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A Second Organisational Amnesty?

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Introduction

The prospect of a second organizational amnesty is an important topic. Such a topic is I think appropriately linked to a conference that is fundamentally about assessing the work of the TRC process. Indeed, our conference was opened with an address by a TRC Commissioner, Yasmin Sooka, stating that opposition to a second amnesty would be a significant concrete result of this conference. Additionally, in at least in some of the panel discussions, that theme has also been raised. This paper aims to explore the question of what the TRC process so far has to say about a second amnesty and what a second amnesty would have to say about the TRC process. It concludes that within certain constraints a collective amnesty may be constitutional but a blanket amnesty would not be.

The first section reviews the interface between constitutionalism, the TRC process, and the South African judiciary. The second section examines some of the media speculation over a second organizational amnesty. It lays out at least two different ideas of what such an amnesty might consist of: a blanket amnesty and a collective amnesty. The final two sections tentatively evaluate the question of a second organizational amnesty (in its different manifestations) first from point of view of the doctrinal constitutionalism of the legal sector and second from the point of view of the constitutionalism of a more sociological definition.

Before I do so, a professional caveat is in order. In the making of history, lawyers often venture where historians fear to tread. This is meant in two senses. In one sense, the work of lawyers is often a focus of the later research of historians. Indeed, lawyers often think that their work should be THE focus, although historians often disagree. In an additional sense of making history, lawyers also often precede historians. As part of their work of persuading decision-makers, lawyers often need to write a history (and to do so quickly). Likewise, judges often engage in the quick production of a history.[1] In so doing, these lawyers are usually criticized for telling stories in partial and instrumental ways and so they should be. So should historians. The following account should be taken as a lawyer's rather than as a historian's history.

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[1] See, e.g., the first two paragraphs of AZAPO where Constitutional Court Judge Ismail Mahomed (who has since become Chief Justice with the Supreme Court of Appeal) begins with one sentence ("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") and ends with the following sentence ("It might be necessary in crucial areas to close the book on the past.").

I. Constitutionalism, Organizations, and the TRC Process

Constitutionalism can be seen as a cultural construction resulting from popular and elite participation in institutions of formal constitution-making (Klaaren 1998; Klug 1996). This definition of constitutionalism goes beyond formal doctrine. It also uses the concept of an organization as a mediating category between popular and elite participation on the one hand and notions of the people, the nation, or the Constitution on the other. In the instance of the TRC process, the TRC both established important linkages itself with other organizations through inter alia the sectoral hearings, but also provided an organizational focus for the more diffuse popular participation in the process. This definition of constitutionalism borrows a fair amount from new institutionalism theory within the sociology of organizations (DiMaggio and Powell 1991). This theory contrasts itself with some of its predecessors by claiming to focus less on normative structures and informal value systems and more on cognitive processes and formal symbolism. It has been criticized for downgrading issues regarding power and conflicts of interest.

In terms of this definition, both the South African judiciary and the Truth and Reconciliation Commission itself have been involved in the production of constitutionalism. Indeed, insofar as the TRC process is concerned, the courts and the TRC Commission have mutually engaged in such a production.[2] While the TRC's legislative underpinnings were upheld in principle by the Constitutional Court in the case of AZAPO v President of the Republic of South Africa, 1996 (4) SA 671 (CC), the Commission's administrative operations have been subject to rather close and exacting judicial scrutiny by the lower courts since that initial decision. Likewise, while the TRC attempted to cast its project of accounting for apartheid over the legal sector including the judiciary, the South African judiciary refused to come in person before the TRC, choosing instead to submit only written representations.[3] Seeing the TRC process as a significant (though far from determinative) site of production of South African constitutionalism, that process demonstrated that as of 1998, the institutional role of the courts within the South African constitutional democracy remained yet to be defined (Klaaren 1998).

If the place of the judiciary within South African constitutionalism remains yet to be specified, the question of a second organizational amnesty – spoken seriously about in the media over the past several weeks – demonstrates the mirror point that the place of the TRC process itself within South African constitutionalism also remains yet to be specified. While such an assertion may initially seem odd (since this conference is billed as beginning the historical assessment of the TRC, regarding that process as a finished chapter), it is oddly appropriate

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[2] In Klaaren 1998, I spoke of "the TRC", meaning the Commission established in terms of the Promotion of the National Unity and Reconciliation Act 34 of 1995. I now use the term the *TRC process* meaning a wider process centred on the TRC.

[3] New institutionalism theory would be particularly apt in exploring the sectoral hearings of the TRC, since this theory sees institutionalization operating at a sectoral, inter-organizational level.

(given the constructivist nature of much of the social theory at this conference) that the contribution that the TRC process may or may not have made to constitutionalism remains an account to be battled over.

II. A Second Amnesty?

Apart from its importance as a topic, the content of a second amnesty is much less clear Indeed, at the time of writing and presenting this paper, the status and shape of a second amnesty is uncertain. Discussions are reported to be presently taking place between (at least) the Department of Justice and the Cabinet of incoming President-designate Thabo Mbeki on this topic with at least some legal advice being commissioned by the Department of Justice.

The political impetus for such a second amnesty appears to come from three sources Two of these can be gleaned from President-designate Mbeki's own words who broached the topic in the following terms (Steinberg 1999):

> "Quite a lot of people in KwaZulu-Natal did not apply (for amnesty) and with the level of violence that took place in that province, if you dig and dig and dig, you are going to have to arrest a lot of people. That can't be right. A number of generals in the SA Defence Force (SADF) are very keen that this matter be dealt with. [] because their own sense too, is that there may very well be significant numbers of people in the former SADF who didn't apply, and again, with regards to them, it would not be right week after week to charge people with something that happened in 1987."

The third potential source that Mbeki apparently did not explicitly mention is the top leadership of the ANC and other political organizations. As is well-known, 37 top ANC leaders collectively applied for amnesty in terms of the TRC legislation and had their application refused on the grounds that the TRC legislation did not allow for amnesty to be granted collectively. Indeed, Mbeki's call was reported to be for a new amnesty law that would allow "organisations and bodies" rather than individuals to be granted collective amnesty (Steinberg 1999).

In considering this second organizational amnesty, we need to distinguish clearly between two separate forms of amnesty, both of which differ from the amnesty offered by the TRC process to date. The first is the idea of a **blanket amnesty**. This is the notion that the criminal (and civil liability for certain classes of human rights violations is extinguished for all persons or at least for all persons within a certain time or space. The amnesty eradicates the criminality of the actions themselves. One cannot be prosecuted in a court of law for such actions. Nor may a person be sued in the civil courts for delictual or other damages arising out of such violations.

The second is the idea of a **collective amnesty**. This is quite a bit different than the idea of a blanket amnesty. The liability for a certain class of gross human rights violations is not legally extinguished for all persons. Instead, the criminal (and civil) liability of only a certain class of persons (e.g. members of an organization or a certain class of organizations) for those human

rights violations which have been adjudged to fall within the terms of the amnesty legislation is extinguished. The criminality of the specified actions remains but its attachment to certain specified persons is precluded. Furthermore, the legal definition of a "person" may include not only real live human beings but also juristic persons (organizations recognized with legal personality such as a corporation or a political party) so that the organizations themselves may be granted immunity. As defined here, a collective amnesty differs from the present process only in allowing for either an organization or members of an organization to claim immunity by virtue of that membership.

In speaking about a second amnesty, it is not completely clear whether President Mbeki was speaking of a blanket amnesty (e.g. for all gross human rights violation in KwaZulu-Natal within a certain period of time) or of a collective amnesty. As explored in greater detail in the next two sections, he would be well-advised to avoid the first and to investigate carefully the details of the second.

III. The Doctrinal Constitutionality of a Second Organizational Amnesty

The constitutionality of the different ideas of a second organizational amnesty can be evaluated in at least two ways. The first would be the way of professional lawyers: in terms of legal doctrine. The second would be in terms of the more sociological definition of constitutionalism which examines popular and elite participation in processes of constitution making. This section considers the doctrinal constitutionality of a second organizational amnesty by first identifying the rationale of the AZAPO case and then applying to to the concept of a second amnesty.

A. The AZAPO Reasoning of the Constitutional Court

The analysis here will likely begin with the Constitutional Court's decision in AZAPO v President of the Republic of South Africa. In this case, victims of apartheid abuses including the widow of Steve Biko challenged the key amnesty-granting section of the TRC legislation. The victims argued that the immunities granted to individual perpetrators from criminal and civil liability was a violation of their right of access to court in terms of the Interim Constitution in force (largely) since April 1994. (The Interim Constitution was (largely) replaced by the 1996 Constitution on 4 February 1997.) This immunity also meant that in respect of the acts for which amnesty was granted there would be no vicarious liability for either the State (if the wrongdoer was an employee of the State) or other bodies, organisations, or person (if, e.g., the wrongdoer was a member of such an organisation). AZAPO para 7. The Constitutional Court unanimously rejected the victims' challenge. There were two broad themes to the Court's reasoning: the transitional imperative and the specific features of the truth-for-amnesty mechanism.

1. The Transitional Imperative Justification

In adverting to the transitional imperative, the Court relied heavily on the placement of a

epilogue in the interim Constitution mandating Parliament to pass such amnesty-granting legislation. Entitled 'National Unity and Reconciliation', this epilogue contained some of most inspiring and transformative language of the Interim Constitution (Klare 1998). The epilogue provided in part:

> In order to advance . . . reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the court of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date . . . 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.

Indeed, in the Court's view, the amnesty legislation was very likely a necessary precondition to a successfully negotiated transition. AZAPO para 19. Surveying some of the international experience with amnesties, Mahomed J concluded:

> 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. AZAPO para 24.

The Court's examination of international law and its effect on the issue has been rightly characterized as brief and incomplete though not necessarily incorrect (Dugard 1998, 1997). Speaking of the immunity from criminal liability, Mahomed J characterized the South African version of amnesty in the following significant terms:

> 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 s 20(3) of the Act, including the very important relationship which the act perpetrated bears in proportion to the object pursued. AZAPO para 32.

This analysis may be merely descriptive but by distinguishing South Africa's TRC process from a blanket amnesty and by placing that TRC process firmly within "a constructive transition to a democratic order" may also be interpreted to signal a presumption against a blanket amnesty.

2. The Truth for Amnesty Justification

In analyzing the actual amnesty-granting mechanism, the Court considered initially its provision of immunity from criminal liability for individuals. Again indicating a presumption against a blanket amnesty, the Court first began by noting that the grant of amnesty was not blanket. Amnesty was only to be granted for those acts which were associated with a political objective. Moreover, this issue was to be determined independently by the Amnesty Committee according to a number of specific criteria set out in the legislation. AZAPO para 20. Second, the grant of amnesty was justified in terms of the necessary condition it provided for the full voluntary disclosure of information by the perpetrators, with the truth being seen as a compensatory benefit for the victim. AZAPO para 20.

With respect to immunity from civil liability, the considerations were essentially no different at the individual level. Here, the Court stated specifically that immunity from the very substantial damages would also provide a necessary condition for full voluntary disclosure of information by perpetrators. AZAPO paras 33-38.

With respect to the effect of the amnesty on the civil liability of political organisations, the Court wrote a single brief paragraph, treating the issue along similar lines as the immunity for individuals. Here, the immunity was again justified on the grounds of the transitional imperative and as a necessary condition for disclosure of the truth. AZAPO para 49. Here, the Court appeared to recognize that individuals might well feel dependent on the direct or indirect support of those political organisations and thus discouraged from fully disclosing the truth were the organisation itself not immune from civil liability.

However, with respect to the effect of amnesty on any potential civil liability of the State, the Court dropped one justification (disclosure of information) and added another (the starving school children rationale). Here, the victims (and the amicus curiae from the Centre for Applied Legal Studies) argued forcefully that immunity from such liability was not a necessary condition for full disclosure of information. For that, criminal and civil liability for the individual were sufficient. Mahomed J's judgment treated this point seriously and essentially conceded the validity of the victims' argument. AZAPO para 41. Nonetheless, the Court fell back on the transitional imperative point and upheld this feature of the TRC legislation. AZAPO paras 42. Above and beyond the transitional imperative, Mahomed J raised a further justification (AZAPO paras 43-48) by asking whether the resources of the State should be directed to compensating the victims of torture and abuse or also to the "other victims" of the broader injustices of apartheid manifested in areas such as education, housing, and primary health care:

> 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 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 the extent again divert funds otherwise desperately needed

to provide food for the hungry, roofs for the homeless and blackboards and desks for those struggling to obtain admission to desperately overcrowded schools. They were entitled to permit that the claims of such school children and the poor and the homeless to be preferred. AZAPO para 44.

Whereas individual immunity was justified on grounds of the transitional imperative plus the rationale of full disclosure, the more difficult issue of State immunity was justified on the grounds of the transitional imperative and the rationale of preferring starving school children over greedy insurance companies. It should be noted that the Court's rationale here is that this was a choice within the discretion of the negotiators of the transitional constitution, not necessarily within the discretion of a democratically elected Parliament.

The separate concurring judgment of Didcott J dealt primarily with the difficult issue of immunity for state civil liability. Didcott J specifically rejected Mahomed J's preference for the countless victims of apartheid on grounds of principle. As Didcott J put it: "[T]he 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." AZAPO para 55. So why did Didcott J not dissent? Interpreting the text of the epilogue, he felt that immunity for the State would be "in the interests of putting an early end to unfruitful recriminations" that would be spawned by ongoing litigation. AZAPO para 59. Further, he pointed to the epilogue's use of the term "the need for reparation" and observed that the TRC legislation at least "offers such *quid pro quo* for the loss [of the victims] and establishes the machinery for determining such alternative redress." AZAPO para 65.

B. The Principles of AZAPO Applied to a Second Amnesty

1. Blanket Amnesty is Unconstitutional

Relatively quick work can be made of the constitutionality of a blanket amnesty. It is unconstitutional. Unless such a law makes provision for the dual elements of (1) linkage of the liability-generating acts to a political objective (2) as determined by an independent and impartial decisionmaker such as the TRC Amnesty Committees, such a blanket amnesty is a non-starter as it offends the presumption against a blanket amnesty that the AZAPO Court identified. The principle may be stated as follows: in terms of South African constitutional law, amnesty may only be granted for acts which have been determined to fall within the terms of the amnesty-granting legislation by an independent and impartial decisionmaker. Such a decisionmaker could be either the ordinary courts or an independent and impartial tribunal. This would be so whether the transitional imperative was seen to persist or not.[4]

[4] It could be argued that the AZAPO requirement of a independent and impartial determination that a specific act falls within the scope of amnesty legislation flows directly from the epilogue and not from the Constitutional more generally, but such an argument would seem weak.

This conclusion that there is a constitutional presumption against a blanket amnesty has an important consequence in dealing with the class of acts for which persons have not applied for amnesty in terms of the TRC process. It is thus a requirement under the 1996 Constitution that either the ordinary courts or an independent and impartial tribunal be the institution to deal with the class of acts for which persons have not applied for amnesty. As we will see below, this has important consequences for the precise form of the second amnesty.

2. With Safeguards, Collective Amnesty Is Constitutional for Organizations and Individuals But Likely Not for the State

Take the issue of collective amnesty. AZAPO's reasoning reveals no presumptive objection to granting immunity from criminal or civil liability to organisations and bodies. Indeed, that decision upheld such an organizational grant of immunity grant at least with respect to acts for which individuals had applied for amnesty. There is no presumptive objection to the granting of amnesty to organisations or bodies.

If there is no in-principle objection to the notion of a collective amnesty, can its undeniable infringement of the rights of the victims be justified?[5] To do this, we must first answer the question of when the transitional imperative expires and then examine the different aspects of a collective amnesty: individual, organizational and state immunity from liability.

Is the Transitional Game Over Yet?

The exercise of deciding when the transition is over is important to the topic of the constitutionality in both substantive and doctrinal ways. Substantively, if the transitional imperative has expired, then the full force of Steinberg's argument (1999) can be felt:

> [I]n the AZAPO case, the Constitutional Court did not need to speculate. It had before it in black and white the negotiated terms of SA's transition to democracy. It knew of an agreement between the protagonists that constitutional democracy would never be born unless justice was suspended. Ruling against amnesty then would have been a rash and arrogant betrayal of those who made constitutionalism itself possible. But that was then.
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> It may be that what is worrying Mbeki is the question of governance. SA would be a more difficult place to govern if trials about apartheid era deeds hit the court rolls every year. Perhaps such trials would indeed produce a political culture that looks backwards rather than forwards. Perhaps it would make it harder to reconfigure the political terrain into shapes undreamed of under apartheid. Perhaps Mbeki's dream of government by broad-based consensus would wither and die.

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[5] AZAPO para 9 found easily that an amnesty infringed the right of access to courts entrenched in section 22 of the Interim Constitution. Essentially the same right is entrenched in section 34 of the 1996 Constitution.

Yet if this is the case we are no longer bartering justice for the future of constitutional democracy, but for convenience. We are saying that suspending justice is not a condition of the new order's survival, but a condition of making it easier to manage If that is the case, it is not at all clear that the barter is an acceptable one, for we are no longer suspending the rule of law in order to protect its posterity; its posterity is already as sure as it can be.

Doctrinally, if the transitional imperative has expired, then the evaluation of the limitation of the victims' rights by a collective amnesty will need to be judged not against the text of the epilogue of the Interim Constitution with its specific reference mandating such a law but rather against the text of the general limitations clause (subsection 36(1)) of the 1996 Constitution In such a latter case, the limitations analysis would need to demonstrate consistency with judgments about any other limitation of a fundamental right. Presumably, with the transitional imperative expired, an evaluation under the general limitations clause of the 1996 Constitution would be less friendly to an amnesty law than was the evaluation in AZAPO in terms of the text of the epilogue to the interim Constitution.

These arguments make it important to determine when the transitional imperative ends One can locate the time at which the constitutional transitional imperative expires at different points. In discussing the need for an anti-defection clause, I argued previously that the transition ended when the 1996 Constitution was submitted to the Constitutional Court for certification in May 1996 and when the National Party left the Government of National Unity (GNU) (Klaaren 1997). More formally (given IFP's continued participation in the GNU), one could identify the recent (30 April 1999) lapsing of the constitutional provisions maintaining the legislative and executive structures of the GNU as the endpoint of the transitional imperative.

General legal arguments for continuing the transitional imperative beyond 30 April 1999 are hard to come by, but one specifically applicable to the TRC process certainly exists. Consider item 22 of Schedule 6 of the 1996 Constitution. For the purposes of the TRC legislation (e.g. The Promotion of National Unity and Reconciliation Act 34 of 1995, as amended), this item deems part of the 1996 Constitution all the provisions of the interim Constitution dealing with amnesty. This has an important legislative drafting consequence. It is possible to take advantage of the transitional imperative justification if one is amending the TRC legislation, rather than drafting a new law.

The Bottom Lines of Collective Amnesty: Individuals, Organisations, and the State

In drafting legislation to give effect to a second amnesty, there are two legal routes to take *amending the existing TRC legislation or drafting a new and separate piece of legislation*

Amending the Current Act There are some clear legal consequences to starting dow

the path of amending the currently existing TRC legislation.[6] In particular, drafting a package of amendments to the existing TRC legislation would most likely tie a collective amnesty to the package of procedures currently specified in the Act. These include a fair degree of publicity, strong victims' rights of participation and confrontation, and an attenuated right to reparations. Moreover, the acts within the scope of such a package of amendments could only be limited to those gross human rights violations committed up to and including May 1994.[7]

Constitutional evaluation of such a package of amendments would ask to what extent is the model of the current TRC legislation being deviated from. Formally, this question would be framed as what scope did the epilogue to the Interim Constitution allow the drafters of the initial TRC legislation. AZAPO paras 44-48. In this exercise, the TRC legislation should be taken as indicative of that range of action.

Providing for leaders of organizations and the organizations themselves to receive immunity in respect of acts for which amnesty has been granted in terms of the TRC legislation would not seem a large deviation. Indeed, it has been argued that creatively interpreted (as the Amnesty Committee did not do in considering the application of the 37 ANC leaders), the present legislation allows for collective amnesty. However, providing organisational immunity with respect to acts not determined to fall within the terms of the TRC Act would stray into the category of a blanket amnesty and should thus be ruled out as too great a deviation.

A New Law. The other legal drafting route is to strike out fresh under the 1996 Constitution. Evaluated under the 1996 Constitution (and assuming the transitional imperative to be expired), the sole AZAPO-recognized justification for the grant of civil and criminal immunity to individuals as well as to political organisations is that of providing for full disclosure of the truth. This is regarded as a compensatory benefit for the limitation of the rights of the victims. Thus, if the drafters of a collective amnesty choose the replacement rather than amendment option, then the specific procedures of the new legislation can be justified solely on the rather slender basis of whether or not they will provide for the full disclosure of information regarding gross human rights violations such that it provides a compensatory benefit to the victims. Such grants of immunity -- which could theoretically cover acts committed since 1994 -- cannot be justified in terms of the transitional imperative. Given the thin justification for such a limitation on the right of victims, it may well be necessary for the drafters of a new law to consider an amendment to the 1996 Constitution to ensure the constitutionality of the second amnesty.

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[6] Additionally, one would be the need to assess the logistics of resuscitating the TRC. One might have thought that the TRC in particular was an organization that would exist only for a limited period of time. But the same was the current thinking about the Independent Electoral Commission, originally created in terms of the pre-constitutional legislation and which, contrary to the predictions of its demise, reached its fifth birthday on 2 June 1999. State organisations have a habit of persistence.

[7] Check date.

Depending on this justification also poses an empirical question for designing a process of collective amnesty: what procedures are both least restrictive of the rights of victims and most suited to encouraging full disclosure of the truth? Additional elements of publicity and a reparations regime and victims' right to participation in the process will clearly argue in favour of the Act's constitutionality. In any case, the institutional forum charged with implementing the amnesty law must be an independent and impartial decisionmaker with the power to determine that specific actions fall within the terms of the amnesty legislation. Either the ordinary courts or an appropriate tribunal could fit that definition.

Furthermore, in drafting a new law, the grant of immunity from civil and criminal liability to the State would not be able to take advantage of this disclosure of truth rationale. It would thus rest solely on the extremely dubious basis of Mahomed J's preference for starving school children over greedy insurance companies. In order for such an assertion to be accepted by the Court as a justification for limiting the victims' right in terms of the limitations clause analysis, such an argument would require solid evidence backing it up. Without some sort of research findings that indeed only insurance companies and not the actual victims would benefit, new amnesty legislation cannot extend constitutionally to providing immunity from liability to the State itself.

Thus, under either the drafting afresh or the amendment route, the destination reached looks a bit the same: organisations may apply for immunity as long as either a court or a tribunal is determining whether specific acts fall within the terms of the amnesty legislation. While the starting afresh route as compared to the amendment route would have the potential "advantage" of covering gross human rights violations committed since 1994, a new law would suffer the disadvantage of not being justifiable in terms of the transitional imperative and risking the necessity of a constitutional amendment. Both forms would not be able to grant immunity for acts not determined to fall within the terms of the amnesty legislation by an independent and impartial decisionmaker.

IV. The Broader Constitutionality of a Second Organizational Amnesty

And what of the second organizational amnesty in terms of more sociological definition of constitutionality? To evaluate the second organizational amnesty in these terms, we will need to look at the process of coming to a second amnesty.

It is obviously hard to look at a process that has been barely begun. But it is does seem significant that it is both an idea that persons are caring about opposing and one that has not been put firmly in the public domain. One could find evidence already in this process to argue that the transparency of the state and its willingness for a wide range of persons to participate in its decision and constitution-making processes has declined from its height during the days of transition to the present. Without necessarily making that argument, it seems likely that a number of persons may well find the very character of the policy-making process around a second amnesty to be an important indicator of a less open South African constitutionalism. By reducing

the extent of popular participation in formal institutions of constitution-making (or constitution-amending), the character of South African constitutionalism is altered.

A second amnesty in the form of a collective amnesty would be an organizational amnesty but one in a very different sense from the TRC process. The TRC process engaged with different organizational sectors of South African society and where such organizational sectors did not exist itself provided the organizational focus. In so doing, the TRC process contributed, at least to some extent, to *popular and elite participation in formal institutions of constitution-making*. However, a second amnesty such as presently being discussed risks being organizational in a completely different sense by excusing all members of certain political organisations. This would undoubtedly support the present strong role of party political organisations. The alternative is to provide a forum in which organizational responsibility is acknowledged and immunity is given with respect to acts determined to fall within the scope of the amnesty legislation.

V. Looking Forward?

There may be other legal avenues to more or less the same end point as one is led to by amnesty legislation in either form as considered above. A programme based either in the office of the National Director of Prosecution or in the office of the President could exercise a discretion respectively to either forego prosecution in exchange for full disclosure of information or to pardon those convicted from any criminal liability.[8] The doctrine of prescription may well serve to limit potential claims against political organisations or other persons at least where the facts of the claim have been known for some time (as is potentially the case with the ANC given its earlier public investigations into its own human rights record) and thereby to make the need for a second amnesty less compelling.

Writing on the topic of a second amnesty in the Business Day, Jonny Steinberg (1999) recently argued that a second amnesty law will likely provide a crucial test case for the Constitutional Court. If such a case were to occur, the episode might indeed fill in at least one of the missing facets of constitutionality I earlier identified: what role will the judiciary assume in the *long term in South Africa's constitutional democracy? But I am not so sure that such a sharp* confrontation is necessarily coming. There may well be a number of turnings-off on the road to a potential Constitutional Court decision on a second amnesty law. The doctrinal constitutionality of such a law may be ensured by an amendment to the 1996 Constitution in one respect or another. Additionally, perhaps more optimistically, the shape of the new amnesty law (like the old one) will be shaped at least to some extent by popular and elite participation in its drafting process. Constitutionalism cannot be left in the domain of legal doctrine.

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[8] One doctrinal question raised is whether a pardon has the effect of immunity from civil liability as well.

References

Azanian People's Organisation (AZAPO) v President of the Republic of South Africa. 1996 (4) SA 671 (CC).

DiMaggio, P, and Powell, W. 1991. *The New Institutionalism in Organizational Analysis*. Chicago: University of Chicago Press.

Klaaren, J. 1997. "Structures of Government in the 1996 Constitution: Putting Democracy Back into Human Rights." *South African Journal on Human Rights* 13: 3-27.

Klaaren, J. 1998. "The Truth and Reconciliation Commission, the South African Judiciary, and Constitutionalism." *African Studies* 57(2): 197-208.

Klare, K. 1998. "Legal Culture and Transformative Constitutionalism." *South African Journal on Human Rights* 14: 146-88.

Klug, H. 1996. "Participating in the Design: Constitution-Making in South Africa." *Review of Constitutional Studies* 3: 18-59.

Steinberg, J. 1991. "Amnesty Quandry Looms For Judges." *Business Day*. Tuesday, June 8, 1999, p. 11.