CHAPTER FIVE

THE TRANSITION TO RIGHTS-BASED TRANSFORMATION INSTITUTIONS

5.1   Introduction

In this chapter I discuss two central themes about South Africa's transition, namely, its characterisation as an elite pacted transition, and the measures taken to install institutions supporting a rights-based transformation from the apartheid legacy. Since my focus is on post-apartheid housing rights discourse, it is only a sketch of, first, events on the path to the political transition to the post-apartheid order and less of an intricate analysis of why particular choices were made, as Habib (1995:58) urges accounts of SA's elite transition should do. Second, it is a sketch of events and issues about the negotiation of a Final Constitution which forms the overarching framework of that rights discourse.

5.2   From protest and armed struggle to negotiations

The policies and legitimacy of the white controlled state was challenged by black protest in the twentieth century on pass laws, forced removals, housing shortages, removal from the voters rolls, imprisonment of political leaders and loss of civic rights (see Lodge 1983 and Marx 1990). The ANC leadership pursued a negotiated transition through a national convention before its banning as well as when it was banned and exiled (Lodge 1989:47-8; Ebrahim 1998:15-17). The bannings of several ANC and SACP members, around 1961, forced leading members of the organisations to decide to include armed struggle in their resistance strategies against the apartheid state (ANC 1969; Barrell 1990) and to form a military wing, Umkhonto we Sizwe (MK). In the 1980s housing struggles became an important area of mobilising internal opposition to the

apartheid regime. The events were rarely concerted or co-ordinated, but, housing struggles, compounded with labour actions, youth and education struggles, and the military actions of liberation movements, created a climate where the leadership elite of the NP and ANC agreed to a negotiated political settlement, and overcame the perceived irreconcilable gap in their economic ideologies.

After a period of repression of African unions by the apartheid state in the 1960s, a watershed year of strikes in 1973 followed the revival of trade union organisation, increases in membership and the number of strikes MacShane et al 1984:17, 20-1,118). After 1984 trade unions increasingly took on political issues and debated collaboration with political organisations and with community organisations involved in housing struggles (Webster 1988). The Black Consciousness Movement's (BCM) criticisms of the apartheid schooling and university education system inspired both the youth revolt against the apartheid education system in 1976 and the drawn out resistance grew in the townships and other spheres (Hirson 1979; Muller 1987). The state appointed commission of inquiry chaired by Justice PM Cillié into the uprisings of 1976 emphasised black people's anger with the apartheid education system as a prompt for the uprisings, but also noted the uprising was also partly fueled by grievances about squalid housing, high rents and housing shortages (RSA 1980:604-6).

Despite about 17 million pass law and influx control prosecutions between 1916 to 1984 (Savage 1986), this did not prevent an increase in the numbers of urban Blacks. Although squatters in shanty settlements remained vulnerable to relocation, they resisted relocations and clashed with authorities, sometimes forming civic organisations to organise resistance to removals (Newton 1989; Platzky & Walker 1985; Seekings 1992:219). After 1979, African permanent urban workers organised themselves into civic organisations, with some civics also being formed in Indian and coloured residential areas (Karis & Gerhart 1997:329-32; Seekings 1992). Thozamile Botha, founder of the Port Elizabeth Black Civics Organisation (PEBCO), said these internal opposition organisations

rejected government's community councils which controlled Black residents in urban townships, they organised against the terrible standards of township houses, they opposed several aspects of apartheid policy, and demanded an end to single sex-hostels for migrants as well as the construction of old-age homes rather than the despatching of the aged to bantustans (ANC 1981:3). Other than its political propaganda and military campaign against the apartheid government, the ANC was marginal in internal politics until the early 1980s, but monitored several conditions while the regime endured, including developments about the "explosive" (ANC 1981a) nature of the housing shortage.

The civics enjoyed a new prominence through the formation in 1983 of the United Democratic Front (UDF). Its launch was attended by delegates of 565 organisations representing students, youth, civics, women, religious, political and other unspecified groups. About eighty-two of the UDF affiliates were civic organisations from around the country (Seekings 2000b:59). The civic organisations the UDF brought under its umbrella fought on rent issues, housing and the new local authority structures designed by the NP's constitutional reforms. After the youth revolt of 1976, many pro-*Freedom Charter* individuals and groups underwent a revival of activism within the country (Seekings 2000b:32-8), and it is not surprising that the UDF effectively aligned itself with the exiled ANC through its endorsement of the *Freedom Charter* at its launch. In 1984 township unrest broke out again as people opposed the NP's constitutional reforms, enveloping many urban townships and rural areas in what appeared to be the beginnings of a cataclysmic end to the regime; however, the NP steadfastly held onto power through declaring a succession of States of Emergency from 1985 to quell the protest (see Murray 1987).

Following the 1976 youth revolt, and particularly after 1981, the ANC increased its attacks on police stations and economic installations (Lodge 1987). Left-wing critics of the ANC's approach to the liberation struggle objective of attaining a transfer of state power maintain it really entailed an acknowledgement that a military victory was unlikely; armed attacks were used as propaganda and as a

prompt to force the white minority government to negotiate with its leadership elite on behalf of the masses (Alexander 1993:37-38; Johnson 2003:213; Legassick 2003:156, 170). Legassick, a member of the Marxist Workers' Tendency (MWT) of the ANC argued the armed struggle should be linked to as well as subject to the defence needs of the masses, or "the organised working class", in their everyday struggles against passes, in squatter camps and against forced removals, and against the state's repression of these struggles (Legassick 2002:20, 36). The ANC did not commit armed actions in conjunction with mass demonstrations, and probably was incapable of doing so (Legassick 2002:52). By the latter half of the 1980s, some ANC leaders recognised that armed struggle could not topple the white minority government and revived their position on a negotiated alternative.

Seekings (1992:217, 232, 235) reports that although the still exiled ANC perceived the civics to be weak, nevertheless, from 1989, civics were debating what role they would play in a transition from apartheid as well as in a post-apartheid order. These civics activists as well as some trade unionists were also debating the formation of a "mass workers party" that would focus on the problems of the working class (Callinicos 1986:58-60; Mayekiso 1996:250-3), but abandoned the idea because it entailed criticism of the ANC and was divisive because many trade unionists supported the ANC (Gqubule 1988a). Seekings (1992:224-6) says that from around1990 the civics were already engaged in negotiations with different levels of the state structures about township development, rent and consumer boycotts. However, it does not appear that significant changes about housing policy emerged from this new legitimacy of the civics after considerable initial clashes with township councillors and repression by the security forces. Furthermore, the role of the civics appeared to be overtaken once it was clear there was definite movement towards negotiations between factions of the ANC and NP leadership elite.

By the mid-1980s, against a backdrop of sustained revolts in black townships, trade union action, a growing international isolation campaign, Western

government officials openly meeting with the ANC, and an increase in the number of ANC armed attacks, various personalities engaged in talks that contributed to the NP leadership conceding to a solution that entailed negotiations with black liberation movements (Kiloh 1997:299-304; Rantete & Giliomee 1992). In the "transition theory" framework this phenomenon where former opposing forces initiate discussions for a negotiated transition is called the "liberalization" of the political space (O'Donnell & Schmitter 1986:7; Przeworski 1991:54-66), a forerunner phase to considerable compromises later made between negotiating elites. Pro-negotiation ANC figures and liberal figures in the NP were making contact (see Sparks 1994) with each other, they overcame fears of each other, and facilitated this liberalisation of the political space. The process also was facilitated later by a change of leadership in the National Party in 1988 from an ailing President PW Botha to FW de Klerk, although the latter only gradually became convinced that negotiations with the ANC was the best option to stabilise South Africa (Sparks 1995:88-108). Political scientists Rantete and Giliomee (1992) argue the nature of the negotiation process more aptly fits a transition model where the balance of power favoured the ruling regime and it had greater capacity to shape the parameters of the negotiation process.

The ANC leadership had to deal with divisions among its members as to whether it was the right time to negotiate with the NP, or to continue ts armed struggle, or if talks with the NP were part of the struggle and not a substitute for the struggle (Shubin 1999:351-6). By August 1989, the ANC leadership overcame its internal division over whether to end the armed struggle and issued the *Harare Declaration* (ANC 1989) which expressed a long held preference for a peaceful solution to the struggle against apartheid. The ANC noted the time for negotiations with the apartheid government had arrived, and a negotiations climate required the apartheid government release political prisoners, end its state of emergency and withdraw troops from the townships. Negotiations would follow to develop a new rights based constitution. It was hardly an "insurrectionary" (Marais 2001:72; Legassick 2003:170-1) situation wherein the

ruling white party was willing to explore negotiations. ANC National Executive Committee member Joe Slovo (1992:36) acknowledged later that they were not dealing with a defeated enemy but the latter was willing to make a break from the past. Furthermore, support for the ANC's protracted armed struggle strategy from the Soviet Union and the states bordering South Africa was diminishing.

Black opposition to apartheid, the struggle for liberation and the ideal of a democratic alternative, cannot be reduced to the prominence, liberation thought, strategies and successes of the ANC (see Neocosmos 2002). Nevertheless, it has to be acknowledged that the ANC played a leading role in facilitating the negotiated transition away from apartheid; its leadership chose to sit across the table and negotiate a new constitution with the NP, while rival liberation groups like the Pan African Congress (PAC) and the Azanian Peoples' Organisation (AZAPO) remained distrustful of the NP and chose to boycott that option (Nyatsumba 1992; Ebrahim 1998:43-5).

Giliomee (1995:84) notes it appears that ruling elites opt for transitions in time of economic crisis rather than in times of economic booms. The leadership of the white minority government also may have felt prompted to explore a negotiated settlement about the time it did since it was encountering protracted overall structural difficulties with the modernisation of the economy and its growth, arguably a consequence of another dimension of the ANC's strategy --- the thirty year long campaign for the international diplomatic, military, cultural and economic isolation of the apartheid government and the imposition of economic sanctions (see Malinga 1986 also United Nations 1977). The UN General Assembly resolution adopted on 9 November of 1977 called for such sanctions; it noted that, besides apartheid's brutal repression, low wages and general denial of rights, forced removals banished Africans to "barren reserves" as well as confined them to "urban ghettoes". International economic sanctions considerably impacted enterprises, consequently, the apartheid accumulation strategy could no longer be sustained. A crisis was affecting both the political system and the economy. The economy's difficulties could not be resolved

without an accompanying reform of the political system that could quell the episodic black labour unrest and youth insurrection (Marais 2001:2-4, 37, 38-39). The NP government attempted to manage that unrest in the 1980s through a reform of certain apartheid policies while still securing white minority political and economic domination. The reform programme was unsuccessful. Blacks rejected it mainly because the different forces organising the renewal of black opposition made all black "poverty, dispossession, landlessness and social disintegration ... attributable to apartheid", and the NP's reform initiative was tantamount to a type of restructuring that failed to undo the patterns of inequality in society (Marais 2001:37, 64-65).

Meetings (Ebrahim 1998; Sparks 1994; Sparks 1995:15-36, 86; Louw 1989:160-68) between white politicians, business leaders, and representatives of black liberation movements were opportunities for the ANC to clarify to concerned white political and business figures its views on a future state form, its constitutional principles and a Bill of Rights (Louw 1989:87-91). In sessions on the economy, socialism and nationalisation, ANC representatives stated they had no plans to close down private business (Louw 1989:111).

Two significant global events appear to have influenced the NP's decision to negotiate as well as created opportunities for a negotiated solution to end the internal violence and work on a new constitutional dispensation. First, the escalation of Huntington's (1991) "third wave" of democratisation, and second, the NP leadership witnessed the collapse of the Berlin Wall and pro-democracy demonstrations in China. The collapse of the Berlin Wall was the symbolic and actual collapse of communist regimes in the Soviet bloc, who hosted and provided military and material support to the exiled ANC and SACP. Many prominent figures in both organisations shared similar ideological orientations with the Soviet Union's political leadership. FW de Klerk argued the collapse of this Soviet support base weakened ANC's capabilities and prompted it toward a negotiated solution. He also was convinced that, worldwide, the Soviet alternative was unacceptable, and, economic revival in a politically transformed South Africa lay in market oriented solutions with minimal state expenditure:

"Those who seek to force this failure of a system on South Africa, should engage in a total revision of their point of view. It should be clear to all that it is not the answer here either."

...

"The Government's basic point of departure is to reduce the role of the public sector in the economy and to give the private sector maximum opportunity for optimal performance. In this process, preference has to be given to allowing the market forces and a sound competitive structure to bring about the necessary adjustments." (de Klerk 1990)

Renowned for his descriptions of the collapse of communist regimes, American political scientist Francis Fukuyama, travelled to South Africa and met with political figures and scholars to discuss his impressions of forces and events shaping the transition. He emerged with the view that events like the fall of communism vindicated the now thoroughly modernised white intellectual, political and economic elite's rejection of socialist models and that they were convinced that social relations could be reconstituted in a reformed capitalist liberal democracy. Therein they saw the path to ending the internal violence and political instability, as well as attaining political legitimacy in the international community, although he did not grasp clearly that movements such as the ANC wanted a political transition that went beyond the prevailing constitution:

"De Klerk's objectives are straightforward; he does not want to build a new society so much as extend the institutions of the existing society, including the present system of constitutional rights and a free market economy." (Fukuyama 1991:18)

One factor made it difficult to characterise the political transition as a situation where leadership elites easily reconciled ideological differences. ANC economic policy orientation was a troubling issue that had to be cleared up for those white parties willing to negotiate with it and for legitimating negotiations with the ANC,

as a likely future government. There were a mixture of signals and statements about this; on the one hand, there was evidence pointing to the dominance of the ANC by socialist or explicitly Marxist-Leninist views, but, on the other hand, there was sufficient evidence to show there was also a powerful leadership elite in the ANC which sought significant reforms within a deracialised capitalism. Frequently, socialist or Marxist-Leninist rhetoric crept into the exiled ANC's statements (Johnson 2003:209); it had an enduring alliance with the South African Communist Party entailing overlapping membership of many leading figures in both organisations and both organisations channeled members into MK (Ellis & Sechaba 1992); and, it was widely believed SACP activists wrote the ANC's the *Freedom Charter* (see Callinicos 2004:219).

The ANC's long courtship with the SACP and the support it enjoyed from the Soviet bloc, as well as reports of statements of certain leadership figures fueled views that the organisation had a socialist orientation. Russian Africanist scholar Vladimir Shubin (1999:361) claims exiled ANC Deputy President, Oliver Thambo, once addressed the Soviet Party Congress in 1971 wherein he stated the ANC had as a long term goal, after the eradication of apartheid, the building of a socialist society. Shubin (1999:361) also recalls Tambo warmed up to the SACP's Joe Slovo's suggestion that in the future the two organisations should merge into one socialist organisation. In a time of Cold War politics it was convenient for the NP to demonise the ANC as a lackey of communists. While still in prison, Nelson Mandela in 1989 clarified in a statement to NP Prime Minister PW Botha that the ANC found common purpose with communists to remove white supremacy, but was never dominated by its communists allies (Johns & Davis 1991:221), and did not share the communist ideal of a creating a utopian classless worker-controlled state (Johns & Davis 1991:126).

The ANC was formed and run by Africans emanating from urban professional middle class and petty-bourgeoisie types of professions (Lodge 1981; Bonner 1982), who lived at similarly low wage levels and endured housing shortage problems and pass law obligations as did unskilled blacks. The European petty

bourgeois is generally depicted as aspiring to upward mobility within the framework of capitalist social relations and this shapes their conservative views towards capitalism. SA's colonial setting of racial domination stunted the upward mobility of black educated, professional and petty-bourgeois blacks; they could easily experience downward mobility to the ranks of their upper-income working class brethren. Many educated blacks expressed desires to distance themselves from unskilled blacks (Bonner 1982:277). Thus, it is expected they would seek to control political organisations in order to further their interests. Nevertheless, the ANC became a multi-class alliance, its leadership had conservative as well as radical individuals or constituencies, and the latter drew the organisation closer to the struggles of black urban workers (Bonner 1982:288-9; Callinicos 1986:4-5). It was a form of black petty bourgeois radicalism with elements who sought reforms, while other elements sought to wean militant black workers away from socialist options (Bonner 1982:299-300); the radical constituency saw the potential strength of an organised black working class to oppose white rule, and at times this leadership sought to end their links with African trade unions (O'Meara 1975:153). Mandela admitted he supported sentiments to expel communists from the ANC (in Johns & Davis 1991:70-1). Karis (1984:394) argues the main statement of the ANC's post-apartheid goals, the *Freedom Charter*, "is not a Marxist document; it envisages a mildly socialist but not anti-capitalist bourgeois democracy."

Educated and petty-bourgeois blacks lived in the same squalid conditions and were subject to the same epidemics as their working class brethren, but the colonial government saw the possibility of driving a rift between these two classes through differential access to housing. Bonner (1928:286) notes the success of such a divisive strategy on the waning influence of radicalism: the needs of the educated and skilled Africans were attended to and probably explains why urban militancy subsided in 1921. Bonner (1982:203) adds that which faction of the ANC was more predominant also varied with the rhythms of the economy and its impact on class struggle. Legassick (1974:282) described the African nationalist ideology of the ANC as having a mass appeal due to

references to different aspects of African domination, but it is "devoid of explicit class analysis" and it could become the instrument of any class; it is more a tool of a black elite made up of rich peasants, petty traders, and professionals who "sought to break the 'racial' barriers to their entry into South African capitalist society".

The SACP endorsed the *Freedom Charter*, which contained clauses of an economic nature, such as:

> "The people shall share in the country's wealth! The national wealth of our country, the heritage of all South Africans shall be restored to the people; The mineral wealth beneath the soil, the banks and monopoly industries shall be transferred to the ownership of the people as a whole; All other industries and trade shall be controlled to assist the well-being of the people" (Karis, Carter & Gerhart 1977:206)

The PAC feared communists were influential in shaping the principles of the *Freedom Charter*, but, over the years, it became apparent the dominant leadership elite in the ANC had little socialist inclinations. Mandela was adamant that the document was not a socialist blueprint adding that its principles and programme would allow a black bourgeoisie to own productive capital (Hudson 1986:8; Hirsch 2005:34). At his 'Rivonia' trial in 1964 Mandela (in Johns & Davis 1991:126) stated "the realisation of the Freedom Charter would open up fresh fields for a prosperous African population of all classes, including the middle class." Mbeki (1984) defended the perceived petty bourgeois orientation in the organisation stating that the ANC never pretended to be a socialist party and none of its documents advocated mobilising a black proletariat or peasantry to spearhead an immediate socialist order.

Debate about ANC economic policies claimed it entailed nationalisation and socialist measures (Karis, Carter & Gerhart 1977:63; Hudson 1988). But the document seemed to simultaneously endorse nationalisation and "a bourgeois

democracy based on natural rights liberalism, and formal equality of opportunity for individuals" (Karis, Carter, Gerhart 1977:63) with no talk of the abolition of classes or public ownership of the means of production. Contrary to Marxist-Leninist theories of socialist transition, the document does not contain explicit directives for the elimination of private property in the means of production or socialisation of the means of property (Hudson 1988:260). The Soviet Union urged the exiled ANC to allay white South Africans' concerns about its economic policy, to soften the *Freedom Charter* and not argue for nationalisation of capitalist property, and to concede to other relevant guarantees to the bourgeoisie (Rantete 1998: 132-3). The document was drafted at a time when the British Labour Party's welfare state measures in the 1940s and 1950s entailed nationalisation of utilities, transport services and the bank of England; by the late 1980s the nationalisation clauses appeared to be an anachronism; and, by the beginning of the 1990s, leading figures in the ANC were softening the position on nationalisation (Riordan 1988:50-1, 55-6).

5.3   Negotiations, elections and an Interim Constitution

Despite conceding to a negotiated transition away from the internal political crisis and violence, the NP and its adversaries would not compromise on their respective models of democracy and means of negotiation (Kiloh 1997:313; Rantete & Giliomee 1992:517-32; Welsh 1994:81-97). Consequently, all-party talks on drafting a new constitution began in 1990 only after two years of sporadic talks. The unbanning of political leaders and organisations in February 1990 was followed by meetings to create a climate for negotiations (Haysom 1992a:28) entailing the release of political prisoners, suspension of armed struggle activities, ending state of emergency measures, and free political activity. During the parliamentary assemblies of 1990 and 1991, the NP scrapped apartheid legislation, such as, the *Reservation of Separate Amenities Act of 1953*, the *Land Acts of 1913 and 1936*, the *Group Areas Act of 1966*, the *Development Trust and Land Act*, the *Black Communities Development Act of*

1984 (Nicol 1997:17; SAIRR 1992:72, 457).

While talks between the political parties for a political transition ensued, civic associations found that in this liberalisation of the political space and the cessation of their repression they could also debate the role of civic society organisations in future local authorities and in the planning for the integration of townships and cities. However, they felt the ANC was sympathetic towards the old apartheid councillors in the townships which the civics had clashed with during the 1980s (Collinge 1991). Attacks on councillors and calls for their resignation continued while negotiations between the ANC and NP continued; between February 1990 and April 1991 404 councillors resigned because of intimidation (SAIRR 1992:490-1). Urban planners and advisors also could debate the thrust of future policies for a transition away from apartheid housing and service delivery practices (Swilling 1990; Smit & McCarthy 1990; Mabin 1991). However, when the political transition negotiations took place between the political parties, other organisations soon felt marginalised and developed the impression the talks were restricted to party elites (Friedman 1993:142-3).

After signing the National Peace Accord, the ANC and NP turned to the issue of multiparty talks. The PAC and the all-white Conservative Party chose not to participate. The ANC sought to get the support of the anti-apartheid parties which had not been participating in negotiations thus far by calling for the formation of a Patriotic Front in October 1991 (Haysom 1992:38-9). The PAC was distrustful of the negotiations. Although seventeen parties participated, the PAC saw the white parties as in a powerful position having drawn into the talks many of those parties that participated in apartheid structures such as the tricameral parliament and homeland governments (see Welsh 1984 and Gastrow 1985), while the black liberation movements would have to make compromises (Seroke 1992). The PAC preferred negotiations to be held in a Constituent Assembly that emerged after national elections.

By December 1991, negotiations reached a stage where participants in the

Convention for a Democratic South Africa (CODESA I), which was really a ceremonial gathering, could deliberate the constitutional details of a transition to a liberal democratic order to be negotiated at CODESA II in May 1992 where five Working Groups made up of delegates from the negotiating parties would do the substantive work debated at CODESA II. The negotiations used a "sufficient concensus" principle to deal with situations where full consensus could not be obtained from all parties. Observers and ANC delegates admit, this favoured the NP and the ANC --- as long as these two forces could agree on an issue this would continue to move the process forward (Friedman 1993:24, 38).

Violent clashes in townships in Natal and the Rand between supporters of the ANC and the Inkatha Freedom Party (IFP) with its ethnic base among Zulu migrant workers and hostel dwellers escalated (Kiloh 1997:314) and caused a deadlock and collapse of CODESA II. A massacre of ANC supporters by IFP supporters in June 1992 in which 43 people were murdered at the Boipatong shack settlement on the East Rand of Gauteng forced the ANC to suspend talks with the government and to embark on a mass action campaign.

The hardline positions of the two main negotiating forces also caused the collapse. Debates in Working Group Two, which worked on the principles of a new constitution and a constitution making body, best illustrate how the breakdown unfolded (see Corder 1994:498-9). Areas of disagreement included: the NP rejected a constitution drafted by a majority; the ANC wanted a constitution drafted by a constituent assembly; the NP favoured a federalist constitution while the ANC favoured a unitary system with some federalist features; disagreement on percentages required for the changing of constitutional clauses (Friedman 1993:60-85). A pertinent illustration of how divisive the percentages issue was, is seen in relation to the ANC's constitutional guidelines and its demands for the majority required to change the Bill of Rights clauses. The NP rejected the ANC's insistence on a principle of a 75 percent majority to change clauses in the Bill of Rights (Friedman 1993:77-8). This should also be seen in relation to the constitutional guidelines that it had released. One of the several socio-economic rights it demanded be included in

a Bill of Rights was an absolute view of "housing is a right" (ANC 1992:23):

> "The right to home and family.
>
> ...
>
> "The Bill of Rights should support the provision of homes, employment and utilities such as lights and water, so as to repair the damage done by apartheid and the migrant labour system, and in order to give real meaning to the right to home and family life."
> (ANC 1992:6)

ANC supporters began to see CODESA was a worthless talkshop (Friedman 1993:73, 74, 79). The parties disagreed over demands that the final constitution be drawn up by the parties at CODESA in opposition to demands that the transition occur through two stages involving an interim government followed by elections and then the drafting of a final constitution by an elected government.

The ANC and its SACP and COSATU allies opted for a mass action campaign of marches and strikes and set a series of demands before it would return to negotiations. Through most of 1992 negotiations were elusive with general concerns that the NP government was still playing a strong role in shaping the terms of the negotiations, and that the ANC, who had thus far been the dominant black negotiating organisation, was not consulting with other black organisations. Attempts were made at public forums to revive negotiations through discussions of the formation of a Constituent Assembly (some called it an All-Party Conference or a Multi-Party Conference) which would draft a constitution, and set an elections date and elections supervision measures. The ANC, PAC, AZAPO, and Democratic Party (DP) all discussed in other public forums the formation of a Constituent Assembly as a means of continuing the negotiated transition and those parties that had kept out of CODESA warmed up to the idea of new multiparty negotiations (African law review 1992). AZAPO rejected multi-party talks in favour of third party intervention by neutral countries to facilitate the transition, and it noted that new legislation on land reform entrenched the

existing property rights over 75 percent of the land. The PAC was concerned that the Constituent Assembly should be representative and formed on the basis of a one-person-one vote on a common voter's roll.

Other events in 1992 showed that party elites were desperately trying to manage militant pressures within their constituencies, to stifle the clashes between their respective constituencies, and to revive negotiations. FW de Klerk responded to signals of an increase in conservative white attitudes by holding a referendum to test the extent of white support for his reform initiatives. The referendum held on 7 March 1992 asked: "Do you support the continuation of the reform process which the state president began on 2 February 1990 and which is aimed at a new constitution through negotiation?" An overwhelming 69 percent voted "yes" (SAIRR 1993:418; Haysom 1992:42-3; Friedman 1993:40-2, 196 fn.9). The size of the "yes" vote hardened NP's negotiators attitude that they could get what they wanted and they impressed this on the ANC delegates. Later in the year, the SACP's Joe Slovo pondered about a return to negotiations and a strategy of making compromises to circumvent possible counter-revolutionary events, and to make a breakthrough towards putting in place a new democratically elected government. The comprises involved "sunset clauses" in a new constitution which guaranteed the jobs of white civil service and security forces employees. The ANC document *Negotiations, a strategic perspective* (ANC 1992a) released in November 1992, evidently adopted Slovos' strategy (Friedman 1993:161-2). The document assessed the "balance of forces" in which the NP was still a strong and disruptive force, but stressed that the ANC was now operating as a legitimate party which preferred a negotiated settlement, and, in conjunction with mass action, it could usher in a phased transition involving some compromises. International pressure also contributed to the efforts by ANC and NP elites to revive the negotiations rather than let the impasse threaten international economic interests in the country. The ANC and NP signed a Record of Understanding on 26 September 1992 opening the way for a resumption of negotiations in a Multi-Party Negotiating Forum (MPNF) in March 1993. These talks included the IFP, the PAC, and some conservative white political parties,

but AZAPO and other white right wing groups still kept out of talks (Kiloh 1997:315-316; Friedman 1993:163-6, 205 fn.23; Corder 1994:500-1). Thereafter, talks led to agreements on a transitional authority made up of the negotiating parties to oversee the activities of the prevailing government, the drafting of an Interim Constitution (IC), the setting of an election date, the setting up of an elections body to supervise the elections, the installation of a government of national unity made up of the major vote winners, the establishment of a Constitutional Court and a Judicial Service Commission (Corder 1994), while the ANC and NP co-operated to contain violence.

Parliament adopted an IC in December 1993, which outlined principles for the organisation of democratic institutions after elections at national, provincial and local government levels, and it signalled a shift of power from the legislature and executive to the judiciary. The Preamble to the IC set the tone for a transition to a new and reconciliatory political order in a constitutional state which recognised fundamental rights and promoted national unity:

> "... We the people of South Africa declare that:
> Whereas there is a need to create a new order in which all South Africans will be entitled to a common citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms;

> "... provision should be made for the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution." (RSA 1994b)

The IC included a chapter on Fundamental Rights which recognised the classical civil and political rights, and socio-economic rights too. Property rights were recognised at *s* 28, but nowhere was there the specific recognition of a right to

housing, except for the acknowledgment that housing, among other welfare services, would be matters dealt with by provincial governments (Corder 1994:520). The PAC was perturbed about the property rights because it gave constitutional protection to the colonial legacy of private land ownership before property rights lost by the colonised people of indigenous descent were first restored (Shabalala 1994:11). A party to the left of the political spectrum, the Workers' List Party (1994), held the position that acknowledging that black people now have the right to buy and sell land was meaningless since they do not have the money to buy land.

The first racially inclusive national democratic election held in April 1994 unseated the white minority brought and legitimated the state where formerly disenfranchised groups could vote on the same ballot as whites. The ANC/SACP alliance won 252 of the 400 seats in the National Assembly, the NP won 82, the IFP won 43, making them the three major parties, four other parties all had less than ten seats (SAIRR 1995: 339; Davenport 2000:568). In terms of the IC a Government of National Unity (GNU) would be formed; the ANC President, as the country's first democratically elected President, constituted a twenty seven member cabinet which included ANC, NP, and IFP members (Basson 1995:xxxii). There were changes in the portfolios on finance and economic development; NP member Derek Keyes was the first Minister of Finance and was later replaced by the ANC's Trevor Manuel; Manuel was initially Minister of Trade and Industry and was replaced by the ANC's Alec Erwin (Basson 1995:xxxii). COSATU, which had endorsed the *Freedom Charter* in 1987 and allied itself with the unbanned ANC, played a major role in drafting the policy guidelines for a new economic policy, the *Reconstruction and Development Programme* (RDP). The ANC adopted the RDP and in 1994 it was adopted by the GNU. In 1996 the GNU announced its preference for an open economy and adopted a policy called *Growth, Employment and Redistribution* (GEAR), a development which added to COSATU's criticisms of the GNU's privatisation strategy whereas it preferred a greater state role in the coordination of economic growth as was clear in the RDP (Davenport 2002:569-70, 583-4). In May of

1996, the NP announced it would withdraw from the GNU and take on the role of an opposition party, leaving the ANC and IFP in the GNU.

Although the ANC was the majority party, it did not embark upon a drastic alteration of property relations that were shaped by three centuries of colonial conquest and race domination (Marx 1997:477-8). A major political hurdle had been overcome, but the challenge to redistribute income remained. For some scholars and political actors the extension of citizenship rights via a new constitution drafted in the mid-1990s spelled one among other steps that would have an effect on addressing the legacy of black misery after a long history of white dominance (Liebenberg 1999:12-13). Marais (2001), argues that in the evolution of the political thought of the premier liberation movement, the African National Congress (ANC), there was the view that the mere seizure of state power would facilitate the easy remedying of a legacy of social and economic inequalities. He argues the *Freedom Charter* contained some formulations on the restructuring of a post-apartheid economy, but while in exile the ANC had not refined any post-apartheid economic policy. The organisation had mainly slogans, and this did not place it in a strong position to argue the structure and workings of a post-apartheid economy (Marais 2001:85, 123-124).

Opinion-makers in the press occasionally sowed suspicion about the participants in the negotiations process and conjectured about its success. For instance, they pointed to the well-known fact that members of the ANC's Communist Party ally continued to participate in its structures while the negotiations proceeded and thereby stoked up fears about communism (Ebrahim 1998:49). The ANC had assuaged NP negotiators that it had no socialist pretensions, that everyone's property would be secure after a transition, it made limited claims for land reclamation or restitution during the negotiations and after the election (Spitz & Chaskalson 2000:313; Kunnie 2000:115), and guaranteed the white civil service their tenure. In his brief encounter with developments in SA's transition, Francis Fukuyama (1991:25) correctly picked up that any drastic retributive measures imposed across the general white population may have prompted an accelerated

flight of white skills and capital, consequently impairing a modernised economy that the new political elite inherited.

Writing one year before the historic 1994 elections and presaging the undesirable implications a pact between the elites of the NP, the ANC and other negotiating parties would have on society's legacy of class and race inequalities, Neville Alexander a veteran left-wing political activist and thinker, and chairperson of the Workers' Organisation for Socialist Action (WOSA), a political organisation formed in 1990, argued the following:

> "... the "settlement" will be an elite cartel. It is an agreement between white and black middle-class and upper-class elites to govern the country along 'non-racial, democratic' lines without changing the fundamentals of the economy and society. All the apartheid laws will be repealed, thus removing skin colour as the measure of real or potential power, status and opportunity. But as money (class) becomes the main measure of 'success' and power, the millions of rural and urban poor - essentially the semi-skilled and unskilled black workers and their families - will remain where they are today. Indeed, because of the disastrous economic context in which the transition from 'apartheid' to 'democracy' is taking place, many of these people will be much worse off than they are today. ... Capitalism in South Africa will continue to reproduce class inequality essentially in the form of *racial* inequality." (Alexander 1993a:12)

Alexander's apprehensions are likely rooted in a Marxist political economy and ideological framework and, at the time, perhaps it was a premature prediction as it still remained to be seen whether the nascent framework of rights, laws and policies could produce effective reforms and thereby significantly change the social and economic legacy of apartheid. Furthermore, regardless of these gloomy predictions, the ANC demonstrated its commitment to redistribution in the social and economic policy framework of the RDP which had been

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developed with its alliance partners, trade unions and civil society groups involved in housing issues. The party maintained the document was based upon the tenets of the *Freedom Charter* and it was a framework to redress the legacy of inequalities created by apartheid policies. The ANC gave sufficient signals that its unfolding economic thinking was not influenced by any Marxist thinking: there are no such formulations in the RDP document, and, through a press interview with Nelson Mandela, soon to be the first black president, the ANC made statements to the effect that its policy could not be connected to Marxist ideology (ANC 1994; Marais 2001:95, 124). Notwithstanding, there has been a growing acceptance the transition was, an elite pact --- a compromise transition managed by adversarial elites, which does not alter significantly economic power relations or enforce economic policies in a manner that radical forces propagate (Bond 2000; Kiloh 1997:315-6; Terreblanche 2002:135). Whatever the redress and redistribution claims of the RDP policy framework, with ten year's of hindsight to his advantage, a proponent of the "revolution betrayed/elite transition argument", Patrick Bond, sums up the disappointing outcomes of the transition thus:

> "... the core concession made by the ANC during the early 1990s transition deal is apparent, namely in the desire by white businesses to escape the economic stagnation and declining profits born of a classical capitalist crisis, in the context of a sanctions-induced laager, and amplified by the 1970s-80s rise of black militancy in workplaces and communities."

> "The deal represented simply this: black nationalists got the state, while white people and corporations could remove their capital from the country, and simultaneously remain domiciled in South Africa with, thanks to economic liberalisation, still more privileges. Trade, credit, cultural and sports sanctions ended; exchange controls were lifted; luxury goods flooded in; white people's incomes rose by 15% during the late 1990s; taxes were cut dramatically; and the corporate sector pre-tax profit share soared during the late 1990s back to 1960s-era levels associated with

apartheid's heyday."

"Hence inequality soared during ANC rule, state statistics show. Black 'African' South Africans suffered an income crash of 19% from 1995-2000, with every indication of further degeneration in subsequent years." (Bond 2004a)

5.4   Drafting a Final Constitution

The Interim Constitution (IC) adopted in November 1993 (Basson 1995:xxi-iii) was to last a maximum of five years. The IC contained entrenched principles which were to be included in a new or Final Constitution (FC), the second phase of transition (Sarkin 1998:631). Parliament would serve as a Constitutional Assembly that oversaw the drafting of the FC in two years. A Constitutional Committee made up of 44 members of the Constitutional Assembly, constituted along proportional lines of the parties in the Constitutional Assembly, had to draft a Final Constitution that complied with 34 principles contained in Schedule 4 of the Interim Constitution (Corder 1994:529-33).

Soon after the political negotiations process of the late 1980s and early 1980s, the constitutional negotiations process hotted up, the different political parties began presenting their views on the contents of a new constitution, whether it should have a Bill of Rights, whether all three generations of rights should be recognised, and whether these rights should be justiciable or mere directives for state policy. Public participation through submissions in drafting the FC would ensure openness and inclusiveness in the process (Ebrahim 1998:239-50) and it cost around R31million to effect this participation where around two million letters and petitions were received (Nicol 1997:22, 28). The South African Law Commission (SALC) gathered the recommendations of the various negotiating parties on the contents of the FC and preferred form of state. The consensus was the constitution should map out a state which followed the *trias politica*

principle of separating legislative, executive and judicial powers (SALC 1991:91-4, 731-46). A Constitutional Court would certify the FC as reliably containing the entrenched principles of the IC. The IC recognised first generation (civic and political), second generation (socio-economic), and third generation (cultural) rights, and it provided the framework for negotiations for a FC (Kotze 1996:138).

Albert Sachs (1992:7-16), an ANC-aligned thinker who prolifically contributed to the debates on the type of constitution that should be developed in the negotiations process, argued a rights philosophy should inform the constitution. Diamond's (1994:49) impression of the thinking among certain leaders of South Africa's liberation struggle and many of the formerly disenfranchised was that democratisation would guarantee substantively social and economic rights, however, debates about the content of the Final Constitution suggest there was still intense thinking going on about a constitution that would have a transformatory impact. Intense debate about the inclusion of socio-economic rights preceded the writing of the Constitution; while all the other negotiating parties agreed on the inclusion of civil and political rights, the ANC's draft bill of rights included socio-economic rights. Under Article 10 of the ANC's draft bill of rights, its constitutional committee clearly demarcated "Social, educational, economic and welfare rights", but did not go as far as its preceding 'constitutional guidelines' document (ANC 1992), which stated an absolute right view on housing (ANC 1992:23). Instead, under an Article 10 subheading, "The right to shelter", the draft bill expressed the view that the State shall "embark upon and encourage an extensive programme of housebuilding" and gave attention to ending arbitrary evictions (ANC 1994a:241). The NP's proposals did not include these as fundamental rights to be included in a Bill of Rights, it saw them as "ideals" which undermine the legitimacy of such a document when elevated to the status of fundamental rights (SA Law Commission 1994:192).

The SA Law Commission compiled the Olivier Commission Report (Haysom 1992; see also SA Law Commission 1991, 1994:180-97), which summed up some of the emerging ideas on rights thinking, and concluded that the challenge

for the configuration of institutions emerging from the negotiated settlement is that, like many Third World countries, the legacy of inequalities nurtured by apartheid policies means the primary needs of the majority of SA citizens fall into the realm of second generation rights; that is, rights to the acquisition of food, housing, work, training, medical services, amongst others. Recognition of such rights, the Report maintained, is a socialist programme and demands tremendous economic sacrifice by the state (SA Law Commission 1991:110). Generally, this realm of rights places an enormous strain on the capacity of states. Consequently, the ultimate phrasing of them has stimulated debate on the meanings of the Constitution and whether or how individuals or communities could enjoy these rights. To the different sides in the debate (for instance, see Davis 1992 & Mureinik 1992), it was apparent that, a constitution matters most to the ordinary people who are its "true guardians" not the courts hence a constitution "must promise both bread and freedom" (Haysom 1992:454). The thrust of arguments in the Olivier Commission's Report about the incorporation of socio-economic rights is that they require positive state action and the efficacy of this is dependent on the state's available resources. In one of its earlier reports, the Commission concluded that the future bill of rights should not contain socio-economic rights (Haysom 1992:456); it reported:

> "The solution suggested by the Commission ... [it] avoids any attempt to make these rights justiciable and enforceable in a positive way ... the Constitution may make it very difficult for any future government to govern and to meet expectations if it lacks the necessary means." (SA Law Commission 1991:112)

Sachs (1990:8) and Liebenberg (1998:41-1) concur that the Constitution's planners and architects sought to harmonise or present the three realms of rights (civic, political, social and economic) as interrelated or holistic. The outcome of the debates and the negotiations was the inclusion of socio-economic rights as justiciable rights. In contrast to its earlier report, the SA Law Commission later recommended the inclusion of such rights, noting again that there are expenses involved, but stated further such rights are "usually limited or restricted in the

application by "internal modifiers" and in any event by the general limitation clause." (SA Law Commission 1994:195) The Final Constitution adopted by the Constitutional Assembly on 8 May 1996 (an amended text was passed on 11 October and signed by President Mandela in Sharpeville on 10 December) is deemed to be unique because it includes socio-economic rights as justiciable rights, a crucial factor in legitimising the Constitution while simultaneously not promising too much, and the poor may claim these rights so as to improve their living conditions (Gutto 2001:252; Heyns & Brand 1999:2-4; Liebenberg & Pillay 2000:374). For Hogan (2001:7), when compared to the parsimonious statement of such rights in the European Union's Charter of Fundamental Rights, the explicit inclusion of these rights makes the Constitution "avant garde". Heyns and Brand (1999:1, 2) say:

> "The new South African Constitution provides arguably the most sophisticated and comprehensive system for the protection of socio-economic rights of all constitutions in the world today. ..."

> "...the effect which the inclusion of socio-economic rights could have on the legitimacy of the Constitution. Those who argued in favour of a significant role for these rights pointed out that it makes little sense to tell people that their civil and political rights will be protected, if they continue to be at the mercy of the elements of social exploitation. ... the legitimacy of the Constitution would suffer..."

If socio-economic rights had been incorporated in a preamble to the Bill of Rights, they would have been merely symbolic "directives of social policy", and not "justiciable"; by being justiciable it means parties who feel that this right has been violated may resort to the courts for their realisation, as becomes the situation with their placement in the Bill of Rights (Parsons 1994:140). As directives of social policy they become part of the general goals that government and parliament strives for in its policymaking, and hence with less of an obligation on the state as things are in the case of their being justiciable.

Law scholar, Heinz Klug (2000) says, in a "post-socialist" and "post-authoritarian" world, South Africa followed a global trend of faith in constitutions with bills of rights to protect human rights, to maintain the "rule of law", and place faith in the judicial branch of government. Klug (2000:5-6) observes most studies of political transitions give attention to the phenomenon of elite-pacting in the negotiations phase and not enough attention is given to the role of law in the democratisation process. This constitutionalism trend, besides recognising liberal rights like individual and property rights, also incorporates socio-economic rights in the new constitutions, which is in tension with the neo-liberal economic policies emanating from the Washington Consensus (Klug 2000:23-4).

5.5   Conclusion

Black struggle against white minority rule and the resulting misery progressed from forms of protest to armed struggle, and was always met with repression. Nevertheless, the ANC always kept alive an option for a negotiated settlement with the white minority government. The eventual negotiated settlement and transition was conducted through different phases, namely: setting the climate for negotiations; negotiations for a transitional government, an Interim Constitution, and elections; elections which would deliver a Constituent Assembly tasked with drafting a new or Final Constitution which a Constitutional Court would confirm; elections that would also make possible a government of national unity comprising the major winners in the elections and that would last for five years; thereafter, in a new order of a rights based constitutional state, significant social change or reforms could be achieved to redress the legacy of misery created by apartheid policies. A crucial aspect of the legitimation of the new constitutional order is the place granted to socio-economic rights as justiciable rights which citizens could approach the courts to protect or assist them in realising whenever they needed.