some insights about the nature of our transition and the possibilities for legitimating the present polity. We need an analysis of what is possible even within the limited degree of choice imposed by the negotiated settlement. It is, after all, one thing to say that we are operating under severe constraints, as indeed we are, and quite another to sing the praises of our 'miracle', 'dream' or 'fairytale' supposedly (4) peaceful transition to democracy.

At the heart of the transitional process in relation to questions of violence and justice, lie various notions and policies of immunity, indemnity and amnesty. It is thus necessary to trace the evolution of attempts at and practices of pardoning people for crimes committed under the previous regime. It is not uncommon for criminals of past regimes to seek indemnity for their crimes once new governments are elected or come to power by some other means. In this way officials of the state and other fellow travelers are protected against legal action. But how have victims of Apartheid brutality responded to pardoning those responsible for the atrocities committed in its defence. We turn to these before a consideration of the evolution of provisions for amnesty as they are related to the unfolding process of negotiations towards the first democratic elections in the country based on universal franchise. The narratives of a perspicacious formerly disenfranchised Eastern Cape woman as well as that of a Gauteng youth, orphaned by Apartheid police operatives, may go some way in elaborating an element of local knowledge about these questions. (5)

Local Responses to Official Discourse

On 17 February 1997, the Committee on Human Rights Violations (HRV) of the Truth and Reconciliation Committee (TRC) held a meeting in the Grahamstown Town Hall to persuade the families and friends of victims of human rights abuses to come forward with statements and affidavits of their experiences. Apparently, the Eastern Cape was far short of its target of statements and this was one way in which committee members thought they could encourage hesitant victims and survivors to participate in the process. It is not an exaggeration to suggest that the agenda for the meeting was bizarre. People were being implored to share their experiences of political victimisation and police repression with the possibility of their public hearings being broadcast on television. It was also an occasion for some publicity for the Truth and Reconciliation Commission where the spokespersons (there were no women speakers!) took it upon themselves to extol the virtues of forgiveness and the righteousness of reconciliation. After listening patiently to the speakers an old township woman, clearly wizened by hardship, eloquently and significantly intervened in the proceedings. Addressing herself specifically to the TRC spokespersons she said, "your lives have changed". Pointing to their double-breasted suits, she continued, "it's alright for you to forgive and embrace the perpetrators of heinous crimes for the sake of reconciliation. Indeed, it's alright for Nelson Mandela to forgive since his life has also changed. But our lives have not have not changed. We still live in the same shacks or matchbox houses". Finally, she asked the really telling question, "how can we forgive if our lives have not changed?"

On 8 June 1997, I watched a stage-managed production entitled , 'Journey to Forgiveness' on the Truth and Reconciliation Report on television. A fourteen year old youth Tshidiso Matiso, was put in the same room as the murderer of his parents, Warrant Officer van Vuuren, who has applied for amnesty. Tshidiso had witnessed the killing when he was five years old. After listening to van Vuuren vainly attempt to absolve himself of his despicable actions, he simply said, " You killed my parents, I cannot forgive you". (6) The assumption underlying the production was that forgiveness is the only possible route to take, with the insidious expectation that Tshidiso should eventually arrive at the predetermined destination of reconciliation. Even though Tshidiso made it clear that he does not forgive and appeared distinctly unwilling to forgive, his opinion was not considered by the producers. After all, it did not follow the script of the dominant discourse which allows very little room for alternatives, hence the title of the production. In order to make matters work neatly, Tshidiso simply had to arrive at forgiveness. The path had already been chartered and straying would not be permitted. Is this manipulation of a youngster, placing him face to face with his parents' killer, not part of the trauma itself? Well-intentioned as they may well be, by assuming, suggesting

and expecting that Tshidiso, for his own good, needs to follow the route of forgiveness, the producers of the programme are very rapidly drifting, either consciously or unconsciously, into the reproduction of an official account of events, without regard for the actual experiences of the subjects: they are becoming the ideologues of the new state, desperately seeking the acquiescence or consent of the survivors and victims, even when it is not there. It is an imposition of official dogma stemming from the nature of the negotiated settlement in the country and the corresponding euphoria about reconciliation. The parameters for acceptable behaviour are in this way, perniciously structured by mechanisms of subjection to the dominant discourse and deviations are necessarily attenuated. (7)

In the unrelenting drone of officialdom for national unity and reconciliation, often relying on the constitutional imperatives 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", voices from below such as these are not easily heard. I was struck by how well the old woman's articulate statement captured the essence of social or systemic justice (Mamdani, 1996) and how Thidiso's position was a quest for individual reparation. Of course, there is a link between the two, depending on how victims are to be defined. Are we to isolate the cases of specific abuse and treat them on an individual basis or are we to analyse the generalised impact of apartheid on the mass of the population? Is there any possibility for doing both or should we separate the direct subjects of human rights violations from the disenfranchised majority who have suffered, in very tangible ways, as a result of the 'violence of normal times' (Barrington-Moore, 1966). Are they not victims too? A number of further questions are suggested by these interventions. Should forgiveness be premised on improvements in the material well-being of the victims and their relatives, or should it be voluntary? (Mamdani, 1996) Can we achieve enduring reconciliation while our society is still fractured by the same inequalities? It seems obvious that some measure of delivery is a precondition for overcoming these divisions. The question which follows, of course, is whether this is possible and, if indeed it is possible what its consequences will be. In this regard we may raise, as Przeworski (1988:148-149) does, the link between the conditions for legitimation and consent of the one hand and the exigencies for accumulation on the other.

Violence and Amnesty in Political Transition

South African history is punctuated with examples of indemnity being granted, or, at least, policies of leniency being observed, after instances of state violence. The turbulent conflicts in the Anglo-Boer War and the two world wars, the Bulhoek Massacre of 1921, the suppression of the White Miner's Strike of 1922, the Sharpeville massacre in 1960 and the political repression

of the Soweto revolt were all followed by some or other form of official exemption from criminal or civil prosecution for the functionaries of the state and other sympathisers. The most-quoted example is that of the nazi spy, Robey Leibbrandt, who was sentenced to death for treason in 1943. His sentence was commuted to life imprisonment and, after serving merely five years in prison, he was unconditionally released by the incoming National Party government. The reprieve which he received was the result of executive authority intervention in the work of the judicial authority. In the South African case, successive executive interferences in the judiciary have called its independence into question in any case. Thus, it does not make much sense to be legalistic about notions of justice in the South African context.

In the recent political and constitutional history of the country, the negotiated settlement essentially, but not only, between the ANC and the National Party government, had a profound impact on questions of justice. In particular, the mechanisms for granting immunity, amnesty and indemnity for perpetrators of violence in defence of as well in the struggle against Apartheid formed a crucial part of the negotiations and were integral to the constitution which eventuated.

Various scholars may have different dates for the start of negotiations in South Africa between the ANC and the government. There can be little doubt though, that the early meeting in July 1989, between PW Botha and Nelson Mandela at Tuynhuys while the latter was still held at Pollsmoor Prison, was a vital icebreaker in the entire process. Besides agreeing to disagree on a range of issues, they confirmed a commitment to peaceful development in South Africa. Less than a year later, Mandela was released, and the informality of Tuynhuys gave way to the first formal talk about talks in May 1990. This meeting was held between the government and a delegation of the ANC to discuss obstacles to negotiations. The result was the Groote Schuur Minute which agreed to the establishment of a working group to deliberate and make recommendations on inter alia: the definition of political infractions, mechanisms for dealing with the release of political prisoners and the granting of amnesty for those guilty of political offences inside and outside South Africa (SAIRR 1989/90).

On 2 May 1990, the very same day on which the Groote Schuur talks commenced the Indemnity Bill was accepted by the joint committee on Justice of the Tricameral Parliament. The connection, of course, was not merely coincidental. It was quite clear that if negotiations were to take place at all, cadres who had been criminalised by the apartheid regime would have to released or granted immunity against possible prosecution. The bill was debated merely five days later by a joint parliamentary sitting and passed as Act No. 35 of 1990, some time before the working group could submit its report. Only the Conservative Party opposed the bill in a vain attempt to stall the negotiations process basing their arguments, ironically, on the necessary independence of the judiciary and the rule of law. (8) The Act provided for

indemnity to be extended to those people who "...in the process of conflict and in the pursuance of a cause, may have committed some or other offence". Essentially, those eligible for indemnity of this kind were in prison, awaiting trial prisoners or returning exiles. The logic of Apartheid injustice was in the process of being unraveled. In large part, this reflected the manner in which the limited legitimacy which Apartheid enjoyed in parliament had started to crumble. In turn, this mirrored the groundswell opposition in the country exemplified by the episodes of the Durban strikes of the early 1970's, the Soweto uprising of the late 1970's, the generalised country-wide popular revolt of the 1980's and early 1990's. The Conservative Party, as their name suggests, attempted to hang on to the exclusivity of previous South African regimes using the rhetoric of the sovereignty of parliament. In the context of the country as a whole, the latter of course, had itself, been discredited, and indeed was the subject of transformation.

The working group proposed by the Groote Schuur Minute presented its report to the second round of talks about talks held in Pretoria in August 1990. A central concern of the group was the definition of a political prisoner or more generally political offences. In the main they followed the Norgaard principles (9) which became the bedrock for the legislation providing for the establishment of the Truth and Reconciliation Commission, namely, the Promotion of National Unity and Reconciliation Act No 34 of 1995. The bare bones of the Norgaard principles for political offences are, (ii) that all cases are treated and administered on an individual basis, (ii) that offences such as treason not involving ordinary crimes like murder or assault will be treated as a political crime and (iii) given particular contexts, ordinary crimes could be regarded as political offences. In terms of the Norgaard principles, the definition of what should constitute political offences was also linked to the following criteria to be taken into account in such cases: (I) the motive should be clearly political and not private, (ii) whether political factors such an uprising had an influence on the immediate context for the offence, (iii) the nature of the political objective, (iv) the legal and factual nature of the offence, rape, for example could never be a political crime, (v) the object of the offence, (vi) the proportionality between the offence and the political objective being pursued and (vii) whether the act was committed with the approval of the organisation or as a direct order or without the knowledge of the organisation (SAIRR, 1991/2, p.64). The final report was accepted in the Pretoria Minute which also, as part of the process of negotiations, announced the suspension of all armed action by the ANC and its military wing, Umkhonto we Sizwe. The Pretoria Minute deviated from the Norgaard principles in that it made provision for indemnity to be dealt with in categories of people rather than on an individual basis only. Besides Piet Rudolph and a handful of other right wing prisoners, the overwhelming majority of people granted indemnity by these provisions were members of the liberation organisations, or those had been found guilty of offences against Apartheid. The benefactors were almost invariably those

engaged in the struggle for democracy. By mid 1992 almost 10 000 people had been indemnified, mainly returning exiles (SAIRR, 1992/93, p.428).

The amnesty issue in relation to the process of political transition in South Africa gave rise to a complex interaction between a host of different institutional settings. In the interplay between parliament, the courts, the administrative and executive arms of the state on the one hand and the process of negotiations on the other, the latter imposed firm agreements on the negotiating partners with serious repercussions for the former. The formality of parliament was preserved, but its functioning had been irrevocably affected by the negotiations. Similarly, the executive and administrative arms of the state had to respond to developments outside of their usual rubrics. Given these complications of transition, it is not easy to unravel the way in which amnesty or indemnity has functioned since the start of the negotiations period. The Pretoria Minute, for example, made provision for a phased conferment of indemnity to individuals and organisation who committed offences "...on the assumption that a particular cause was being served or opposed". It also put in place the administrative mechanisms for the implementation of these provisions (SHIRR, 1991/2, p.513). Thus, the negotiating decisions had sufficient force to jolt, but not to replace the executive and administrative functioning of the Apartheid state.

These earlier policies and practices around indemnity and amnesty flowed from the negotiations and were, in the main, aimed at opponents of apartheid, certainly they were the primary beneficiaries. In 1992 the National Party government responded with fundamental amendments to the legislation, deleting the disclosure of offences. The legislation was specifically designed for the proponents of apartheid. It was called the Further Indemnity Bill and was enacted in November 1992, following its announcement in August of that year by the Minister of Justice. (9) The essential Norgaard principles were completely disregarded by this law. The hearings would be secretive with as little public accountability as possible. The names of those granted indemnity would be made known only after their application was successful. Those applying would not have their names revealed. There was no clear indication of the actual crimes that they committed for which they were being granted indemnity and no disclosure of the command structure and their level of culpability. Instead, in terms of the provisions of this act, a vague account of the political nature of the crime was sufficient. In introducing the Bill to a joint sitting of the tricameral parliament in October 1992, the Minister of Justice tried to legitimise the legislation by pointing to the Record of Understanding reached between the government and the ANC on 26 September. Two days later, 150 prisoners were released including Robert McBride and Barend Strydom.(10) However, the ANC was publicly critical of the proposed legislation and suggested that it would be repealed as soon as the opportunity arose. In this way, the suggestion that the Bill was a product of negotiations was effectively repudiated. Instead, the proposed legislation was unilaterally imposed, without

consultation with other political parties - hardly a recipe for reconciliation. Since the House of Delegates rejected the bill, it had to be referred, in terms of the requirements of the tricameral parliament, to the President's Council where, unsurprisingly, it was hammered through. The apartheid state had thus put in place the legal mechanisms to pardon itself of any gross violations of human rights. While the mechanisms were accessible many miscalculated and did not take their chances. It will be interesting to research the manner in which perpetrators came to take decisions about whether to apply for amnesty or not and when to apply. Part of the reason that so many did not use these earlier opportunities for indemnity must rest with a misplaced confidence in the continuation of authoritian rule and the self-assurance that they would be protected by their political leaders.

The Further Indemnity Act remained in force until the passage of the Promotion of National Unity and Reconciliation Act of 1995. Even though this act repealed all previous legislation dealing with indemnity or amnesty, it indicated that previous decisions regarding the granting of indemnity would remain in force. The Truth and Reconciliation Commission, with Desmond Tutu as Chairperson, was established in terms of the provisions of this Act. Its stated purposes are, "...to promote national unity and reconciliation in a spirit which transcends the conflicts and divisions of the past". This would be done by: "(i)...establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights ...including the antecedents, circumstances, factors and contexts of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations, by conducting investigations and holding hearings; (ii) facilitating the granting of amnesty...; (iii) establishing and making known the fate or whereabouts of the victims and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims and by recommending reparation measures in respect of them ; (iv) compiling a report". More than anything else, the question of how we are to deal with the those guilty of committing heinous crimes in defence of and against apartheid has occupied the public mind now that the revelations of the Truth and Reconciliation Commission are compelled into our consciousness on a daily basis through television broadcasts of the hearings as well as extensive radio and newspaper coverage of its Investigative Unit and three committees: the Amnesty Committee, the Committee on Human Rights Violations and, albeit less frequently, of the Committee on Reparation and Rehabilitation, being the committees established to realise the objectives of the act.

The mechanisms and procedures for the granting of amnesty are contained in chapter four of the act. It makes provision for the establishment of a committee on amnesty appointed by the state president and constituted solely by judges. The committee enjoys a semi-autonomous relation with the Truth and Reconciliation Commission in that it reports directly to the state president

and though its two ordinary members are Truth Commissioners its three judges are not (Du Toit 1997, p.9). In terms of the act one may be granted amnesty only for a crime or offence which you admit that you committed and if it had a clear political objective. Furthermore, the Act expects, but is not explicit in this regard, that the proportionality of the crime to the objective pursued should play a role in the determination as to whether a specific crime could be defined as having a political objective or not. Since there are no guidelines for the definition of what would reasonably constitute an act proportional to a political objective, the law is open to various interpretations in this regard. In terms of the Act, also, the crime should be specified so that a proper (truthful?) account of the history of the country can emerge. The Act insists on full disclosure of all the relevant facts to the case. If amnesty is granted the pardon is effective for both criminal and civil prosecution.

The Case for Amnesty

Arguments in favour of amnesty almost invariably emphasise pragmatic considerations concerning the nature of political compromise and the necessity for concessions in terms of the relative strengths of the contending parties. Desmond Tutu for example avers that, "...amnesty was a crucial ingredient of the compromise which reversed the country's inevitable descent into a bloodbath. To repudiate amnesty now would be to tear up the Interim Constitution". Boraine (1996, p.7) agrees, "...amnesty is the price we had to pay for peace and stability...if negotiations politics had not succeeded the bitter conflict would have continued and many more human rights violations would have occurred...the alternative was, in my view, far less desirable and potentially more destructive". Wilhelm Verwoed (1997, p.7) virtually echoes these words, "Guaranteeing amnesty is the price we, unfortunately have to pay for peace, the common good, for a negotiated settlement in 1994 which led to a democratic South Africa". The political compromise inherent in the negotiations process and accomplishing fruition in the constitution provided the framework for a reconciliation of the antecedent conflicts. This kind of pragmatism accepts, as reconciliation prescribes, that there was a stalemate out of which neither party could emerge victorious. Reconciliation under these conditions would imply that previously held expectations would be revoked in order to embrace the present in its,own right, not merely as a step to a different order. The constitution lies at the heart of this kind of argument. It sets, from the perspective of this argument, the framework within which societal conflicts and tensions may be overcome in the quest for reconciliation and national unity (Hardimon, 1994, p.87-94). Following the theological logic characteristic of the TRC, the guilt of the perpetrators and the shame of the victims ought to be reconciled within a context of forgiveness and for the betterment of all (Patton, 1987, p.39-62).

Another argument in favour of amnesty suggests that it is the only way in which we could achieve a comprehensive account of the past. Since the actions of the much of the security forces were clandestine in nature, the perpetrators are indeed the only ones who can tell the full story. Mahomed, (1996, p.7) in this regard, states, "(A)ll 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". There simply is not enough evidence to convict these criminals especially now that attorneys general do not have on their side a security establishment which could, under duress and torture, force confessions out of offenders. In short, we need to offer them amnesty from both criminal and civil prosecution in order to give them an incentive to divulge the details of their atrocities so that we may arrive at the truth, as the title of the commission implies. Speaking on behalf of the survivors, Mahomed (1996, p.8) presumes that their yearning for the truth can only be alleviated in this manner.

In a more ambitious defence of the granting of amnesty, Verwoed (1997, p.2) attempts to demonstrate a linkage between the amnesty hearings and a broader realisation of justice. His line of argumentation is that perpetrators will be named in amnesty applications and in this way evidence may be accumulated so that a case may be constructed against them. The suspension of justice is thus merely temporary and indeed it may aid the process of criminal prosecution. Following on this kind of explanation, Omar (cited in Rwelamira, 1996, p.xii) tries to combine the relinquishing of justice in the present with the possible achievement of social justice at some indeterminate point in the future. The obscure logic of this position suggests that we may delay justice now for the sake of its realisation later on.

Possibly the most sustained argument in favour of the granting of amnesty is to be found in the constitutional court judgement in the case of AZAPO, Nontsikelelo Biko, Churchill Mxenge and Chris Ribeiro versus the President, the Government, the Minister of Justice, the Minister of Safety and Security and the Chairperson of the TRC. (11) Using the postscript to the interim constitution as a basis for his contention, Justice Mahomed argued that facilitating legislation for the granting of amnesty was a constitutional obligation imposed on parliament. In opposing the application by AZAPO and others, Mahomed (1996, p.11) makes the legal point that limitations on the rights of citizens to "...have justiciable disputes settled by a court of law or, where appropriate, another independent or impartial forum" are sanctioned in terms of section 33(1) of the interim constitution, which states, "(T)he rights entrenched in this Chapter may be limited by law of general application, provided that such limitation; (i) shall be permissible only to the extent that it is reasonable and justifiable in an open and democratic society based on freedom and equality and (ii) shall not negate the essential content of the right in question". Indeed the right to civil redress for the victims and survivors is

effectively expunged by conceding amnesty to perpetrators. Although couched in formal legal terms, these statements do not allow for one interpretation only and I shall take up this matter in my discussion on the case against amnesty. In the same judgement Justice Didcott (1996, p.45-56) arrives, in his own words, "...rather reluctantly", at the same conclusion but via a slightly different route finding consolation for his own nagging doubts in the provision of state reparation for victims as envisaged in the Promotion of National Unity and Reconciliation Act.

The position of the National Party should also be added to this list. Understandably, they argue for a far wider interpretation of amnesty than the act allows. From this perspective, all people should be granted a general indemnity and that scratching at the surface of these old wounds would merely damage the reconstruction effort. It would lead, they further argue, to a witch-hunt of members of the previous regime who were merely defending a system which they regarded as just, legal and legitimate. Seeking revenge in this way will merely lead to a spiral of violence out of which the country will emerge far more devastated. The National Party points to the constitution saying that while there should be some redress for the evils of apartheid, existing, entrenched (minority) rights should be respected.

The position of the National party was not merely hypothetical. They actually attempted to put it in practice in the Further Indemnity Act as well as their actions on the eve of the transition, when, secretly, and without the knowledge of the incoming cabinet, they attempted to provide a blanket indemnity for about 3 500 policemen and women including the head of the Police force, General van der Merwe and the ex Minister of Law and Order, Adrian Vlok and the Minister of Defence, Magnus Malan. In essence, they tried to indemnify themselves from any possible crime which they may have committed during their terms of office.

Jettisoning Justice, the Case Against Amnesty

This paper raises questions about the long term effects of jettisoning justice. It starts from the premise that the constitution itself should be open to public criticism and amendment. In contrast, the pragmatic position reifies the present as if there are no other possible outcomes. It conceptualises history as an ineluctable process which does not tolerate alternatives. In the name of being realistic, it attempts to marginalise perspectives which raise awkward questions about the viability of delivery within the context of the compromise. If the negotiations and the resultant constitution are taken at face value and as given, then of course, possibilities for critical evaluation of these processes will be truncated. In this manner, it is implied that the reality of the present is unchanging and this inference is then used in a circular fashion to justify the suspension of justice in the granting of amnesty. The reasoning is circular

because it feeds off itself. Amnesty was necessary for the political compromise which facilitated the adoption of the constitution which in turn provides for amnesty. This position is normatively sealed to avoid questions about the long term possibilities for systemic reform. It necessarily sanctions the existing divisions in our society in the facile hope that forgiving wrongdoers will create conditions for legitimation of the new polity.

The second point in the case for the granting of amnesty refers to the TRC objective of revealing as complete a picture of past abuses as possible. In his constitutional court judgement against AZAPO and others Mahomed (1996) is at pains to demonstrate that amnesty on the basis of full disclosure is the only way of arriving at the truth. The first problem with this argument is that the overwhelming majority of amnesty applications have come from imprisoned criminals who very clearly have an interest in being released. The available evidence was sufficient to convict them and in this some element of the truth has obviously emerged. The lack of evidence thus can only be used as an argument for granting amnesty for crimes where there has been no conviction and not in all cases unless the amnesty committee has some forensic mechanism other than the courts for establishing the truth.

Concerning the role of amnesty hearings as an aid to criminal prosecution, it may be mentioned that these very rarely name other perpetrators. In fact, the manner in which the amnesty provisions have been applied, even within the limited purview of the legislation has not been consistent at all. Invariably, the only criterion used has been whether the act could be associated with a political objective or not. (12) In the cases that are electronically accessible, there is no evidence that proportionality or proximity are being considered as important factors in the granting of amnesty. The decisions of the committee do not involve a great deal of detailed evidence at all - certainly not of the sort that would be needed for the prosecution of offenders. In this regard also, it should be said that emphasising amnesty an incentive for the perpetrators to tell the truth, effectively implies that proportionality and proximity tests will not be applied, as indeed, it appears, they are not. It does not make much sense to offer an incentive to political criminals only to remove it if they do not meet the further requirements of the act. It is more expedient to simply apply amnesty by the line of least resistance, and in so doing, deviate from the act itself. Amnesty has to appear to be working, if is to act as an incentive to perpetrators. Cynically stated, since we are incapable of administering justice, of prosecuting the criminals, we should rather attempt to lure them into revealing their crimes and exposing what their roles were in the violence of the past. These very same perpetrators may then walk free without even showing remorse for their actions, supposedly one of the imperatives for reconciliation. (13)

The constitutional argument in favour of amnesty is an extension of the pragmatic political argument. While the constitution entrenches the right to civil action against perpetrators of harm, the political expedience of amnesty

annuls, for the constitutional court judges, this right. Essentially then the broader political objectives of the negotiated settlement supercedes the individual right to civil redress from the perpetrators as well as the state. The constitution guarantees their exemption from both civil and criminal liability. In a similar manner, the constitution may be politically used to sanction the deals made over the negotiating table, the elite pacting of the transition, the golden handshakes given to the functionaries of the apartheid state. There are other inconsistencies and injustices. To name a few: re-employing Wouter Basson; the unsolved question of informers for the previous regime in the present government; the witness protection programme for state witnesses such as Joe Mamasela, whose evidence is then not used in court; the clamour to claim collective responsibility on behalf of the ANC, to make composite submissions for the National Party and to submit a master application for amnesty for the Freedom Front for their respective gross violations of human rights, notwithstanding Desmond Tutu's appeals for individual applications.

There may be something in the argument to accept the principle of amnesty for the crimes of Apartheid if the motive for these crimes was clearly political. The fear that correcting injustices with retribution may lead to further injustices is not baseless. History is littered with examples of the morally sound in opposition turning into grotesque abuses once in power. All the arguments in favour of amnesty suggest that the orientation should be towards the future rather than the past. However, establishing the varieties of truth is a vital part of that process and the consequences of deciding against prosecuting the perpetrators are not yet apparent. Ostensibly, a very big part of the motivation behind the establishment of the TRC was to prevent similar abuses in the future. If this very commission pardons the perpetrators, what guarantee is there that future leader will not use this example against the populace? Also, it is facile to suggest that the bitterness, scorn, anger and enmity which animated the opposition to authoritarianism would simply dissipate in the overwhelming ocean of official reconciliation. If not effectively expunged, I have no doubt that these will merely reappear. The only manner in which this can be done, intractable as it now appears, is if the divisions of the past are seen to be dismantled and the second generation rights of the people are given the force and prominence which they deserve.

Notes

(1) I am grateful to Nyanisile Jack, Researcher for the TRC, Ntsikilelo Sandi, Human Rights Violations Committee member of the TRC, Dumisa Nstebeza, Head of the Investigative Unit of the TRC and Gavin Williams of Oxford University for many discussions on the issues raised in this paper.

(2) The Promotion of National Unity and Reconciliation Bill, 1995.

(3) There is compelling evidence to suggest that many official records, especially those of the security establishment guilty of direct human rights abuses, have been destroyed in order to conceal the truth. In their submission to the Department of Justice on the draft bill for the Promotion of National Unity and Reconciliation, the South African Society of Archivists suggested the establishment of a Committee on Official and Confiscated Records. It was felt that the lack of evidence would severely undermine the work of the Truth and Reconciliation Commission and thus necessary for the Commission to investigate as precisely as possible, who was responsible for the shredding of documents who authorised this practice and how widespread was it. Unfortunately, this recommendation was not incorporated into the Act. Apparently, this critical issue has been removed from the operational side of the work of the TRC and despatched to its research division.

(4) According to the Human Rights Commission's submission to the Truth and Reconciliation Commission, about 15 000 people died in politically-inspired violence between 1990 and 1994 - hardly a peaceful transition. Nyanisile Jack, a TRC researcher, takes this argument somewhat further in suggesting that the underlying reason for the conception of a peaceful transition is the fact that relatively few whites died in the conflict. From this perspective, it is quite easy to erase these deaths as irrelevant to the democratisation of the country, in order to arrive at the conclusion that the transition was "...relatively peaceful ... and miraculous" (Verwoed 1997, p.1).

(5) We realise, of course, that there is a wide range of other responses to official dogma and there is certainly no intention to exhaust this diversity by the examples presented here.

(6) Tshidiso also asked van Vuuren, "Who will look after me when my old grandmother dies?" The killer of his parents looked very awkward about this and lamely suggested, clearly without any thought, that Tshidiso could live with him.

(7) I've reconstructed these accounts from memory. Obviously, my recollection may have blurred things somewhat, I will be pleased to change the details of these stories if there are any inaccuracies.

(8) C. de Jager for example had this to say about the bill, "(P)arliament no longer governs; decisions are now taken by the Executive Authority...We find that the Executive Authority decides whether a person is legally liable or not. This is practically a take-over of the function of the courts, in a sense that a decision is made as to whether a person is culpable or not." (House of Assembly Debates, 1990: cols.8109-8110, 7 May).

(9) Carl Norgaard, president of the European Commission for Human Rights, acted as arbiter in the Namibian case on the determination of whether convicted offenders could be categorised as political prisoners.

(10) Further Indemnity Act No 151 of 1992.

(11) Robert McBride killed three people and injured 69 in his bombing of the Magoo's bar in Durban. Barend Strydom was a former policemen and member of the neo fascist Wit Wolwe was convicted of murdering eight black people in an urban killing speed.

(12) I am grateful to Elsa van Huuysteen for pointing me to the Web site of the Wits Law School at http://sunsite.wits.ac.za/law/ which covers matters pertaining to the constitutional court.

(13) Of all the amnesty decisions which I have consulted, not one mentions the name of other perpetrators who may have been involved in the act of abuse or crime.

(14) Bishop Desmond Tutu (1996) has this to say in this regard, "The law doesn't require that they should express remorse: they can come to the Amnesty Committee and say, for example, that they fought a noble struggle for liberation, but that because they opened themselves to prosecution or civil actions as a result, they are asking for amnesty".