From Apartheid to Democracy in South Africa

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I. Introduction and Historical Background

South Africa's transition to democracy in the early 1990s can be described as a complex transition. It was not only a transition from a dictatorship and an oppressive regime to a democratic dispensation. It was, first and foremost, a transition from apartheid (a deeply entrenched system of racial oppression) to a democratic system based on universal rights, the rule of law, and freedom. It was also a transition which was, in a sense, South Africa's long overdue joining of the process of decolonisation that began several decades earlier for the rest of the African continent. On top of that, the transition also coincided with the end of the Cold War and the fall of the Berlin Wall, thus prompting a repositioning of the liberation movements, notably the African National Congress (ANC) and its alliance partners, the South African Communist Party (SACP) and the Congress of South African Trade Unions (COSATU). In short, the end of apartheid brought not only democracy to South Africa, it also required this new democracy to find its place in a fast-changing international dispensation that was no longer a somewhat simple binary of "East" and "West".[1]

It is perhaps because of the fact that South Africa managed a relatively peaceful transition, in a complex world in flux, and with little outside assistance, that the South African transitional model is still celebrated internationally, even while there is growing domestic (and international) scepticism about the viability and integrity of this transition and the fledgling "New" South Africa.[2] There was also the remarkable contrast between South Africa's year of liberation, 1994, when the country's first democratic elections were held and Nelson Mandela was sworn in as the country's first Black president, and fellow African country Rwanda, which was almost destroyed by a horrific genocide in the same year (and month) of South Africa's celebrated first democratic elections.

The complexities of South Africa's transition must also be analysed against the backdrop of the internal debates in the broader anti-apartheid movement (and the

[1] *Peter Bouckaert*, "The negotiated revolution: South Africa's transition to a multiracial democracy" (1997), Stanford Journal of International Law 375, pp. 378–380.

[2] For a critical assessment, see: *Heinz Klug*, "Decolonisation, compensation and constitutionalism: Land, wealth and the sustainability of constitutionalism in post-apartheid South Africa" (2018), South African Journal on Human Rights, pp. 469–491.

ANC in particular) regarding the various peace and justice options that would bring a formal end to apartheid and help usher in the new democratic order. While the address by F. W. de Klerk, apartheid South Africa's last president, to the "tricameral" parliament on 2 February 1990 constituted a dramatic moment, the end of apartheid was at that stage a long time coming. This is not to say that De Klerk's speech on that day was not a hugely symbolic and practical matter that would grab the attention of the world, energise domestic political forces, and help to cement De Klerk's personal role as an indispensable negotiating partner and architect of the new post-apartheid order. Together with Nelson Mandela, the undisputed moral and political leader of the liberation struggle, De Klerk would later receive the Nobel Peace Prize for his efforts, but in his twilight years the last apartheid president largely destroyed his transitional legacy by questioning the status of apartheid as a crime against humanity.[3] But South Africa's transition from apartheid to democracy was not primarily driven by personalities, even if one might want to think of the transition story as that of the major *dramatis personae* such as Mandela, De Klerk and others. In reality, the transition was a political process directed and facilitated by the liberation movements, the National Party (NP) government, the military- and state security clusters, civil society, the religious groups, academics, and the business community. The political processes were guided by legal understandings, agreements, and frameworks that would ultimately result in a democratic constitution with a justiciable Bill of Rights.

South Africa, a nation state formed from four British colonies in 1910 as one of the so-called "white dominions" (the other being Canada, Australia, and New Zealand) missed all the opportunities to follow the route of decolonisation and democratization. The white minority rulers of the Union of South Africa (1910 to 1961) and later the Republic of South Africa (since 1961) essentially transformed the settler-colonial entities that existed since 1652 in the geographical area now known as South Africa into a state founded on white minority rule and entrenched and systemic racism.[4] This culminated in the system of apartheid which became official government policy after the election victory of the NP in 1948. The NP would govern South Africa in the face of increasing domestic and international opposition to apartheid, until the first democratic election of 1994, when it lost decisively to the ANC. The latter has governed democratic South Africa ever since.

It is important to understand that apartheid was not an autocratic derivative from other autocratic and totalitarian racist movements in Europe and elsewhere. It was an autocratic and criminal system in its own right.[5] Apartheid certainly shared many of the segregationist features of the American South, and there were indeed superficial

[3] De Klerk later apologised for his questioning of apartheid's status as a crime against humanity, but the damage to his reputation was done. For a report, see: https://www.bbc.co.uk/news/world-africa-51532829, last visit 05. 06. 2022.

[4] For an historical overview, see: *Rodney Davenport/Christopher Saunders*, South Africa – A modern history (2000), pp. 233 – 424.

[5] *Stephen Skinner* (ed.), Ideology and criminal law – Fascist, national socialist and authoritarian regimes (2019), pp. 125 – 143.

similarities between the race laws of Nazi Germany and apartheid South Africa. In order to understand apartheid, it is necessary to view it first and foremost as a home-grown settler-colonial system with deep socio-cultural, political, and even theological roots, premised on an ideology of white supremacy and with the aim to dominate all non-white inhabitants of South Africa and, for a time, also Namibia. Racism and white supremacist movements are, of course, not unique to South Africa, but the systemic, law-based, and entrenched nature of apartheid prompted international condemnation that intensified as the apartheid state became increasingly violent in its oppression of any resistance to the apartheid policies. The international condemnation[6] concretised in the adoption of the Apartheid Convention in 1973. This Convention is not only a political statement; it is indeed a clear declaration that apartheid is a crime against humanity, punishable under international law.[7] The Convention never resulted in any criminal prosecutions, though.[8] The Truth and Reconciliation Commission (TRC) that was created as part of the transition, recognised apartheid as a crime against humanity.[9] It would only be in 2021 that individuals were for the first time indicted in South Africa for the crime against humanity of apartheid.

The transition from apartheid to democracy must be understood as more than just a change in political culture from autocracy to democracy; the transition was (and in many ways continues to be) a dismantling of the system of settler-colonial oppression that culminated in apartheid. It is against this background, then, that the sequencing and complexities of South Africa's transition to democracy will now be discussed in more detail, starting with the domestic and international efforts to end apartheid and to negotiate the framework for a new, democratic dispensation.

In 1983 a constitution was adopted under the leadership of then President PW Botha.[10] It replaced the republican constitution of 1961 and was supposed to be a "reform constitution". In reality, the 1983 constitution, which provided for a tricameral parliament, with legislative chambers for white, coloured, and Indian South Africans (but not for black South Africans, the majority of the population) did nothing to move the country towards greater democracy. Rather, it sent the clear signal to black South Africans that they were not regarded as full citizens, and even coloured and Indian citizens were still marginalised and without the same rights as their white compatriots. As a result, the domestic opposition to apartheid took on a new form with the establishment of the United Democratic Front (UDF) in 1983, an umbrella movement

[6] Various declarations by the UN General Assembly and the UN Security Council. For an overview, see: *Carola Lingaas*, The concept of race in international law (2020), pp. 146–152.

[7] Article 1 of the International Convention of the Suppression and Punishment of the Crime of Apartheid, UN General Assembly, 1973. For analysis, see: *Lingaas*, The concept of race (supra), pp. 153–160.

[8] *Christopher Gevers*, "Prosecuting the crime against humanity of apartheid: Never, again" (2018), African Yearbook on International Humanitarian Law, pp. 25–49.

[9] TRC Report, Appendix to Vol. I, Chapter 4, para 1.

[10] For background, see: *Gretchen Carpenter*, "Republic of South Africa Constitution Act 110 of 1983" (1983), South African Yearbook of International Law, pp. 96–104.

consisting of several hundred civic organisations, trade unions, student organisations, churches and other religious groups.[11] While the ANC and the other liberation movements such as the Pan Africanist Congress (PAC) were fighting apartheid from their positions in exile, the domestic resistance prompted the government of PW Botha to declare a series of national states of emergency.[12] The apartheid state was now a securocratic police state with power concentrated in the hands of the president and a few ministers and bureaucrats in the so-called "security cluster". The security state's response to the increased domestic opposition against apartheid, led by the UDF, resulted in an increase in human rights violations and a systematic curtailment of what was left of the rule of law in South Africa. Detention without trial, kidnappings, torture, and extrajudicial killings became a feature of the apartheid state's response to the mass democratic movement. The incidences of gross human rights violations were later recorded in the reports of the TRC.

The 1980s, then, saw high levels of domestic violence and opposition to apartheid policies and increased international isolation. The apartheid state faced an existential crisis. By 1989, with the President Botha in ill health and the country facing a financial crisis, the end of the Cold War and the election of a new leader of the NP in the person of F. W. de Klerk, seemed like an opportune window for a political settlement of sorts. In reality, there have been some clandestine talks between the apartheid government and the main liberation movement, the ANC in exile, a few years before the dramatic speech by President De Klerk on 2 February 1990[13] when the ANC and the other liberation movements were unbanned, and that marked the beginning of the process that led to the democratic dispensation. The secretive talks between apartheid officials and members of the ANC coincided with public outreaches of academics, student organisations, and other influential Afrikaner establishment figures to the ANC in exile. A high-profile meeting in 1987 in Dakar, Senegal, between senior members of the ANC and a group of mainly Afrikaner and establishment academics, writers, and other opinion makers was ostensibly criticised yet tolerated by the apartheid government. The purpose of the meeting was to explore mutual strategies for political, social and economic change in South Africa. An important outcome of this meeting was the mutual understanding that there had to be a negotiated resolution of the liberation struggle. Many commentators regarded this meeting as a significant breakthrough, not only in symbolic terms, but indeed in terms of practical politics. It would, however, take a few more years (culminating in De Klerk's speech of February 1990) before substantive negotiations started.[14]

[11] For more background, see: https://www.sahistory.org.za/article/united-democratic-front-udf, last visit 05. 06. 2022.

[12] *Graham Dyson*, "South Africa: The state of emergency" (1985), 3 Mennesker og Rettigheter, pp. 30–34.

[13] For context and analysis, see: https://theconversation.com/fw-de-klerk-made-a-speech-31-years-ago-that-ended-apartheid-why-he-did-it-130803, last visit 05. 06. 2022.

[14] For background, see: https://www.sahistory.org.za/dated-event/dr-federik-van-zyl-slabbert-leads-delegation-meet-anc, last visit 05. 06. 2022.

The opening up of tentative channels for negotiation between the apartheid government and the liberation movements in the late 1980s caused the ANC to consider its options in terms of the best way forward in dealing with the apartheid state, the negotiation process, and the need for justice and redress in the post-apartheid dispensation. The starting point for the ANC has been the Freedom Charter, adopted at the historic Congress of the People in 1955. The democratic and transformative significance of the Freedom Charter were described by Nelson Mandela, as follows:

> "For the first time in the history of our country the democratic forces, irrespective of race, ideological conviction, party affiliation or religious belief, have renounced and discarded racialism in all its ramifications, clearly defined their aims and objects and united in a common programme of action. The Charter is more than a mere list of demands for democratic reforms. It is a revolutionary document precisely because the changes it envisages cannot be won without breaking up the economic and social political set-up of present South Africa … Whilst the Charter proclaims democratic changes of a far-reaching nature, it is by no means a blueprint for a socialist state but a programme of the unification of various classes and groupings amongst the people on a democratic basis … Its declaration, 'The People Shall Govern!' visualises the transfer of power not to any single social class but to all the people of this country, be they workers, peasants, professional, or petty-bourgeoisie."[15]

Throughout the struggle against apartheid, the Freedom Charter remained a guiding framework, but as Mandela acknowledged in the above quote, it was not a blueprint, but rather an enabling guide for the dismantling of the oppressive state, and then onwards toward freedom and equality for all South Africans. The legal-technical complexities regarding the drafting of a new post-apartheid constitution would come later, but first some fundamental questions concerning the nature and prerequisites for negotiating with the apartheid government had to be settled by the ANC in their internal debates about the way forward. Underlying the question of how best to take advantage of an opportunity to find a negotiated settlement that would give meaning to the aspirations reflected in the Freedom Charter, was the fact that the situation in South Africa was not a conflict between equals; it was not a war that could be settled by a peace treaty and then life could go on. There was a violent conflict, of course, but it was a conflict brought about by the struggle against an oppressive system.[16] Thus, any agreement that would focus only on the restoration of peace, without a reckoning with the past, would not be acceptable. In short, peace without justice was a non-starter for senior ANC leaders. For their part, the apartheid government, the military and security establishment, and the NP leaders were concerned about any reprisals or Nuremberg-style trials of apartheid leaders. There were also concerns about minority (read: *white* minority) rights and interests, notably language, cultural, and property rights. None of these concerns were removed by De Klerk's speech; indeed, the political energy released by the speech and its implications only accentuated the vast differences between

[15] *Nelson Mandela*, quoted in: Ismail Vadi, The Congress of the People and Freedom Charter – A People's History (2015), pp. 145–146.

[16] *Kader Asmal/Louise Asmal/Ronald Suresh Roberts*, Reconciliation through Truth – A reckoning of apartheid's criminal governance (1997), pp. 41–45.

the various factions, political formations, and racial groups in South Africa. It would take sustained political commitment, leadership, and the South African population's hunger for peace, justice, and progress to enable the negotiations of 1990 to 1993 and the adoption of the Interim Constitution. The same factors were again put to the test in the years of transition and transformation that followed the first democratic elections that were held in terms of the interim constitution in 1994. In this sense it can be said that the transformative spirit of the Freedom Charter lives on in the political, socio-economic, legal, and constitutional discourses of present-day South Africa; the post-apartheid democracy that is still dealing with the legacies of the past.

No options for ending apartheid, dealing with the past, and moving the country towards democracy were obvious or easy in the years of negotiations between 1990 and 1993. Given the criminality of apartheid and the gross human rights violations that were committed in the course of the apartheid state's suppression of opposition to the apartheid system, accountability was a key issue for the ANC. Initially, the idea was that criminal trials according to the Nuremberg model would be the appropriate way to deal with apartheid criminals. However, by 1992 ANC policy documents no longer mentioned any criminal trials for apartheid leaders. The ANC position changed to accountability based on five principles: historical discovery of the past, public dialogue on the best way to discover the past, the possibility of amnesty (except for crimes against humanity), the exclusion of torturers and apartheid murderers from employment in the civil service, and, reparations for the victims of apartheid and their families.[17]

II. The Chronology and Main Features of the Political Negotiations Between 1990 and 1993

It was noted that F. W. de Klerk's speech on 2 February 1990 should not be considered as a cataclysmic event, but rather as a dramatic public culmination of processes and dynamics that started in the late 1980s. While De Klerk's speech can certainly be marked as a milestone in the politics of transition, it was by no means the beginning. What follows is a brief chronology and overview of the processes that led to the adoption of the interim constitution of 1993 in terms of which South Africa's first democratic elections were held. Those same elections in 1994 produced the Constitutional Assembly that drafted the "final" constitution of 1996, which is in operation to this day.

1. The Pre-1990 Processes and Initiatives

De Klerk's February 1990 speech was the culmination of the informal processes and initiatives mentioned above. It also occurred against the backdrop of a more fa-

[17] *Luc Huyse*, Alles gaat voorbij, behalve het verleden (2006), p. 140.

vourable geopolitical context. Indeed, insider accounts of the events leading up to 2 February 1990 confirmed that the apartheid government was in contact with certain foreign governments to alert them to the steps that were announced by De Klerk in his speech (notably the unbanning of the liberation movements and the release of prominent political prisoners, including Nelson Mandela). The most important outcomes of the pre-1990 informal processes were extensive discussions around three key aspects: negotiation, settlement, and compromise. While all of the pre-1990 discussions and outreaches concerned some or other concrete political, socio-economic, and cultural topics, the main benefit of these processes was the creation of a climate of mutual trust between erstwhile enemies. After all, the liberation movements were at that stage still banned and in exile and technically locked in an armed struggle with the apartheid state. It was also an important pre-liminary process to identify the main leaders who would ultimately partake in more formal discussions and negotiations.[18]

2. The 2 February 1990 Speech and the Start of official Negotiations

The unbanning of the liberation movements and the release from prison of their leaders paved the way for official negotiations between the various political formations and the apartheid government to start. The first milestone was the Groote Schuur Summit in Cape Town in May 1990. The Groote Schuur Summit was followed by the Pretoria Summit in August 1990. These summits led to the crucial National Peace Accord of 14 September 1991. The various summits and mini-summits were held amidst ongoing tensions and sporadic political violence in the country. Nevertheless, by December 1991 enough progress was made for the first official multiparty Congress for a Democratic South Africa (CODESA I) to be held. This important event was attended by 19 political groups and governments (the apartheid government and the governments of the so-called "independent homelands"). Some parties on the right and the left did not attend, notably the Conservative Party (CP) and the PAC. Four working groups were established at CODESA I, namely:

- Working Group I: responsible for the creation of a climate for free political participation and for international engagement.
- Working Group II: facilitation and generation of proposals concerning general constitutional principles as well as a constitution writing structure and process.
- Working Group III: provincial arrangement and an interim government.
- Working Group IV: the future of the "independent homelands".
- Working Group V: timetables and implementation of decisions taken at CODESA.

It should be kept in mind that while progress was made at CODESA, South Africa was still governed by a white minority government supported by the dominant white

[18] *Willem de Klerk*, "The process of political negotiation: 1990 – 1993" in: Bertus de Villiers (ed.), Birth of a Constitution (1994), pp. 1 – 2.

chamber of the Tricameral Parliament. There was growing opposition from the white rightwing and the CP was actively opposing the negotiation process. In a political gamble that paid off handily, F. W. de Klerk called the right's bluff with a referendum for white voters that was held on 17 March 1992. Voters were asked to answer the following question with a "Yes" or "No": "*Do you support continuation of the reform process which the State President began on February 2, 1990 and which is aimed at a new constitution through negotiation?*" The pro-negotiation "Yes" won the referendum with more than 65 percent of the vote.[19] De Klerk took this as a mandate for further negotiations with the liberation movements and the other parties at CODESA.

3. The Referendum's Aftermath

The referendum result was a big relief for the ANC, the NP and the other pro-negotiation parties, but there was a growing gulf between the negotiating positions of the ANC and the NP/apartheid government. While the ANC was still guided by the fundamental principles contained in the Freedom Charter, the NP was growing increasingly concerned about four issues in particular: (i) the risk of "domination" and "abuse of power" by a simple majority form of government; (ii) the need for maximum devolution of power as a mechanism to dilute the risk of "tyranny of the majority"; (iii) the need for a "phased approach" during the transition, coupled with the abolishment of unrealistic time scales; and, (iv) the need to entrench the foundational principles of the final constitution already in the interim constitution.[20] The ANC was naturally not willing to cede too much ground, and accused the NP of negotiating in bad faith with a view to entrench minority power at the expense of true democratic reform and majority rule. The ANC consequently threatened to withdraw from the negotiating process and CODESA II, which started on 16 May 1992, seemed to be in serious trouble. Mass protests by the ANC and its alliance partners ensued in the period June to August 1992. A real crisis moment occurred on 17 June 1992 as a result of the Boipatong massacre when 38 people were killed in the township south of Johannesburg. It was widely believed that the apartheid government was complicit in the killings.[21] The growing lack of trust between the ANC and the NP/apartheid government, the sense that the government lost control, and the NP's perception that the ANC was only interested in taking over power, brought CODESA II and the negotiating process to a crisis moment. Under international pressure, and with the help of behind-the-scenes discussions, talks between the ANC and

[19] For more detail, see: *A. Strauss*, "The 1992 Referendum in South Africa" (1993), The Journal of Modern African Studies 31(2), pp. 339–360; and here: https://www.sahistory.org.za/article/1992-whites-only-referendum-or-against-negotiated-constitution, last visit 08.08.2022.

[20] *De Klerk*, in: Birth of a Constitution (supra) 7.

[21] For background and analysis, see: *James Simpson*, "Boipatong: The politic of a massacre and the South African transition" (2012), Journal of Southern African Studies, 38(3), pp. 623–647.

the NP/apartheid government resumed. This led to the "Record of Understanding" which was adopted on 26 September 1992. A key outcome of this was that Nelson Mandela and F. W. de Klerk had agreed publicly on the need for a democratically elected body to draft and adopt the "final" constitution. The constitution drafting body would be bound by agreed constitutional principles, would work within a fixed timeframe, and would operate democratically and with deadlock-breaking mechanisms. For the transitional period, there would be an interim government of national unity and other transitional structures.[22]

4. The Multi-Party Negotiating Process

The Record of Understanding helped to restart the negotiating process, but it was not quite "CODESA III". In March 1993 a multi-party conference was held at the World Trade Centre in Kempton Park, near Johannesburg. The meeting was more inclusive compared to either CODESA I or II. Importantly, the main rghtwing party, the CP, was now part of the process. On the left, the PAC also decided to partake. The formalisation of the restarted negotiating process became known as the Multi-Party Negotiating Process (MPNP). Although the proceeds of the two CODESA processes served as a basis for the negotiations at the MPNP, the consolidated CODESA report had no formal status at the MPNP and the emphasis was really on the dynamics between the ANC and the NP/apartheid government. An early crisis for the MPNP came when Chris Hani, the popular leader of the South African Communist Party (SACP), was assassinated on 10 April 1993 by a rightwing Polish immigrant. The country was on the brink, but largely due to cool heads within the ANC leadership the country as a whole was guided through the crisis and the focus remained on the goal of finding a negotiated constitutional framework for a democratic South Africa. Crucially, progress was made towards a decision on a date for South Africa's first democratic elections (which would also serve as an election for the constitutional assembly, tasked with the drafting of the final constitution). This is not to say that everything was going smoothly in the period immediately following the averted crisis due to the assassination of Chris Hani. On the right, a group of generals joined forces with a group of conservative Afrikaners to form the Afrikaner Volksfront (AVF). This group wanted all negotiations stopped till violence in the country was under control, a goal that was neither feasible nor realistic. The MPNP's Negotiating Council in the meantime reported some progress which turned out to be a decisive and disciplining milestone. On 7 May 1993 the Council adopted a Declaration of Intent, stating that South Africa's first democratic elections had to be held no later than 30 April 1994. Later, on 1 June 1993, the Council finally agreed that the elections would be held on 27 April 1994. The fixed date of the elections brought a sense of urgency to adopt the necessary laws and constitutional framework in terms of which the election would be held. There was also a need for clear transitional mech-

[22] *Richard Spitz/Matthew Chaskalson*, The politics of transition – A hidden history of South Africa's negotiated settlement (2000), p. 30.

anisms. The picture became clearer with some key agreements between the ANC and the NP/apartheid government:

- The elections on 27 April 1994 would be according to a system of proportional representation.
- The MPNP decision on the powers and functions of provinces would be binding on the Constitutional Assembly (to be elected on 27 April 1994).
- A demarcation commission would determine the provincial boundaries for the purpose of the elections and for the interim phase.
- A legislative framework for the creation of a Transitional Executive Council, an Independent Electoral Commission, and an Independent Media Commission would be recommended by the MPNP and adopted by the tricameral (apartheid) parliament.
- MPNP negotiators would agree on a list of apartheid-era legislation to be repealed as a priority before the elections of 27 April 1994.

In July 1993 intensive work started on the drafting of the interim constitution and the transitional package. The Negotiating Council produced a first draft of the interim constitution by 26 July and by 7 August a draft Transitional Executive Council Bill was produced. The Transitional Executive Council would become the de facto government of South Africa for the transitional period and till after the first elections. By December 1993 South Africa had a transitional government in the form of the Transitional Executive Council (TEC). The main task of the TEC was to create conditions on the ground conducive to free and fair elections, and to guide the country through the transition. There was one delicate issue that could pose a significant risk to the transition: the large number of apartheid-era public and security officials who would be in a position to make or break the functioning of the state during the transition. An agreement was therefore reached between the ANC and the NP/apartheid government in terms of which security of tenure was provided for the public and security services. This brought a sense of calm and stability. In addition, agreement was reached that the interim constitution would provide for eleven official languages (including Afrikaans), thus mollifying the nervous Afrikaner minority that their cultural rights would be respected.

By 17 November 1993 the MPNP was in a position to consider the final draft of the interim constitution. The draft text was supplemented by a "six-pack" deal between Mandela and De Klerk. This last-minute deal proved to be crucial in clinching the political deal on the interim constitution. The six components of the deal were the following:

- The NP no longer insisted on a veto power in the cabinet of the government of national unity.
- The government of national unity would last for five years.

- A single ballot paper would be used in the first democratic elections that were to be held on 27 April 1994.
- The Constitutional assembly (elected on 27 April 1994) would be able to adopt the final constitution by a 60 percent majority (this was a compromise between the ANC's initial proposal for a deadlock-breaking mechanism of a simple majority and the NP's position that a threshold higher than 60 percent would be needed for deadlock breaking).
- Provisions in the final constitution relating to the boundaries, powers, and functions of provinces, and any subsequent amendments to. such provisions, would require the approval of the upper house (the senate), by a two-thirds majority.
- Provinces would be empowered to adopt provincial constitutions, subject to compliance with the agreed constitutional principles, the national constitution, and certification by the Constitutional Court.[23]

5. Adoption of an Interim Constitution

On 17 November 1993, a plenary of the MPNP adopted the text of the interim constitution. This text was given legal status as an act of parliament. The interim constitution was thus adopted as Act 200 of 1993 and was signed into law by President De Klerk on 28 January 1994.[24] The fact that the last apartheid parliament adopted South Africa's first non-racial, democratic constitution underscored the fact that South Africa's transition was, indeed, a negotiated constitutional revolution. The adoption of the interim constitution paved the way for the first democratic elections on 27 April 1994. South Africa would be governed in terms of the interim constitution till the drafting and adoption of the final constitution, however that process would not be done by an unelected MPNP, but rather by the democratically elected Constitutional Assembly.

III. The Role of the Transitional Executive Council

One of the remarkable features of South Africa's transition from apartheid to democracy, was how power gradually slipped away from the NP/apartheid government without causing too much alarm among the white voters, the military/security cluster and the reactionary far right. At the same time, meaningful power sharing, even during the negotiation and early transition phase, gave the process legitimacy. For the

[23] *De Klerk*, in: Birth of a Constitution (supra), pp. 8–11.

[24] For an overview of the MPNP leading up to the adoption of the interim constitution, see: *Spitz/Chaskalson*, Politics of Transition (supra), pp. 34–44; *De Klerk*, in: Birth of a Constitution (supra) 8–11. See also: *Heinz Klug*, The Constitution of South Africa – A contextual analysis (2010), pp. 29–33.

first time, black South Africans not only had a real voice in the halls of power, but also real input and governing responsibility. The Transitional Executive Council (TEC) was therefore a crucial aspect of the transition.[25]

The idea of a TEC was mooted at CODESA II in 1992 and was later ratified by the MPNP. The legal basis for the TEC was the Transitional Executive Council Act 151 of 1993. The first meeting of the TEC was held in December 1993. The TEC's essential task was to prepare South Africa for the first democratic elections that were due in April 1994.[26] The TEC was assisted by seven sub-councils, which had responsibilities for the following areas:

- Regional and local government and traditional authorities
- Law and order
- Stability and security
- Defence
- Finance
- Foreign affairs
- Status of women
- Intelligence

It is important to keep in mind that the TEC did not replace the government of the day; it did not operate as a shadow government but rather as a complementary structure with very specific aims. There were, of course, significant potential hurdles, especially given the fact that the TEC relied on the apartheid bureaucracy to achieve its goals. It is easy to imagine an obstructive bureaucracy hindering the work of the TEC towards a free and fair election. To assist the TEC in providing oversight and guidance in the eight specific areas and in terms of the general task of preparing South Africa for free and fair elections, the TEC Act, 1993, provided that a member of TEC or one of the sub-councils could require access to government information or documents, as long as it could be shown that the request was linked to the overarching goals of TEC or one of the specific areas outlined above.[27]

The number of TEC members were not predetermined since the composition of the TEC depended on the participating political parties and governments that have committed themselves to the aims and objectives of the TEC. All participants also had to renounce violence as a means of achieving political aims. The TEC appointed the members of the sub-councils. Since the main task of the TEC was to prepare South Africa for the first democratic elections, a Special Electoral Court[28] was cre-

[25] For an overview, see: *Jan Heunis*, "The Transitional Executive Council", in: Bertus de Villiers (ed.), Birth of a Constitution (1994), pp. 20–28.

[26] Section 3, Transitional Executive Council Act 151 of 1993.

[27] Section 22, Transitional Executive Council Act 151 of 1993.

[28] Independent Electoral Commission Act 150 of 1993.

ated to deal with any disputes involving the TEC or a sub-council and any political party, organisation or government.

Apartheid, as a racist and oppressive system, had a particularly detrimental impact on black women. The transition to democracy therefore also required a gender perspective and work to address the needs of women, specifically black and rural women. The work of the sub-council on the status of women was tasked to deal with these issues.[29]

The TEC played an important function in the transition from apartheid, through the negotiation process towards the first democratic elections in 1994. It was obviously not perfect and received criticism from all quarters. The purpose of the TEC was described by the then Minister of Constitutional Development, as follows:

> "The concept of the TEC acknowledges the need for constitutional continuity. In essence this means that another system will ultimately have to be substituted for the present constitutional system by Parliament, but that the present executive, legislative and judicial authorities will have to remain in force until that juncture. In the interim there is a need for multiparty structures to facilitate the process of transition from the old dispensation to the new and to ensure that the substance of the new dispensation and the process that is utilized to establish it will be generally acceptable. It is precisely in regard to this process that the TEC must play an essential role. In other words, it will be able to provide the transitional process with the necessary acceptability and legitimacy."[30]

Looking back, one can see that the TEC was more than just a technocratic solution to the problem of continuity in transitional contexts. The TEC played a crucial role to guide South Africa towards the first democratic elections. A failure in this crucial phase of the transition would have had catastrophic consequences for the democratic project and could very well have plunged the country into serious instability or, worse, civil war. That did not happen, and on 27 April 1994 the world was able to witness how South Africans of all races and genders participated in peaceful elections. The scene was set for the next phase of the transition to full democracy and for the transformation of the post-apartheid society.

IV. Democratic Elections and the Constitutional Assembly

The elections of 27 April 1994 produced South Africa's first democratic parliament, consisting of two chambers – the National Assembly and the Senate. The two chambers also functioned jointly as the Constitutional Assembly that was tasked to draft the "final" constitution within a period of two years. The Constitutional Assembly did not have complete freedom, but was rather bound by the constitutional

[29] Section 19, Transitional Executive Council Act 151 of 1993.

[30] Minister of Constitutional Development response in parliament, *Hansard*, Monday 20 September 1993 col 13219.

principles annexed to the interim constitution. There were 34 principles. The significance of these principles can be summarised as follows:

- As mentioned, the Constitutional Assembly was bound by the principles.
- During the drafting process for the final constitution, any provision could be referred to the Constitutional Court at the request of one-third of the members of the Constitutional Assembly to ascertain whether the provision in question complied with the constitutional principles.
- The Constitutional Court had to certify that the final constitution was in compliance with the constitutional principles before the final constitution could become operational.
- If provinces adopted provincial constitutions, they would also have to comply with the constitutional principles.
- No amendment aimed at qualifying, limiting, or reducing the binding nature of the constitutional principles in the constitution drafting process would be permissible.

It is not necessary to reproduce the full text of all 34 principles here, suffice to note the essential content of the principles by way of themes. The *first theme* related to the sovereignty of the constitution; of post-apartheid South Africa as a democracy that adheres to the rule of law and the *rechtstaat* idea. Flowing from this theme is the notion that the new South Africa would acknowledge the role of the courts, especially the Constitutional Court, as guardians of the constitutional order. The *second theme* relates to the nature of the post-apartheid state as a democracy based on the separation of powers, with an executive, legislative, and judicial branch. The independence of the judiciary must be guaranteed. The *third theme* concerned the nature of the post-apartheid state as a democracy with representative and responsible government which must be established through general elections on the basis of proportional representation with minority parties guaranteed effective participation and with special majorities required for specific matters (such as the adoption of constitutional amendments). The *fourth theme* concerned arguably the most important aspect of South Africa's transition from an oppressive apartheid state to a democracy based on respect for and advancement of human rights. This theme required any final constitution to contain a bill of fundamental rights and that language and cultural diversity would also specifically be recognised and acknowledged. The *fifth theme* related to the three levels of government, namely national, provincial, and local. *Theme six* required there to be a constitutionally defined fiscal relationship between the three levels of government, with the Financial and Fiscal Commission being responsible for the making of allocations between the various levels. *Theme seven* stipulated that the independence of the Commission for Administration, the central bank (Reserve Bank), Ombudsman, and Auditor-General must be guaranteed. *The eighth theme* concerned the professionalism of the security forces and required these forces to always act in the national interest and not in any partisan political way. Finally, *theme*

nine related to certain transitional arrangements including the duration of the interim constitution.[31]

The 34 principles guided the drafting process of the Constitutional Assembly. This process led to the adoption of a final constitutional text on 8 May 1996. As required, the text was then submitted to the Constitutional Court for a comprehensive review to determine whether the "final" constitutional text was in compliance with the 34 principles. The Constitutional Assembly's first attempt to get the constitutional text certified by the Constitutional Court, failed. In the First Certification[32] judgment, the Constitutional Court declined to certify the constitutional text, mainly because the text was not in compliance with the constitutional principles pertaining to provincial powers, local government, entrenchment of the Bill of Rights, and the Public Service Commission. The Constitutional Assembly had to make several changes to the constitutional text. The amended text was again submitted to the Constitutional Court which proceeded to certify the constitutional text in the Second Certification[33] judgment. The constitutional text was thus ready to be adopted as South Africa's "final" post-apartheid constitution, heralding an important milestone in the transition.[34] The Constitution, 1996, was signed into law by President Nelson Mandela on 10 December 1996 (it entered into force on 4 February 1997).[35]

V. The Government of National Unity

The interim constitution of 1993 had to achieve many different and difficult, even contradictory, things. It had to acknowledge the divisions and conflict of the past (an aspect that is dealt with in the next section), while looking to a democratic future built on national unity. The interim constitution provided for a government of national unity and the underlying idea was to balance the need for a government based on popular will with the need to bring the major political factions in the country together for at least a few in years. The results of the first democratic elections of 1994 were helpful. As expected, the ANC under the leadership of Nelson Mandela came out on top with 60% of the popular vote, which made the ANC the biggest party in the National

[31] For an overview and assessment of the constitutional principles, see: *Bertus de Villiers*, "The constitutional principles: Content and significance", in: Bertus de Villiers (ed.), Birth of a Constitution (1994), pp. 37–49.

[32] Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 ("First Certification judgment"), 1996 (4) SA 744 (CC).

[33] Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 ("Second Certification judgment"), 1997 (2) SA 97 (CC).

[34] For more on this, see: *Christina Murray*, "A constitutional beginning: Making South Africa's final constitution" (2001), University of Arkansas at Little Rock Law Review, pp. 809–838.

[35] See further: *Iain Currie/Johan de Waal*, The Bill of Rights Handbook 6 ed. (2013), pp. 6–7.

Assembly (and in the Constitutional Assembly). F. W. de Klerk's NP came in second with about 20% of the vote, with the Zulu traditionalist IFP third, with just over 10%. None of the other parties managed to get the minimum 20 seats (5%) of the vote that would give them the right to participate in the government of national unity (GNU). The interim constitution provided that any party that won more than 20 seats in the national Assembly could appoint at least one minister in the GNU. Given the outcome of the election, only the ANC, NP, and IFP were entitled to cabinet positions in the GNU. Nelson Mandela became South Africa's first democratically elected head of state, with Thabo Mbeki (ANC) and F. W. de Klerk (NP) as deputy presidents. The interim constitution empowered the president to appoint ministers in the cabinet "after consultation with the executive deputy presidents and the leaders of the participating parties." The president furthermore had the power to establish deputy ministerial positions, to be allocated "in the same proportion and according to the same formula" used for the ministerial positions. Of course, not all cabinet positions are of equal importance, and there was a fair degree of negotiation for the "main" areas, notably security, economy, social, and administrative. Given the decades of violence, civil unrest, and the abuse by the apartheid state, appointments to the security and defence clusters were particularly sensitive. Mandela could clearly not leave the country's security and defence in the hands of the same people who were responsible for gross human rights violations during apartheid, and he therefore appointed ANC members to the key security and defence positions in the cabinet. De Klerk was however given the position of chair of the cabinet committee on security and intelligence, and in that way there was even a degree of "national unity" in these crucial areas. On the other hand, the concerns of the (mainly white) business sector prompted Mandela to retain the outgoing NP minister of finance in the GNU as minister responsible for finance and economic affairs. This reassured the nervous business community and calmed the markets, not unimportant matters in a transitional situation. When the NP-minister of finance resigned a few months into the first term of the GNU, Mandela and De Klerk decided to replace him with a politically unaffiliated businessman.

The GNU, South Africa's first democratically elected government, was sworn in 11 May 1994, two weeks after the elections. Although Mandela was an executive president, as stipulated in the interim constitution, and not a ceremonial head of state, he nevertheless decided to leave the practical operation and functioning of the cabinet to his two deputies. This decision served two purposes. First, it allowed Mandela to stay above the day-to-day political fray and to focus on matters of national unity and reconciliation, which were crucial for the transition. Second, it gave executive prominence to De Klerk (and the NP), thus underscoring the symbolic and practical importance of unity governance.[36]

[36] For background based on interviews with key members of the first GNU, see: https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/LS_POWERSHARING_South%20Africa_FORMATTED_19Dec2016_USIPLogo_ToU_1.pdf, last visit 09. 08. 2022.

VI. The Adoption of the "Final" Constitution

As noted, the first democratic elections of 27 April 1994 not only produced South Africa's first non-racial parliament, but also served as the constituting election of the Constitutional Assembly which had to draft the "final" constitution. Throughout this phase of the transition, South Africa was governed in terms of a supreme constitution (the interim constitution) with a justiciable Bill of Rights. The interim constitution was in operation till 3 February 1997 when it was replaced by the "final" constitution of 1996. Some of the most significant judgments by the Constitutional Court were delivered under the interim constitution, thus establishing South Africa as a constitutional democracy based on the rule of law and respect for human rights, notably the rights to dignity, freedom, and equality.[37] In a sense, then, the drafting of the "final" constitution was less challenging than the process that produced the interim constitution. The broad framework and even much of the detail were in place. It was a matter of finetuning, recalibrating, and rethinking rather than drafting from scratch. Of course, the 34 constitutional principles also provided a basic political and legal structure for South Africa as a constitutional democracy with certain negotiated features. On the other hand, the political dynamics have changed since the MPNP that produced the interim constitution. The elections of 1994 confirmed the ANC as the dominant political force in South Africa, and this was reflected in the Constitutional Assembly. The ANC thus had the opportunity to give effect to this mandate in the draft-

[37] The Constitutional Court delivered some of its most judgments under the interim constitution, thus providing a firm jurisprudential foundation for South Africa's transition from apartheid to democracy and the rule of law. For instance, on human dignity: *S v Williams* 1995 (3) SA 632 (CC), a case concerning the abolishment of corporal punishment, the Constitutional Court noted (at para 58) that the constitution of 1993 required that "measures that assail the dignity and self-esteem of an individual will have to be justified; there is no place for brutal and dehumanising treatment and punishment. The Constitution has allocated to the State and its organs a role as the protectors and guarantors of those rights to ensure that they are available to all. In the process, it sets the State up as a model for society as it endeavours to move away from a violent past. It is therefore reasonable to expect that the State must be the foremost in upholding those values which are the guiding light of civilised societies. Respect for human dignity is one such value; acknowledging it includes an acceptance by society that … even the vilest criminal remains a human being possessed of common human dignity." Regarding the constitutionality of the death penalty (frequently imposed under apartheid), the Constitutional Court interpreted the right to life in the interim constitution and held in *S v Makwanyane* 1995 (3) SA 391 (CC) as follows, at paras. 326–327: "[T]he right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society. The right to life thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity."

ing of the "final" constitution. Ultimately, though, it is remarkable, and perhaps testament to the negotiating wisdom of the MPNP, that the interim constitution and the "final" constitution compared are not fundamentally different in spirit and in letter. There are differences, of course. For instance, the upper house of parliament, the senate, was replaced by a national council of provinces. This was not merely a name change but indeed a reflection of a new role for the provinces in the national legislative process. Another area of difference is the judiciary, where the "final" constitution integrated the high court (with its various provincial divisions), the Supreme Court of Appeal, and the Constitutional Court into one court system. The Constitutional Court would later also be established as the apex court in all matters with the chief justice as head of the judiciary and of the Constitutional Court. A comparison between the interim and "final" constitutions also show that provinces had a few more powers under the interim constitution and less so under the "final" constitution, thus reflecting the ANC's general dislike of federalism. As for the Bill of Rights, arguably the most important part of the constitution, it has been observed by commentators that the differences between the two constitutions are differences of nuance and not fundamental in nature.[38] For example, the right to equality was protected as a fundamental right under the interim constitution[39] and is also protected under the "final" constitution.[40] But the right, as formulated in the two texts, is not verbatim the same. The listed grounds of unfair discrimination[41] in the "final" constitution are more extensive than those in the interim constitution.[42] Pregnancy, marital status, and birth were added to the grounds of unfair discrimination in the "final" constitution.

VII. The Truth and Reconciliation Commission (TRC)

Arguably the most prominent (and most contentious) facet of South Africa's transition from apartheid to democracy was the Truth and Reconciliation Commission (TRC). While the other transitional mechanisms, and most notably the constitution drafting processes, were designed to look to the future, the TRC was tasked to deal with South Africa's violent, oppressive, and racist past. There was a moral imperative to record the truth about the past, to provide reparations for victims, and to bring justice to perpetrators. But there was also a need for reconciliation, to move the country forward and to build trust and a sense of common belonging. It was mentioned in the introduction above that by 1992 the ANC had abandoned the notion of Nuremberg-style trials for apartheid criminals even though apartheid is a crime under international law. Blanket amnesty was out of the question from a moral point of view, and there was a need to break with the lawlessness of the apartheid state and to establish the

[38] *Spitz/Chaskalson*, The politics of transition *(*supra), p. 423.

[39] Section 8 of the interim constitution of 1993.

[40] Section 9 of the constitution of 1996.

[41] Section 9(3) in the constitution of 1996.

[42] Section 8(2) in the interim constitution of 1993.

new, democratic South Africa on a foundation of respect for human rights, the rule of law, and truth. Indeed, there is an emerging view that there is a right to truth in international law,[43] and countries across the world have adopted various mechanisms to use the establishment of truth about a violent past as a way to dismantle oppressive systems. For instance, Tunisia's "Organic Law on Establishing and Organizing Transitional Justice"[44] articulates the role of truth in transitional contexts, as follows:

> "Revealing the truth shall consist of a series of methods, procedures and research used to dismantle the authoritarian system by identifying and determining all the violations as well as determining their causes, conditions, sources, surrounding circumstances, and repercussions. In cases of death, missing persons, and enforced disappearance, [truth finding] shall uncover the fate and whereabouts of the victims as well as the identity of the perpetrators and those responsible for such acts."[45]

Decades before the adoption of Tunisia's transitional justice law, the major protagonists in South Africa's transitional justice negotiations realised that the post-apartheid democracy had to deal in some way with the past, and that truth about the past would have to be at the centre of that process. But truth on its own can be a destructive force, hence the argument by some scholars that in order to achieve peace and to move beyond the conflict and injustices of the past, one may very well ask whether truth should trump all other considerations.[46] But it is inconceivable that a society transitioning from three centuries of settler-colonial and apartheid violence and oppression to democracy, peace, and the rule of law, should just "forget and move on". The negotiators that drafted the interim constitution realised that the new democratic dispensation had to deal with the past, but without risking the fragile transition. The interim constitution thus contained, under the heading "national unity and reconciliation", the following postscript, which enjoyed the same status[47] as the provisions of the main text of the interim constitution itself:

> "This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.
>
> The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.
>
> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

[43] See, in general: *Melanie Klinkner/Howard Davis*, The right to the truth in international law – Victims' rights in human rights and international criminal law (2020).

[44] Organic Law No 2013–53 Establishing and Organising Transitional Justice, 24 December 2013.

[45] Organic Law (supra) article 4.

[46] *David Rieff*, In praise of forgetting – Historical memory and its ironies (2016), p. 89.

[47] *Dion Basson*, South Africa's Interim Constitution – Text and notes (1995), p. 339.

> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.
>
> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.
>
> With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.
>
> *Nkosi sikelel' iAfrika. God seën Suid-Afrika. Morena boloka Sechaba sa heso. May God bless our country. Mudzimu fhatutshedza Afrika. Hosi katekisa Afrika.*"

The interim constitution's postscript provided the imperative and the broad rationale, but it was up to the newly elected parliament after the 1994 elections to provide legal and institutional content. It was a difficult debate with significant consultations and negotiations, but ultimately the Promotion of National Unity and Reconciliation Act 34 of 1995 ("TRC Act") was passed by parliament. This provided the legal framework for and establishment of the TRC. There is a considerable body of literature on the TRC.[48] Virtually all the individuals who have served as TRC commissioners had their own impressions of their work on the commission published.[49] And, of course, the TRC itself published a seven-volume report on its main findings and recommendations.[50] What follows is a brief description and assessment of the TRC as a transitional mechanism.

The TRC was not primarily created to deal with the whole of South Africa's history of settler-colonialism and apartheid, although the TRC Report did reached some conclusions as to the status of apartheid as a crime against humanity. Rather, the

[48] This includes numerous journal articles, surveys, academic dissertations, comparative studies, books, monographs, and critical assessments, too numerous to list here. A few suggestions are in order. For a brief historical and legal overview, see: *Johnny de Lange*, "The historical context, legal origins and philosophical foundation of the South African Truth and Reconciliation Commission", in: Charles Villa-Vicencio/Wilhelm Verwoerd (eds.), Looking back reaching forward – Reflections on the Truth and Reconciliation Commission of South Africa (2000), pp. 14 – 31. For the TRC in international and comparative context, see: *Gerhard Werle/Moritz Vormbaum* (eds.), Transitional Justice (2018), pp. 184 – 189. For a comprehensive analysis, see: *Afshin Ellian*, Een onderzoek naar de Waarheids- en Verzoeningscommissie van Zuid-Afrika (2003). For an eyewitness account of the TRC's hearings, see: *Antjie Krog*, Country of my skull (1999).

[49] A representative sample of personal reflections by former TRC commissioners: *Wendy Orr*, From Biko to Basson – Wendy Orr's search for the soul of South Africa as a commissioner of the TRC (2000); *Alex Boraine*, A country unmasked – Inside South Africa's Truth and Reconciliation Commission (2000); *Piet Meiring*, Kroniek van die Waarheidskommissie – Op reis deur die verlede en die hede na die toekoms van Suid-Afrika (1999).

[50] TRC Report (1998).

TRC's mandate focussed on "gross human rights violations" (by all sides) perpetrated in the period of increased violence by the apartheid state and liberation movement resistance (1960 to 1994). In historical terms, it covers the period following the Sharpeville massacre up to the first democratic elections in 1994. The main acts covered were killings, abductions, and torture. The TRC's Amnesty Committee had the power to grant amnesty to persons who applied and who qualified. The TRC was also tasked with the compilation of a list of victims for reparations purposes. Finally, the TRC was tasked with the writing of a narrative report on the nature and incidences of gross human rights violations in the period 1960 to 1994.

The various committees of the TRC heard testimony from more than 21,000 victims and other witnesses. The public hearings, chaired most of the time by Archbishop Desmond Tutu, received oral testimony from more than 2,000 individuals. The Amnesty Committee received 7,112 applications, of which 849 were successful.[51] A number of applications were later withdrawn. The systematic destruction of apartheid-era documentation and records posed a significant problem for the work of the TRC. In fact, even after the first democratic elections in 1994 and while the GNU was in place, records were still systematically destroyed by holdovers from the old order. Despite these challenges, the TRC was ultimately in a position to publish its report and recommendations. The Reparations Committee recommended a reparations programme that included financial, symbolic and community reparations. A list of perpetrators was published, with a recommendation for the prosecution of around 300 individuals.[52]

The TRC was the product of political compromise and moral imperative, as reflected in the postscript to the interim constitution. It was, however, not universally supported. A collective of political and victims' groups therefore challenged the constitutionality of the legal framework that set up the TRC. The challenge was heard by the Constitutional Court. The court rejected the application and confirmed the constitutionality of the TRC, but the court was also careful to recognise the inherent moral difficulty of the TRC model as a transitional mechanism. On the amnesty process, the Constitutional Court noted the following:

> "Every decent human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity, protected in their freedom by an amnesty immune from constitutional attack, but the circumstances in support of this course require carefully to be appreciated … Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling … That

[51] *Linda van de Vijver*, "The amnesty process", in: Wilmot James/Linda van de Viver (eds.), After the TRC – Reflections on truth and reconciliation in South Africa (2000), pp. 128–139.

[52] For the full TRC Report, see: Truth and Reconciliation Commission of South Africa Report, Vol. I to VII (1998). For an online version, see: http://www.justice.gov.za/trc/report/. For an overview, see: https://www.usip.org/publications/1995/12/truth-commission-south-africa.

> truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do."[53]

The Constitutional Court also put the work of the TRC, and the amnesty process in particular, in the broader context of the transition from apartheid and authoritarianism to democracy and the rule of law. The court stated as follows:

> "Although the mechanisms adopted to facilitate that process [of a transition to democracy] have differed from country to country and from time to time, the principle that amnesty should, in appropriate circumstances, be accorded to violators of human rights in order to facilitate the consolidation of new democracies was accepted in all these countries [Chile, Argentina, El Salvador] and truth commissions were also established in such countries."[54]

The Constitutional Court's articulation and contextualisation of the TRC's transitional justice rationale was valid at the time and is probably still true, today. Even more than twenty years after the TRC concluded its work, it is hard to disagree with the essential conclusion that the TRC played a crucial role in South Africa's transition from apartheid to democracy. It is also true, however, that the role of the TRC in the transition should not be overstated. Mahmood Mamdani argued that South Africa's transitional processes (notably CODESA and the MPNP) correctly viewed apartheid first and foremost as a collective political problem rather than individual transgressions. Of course, the logic of the TRC demanded that individual perpetrators had to apply for amnesty or risk being prosecuted. But this criminal justice dimension of the transitional process was not the main focus. For Mamdani, anti-impunity modalities (from Nuremberg on the one extreme to qualified modalities like the amnesty process in South Africa at the other end of spectrum), are inevitably backward looking, but the main focus in South Africa's transition was forward-looking: negotiations at CODESA and later the MPNP aimed at the constitutional framework for a new inclusive, just, and democratic society based on the rule of law and respect for human rights.[55]

From a rule of law and justice point of view, the amnesty compromise turned out to be tainted by what happened in the post-TRC failure of the National Prosecuting Authority (NPA) to follow through on the prosecution of those apartheid-era criminals identified by the TRC for possible prosecution. But this was not merely a case of inaction by the NPA. Disturbing allegations of political interference were later con-

[53] *Azanian People's Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*, 1996 (8) BCLR 1015 (CC), pp. 1027 – 1028.

[54] *AZAPO* case (supra), p. 1030.

[55] *Mahmood Mamdani*, Neither settler nor native – The making and unmaking of permanent minorities (2020), p. 180.

firmed in an application before the Supreme Court of Appeal.[56] It seemed that a political decision at the highest levels was made during the period 2003 to 2017. This decision boiled down to *de facto* impunity, because none of the apartheid-era gross human rights violations were to be pursued. This was obviously a direct violation of the amnesty compromise that was reached during the negotiations in the 1990s to create a TRC as part of South Africa's transition to democracy. Already in 2019, before the decision by the Supreme Court of Appeal, several former TRC commissioners wrote a letter[57] to President Ramaphosa. The letter called on the President to apologise on behalf of the State to the victims of gross human rights violations and their families who were denied justice. The former commissioners also requested the President to appoint a commission of inquiry into the alleged (and now confirmed) political interference which has stopped the investigation and prosecution of almost all the cases which were referred by the TRC to the NPA. The former commissioners wrote:

> "In our Final Report released on 21 March 2003 we stressed that the amnesty should not be seen as promoting impunity. We highlighted the imperative of 'a bold prosecution policy' in those cases not amnestied to avoid any suggestion of impunity or of South Africa contravening its obligations in terms of international law.
>
> Most victims accepted the necessary and harsh compromises that had to be made to cross the historic bridge from apartheid to democracy. They did so on the basis that there would be a genuine follow-up of those offenders who spurned the process and those refused amnesty. Sadly, this has not happened."

The letter further noted what was later confirmed by the Supreme Court of Appeal, namely that changes in prosecutorial policy during the Mbeki and Zuma administrations resulted in the politically motivated end to NPA efforts to follow up on the TRC's list of apartheid-era gross human rights violations which needed to be investigated and prosecuted.

The political and legal backlash against the NPA's post-TRC inaction prompted a new approach and in November 2021 a historically significant indictment was issued. This indictment against two former apartheid-era security police officers included, for the first time, a charge of the crime against humanity of apartheid.[58] This case has not yet commenced at the time of writing, but the historic significance of the inclusion of not only apartheid-era crimes like murder as a crime against humanity, but

[56] *Rodrigues v. The National Director of Public Prosecutions* [2021] ZASCA 87 (21 June 2021).

[57] For the text of the full letter, see https://www.scribd.com/document/399024578/TRC-Letter-to-the-President-5-02-2019, last visit 08.05.2022.

[58] In the High Court of South Africa, Gauteng Division, Johannesburg, indictment of TE Mfalapitsa and CS Rorich, November 2021, on charges of kidnapping, the crime against humanity of murder, and the crime against humanity of apartheid. Copy of indictment on file with author. For civil society reaction, see: https://www.ijr.org.za/2021/11/26/the-institute-for-justice-and-reconciliation-welcomes-the-decision-of-the-director-of-public-prosecutions-dpp-to-include-crimes-against-humanity-in-the-indictment-of-the-accused-in-the-cosas-4-trial/, last visit 08.08.2022.

indeed of the crime against humanity of apartheid itself, cannot be overstated. Time will tell how the criminal courts of South Africa will deal with indictments like these, but the NPA's change of heart regarding post-TRC prosecutions, is a significant and historical development in its own right.

VIII. Concluding Remarks

In the broader scheme of things, the relative success of South Africa's transition from the oppression and authoritarianism of apartheid to a democratic society built on the rule of law, should not only be viewed with reference to the work of the various transitional mechanisms discussed in this contribution. Taken as parts of a whole, all these mechanisms were part of a bridge which made the transition possible, but the real test is whether what came as a result of the transition, South Africa's *transformative* constitutional democracy, is able and willing to deliver a better life for the people.[59]

[59] For critical reflections, see: *Jean Meiring* (ed.), South Africa's constitution at twenty-one (2017).