

## Challenge claims amended prosecution policy infringes constitutional rights

**Sister of Nokuthula Simelane and the widows of the Cradock Four as well as Khulumani Support Group, The Centre for the Study of Violence and Reconciliation (CSV), and The International Center for Transitional Justice (ICTJ) have launched proceedings in the Pretoria High Court to challenge the validity of amendments to the National Prosecution Policy dealing with apartheid-era crimes**

Thembisile Nkadimeng, Nyameka Goniwe, Nombuyiselo Mhlauli, Sindiswa Mkhonto, Nomonde Calata, Khulumani Support Group, The Centre for the Study of Violence and Reconciliation (CSV), and The International Center for Transitional Justice (ICTJ) launched a challenge on July 19, 2007 requesting the court to strike down the amendments to the prosecution policy as being unconstitutional, in breach of international law, in breach of the principle of the rule of law, and in breach of the principles of administrative fairness and justice.

The applicants in this case allege that the amended policy infringes the constitutional rights to dignity, life, freedom and security of the person and equal protection before the law. The amended policy also infringes South Africa's international law obligations arising from the International Covenant for Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

"The amended prosecution policy is in conflict with the human rights culture that is entrenched in a democratic South Africa and undermines the rule of law. It also conflicts with South Africa's legal obligations under international and regional human rights treaties such as the African Charter on Human and Peoples' Rights," says CSV executive director Ahmed Motala.

The applicants also allege that the amended policy violates the fundamental principle of the rule of law by allowing for impunity from prosecution for those guilty of serious human rights abuses and the commission of serious crimes in an insufficiently transparent process. Few of the safeguards present in the TRC process are present in the amended policy. The applicants further allege that the adoption of the policy is in breach of the Promotion of Administrative Justice Act, 2000 on various grounds, including the following:

- The amended policy was adopted without sufficient public consultation;
- The procedure for making decisions under the amended policy is not sufficiently transparent; and
- While the goals of "nation-building" and "reconciliation" are clearly to be supported, these values are neither possible nor durable if they are sought at the expense of the rule of law, fulfillment of international law obligations and effective access to justice by those victimised. Legally, such considerations are not rationally related to the purpose of the prosecution policy and are not legally relevant in the proper exercise of prosecutors'

powers, namely the effective prosecution of crime without fear, favour or prejudice,

The Director of Public Prosecutions (NDPP) prepared the national prosecution policy with the concurrence of the Minister of Justice, in accordance with section 179 of the Constitution and the National Prosecution Authority Act.

In December 2005, amendments were effected to the policy “relating to the prosecution of cases arising from conflicts of the past and which were committed before 1 May 1994”.

In terms of the amendments, perpetrators may apply to the NDPP for “indemnity” from prosecution. The NDPP may then exercise a discretion not to prosecute such applicants if they comply with certain requirements. The primary factors in the exercise of the discretion are the same as those applicable to the TRC process (i.e. truth, a political motive and proportionality between the motive and the crime) but other factors are also relevant, including the following:

- “The degree of co-operation on the part of the alleged offender”;
- “The personal circumstances of the alleged offender”, including “the alleged offender's sensitivity to the need for restitution... the degree of remorse shown by the alleged offender and his or her attitude towards reconciliation... renunciation of violence and willingness to abide by the Constitution on the part of the alleged offender; and the degree of indoctrination to which the alleged offender was subjected”; and
- “The extent to which the prosecution or non-prosecution of the alleged offender may contribute, facilitate or undermine our national project of nation-building through transformation, reconciliation, development and reconstruction within and of our society.”

The challenge argues that, despite what the amended policy itself says, it is clear that it allows for a re-run of the TRC process, with three key differences:

- Unlike the TRC, the application process will not happen in the public eye. The provisions for some form of publicity in the amended policy do not go far enough. The general public has an interest in knowing the details of the crimes of the past;
- Unlike the TRC, victims will seemingly not be entitled to lead evidence of their own or oppose the grant of indemnity; and
- Unlike the TRC, the decisions will be of an administrative nature made by the NDPP, a member of the executive. TRC amnesty decisions were made by a specially constituted judicial body.

Tshepo Madlingozi of Khulumani stated: “The amended policy effectively constitutes a re-run of the TRC process, it allows perpetrators who shunned the TRC process and those whose amnesty applications were rejected a second bite at the cherry. Victims have waited far too long for justice. What is most disconcerting is while the government has stated that it will not institute another ‘TRC-like’ process that will cater for thousands of victims who were left out of the TRC process, this policy will have the effect of giving perpetrators a second chance. This could derail efforts aimed at achieving social reconciliation.”

The amended policy constitutes a betrayal of the fundamental premise of the TRC in that it potentially allows those who did not apply for amnesty or those who were not granted amnesty to be effectively indemnified from prosecution even in cases where:

- There is sufficient evidence to charge the applicant and obtain a conviction;

- The crime in question is serious; and
- The victim is in favour of a prosecution.

“Although nation-building, reconciliation, development and reconstruction are undoubtedly laudable in their own right, they are entirely irrelevant in relation to the decision whether or not to prosecute alleged criminals. Many of the factors referred to in the amended policy are irrelevant in the exercise of the ordinary discretion a prosecutor exercises to proceed with a case or not. Prosecutorial discretion must be based primarily on the question whether the case is winnable on the available evidence or on evidence that may be uncovered in the course of further investigation,” commented the Legal Resource Centre's Richard Moultrie.

The applicants are represented by the Legal Resources Centre, which has represented victims of apartheid crimes for many years. The widows of the Cradock Four have been clients of the LRC for approximately 20 years.

Counsel for the applicants include Gilbert Marcus SC, Muzi Sikhakhane and Howard Varney.

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