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**Positive Rights or Economic Growth: The Development Dilemma**  
A South African Case Study

By  
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A thesis submitted to the Department of Political Studies in conformity with the requirements for  
the degree of Master of Arts  
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## **Abstract**

**This thesis examines the economic implication of ratifying positive rights legislation and the degree to which they limit an underdeveloped country's ability to pursue a successful capitalist economic policy. Assessing the argument within development theory that a strong commitment to redistribution inhibits a country's chance of development, the experience of post-apartheid South Africa was explored. South Africa, ruled by the African National Congress (ANC) represented a country with a strong commitment to both positive rights and a capitalist growth model. The collapse of the ANC's first economic policy, the Reconstruction and Development Program (RDP), and the shift to its second economic policy, the Growth Economy and Reconstruction (GEAR) program, is explained. Secondly, the country's new bill of rights is outlined along with the Soobramoney and Grootbroom court challenge regarding the constitutionality of the government's policy.**

**This paper seeks to answers two questions. First, does a successful economic growth policy require the limitation or delayed implementation of positive human rights? If it does, is this action a violation of positive rights legislation, making the ratification of such laws a measurable legal limitation for a successful growth policy? This paper concludes that despite its best efforts, the ANC was unsuccessful in its attempt to rapidly realize its positive rights obligations while sustaining economic growth. The ANC's strong commitment to redistribution, in fact, contributed to the economic crisis that resulted in the abandonment of the RDP and adoption of the neo-liberal GEAR, based on the delayed realization of the positive rights. Despite this shift, the constitutional court ruled in Soobramoney and Grootbroom that the constitutionalization of positive rights did not require the immediate realization of positive rights. The progressive nature of these rights provided for flexibility in implementation. As a result, a growth oriented economic policy does not constitute a violation of a government's positive rights commitment.**

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## **Chapter 1: Introduction**

Development theory has always sought to improve the lives and standard of living for the citizens of underdeveloped countries through sustained economic growth. Recently, there has been debate as to the means by which this result should be pursued. With the dominance of neo-liberalism in the world, underdeveloped countries have been under tremendous pressure to pursue capitalist economic policy.

At the core of development theory rests a simple reality. A key component in any rise in the standard of living and overall development of a country is economic growth. Without growth, there can be no redistribution, whether government directed or not. The largest problem facing an underdeveloped country is a fixed source of capital resources that limits the government's ability to satisfy the needs and wants of their population. Therefore, in order to pursue social development, a government must concern itself with economic growth. In a 1991 United Nations report on development, it was concluded that successful development could not be achieved without capital resources and economic growth.<sup>1</sup>

The current debate often centers on whether the apparent tension between the ultimate goals of development and the fundamentals of the capitalist growth model

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<sup>1</sup> Report prepared by the Secretary-General Pursuant to Commission on Human Rights resolution 1989/45 The Realization of the Right to Development (United Nations, New York, 1991) Article 85



are compatible.<sup>2</sup> Critics of neo-liberalism use the argument that "increases in national income will not benefit the poor unless they reach the poor".<sup>3</sup> Without a government directed policy of redistribution, income inequality persists and only an elite few benefit from the expanded economy. The capitalist counter-argument states that concentrated wealth will assist in expanding the economy and by consequence, provide employment and investment that generates material gain. This concentrated wealth eventually 'trickles down' to the general population "in the form of jobs and opportunities".<sup>4</sup>

One of the fundamental requirements for economic growth is a ready source of capital to fund investment and expansion. This capital exists when individuals collectively decide to save a portion of their income, rather than spend it immediately.<sup>5</sup> The equation is simple. Without savings, there can be no economic growth.<sup>6</sup> Therefore, the fundamental problem facing developing governments is how best to increase its population's propensity to save or attract another country's saved capital.<sup>7</sup>

"The central problem in the theory of economic development is to understand the process by which a community which was previously saving and investing 4 or 5 percent of its national income converts itself into an economy where voluntary saving is running about 12 to 15 percent of the national income or more."<sup>8</sup>

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<sup>2</sup> Gilbert Rist, The History of Development (Zed books, New York, 1997) p.208

<sup>3</sup> Ian Smilie Mastering the Machine (Intermediate Technology Publications, Britain, 1991) p.46

<sup>4</sup> Ian Smilie Mastering the Machine (Intermediate Technology Publications, Britain, 1991) p.34

<sup>5</sup> Gillis, Malcolm; Perkins, Dwight H.; Roemer, Michael and Snodgrass, Donald R.

Economics of Development (W.W. Norton & Company, New York, 1992) p.268-9

<sup>6</sup> Ray, Debraj Development Economics (Princeton University Press, New Jersey, 1998) p.52

<sup>7</sup> Gillis, Malcolm; Perkins, Dwight H.; Roemer, Michael and Snodgrass, Donald R.

Economics of Development (W.W. Norton & Company, New York, 1992) p.93

<sup>8</sup> Gillis, Malcolm; Perkins, Dwight H.; Roemer, Michael and Snodgrass, Donald R. Economics of Development (W.W. Norton & Company, New York, 1992) p.93

Debraj Ray argues that the government should allow inequality to persist. High rates of income disparity concentrate wealth in the hands of individuals. This surplus results in a portion of the population willing to save and invest, boosting the growth rate.<sup>9</sup> This belief that a successful economic strategy implies the short-term sacrifice of basic needs in order to “shift resources from consumption to investment. Considerable income inequality is accepted, or even encouraged.”<sup>10</sup>

While this may seem tough medicine, “the allocation of resources between present and future consumption (saving) is one of the most fundamental economic choices facing any economy.”<sup>11</sup> This encouraged inequality can nonetheless easily be criticized. Advocating economic inequality means there are resources that are being denied from a population suffering from poverty, malnutrition and disease. Not only do scenes of gross inequality and poverty seem difficult to justify; it raises a legal question. If a country willingly permits a segment of its population to live in poverty, has it violated any laws? The most appropriate legal condemnation of this policy of inequality is obviously a violation of some type of human rights. The purpose of this paper is to examine the legality of postponing the immediate implementation of positive rights in favour of capital accumulation.

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<sup>9</sup> Ray, Debraj Development Economics (Princeton University Press, New Jersey, 1998 p.173  
<sup>10</sup> Ed. Forsythe. David P. Human rights and development : International views (Houndmills, Basingstoke, Hampshire : Macmillan 1989 ) p.308

<sup>11</sup> Gillis, Malcolm; Perkins, Dwight H.; Roemer, Michael and Snodgrass, Donald R. Economics of Development (W.W. Norton & Company, New York, 1992), p.273

**This paper seeks to explore this debate on two levels. First, an assessment will be made as to whether or not permitted inequality is a necessary component of a successful growth policy. Secondly, regardless of necessity, does the decision by a government to pursue a neo-liberal growth strategy, violate its citizens' right to social services? While the scope of this work prevents a comparative analysis, this work will focus on the experience of post Apartheid South Africa. Two broad criteria were used in selecting an appropriate case study. First, the country in question needed to be underdeveloped, facing the problem meeting the basic needs of its citizens. The capital resources of the country needed to be limited so that the success of development effort would be dependent upon the generation of economic growth. The country could not be engaged in a civil or inter-state conflict, as these factors would affect the government's ability and commitment to development. Secondly, the country in question needed to be ruled by a government that demonstrated a genuine concern for the protection and realization of the human rights of its citizens. Post Apartheid South Africa proved to be an excellent case study.**

**In 1948, the newly elected Nationalist Party of South Africa established the now infamous Apartheid regime. Supported by white supremacists, Afrikaners nationalists, the new government established the Apartheid regime, a policy of segregation based on race to defend what they perceived was the threat of black**

urbanization<sup>12</sup>. This system of Social legislation, ranging from disenfranchisement, bans on mixed marriages, segregation of amenities and 1950 Population Registration Act, were designed to keep black wages low and the white and black populations separated. It was in response to this discrimination that the African National Congress (ANC) was established. Accompanied by the communist party in 1949, the ANC began a campaign of defiance designed to undermine and eradicate Apartheid.<sup>13</sup> It would not be until April of 1994, with the formation of the Government of National Unity (GNU), that the ANC was in a position to fulfill the objectives of the defiance campaign.

While the DeKlerk government rescinded the legal foundations of the Apartheid regime in 1991, by ending of the population registration act that classified all South Africans by race, the long-term effects of decades of discriminatory spending on health, education, housing and other social services would not be easily resolved.<sup>14</sup> The ANC inherited a South Africa that was crippled by poverty and possessed one of the greatest income discrepancies in the world.<sup>15</sup> White South Africans continued to own a disproportionate amount of the resources and wealth of the country.<sup>16</sup> South Africa was a country with an acute need to promote redistribution and development.

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<sup>12</sup> Worden, Nigel The Making of Modern South Africa (Blackwell, Cambridge, 1995) p.95

<sup>13</sup> Worden, Nigel The Making of Modern South Africa (Blackwell, Cambridge, 1995) p.95

<sup>14</sup> Tarp, Finn & Brixen, Peter The South African Economy Routledge, New York, 1996) p.8

<sup>15</sup> Tarp, Finn & Brixen, Peter The South African Economy Routledge, New York, 1996) p.8

<sup>16</sup> Sisk, Timothy, D. Democratization in South Africa (Princeton University Press, New Jersey, 1995)

The ANC's commitment to human rights regime was evident immediately upon taking power. One of its first acts was to spearhead the redrafting of the constitution to include both extensive positive and negative rights. This was seen as not only the best guarantee against a recurrence of racial legislation, but as a fundamental tool in redressing the economic and social effects of Apartheid. Negative rights. Such rights differ from positive rights in that they are designed to protect individuals by limiting the power of a state's actions against its citizens. Adhering to negative rights meant that a state had to ensure that its agents and agencies did not violate the rights of their citizens. Among these rights are the right to life, freedom from discrimination and protection from torture. This was the government's guarantee against the re-establishment of another apartheid. Positive rights require significantly more of a government for their realization. Rights such as the right to housing, food and social services, demand that a government commit a significantly larger portion of capital resources towards their realization.<sup>17</sup>

While entrenching a wide range of positive rights appeared a positive step forward, critics both within and outside of South Africa challenged the government over the practical limitations of such legislation. While agreeing to the goals of positive rights, these voices argued that South Africa was not in the financial position to provide a range of social services and redistribution. Too strong a commitment to positive rights and redistribution would result in a country where citizens were

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<sup>17</sup> p.56  
Chowdhury, Subrata Roy, Rule of Law in a State of Emergency. (Pinter Publishers, London, 1989) p.4

equally impoverished, leaving little capital available for investment and economic growth.<sup>18</sup> Ironically, it was argued that the ANC's commitment to positive rights would be the largest impediment to a successful development policy. The ANC, however, saw little problem with a commitment to a robust positive rights regime. If they did not have the necessary capital, the government could implement an aggressive growth strategy to finance its redistribution initiative. Simplistic in theory, many economists doubted the new government's ability to generate a sustained growth rate while simultaneously pursuing redistribution.

This paper examines the experience of the ANC as the ruling party in South Africa between 1994 and 2000. The legacy of Apartheid left South Africa in dire need that some policy would seek to address the extreme poverty and equalize the massive income discrepancies that plagued the nation. Secondly, when the ANC took control over South Africa, the economy had been crippled by a ten year recession, high inflation and stagnating growth. The ANC needed to address both the poverty and lagging economic growth almost immediately upon taking power. Finally, the ANC's genuine commitment to positive rights legislation translated into a robust positive rights regime. Therefore, having passed into legislation an extensive rights regime, the failure of the ANC to sustain both redistribution and growth would raise the judicability of concentrating government efforts away from positive rights in favour of economic growth.

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<sup>18</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p.15

## **Outline**

This paper is organized into five chapters, with this being the introductory one and chapter six the conclusion.

Chapter two outlines the historic and economic legacy of Apartheid. In 1994, with a large debt, bloated bureaucracy and a government deficit, South Africa was suffering its longest recession in over eighty years. The lingering effects of international sanctions worsened the situation. Unemployment was at over 50% and income inequality that ranked among the highest in the world.<sup>19</sup>

Chapter three explains the rationale by the ANC for choosing a legislated solution to its social crisis. Why did the ANC decide that an entrenched bill of rights was the best means of addressing the poverty that plagued the nation? While the bill of rights received popular support, resistance continued from those concerned that a bill of rights was an ineffective means of achieving the desired outcome. The negotiated process of drafting the constitution and the final shape of the bill of rights highlighted this debate.

Chapter four explores the ANC's first economic policy. This policy can be seen as closely intertwined with the ANC's positive rights legislation. Insisting that the foundation of solid economic growth was poverty alleviation and redistribution, the

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<sup>19</sup> U.S. State Department 1995 South Africa Country Report On Economic Policy and Trade Practices (submitted to the Senate Committees on Foreign Relations and on Finance, and the

ANC implemented the Reconstruction and Development Programme (RDP) in 1994. The RDP focused heavily on erasing the effects of Apartheid by engaging in a rapid social development program, including the creation of schools, hospitals and low-income housing. Launched with high aspiration, this chapter will outline the swift collapse of the RDP and the significant shift in the government's economic policy. By 1996, the same government that entrenched positive rights into the constitution rapidly adopted the Growth Economic and Redistribution policy (GEAR), a much more conservative economic policy that de-emphasized redistribution, encouraged labour restraint and tolerated short-term inequality. This chapter compares the RDP and GEAR and will explore why the RDP so rapidly collapsed.

Chapter five analyzes the legal implication of the ANC decision to abandon the RDP. With the new constitution, the ANC had committed itself and future governments to extensive positive rights and a commitment to redistribution. As a result, the judicability of the government's shift to GEAR could be challenged. In 1999, this new economic policy was challenged by a group of homeless citizens that demanded that the government uphold its commitment to constitutionally providing them with housing. The Grootboom decision raised and answered an important question in the field of development. Can a government seek growth-oriented economics while maintaining its positive rights obligations?



## **Chapter 2: The Legacy of Apartheid**

The legacy of Apartheid was the overarching factor in shaping Post Apartheid South Africa economic policy. Not only was it the ruling regime for nearly a half a century, it was the impetus for ANC existence. Staunch opponents of Apartheid, the ANC waged a campaign against the old regime that demanded human rights and a redistribution of concentrated wealth to the poorest members of the country. The election victory of 1994 was also a victory for these objectives. The ANC was finally in a position to realize their human rights demands and calls for redistribution. The drafting of the new constitution reflected this. However, the ANC also inherited a country with a stagnating economy. It compelled the ANC to seek a sustainable economic solution to the rampant inequality. This chapter outlines the national situation and pressures facing the ANC when they took power in 1994. Three overarching factors shaping the new government policy will be identified: the economic ramifications of Apartheid, the international environment into which South Africa was re-integrating, and the internal challenges faced by the ANC as it evolved from a resistance organization to a political party.

### **Apartheid's Legacy**

In 1948, a newly elected Nationalist Party established the racist Apartheid regime. Drawing support from white supremacists, Afrikaners nationalists and white workers threatened by black urbanization, the new government sought to segregate South

Africa economically and socially by race.<sup>20</sup> This involved the creation of black homelands, separate governmental mechanisms and separate social facilities for blacks and whites. Needless to say, social services, infrastructures and resources were disproportionately allocated in favour of the white minority. Over the course of the next forty years, this resulted in mass poverty and underdevelopment for the African majority.

It is this legacy that overshadowed the first post-Apartheid government. The ANC inherited a country with a population of 39.7 million people<sup>21</sup> plagued with massive income disparities between the rich and the poor that registered among the highest in the world.<sup>22</sup> In 1991, 48.9% of households in South Africa were estimated to be living in poverty. Whites earned 60% of the income in the country while constituting barely 13% of the population.<sup>23</sup> In 1994, the U.S. State department estimated that 7.5 million blacks had no permanent shelter or housing. Infant mortality rate for whites was 6 per thousand, while for blacks it was 66 per thousand.<sup>24</sup> About 12 million people had no reasonable access to water and about 21 million had inadequate sanitation. While there was spare electricity in South Africa, only 36% of households were resulting in roughly three million homes without electricity.

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- <sup>20</sup> Worden, Nigel The Making of Modern South Africa (Blackwell, Cambridge, 1995) p.95  
<sup>21</sup> Peterson, Lennart, (ed.) Post-Apartheid Southern Africa (Routledge, New York, 1998) p.3  
<sup>22</sup> Lundhal, Mats The post Apartheid Economy, and after? in (ed.) Peterson, Lennart, Post-Apartheid Southern Africa (Routledge, New York, 1998) p.22  
<sup>23</sup> McGrath, Mike "Income Inequality and Poverty in South Africa" in Maasdorp, Gavin Can South and Southern Africa Become Globally Competitive Economies? (MacMillan Press Ltd., London, 1996) p.69  
<sup>24</sup> U.S. State Department 1995 South Africa Country Report On Economic Policy and Trade Practices (submitted to the Senate Committees on Foreign Relations and on Finance, and the House Committees on Foreign Affairs and Ways and Means) May 1996) section1

Nineteen thousand schools (86% of the total) and 4,000 clinics had no electricity. For blacks, there was only 1 phone line for every 100 people while the ratio for whites was 60 phone lines for every 100 people.<sup>25</sup>

Black South Africans were predominantly unskilled and semi-skilled workers, whereas white South Africans held the majority of skilled and managerial jobs.<sup>26</sup> This was a direct result not only of the racial barriers to employment but the allocation of resources for education. The Apartheid regime spent less than 13% of its education budget on black education.<sup>27</sup> The average student-teacher ratio in white schools was 20:1, whereas in black schools it was 38:1.<sup>28</sup> While the DeKlerk government made a near total repeal of the legal foundations of the Apartheid regime in 1991, the debilitating social effects of the Apartheid regime upon black South Africans could not be reversed so easily.<sup>29</sup>

While massive poverty and inequality were obvious legacies, one of the overarching consequences of apartheid was economic. The Apartheid economic policy was an inward looking import substitution industry based on the exploitation of artificially

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<sup>25</sup> African National Congress A Basic Guide to the Reconstruction and Development Programme (ANC, South Africa, 1994) (<http://www.anc.org.za/ancindex.html>)

<sup>26</sup> Natrass, Nicola and Seekings, Jeremy "Changing patterns of inequality in the South African labour market" in (ed.) Peterson, Lennart, Post-Apartheid Southern Africa (Routledge, New York, 1998) p.45

<sup>27</sup> Ginsberg, Anthony South Africa's Future MacMillian Publishers Ltd., London, 1998) p.24

<sup>28</sup> U.S. State Department 1995 South Africa Country Report On Economic Policy and Trade Practices (submitted to the Senate Committees on Foreign Relations and on Finance, and the House Committees on Foreign Affairs and Ways and Means) May 1996) section 1

<sup>29</sup> Worden, Nigel The Making of Modern South Africa (Blackwell, Cambridge, 1995) p.137

lowered black labour.<sup>30</sup> This combination of a protected economy and racial policies eventually left the country internationally isolated, internally divided and suffering a long recession partially attributed to the inefficient allocation of resources.

The ANC inherited a country that had been crippled by 10 years of economic stagnation, the longest recession in over eighty years, an eroding stock of fixed capital and inflation levels consistent at 15%.<sup>31</sup> From 1989 to 1993, GDP declined at an annual rate of 0.6%. In 1992, the economic growth rate had been negative for the third year in a row with a growth rate of -2 per cent, -0.5 in 1990 and -0.6 per cent in 1991. This steady economic decline began in the 1970s. In the 1960s, the economy averaged a 5.8% annual growth rate, in the 1970s the average annual was down to 3.4%, and by the 1980s it averaged only 1.5%. To further compound the problem, the 1990s did not look very promising.<sup>32</sup> The population growth rate had exceeded GDP growth by 1% since 1980, resulting in a diminishing per capita income.<sup>33</sup> The worldwide recession in the late 1980s and the country's worst drought of the century exasperated this downturn.<sup>34</sup>

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<sup>30</sup> Tarp, Finn & Brixen, Peter The South African Economy Routledge, New York, 1996) p.10  
<sup>31</sup> Price in Stedman, John (ed.) South Africa: The Political Economy of Transformation. (Lynne Rienner Publishers. Boulder, 1994) p.191  
<sup>32</sup> Walden Publishing Ltd. Country Reports COUNTRY: South Africa January 30, 1995  
<sup>33</sup> Ginsberg, Anthony South Africa's Future (MacMillian Publishers Ltd., London, 1998) p.9  
<sup>34</sup> U.S. State Department 1995 South Africa Country Report On Economic Policy and Trade Practices (submitted to the Senate Committees on Foreign Relations and on Finance, and the House Committees on Foreign Affairs and Ways and Means) May 1996).

It was only after the DeKlerk government had announced that it would move to end Apartheid and hold all race elections that a temporary influx of foreign investment allowed inflation to drop to single digits in 1993 and help the GDP registered positive growth for the first time in four years with 1.1% growth.

Still, the 1993/94 budget ended in a deficit of 31.4 billion dollars. New jobs had not been created in the manufacturing, mining or agricultural sectors in over a decade.<sup>35</sup> With a half a million school leavers entering the economy looking for employment every year, the trend was worrisome.<sup>36</sup> Not surprisingly, the unemployment rate had increased from 37% in 1980 to 55% in 1992.<sup>37</sup> Because of the protected nature of the Apartheid economy during Apartheid, the South African industrial sector was not internationally competitive.<sup>38</sup> The national party's policy of high tariffs that encouraged import substitution through high customs and import duties "...led to an abnormal sense of complacency among many South African manufacturers who enjoyed the protection of high tariff walls."<sup>39</sup> By the early 1990s, South Africa was facing a crisis of productivity.<sup>40</sup> The rising cost of black labour in the eighties

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<sup>35</sup> U.S. State Department 1995 South Africa Country Report On Economic Policy and Trade Practices (submitted to the Senate Committees on Foreign Relations and on Finance, and the House Committees on Foreign Affairs and Ways and Means) May 1996).

<sup>36</sup> Padayachee, Vishnu "The International Monetary Fund and World Bank in Post Apartheid Africa: Prospects and Dangers" in Coetzee, Jan K. and Graaff, Johann Reconstruction, Development and People (International Thompson Publishing, New York, 1996) p.369

<sup>37</sup> McGrath, Mike "Income Inequality and Poverty in South Africa" in Maasdorp, Gavin Can South and Southern Africa Become Globally Competitive Economies? (MacMillan Press Ltd., London, 1996) p.70

<sup>38</sup> Nam, Duck-Woo "Trade Policy and International Competitiveness: The South Korea Experience" in Baker, Pauline H., Boraine, Alex and Warren Krafchik (eds.) South Africa and the World Economy in the 1990s (The Brookings Institution, Cape Town, 1993) p.71

<sup>39</sup> Ginsberg, Anthony South Africa's Future MacMillian Publishers Ltd., London, 1998) p.24

<sup>40</sup> Stedman, John (ed.) South Africa: The Political Economy of Transformation. (Lynne Rienner Publishers. Boulder, 1994) p.191) p.15

worsened this situation<sup>41</sup> while Apartheid compounded the problem. The political objective of maintaining racial separation was economically harmful. Capital flowed into police and bureaucratic institutions instead of education and skill training for black workers.<sup>42</sup> Large and inefficient bureaucratic expenditures were necessary to support duplicate racially separate layers of government and facilities required by Apartheid. This racially motivated duplication resulted in excessive bureaucratic expenditure to drain necessary resources and retard economic growth.<sup>43</sup>

Despite the economic recession, the drop in productivity and the high unemployment rate, South Africa still had many advantages over other developing countries. The U.S. State Department in 1994 reported that the South African economy has the potential to grow at an annual rate above five percent.<sup>44</sup> South Africa continued to hold a major share in the world's reserves in nearly all import industrial minerals. The racial legislation and funneling of resources into white communities also helped build the infrastructure for the foundations of a modern economy. It had an advanced telecommunication and transportation infrastructure and continued to have a pool of intellectuals including scientists, engineers and

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<sup>41</sup> Nattrass, Nicola and Seekings, Jeremy "Changing patterns of inequality in the South African labour market" in (ed.) Peterson, Lennart, Post-Apartheid Southern Africa (Routledge, New York, 1998) p.45

<sup>42</sup> U.S. State Department 1995 South Africa Country Report On Economic Policy and Trade Practices (submitted to the Senate Committees on Foreign Relations and on Finance, and the House Committees on Foreign Affairs and Ways and Means) May 1996)

<sup>43</sup> Tarp, Finn & Brixen, Peter The South African Economy Routledge, New York, 1996) p.11

<sup>44</sup> U.S. State Department 1995 South Africa Country Report On Economic Policy and Trade Practices (submitted to the Senate Committees on Foreign Relations and on Finance, and the House Committees on Foreign Affairs and Ways and Means) May 1996)

other professionals.<sup>45</sup> In addition, it had a well-endowed natural resource base and an advanced financial, legal and communication structure.<sup>46</sup> South Africa possesses a strong production base and a working capitalist economy.<sup>47</sup> The large domestic population constituted an untapped potential market.<sup>48</sup> In short, the potential for significant and sustained growth was present. It would fall on the ANC to realize this potential and generate a successful economic policy.

### **International Pressure**

In 1982, Botha announced that the government would not pursue a policy to reform its racial legislation to meet internal demands and appease foreign threats of sanctions. In response to this, foreign banks called in their loans in 1985.<sup>49</sup> While this was punitive, the net result inadvertently improved South Africa's credit situation. As international financial sanctions went up, the government was forced to pay off medium-term foreign debts while being denied access to new credit.<sup>50</sup> Due to the severing of investments and loan capital from foreign banks, South Africa's foreign debt load dropped significantly. By 1994 roughly 95.6%, of South Africa's debt was domestically owed.<sup>51</sup> The ANC inherited a country that, among

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<sup>45</sup> Price in Stedman, John (ed.) South Africa: The Political Economy of Transformation. (Lynne Rienner Publishers. Boulder, 1994) p.191) p.191  
<sup>46</sup> Centre of African Studies, Occasional Papers No. 53 (Centre of African Studies, Edinburgh University, 1994) p.11-13  
<sup>47</sup> Price in Stedman, John (ed.) South Africa: The Political Economy of Transformation. (Lynne Rienner Publishers. Boulder, 1994) p.191  
<sup>48</sup> Padayachee, Vishnu "The International Monetary Fund and World Bank in Post Apartheid Africa: Prospects and Dangers" in Coetzee, Jan K. and Graaff, Johann Reconstruction, Development and People (International Thomson Publishing, New York, 1996) p.370  
<sup>49</sup> Worden, Nigel The Making of Modern South Africa (Blackwell, Cambridge, 1995) p.135  
<sup>50</sup> Worden, Nigel The Making of Modern South Africa (Blackwell, Cambridge, 1995) p.135  
<sup>51</sup> Daily Mail and Guardian Newspaper 03/29/99

developing countries, had some of the lowest foreign debt burdens in the world.<sup>52</sup>

The low degree of foreign debt made South Africa a low risk for international loans and improves its bargaining position vis-a-vis the international financial organizations, such as the IMF and World Bank.

South Africa was one of the founding members of the World Bank and had a good credit rating with the IMF. It received its first loan in 1957 without conditionality. In 1973, South Africa received another loan despite some economic opposition due to its sizable gold reserves. Some countries felt that South Africa should contribute to the fund and not borrow from it. In 1976, in face of the Soweto uprisings, the government asked for money to steady foreign bank creditors in the face of the riots. Again, the loan was received without conditionality. It was not until 1983 that the IMF refused to loan money to South Africa for political, not economic reasons.<sup>53</sup> Despite the IMF's late coming concern with Apartheid, South Africa's economic standing with the IMF and the World Bank was favourable.

The high degree of Western media exposure to the struggle against Apartheid in the years leading up to the democratic elections had rallied support even among economists for the South African cause.

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<sup>52</sup> Payadachee, Vishnu "Development Implications for South Africa of Using IMF and World Bank Loans and Resources" in Pauline H. Baker, Alex Boraine and Warren Krafchik in South Africa and the World Economy in the 1990s (The Brookings Institution, Cape Town, 1993) p.193

<sup>53</sup> Padayachee, Vishnu "The International Monetary Fund and World Bank in Post Apartheid Africa: Prospects and Dangers" in Coetzee, Jan K. and Graaff, Johann Reconstruction, Development and People (International Thomson Publishing, New York, 1996) p.363-4



**“Since the struggle against Apartheid fit very well with Western conceptions of individual human rights, the ANC and its political allies enjoyed widespread and rather uncritical support in the United States and Europe after the 1994 elections and President Mandela’s triumphant rise from Robben Island prisoner to president of the republic.”<sup>54</sup>**

The sanctions against the country were an international means of encouraging the end of Apartheid. Renewal of economic relations was upheld as a reward to the country should it dismantle Apartheid. With the end of Apartheid, there was some pressure on the international community to honour its commitment. In 1990, the IMF gave South Africa access to domestic and foreign sources of savings as a reward for its measures against Apartheid.<sup>55</sup>

The international community of the late 1980s and early 1990s was dominated by neo-liberal economic policies. Neo-liberalism is characterized by its hostility towards socialist, collectivist and state interventionist models of development.<sup>56</sup> Despite this hostility, the commitment the ANC demonstrated to redistribution and state intervention did not foster the international community’s embrace of the new government.

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<sup>54</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p.11

<sup>55</sup> Padayachee, Vishnu “The International Monetary Fund and World Bank in Post Apartheid Africa: Prospects and Dangers” in Coetzee, Jan K. and Graaff, Johann Reconstruction, Development and People (International Thomson Publishing, New York, 1996) p.372

<sup>56</sup> Padayachee, Vishnu “The International Monetary Fund and World Bank in Post Apartheid Africa: Prospects and Dangers” in Coetzee, Jan K. and Graaff, Johann Reconstruction, Development and People (International Thomson Publishing, New York, 1996) p.368

## **ANC Internal Challenge**

In South Africa, "...democracy (was) associated, for better or worse, with the idea of narrowing the gap between rich and poor and between the living conditions of black and white citizens."<sup>57</sup> This close correlation has placed additional pressure on the ANC to provide poverty alleviation upon taking power. The ANC's party appeal was based on promises of socioeconomic betterment for a large portion of the population.<sup>58</sup> Consequently, one of the ANC's top priorities was the redistribution of basic needs. Nonetheless, the collapse of Apartheid left many South Africans, including the ANC, with exaggerated expectations of what the new government would accomplish.

The domestic and international challenges and opportunities faced by the ANC were made more complex by the party's need to deal with its own success. The ANC had to reshape itself into a political party from a resistance organization. This required its leadership to consider and declare clear economic and policy objectives. "The ANC (had) always been more like a church for all those who opposed Apartheid than an actual political party with a defined ideology and program of action"<sup>59</sup> In attempt to keep this coalition united, the ANC had remained quiet on issues that may split the alliance, including specific economic policies.<sup>60</sup>

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<sup>57</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p.179

<sup>58</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p.64

<sup>59</sup> Jeffrey Herbst South Africa: Economic Crises and Distributional Imperative in Stephen John Stedman South Africa: The Political Economy of Transformation (Lynne Rienner Publishers, Boulder 1994) p. 32

<sup>60</sup> Jeffrey Herbst South Africa: Economic Crises and Distributional Imperative in Stephen

In the early 1990s, with the increased likelihood that it may become the ruling party on South Africa, the ANC was forced to redefine itself. The ANC's first clear policy since the 1955 Freedom Charter was announced in 1990 during a conference in Harare, Zimbabwe. This policy clearly called for the nationalization of industries. It was inward looking and was based on the needs and capacities of the domestic economy. Foreign capital was seen as a supplementary source of capital. It was argued that domestic savings would finance the reconstruction of the economy. The role of the government was clear, as it would function to direct and regulate the economy through the expected growth.<sup>61</sup>

**"The ANC insisted that foreign investment in South Africa would only be tolerated under certain conditions. The state and unions would supervise such investors to make sure that their investments promoted economic growth. In the same policy document, the ANC took the position that the state had the right to nationalize key industries and that the unions would be involved in economic policy making."<sup>62</sup>**

The peaceful transition by which the ANC assumed power meant that it had to pay more attention to business confidence and property rights in order to reassure them that their investment and capital were secure if it hoped to avoid capital flight.<sup>63</sup>

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<sup>61</sup> John Stedman South Africa: The Political Economy of Transformation (Lynne Rienner Publishers, Boulder 1994) p. 32

<sup>62</sup> Padayachee, Vishnu "The International Monetary Fund and World Bank in Post Apartheid Africa: Prospects and Dangers" in Coetzee, Jan K. and Graaff, Johann Reconstruction, Development and People (International Thompson Publishing, New York, 1996) p.369

<sup>63</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p. 104

<sup>63</sup> Jeffrey Herbst South Africa: Economic Crises and Distributional Imperative in Stephen John Stedman South Africa: The Political Economy of Transformation (Lynne Rienner Publishers, Boulder 1994) p. 32

The ANC took control of a government that needed to balance the interests of business against its desire to redress the legacy of Apartheid. The ANC would struggle to convince corporate interests that a large range of positive rights could prove to be economically viable, if not beneficial. It would only be after the 1994 elections that the ANC would undergo “a steep learning curve regarding what its economic policy options really (were).”<sup>64</sup> The limited amount of domestic capital coupled with the enormous under-development present in South Africa meant that South Africa would be dependent upon foreign sources of capital to foster its economic growth more than it may have liked.<sup>65</sup> Not only could the government not ignore the demands of the international community or the economic realities of domestic investment but would eventually become dependent on it.

### **Summary**

It is important to understand the economic and social pressures that the new government faced as it took power. The ANC was forced to balance between jump-starting the stagnant economy and trying to meet the expectations of citizens who had suffered massive poverty under the old guard. Ignoring the economic realities would leave the government little chance of reversing the economic downturn of the previous decade, while ignoring the demands for redistribution would signal a

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<sup>64</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p. 181

<sup>65</sup> Payadachee, Vishnu “Development Implications for South Africa of Using IMF and World Bank Loans and Resources” in Pauline H. Baker, Alex Boraine and Warren Krafchik in South Africa and the World Economy in the 1990s (The Brookings Institution, Cape Town, 1993) p.184

**dramatic shift in ANC philosophy. It was the pursuit of these twin objectives that would characterize the ANC's first term in office.**

### **Chapter 3: The legacy of Apartheid and the ratification of positive rights**

**“A bill of rights is not a political manifesto.... it is a protective device. It is a shield, in other words, rather than a sword. It can state effectively and quite easily what may not be done. It cannot stipulate, with equal ease or effectiveness, what shall be done. The reason is not only that the courts, its enforcers, lack the expertise and infrastructure to get into the business of legislation or administration. It is also, and more tellingly, that they cannot raise the money.”<sup>66</sup>**

**Justice J.M. Didcott**

**The South African constitution was signed into law on December 10, 1996.<sup>67</sup> The drafting of the constitution and entrenched bill of rights was more than a simple act of legislation. While the creation of a constitution is a monumental event in the political development of any country, the South African constitution marked a more profound political transformation. The constitution was the symbolic transition of South Africa from white Apartheid rule to full representative democracy. It would symbolize the “historic bridge between the past of injustice and a (democratic) future.”<sup>68</sup>**

**This shared experience of Apartheid was the most profound influence on the drafters of the new constitution. The inclusion of the bill of rights was designed specifically to prevent a recurrence of Apartheid regime and as an attempt to reverse the damage caused by Apartheid. Without Apartheid, the need for an extensive human rights system would not have been as acute.**

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<sup>66</sup> Sisk, Timothy, D. Democratization in South Africa (Princeton University Press, New Jersey, 1995) p.162

<sup>67</sup> South African Constitution: Explanatory notes

<sup>68</sup> Klare, Karl “Legal culture and transformative Constitutionalism” South African Journal on

This chapter argues that the new South African constitution was a historically conscious document designed to respond to the country's experience with Apartheid. Needless to say, there was a wide consensus to entrench negative rights to limit the power of future governments. The legacy of Apartheid, however, also compelled the ANC to entrench a wide range of positive rights. Despite opposition within South Africa, the massive poverty that plagued the country compelled the ANC to seek a legislative solution. This chapter outlines the rationale behind seeking a legislative solution to Apartheid drafting and the contention that existed within the country over the establishment of such a robust human rights regime. In response to the racial laws of Apartheid, it was deemed necessary to draft a new constitution that included an entrenched bill of rights. The constitution and its drafters were extremely "self conscious about its historical setting and transformative mission."<sup>69</sup>

"The constitution does not even purport to present itself as timeless and metahistoric, coming down from on high. It rejects the fiction that the political community is founded at a single magic moment of 'social contract'."<sup>70</sup>

The constitution is clearly the product of the ultimate triumph over Apartheid. Understanding itself as a historic piece of legislation, the drafters attempted to use the constitution as a catalyst for change and a watershed for the emergence of a

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<sup>69</sup> Human Rights, Volume 14, 1998 p.156  
Klare, Karl "Legal culture and Transformative Constitutionalism" South African Journal on Human Rights, Volume 14, 1998 p.153

<sup>70</sup> Klare, Karl "Legal culture and Transformative Constitutionalism" South African Journal on Human Rights, Volume 14, 1998 p.155

new South Africa. It was this desire to use the bill of rights as a mechanism for change that proved to be the most controversial. The constitution would be used to prevent the re-establishment of an Apartheid state by entrenching a bill of rights in the highest law of the land. It would also seek to rectify the gross injustices of the past by committing all future governments to a proactive social and economic distributive policy.<sup>71</sup>

### **Why a Constitution?**

The decision of Nelson Mandela's government to use a legal mechanism as a protection against human rights abuses to seek a policy of redistribution is interesting and deserves examination. The peculiarity of the ANC's choice of a legal solution to the years of discrimination and human rights abuses is evident when one considers the legalistic nature of Apartheid.

The South African parliament established Apartheid as a set of laws upheld by the courts and enforced by the police. It was no secret that "constitutional law and administrative law were unashamedly used as instruments of the Apartheid state in its exercise in racist social engineering."<sup>72</sup> Why then would the ANC believe the law to be "the best protector against injustice" and the greatest promoter of redistribution?<sup>73</sup> Additionally, why would the constitutional drafters believe that

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<sup>71</sup> Preamble to the South African interim constitution (1994)

<sup>72</sup> Dugard, John "The South African Judiciary and International Law in the Apartheid Era" South African Journal on human rights, Volume 14, 1998 p.111

<sup>73</sup> Ellmann, Stephan "Law and Legitimacy in South Africa" Law and Social Inquiry Journal, 1995 p.473



black South Africans would readily accept the jurisdiction of the law to protect them when, for so many years, it had been the instrument used to oppress them?

The answer can be found in an interesting study of the South African legal system by Stephen Ellman. Ellman found that throughout the battle for equal rights in South Africa, the law managed to maintain a degree of credibility in the eyes of most black South Africans, despite its role in upholding the racist legislation. While opponents of Apartheid rejected participation in the institutions of the state, they continued to participate in the courts and legal system. In fact, the courts proved to be a vital battleground against Apartheid in the eyes of activists. Lawyers who represented clients charged with violating Apartheid laws did not adopt courtroom strategies of total defiance. They chose to “play within the rules, to press the categories of South African legal argument to their limits but still to remain within those categories.”<sup>74</sup>

Individuals who faced trial under the most unjust of Apartheid laws appeared on their court date for trial and did so with the assistance of counsel. Those who were denied the opportunity for trial sought redress, not by rejecting the courts, but by making court appeals.<sup>75</sup> Even the South African unions which were among the most outspoken opponents of the regime, obeyed adverse court orders and appealed them, rather than simply disobey them.<sup>76</sup> Perhaps most surprisingly was that

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<sup>74</sup> Ellmann, Stephan “Law and Legitimacy in South Africa” Law and Social Inquiry Journal, 1995 p.408

<sup>75</sup> Ellmann, Stephan Law and Legitimacy in South Africa (Law and Social Inquiry Journal, 1995) p. 408-9

<sup>76</sup> Ellmann, Stephan Law and Legitimacy in South Africa (Law and Social Inquiry Journal, 1995) p.411

despite the support the courts gave to the Apartheid regime, anti-Apartheid lawyers and their clients sometimes won their cases.<sup>77</sup>

This confidence in, and desire for a new bill of rights had its critics. Andrew Caiger, for example, stated that "...there is almost an optimistic instrumentalist and deterministic approach to the bill of rights issue - an excessive confidence on the quality and degree of judicial performance - yet little evidence is produced which gives cause for such optimism."<sup>78</sup>

While scholars and lawyers outside the country criticized these South African lawyers for legitimizing racist legislation, ironically, it is the legitimization of South African lawyers and dissidents that gave the courts throughout the Apartheid era the legitimacy to the ANC's new constitution and robust bill of rights.

### **Negative rights: Protecting the Future**

One of the most established mechanisms for guarding against the misuse of government powers is to entrench into the constitution of a country a bill of rights.<sup>79</sup>

A bill of rights establishes a set of rights that supercede government power. Unlike the Apartheid regime, it becomes impossible to legally pass legislation that violates

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<sup>77</sup> Ellmann, Stephan Law and Legitimacy in South Africa (Law and Social Inquiry Journal, 1995) p.408

<sup>78</sup> Bennun, Mervyn & Newitt. , Malyn D.D. Negotiating justice : a new constitution for South Africa (Exeter, Devon, UK : University of Exeter Press, 1995) p. 137

human rights.<sup>80</sup> The decision to entrench within the constitution a bill of rights established the supremacy of the rule of law and ended the sovereignty that the South African parliament had always enjoyed.<sup>81</sup> Article 2.8.1 of the 1996 final constitution clearly binds “the legislature, the executive, the judiciary and all organs of the state” to the bill of rights.<sup>82</sup>

The South African bill of rights is contained in Article 7 through 29 of the 1996 final constitution. The constitution guarantees that basic human rights, including the right to life (article 11), freedom and security (article 12), freedom from slavery and forced labour (article 13), privacy (article 14) and religion (article 15). It also protects labour rights, an obvious by-product of the long role unions have played in fighting Apartheid and the socialist tradition of the ANC. The bill of rights also guarantees notably the right to form and join unions (Article 23).

There was debate between business leaders and union representatives about labour issues such as the right to strike. COSATU, South Africa's largest union, argued that the right to strike should be unconditional, even in times of emergency. NACTU, another South African union wanted to guarantee a right not to be arrested simply for striking. Business leaders felt that such a guarantee would create a less than favourable labour market that may scare off international investors and serve to

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<sup>80</sup> Rautenbach, I.M. and Malherbe, E.F.J. What the Constitution Says (B&D Printers, Johannesburg, 1994) p.3

<sup>81</sup> The South African Constitution Article 1.1.C

<sup>82</sup> Klare, Karl “Legal culture and Transformative Constitutionalism” South African Journal on Human Rights, Volume 14, 1998 p.153

stifle economic growth. In the end, however, businesses conceded and the right to strike was guaranteed in the constitution, but the right not to get arrested for doing so was excluded. (Article 22.2(c))

Perhaps in fear of an attempt by future governments to rewrite the constitution, the drafters of the charter deliberately incorporated international human rights laws into the bill of rights.<sup>83</sup> The document clearly states that international law should be used in rendering decisions where rights violations come into play. A deliberate break from the past regime's view of international law becomes apparent. In response to international condemnation of the Apartheid regime, the Apartheid legal system had self-imposed a withdrawal from the international legal community. Reversing this isolation was a way of 'undoing' what the previous governments had done. The country, which was not a party to any international human rights conventions during the Apartheid years,<sup>84</sup> had ratified within two years all five of the major international human rights conventions between 1993 and 1995.

**“The 1996 South African constitution . . . (sought) to remedy the past by expressly declaring that customary international law is part of our law, and that all legislation, and particularly the bill of rights, is to be interpreted to accord with international law.”<sup>85</sup>**

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<sup>83</sup> Maluwa, Tiyanjana “Discourses on Democracy and Human rights in Africa” African Journal of International and Comparative law, March 1997 Volume 9 p.56

<sup>84</sup> Dugard, John “The South African Judiciary and International Law in the Apartheid Era “ South African Journal on human rights, Volume 14, 1998 p.118

<sup>85</sup> Dugard, John “The South African Judiciary and International Law in the Apartheid Era “ South African Journal on human rights, Volume 14, 1998 p.126

In order to ensure that government action is subject to an independent review, the Constitutional Court was created as a guardian of the constitution.<sup>86</sup> The constitution established six independent organizations to promote democracy and protect human rights. These are the Human Rights Commission, the Commission on Gender Equality, the Office of the Public Protector, the Judicial Service Commission, the Truth and Reconciliation Commission, the Commission for the Promotion and Protection of the Rights of Cultural and Religious and Linguistic Communities.<sup>87</sup> While a lengthy discussion of these organs are beyond the scope of this work, they are all designed to protect and establish a robust rights regime and full democratic system in South Africa.

### **Positive rights: Repairing the Past**

Traditionally, a bill of rights was designed to protect an individual's freedom and property against the abusive power of the state.<sup>88</sup> The drafters of the South African constitution envisioned the constitution as more than the simple prevention of future rights abuses. It was seen as an instrument of social transformation and reconstruction.<sup>89</sup> In order to accomplish this social transformation, a government had to do more than simply not violate rights. It must take a positive role towards the realization of the specific rights that the citizens of their country possessed.<sup>90</sup>

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<sup>86</sup> Human Rights Internet (1998) (<http://www.hri.ca/fortherecord1998/vol2/southafricarr.htm>)

<sup>87</sup> Human Rights Internet (1998) (<http://www.hri.ca/fortherecord1998/vol2/southafricarr.htm>)

<sup>88</sup> Klare, Karl "Legal culture and Transformative Constitutionalism" South African Journal on Human Rights, Volume 14, 1998 p.153

<sup>89</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p.155

<sup>90</sup> Claude, Richard Pierre and Weston, Burns H. (eds.) Human Rights in the World Community (University of Pennsylvania Press, Philadelphia, 1992) p.18-9

The argument for the inclusion of 'positive rights' in the constitution was contentious among its drafters throughout the process. Maluwa best states the over-arching argument for the inclusion of these rights. He wrote, "for the subsistence farmer unsuccessfully trying to scratch a living from the soil, freedoms to vote and speak are meaningless."<sup>91</sup> The historic consciousness of the drafters wouldn't let them overlook the inequality left as a by-product of the previous regime.

The support for these rights was in no way as widespread as for negative rights. Entrenching positive (socio-economic) rights in the constitution proved to be contentious for three reasons. Groups such as the Free Market Foundation, the South African Chamber of Mines and the South African Chamber of Business argued that strong moves towards redistributive legislation would shake foreign investor's confidence. This drop in foreign investment would lead to a worsening economic situation in the country that could do little to resolve the issue of poverty in the country.<sup>92</sup>

The second reason was for the reluctance to entrench social and economic rights into a constitution. Despite the fear that these promises or rights were unfulfillable, there was the fear that by making them judicable would eventually put the country in

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<sup>91</sup> Maluwa, Tiyanjana "Discourses on Democracy and Human rights in Africa" (African Journal of International and Comparative law, March 1997 Volume 9) p. 66

<sup>92</sup> South African Constitutional Talks 10, 1995 (<http://www.anc.org.za/>)

bankruptcy.<sup>93</sup> Any serious attempt to comply with these rights would pour money into a hole that could not be filled and by not making a serious attempt, a government would be in violation of the law.

The third reason was a perceived threat to democracy. Some feared that entrenching positive rights would create an unresolvable dilemma for the courts. There is an underlying assumption that these rights were at risk of being ignored unless the courts took a proactive step to guide the legislation? In this situation, they would “ forsake their proper role of negatively testing government initiatives against clear legal standards in exchange for a dangerous assumption of positive command over the government’s policy initiatives”.<sup>94</sup> By doing so, the judges, a non-elected body, would begin to guide legislation out of the hands of the democratically elected parliament. The implications for democracy in South Africa under this situation are unclear. These groups who opposed the inclusion of positive rights in the constitution were not arguing that the gross inequality left over from the Apartheid regime should be ignored. Rather, they argued that socio-economic objectives should be included in a set of legislative directives passed by the government instead of being entrenched in the constitution.<sup>95</sup>

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<sup>93</sup> South African Constitutional Talks 10, 1995 (<http://www.anc.org.za/>)

<sup>94</sup> Michelman, Frank The constitution. Social rights and Reason: A tribute to Etienne Mureiknik South African Journal on Human Rights, Volume 14, 1998) p.500

<sup>95</sup> South African Constitutional Talks 10, 1995 (<http://www.anc.org.za/>)

## **Negotiating the Constitution**

Constitutional talks began as direct negotiations between the ANC and the National Party in 1993. This process would later be expanded to include the Inkatha Freedom Party (IFP), the ethnic based Zulu party and the Democratic Party (DP) which sought to defend private property and free market principles. The Pan African Congress (PAC) drew support from the poor and argued for land reform and redistribution<sup>96</sup> the African Christian Democratic Party (ACDP) and the Freedom Front (FF)<sup>97</sup>. The negotiations took place over two years and addressed a wide range of issues ranging from social services to property rights. The contention over positive rights can be demonstrated by the discussion that occurred over entrenching the right to property in the constitution.

The ANC's position on property rights had been established years before they ever had the hope to establish a government. The clearest ANC stance on this issue is found in the 1955 Freedom Charter. In it, the ANC "seemed to demand the nationalization of the mines, banks, and monopolies."<sup>98</sup> and supported the seizing of land and redistribution of it to the poor. True to these objectives, the ANC was reluctant to include the right to property in the drafting of the constitution because it would limit its ability to nationalize industries if deemed necessary. This would tie

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<sup>96</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p. 99

<sup>97</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p.61

<sup>98</sup> Jeffrey Herbst South Africa: Economic Crises and Distributional Imperative in Stephen John Stedman South Africa: The Political Economy of Transformation (Lynne Rienner Publishers, Boulder 1994) p.32



the government's hand to address the second objective of the constitution; to redress the actions of racially based property seizures<sup>99</sup> by limiting the new government's ability to expropriate land.<sup>100</sup> While entrenching property rights not only protected South Africans from future government seizures of land, it protected the inhabitants who had benefited from the Apartheid regime.

Despite its objections and the ANC's long standing commitment to the redistribution of property, Mandela's government faced tough negotiations over this issue.

Agreeing to negotiate this issue demonstrated the ANC's firm commitment to the democratic ideals, even at the risk of alienating its support base. The ANC's appeal was based on "promises of socioeconomic betterment for the vast majority of South African citizenry."<sup>101</sup> One of the key methods for achieving this in a transitional period is the expropriation of land. The interim constitution reflected this view, including the right for citizens to own property. By agreeing to discuss this issue, the ANC was sending a clear message that democratic ideals were more important than its supporters or even its own ideals.

The negotiations positioned the ANC in opposition to the National party, the next most significant negotiating party.<sup>102</sup> The National party represented wealthy South

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<sup>99</sup> Klare, Karl "Legal culture and Transformative Constitutionalism" South African Journal on Human Rights, Volume 14, 1998 p.124

<sup>100</sup> Maluwa, Tiyanjana "Discourses on Democracy and Human rights in Africa" African Journal of International and Comparative Law, March 1997 Volume 9 .p. 66

<sup>101</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p.64

<sup>102</sup> Mettler, Johann "The Process of Land Restitution in South Africa" African Journal of International and Comparative Law, March 1998, volume 10 p.126

Africans as well as the business community, including broad property protection, which would ensure the protection of current property owners (mainly white) from the actions of future, albeit democratically elected governments. Business leaders supported this position for different reasons. They argued that weak property rights could lead to poorly implemented land reforms. In turn, this would have the net effect of scaring foreign investors out of South Africa for fear that their corporate holdings may one day be seized.<sup>103</sup>

A negotiated compromise resulted between these two opposing views.<sup>104</sup> The clause on property rights (section 28) “boasts no less than nine subsections making it the most detailed human right next to section 35 which deals with the rights of detained and accused persons, a far cry from the three subsections of predecessor<sup>105</sup> in the interim constitution. In its final form, the clause on property rights (28) in “its subsections (1) and (2), like its predecessors, does not confer the right to own property onto anyone but instead protects those fortunate enough to own property from arbitrary interference by the state, in true western liberal-democratic tradition.<sup>106</sup> This was a victory for the National party who viewed the right to property as a threat to those who own a disproportionate amount of property. The ANC was able to ensure that both the interim and the final constitutions allowed

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<sup>103</sup> South African Constitutional Talks 3 1996 (<http://www.anc.org.za/>)

<sup>104</sup> Klare, Karl Legal culture and Transformative Constitutionalism South African Journal on human rights, Volume 14, 1998 p.124

<sup>105</sup> Mettler, Johann “The Process of Land Restitution in south Africa” African Journal of International and comparative Law, March 1998, volume 10 p.126

<sup>106</sup> Mettler, Johann “The Process of Land Restitution in South Africa” African Journal of International and comparative Law, March 1998, volume 10 p.126

for land restitution, yet under strict guidelines. The power to decide on land claims, however, was moved out of the government's hands and into the hands of the courts to prevent the arbitrary seizure of property. A land claims commission, a government agency, was established to facilitate and recommend the courts issues regarding land claims. The commission was given no formal powers.<sup>107</sup> Instead, the court remains "the only body empowered to make a final order in respect of a land claim."<sup>108</sup>

The complexity of this clause represents a degree of disagreement over the effect of entrenching positive rights into the constitution. Despite the debate, the South African constitution emerged as one of the most robust human rights legislations, enshrining a vast array of positive rights. The constitution did not simply include these rights, but committed the country "to achieve a new kind of society in which people actually have the social resources they need to meaningfully exercise their rights".<sup>109</sup> For the drafter of the constitution, political freedom, democracy and positive rights could not be separated.<sup>110</sup>

The positive rights that the constitution guaranteed included the right of citizens to clean the environment for the benefit of present and future generations. It requires

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<sup>107</sup> Klare, Karl "Legal culture and Transformative Constitutionalism" South African Journal on Human Rights, Volume 14, 1998 p.127

<sup>108</sup> Klare, Karl "Legal culture and Transformative Constitutionalism" South African Journal on Human Rights, Volume 14, 1998 p.127

<sup>109</sup> Klare, Karl "Legal culture and Transformative Constitutionalism" South African Journal on Human Rights, Volume 14, 1998 p.153

<sup>110</sup> Klare, Karl "Legal culture and Transformative Constitutionalism" South African Journal on Human Rights, Volume 14, 1998 p.153

the state to implement “reasonable legislative” to prevent pollution and ecological degradation (Article 24). Positive rights also include social and economic rights including the right to adequate housing (Article 25), health care services, sufficient food and water, emergency medical treatment, social security and social assistance (Article 27).

While the bill does not stipulate that the state is not bound to the immediate implementation of positive rights, the government “must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights” (Article 27.2). This obligation serves to limit the financial decisions and options a government possessed by requiring it to commit some available resources to housing, health care and environmental protection.<sup>111</sup> Article 2.1 does not require the state to seek to fulfill these rights by clearly stating that the “obligations imposed by [the constitution] must be fulfilled” (Article 2.1).

### **Summary**

The South African constitution was a product of its time and place. It was the ANC's response to Apartheid as it would not only guarantee that the Apartheid legislation would be repealed forever, but that future governments would be required to redress its lingering and most devastating legacies. These discussions instigated the fiercest debate with respect to the contention between successful growth and

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<sup>111</sup> Michelman, Frank “The constitution, Social rights and Reason: A tribute to Etienne Mureiknik” South African Journal on Human Rights, Volume 14, 1998 p.500

**positive rights. The ratified constitution challenged its critics who argued that such a bill of rights would be unworkable and detrimental. If the ANC was capable of sustaining growth and realizing its positive rights commitments, it would send a clear message to other developing countries that sustained growth and a strong positive commitment are not mutually exclusive endeavors. It was a challenge that the ANC would unfortunately lose.**

## **Chapter 4: Growth and Redistribution**

**“Whatever might be said elsewhere about the superiority of the market as an engine of provision for such needs, a constitution for South Africa, supposedly marking the transition from Apartheid to freedom, while imposing no duty on the state to see to the matter of relief from the privations of gross historical injustice, would be a travesty.”<sup>112</sup>**

The ratification of the bill of rights was a self-imposed commitment by the ANC to an economic policy of redistribution. The extensive positive rights would compel the ANC and all future governments to the economic and social objectives of redressing the gross inequality created by the Apartheid regime. With this intention, the ANC implemented its first economic policy, the Reconstruction and Development Programme (RDP). The RDP reflected the party's desire to redress the legacy of Apartheid by committing the government to an intensive redistribution policy to provide housing, infrastructure and social services to the poor. The RDP was based on the assumption that positive rights were not only compatible rather intertwined. “Policies aimed at achieving higher economic growth rates and those policies aimed at reducing poverty and inequality can reinforce each other.”<sup>113</sup> A government could not build an economy while millions did not have the basic necessities of life, such as a home, running water and electricity.

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<sup>112</sup> Michelman, Frank “The constitution, Social rights and Reason: A tribute to Etienne Mureiknik” South African Journal on Human Rights, Volume 14, 1998 p.500

<sup>113</sup> “Poverty and Inequality in South Africa Report” prepared for the Office of the Executive Deputy President and the Inter-Ministerial Committee for Poverty and Inequality/Summary Report, 13 May, 1998, Sections 3: Macroeconomic Context

**As idealistic as the RDP was, it did not reflect the economic realities of the country the ANC was elected to govern. Within two years of its implementation, the ANC was forced to abandon the RDP in favour of a much more conservative growth oriented economic policy. The Growth, Economy and Redistribution Programme (GEAR) implemented in 1996 did not abandon the government's commitment to positive rights, but significantly curtailed the extent of its commitment.**

**This chapter will focus on the attempt by the new government to generate and sustain a national growth rate necessary to fund the RDP's positive rights commitments. While the redistribution objectives and successes will be highlighted, the success of the RDP ultimately lays in the ability of the government to generate and sustain a growth rate of five per cent a year. It was primarily the failure of the ANC to address the economic realities of the country that ultimately forced it to abandon the RDP and pursue a much more conservative growth oriented economic policy.**

**The RDP tested the ability of a government to maintain a positive growth rate while implementing aggressive positive rights. The ANC's decision to adopt GEAR answered that challenge and was a sober realization that the relationship between growth and redistribution were antagonistic.**

## **Reconstruction and Development Programme (RDP)**

The ANC came to power in 1994 capturing 62.6% of the vote, decisively beating the National Party that took 20.4%, and the Inkatha Freedom Party that won 10.5%.<sup>114</sup>

The ANC was finally in a position to fulfill one of its key objectives, the "fight for social justice and to eliminate the vast inequalities created by Apartheid".<sup>115</sup> It was with this objective that the ANC launched the RDP. The ANC hoped to mobilize the country "toward the final eradication of the results of Apartheid" by providing a wide range of positive rights.<sup>116</sup>

To these ends, the RDP emphasized redistribution over growth, identifying ten basic needs required by all South African citizens and pledged government resources towards their realization. These needs included jobs, land, housing, water, electricity, telephones, transport, environment, food, health care, social security and welfare.<sup>117</sup> It promised to build or help provide affordable shelter to every citizen by the year 2003, with one million new low-cost houses to be built within five years. The RDP pledged to supply 20 to 30 litres of clean water each day to every person within their first two years, and 50 to 60 litres a day within five years. All homes were promised sanitation and garbage collection within two years. Two and a half million households, schools and clinics would be provided with electricity by the year 2000. By 1999, free medical care was to be provided to children under

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<sup>114</sup> Sisk, Timothy, D. Democratization in South Africa (Princeton University Press, New Jersey, 1995) p. 298

<sup>115</sup> ANC constitution (As amended by and adopted at the National Conference of the African National Congress, December 1997) Article 2.4

<sup>116</sup> The Reconstruction and Development Programme article?



six, the disabled, elderly and unemployed. Ten years of free compulsory education would be provided as soon as possible. By the year 2000, it was expected that no classroom would have a student to teacher ratio of more than 40 to 1.

The economic component of the RDP was designed to sustain the provision of basic needs stating that all of its policies "must aim to alleviate inequalities in income and wealth and expand productive opportunities."<sup>118</sup> The government pledged to create between 300 000 and 500 000 jobs in industry, trade and commerce within five years<sup>119</sup> and committed itself to sustaining an economic growth rate of five percent.<sup>120</sup> Bernie Fanaroff, the RDP's deputy general director, estimated that while a four percent annual growth rate would stabilize the employment situation, it would not be sufficient to create employment growth.<sup>121</sup>

The RDP was not strictly an ANC initiative. It received wide support by all political parties as well as the general population.<sup>122</sup> In a survey conducted by the South African Communist party (SACP), 65% of respondents believed that essential services such as water and electricity should be free to those who could not afford them. Fifty-seven percent of respondents felt that the government should provide

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<sup>117</sup> The Reconstruction and Development Programme Article 1.4.2

<sup>118</sup> The Reconstruction and Development Programme 4.2.9

<sup>119</sup> African National Congress. *A basic Guide to the Reconstruction and Development Programme* (ANC, South Africa, 1994) (<http://www.anc.org.za/ancindex.html>)

<sup>120</sup> African National Congress. *A basic Guide to the Reconstruction and Development Programme* (ANC, South Africa, 1994) (<http://www.anc.org.za/ancindex.html>)

<sup>121</sup> Koelble, Thomas A. *The Global Economy and Democracy in South Africa* (Rutgers University Press, New Jersey, 1998) p.114

<sup>122</sup> Koelble, Thomas A. *The Global Economy and Democracy in South Africa* (Rutgers University Press, New Jersey, 1998) p. 105

housing to those who could afford it.<sup>123</sup> Even the ANC appointment of Jay Naidoo, the former general secretary of COSATU, demonstrated his commitment to labour and workers' concerns over economic growth.<sup>124</sup>

### **Evaluating the RDP**

The ANC launched the RDP in 1994 with great optimism. Within two years, this new policy had proven to be "both a spectacular success and an abysmal failure."<sup>125</sup> The RDP's success lay in its ability to meet many of its social objectives. Free health care was instituted for women and children. A nutrition program had been developed to include over 12,500 schools. More than 550 new health clinics were built and nearly as many clinics were upgraded. More than 1.3 million new electrical connections were made, more than a million water connections had been completed<sup>126</sup> and more than 1.8 million new telephone lines were laid.<sup>127</sup> The only serious social failure of the RDP was its housing policy. Jay Naidoo had promised 300 000 houses by the end of 1996, yet by mid 1996, only 30 000 had been built<sup>128</sup> resulting in an estimated shortfall of 1.2 million houses.<sup>129</sup> These were "staggering

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<sup>123</sup> **SACP RESPONSE TO "REALITY CHECK" SURVEY** By Dr. Blade Nzimande SACP General Secretary <http://www.sacp.org.za/docs/reality.html>

<sup>124</sup> Koelble, Thomas A. **The Global Economy and Democracy in South Africa** (Rutgers University Press, New Jersey, 1998) p.106

<sup>125</sup> Mayibuye: December 1997 <http://www.anc.org.za/ancdocs/pubs/mavi9712.html> 'Why has South African Land Reform Failed?'

<sup>126</sup> Mayibuye: December 1997 <http://www.anc.org.za/ancdocs/pubs/mavi9712.html> 'Why has South African Land Reform Failed?'

<sup>127</sup> Koelble, Thomas A. **The Global Economy and Democracy in South Africa** (Rutgers University Press, New Jersey, 1998) p.129-138

<sup>128</sup> Koelble, Thomas A. **The Global Economy and Democracy in South Africa** (Rutgers University Press, New Jersey, 1998) p.111

<sup>129</sup> Koelble, Thomas A. **The Global Economy and Democracy in South Africa** (Rutgers University Press, New Jersey, 1998) p.118

accomplishments for a nation that teeters with one foot in the developing world and one foot in the developed."<sup>130</sup>

The social success of the RDP came at an economic expense. The RDP had fallen dramatically short of its promise to create 300 000 - 500 000 jobs in industry, trade and commerce.<sup>131</sup> By the middle of 1995, only 55 000 new jobs had been created in the formal economy.<sup>132</sup> Unemployment levels remained close to forty percent.<sup>133</sup> This situation was made worse by the fact that South Africa had a population that was growing faster than the economy with more people competing over the same number of jobs.<sup>134</sup>

The lack of job creation was indicative of more deeply rooted economic problems. Entrenched labour rights had helped to worsen the labour situation in the country, not improve them. A World Bank report stated that joining a union in South Africa raised the price of labour by 25-35%.<sup>135</sup> Critics of the RDP pointed out that "the wage-raising effect decreased the total number of jobs in the economy by 6.3%".<sup>136</sup>

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<sup>130</sup> Mayibuye: December 1997 'Why has South African Land Reform Failed?'  
<http://www.anc.org.za/ancdocs/pubs/mayi9712.html>

<sup>131</sup> African National Congress A basic Guide to the Reconstruction and Development Programme (ANC, South Africa, 1994) (<http://www.anc.org.za/ancindex.html>)

<sup>132</sup> ANC, UNDERSTANDING GEAR. Growth, Employment and Redistribution. The Government's new economic strategy, 2nd Quarter, 1997)  
(<http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo2.html>)

<sup>126</sup> US Government, Department of State Report submitted to the Senate Committees on Foreign Relations and on Finance and to the House Committees on Foreign Affairs and on Ways and Means (January 1997) <http://www.state.gov>

<sup>134</sup> ANC, UNDERSTANDING GEAR. Growth, Employment and Redistribution. The Government's new economic strategy, 2nd Quarter, 1997)  
(<http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo2.html>)

<sup>135</sup> The Economist Magazine (Oct. 31 1998)

<sup>136</sup> The Economist Magazine (Oct. 31 1998)

With approximately 3.4 million South Africans in unions, (roughly 35% of the economically active population),<sup>137</sup> owners of businesses became reluctant to invest in labour intensive enterprises and there was a greater intent on hiring machines and robots to perform work wherever possible."<sup>138</sup> This shift towards capital-intensive forms of production, as opposed to labour intensive initiatives only worsened the employment situation.<sup>139</sup>

At the core of the dilemma was that job creation requires economic growth. The growth rate of the economy in 1995 was 3.5%, dropping to 3% in 1996 and 2% by 1997. This downward trend was well below the required 5% growth rate needed to sustain the RDP initiatives. Poor market performance, strong redistributive policies and tough labour protection resulted in a loss of confidence among foreign investors, resulting in a 30% depreciation of the Rand in dollar terms in 1996.<sup>140</sup>

This depreciation served to worsen the government's other financial problem, its mounting debt load. When the ANC took power in 1994, the debt was R189.9 billion or 48% of GDP. By 1996, the debt had skyrocketed to R312.<sup>141</sup> Servicing

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<sup>137</sup> US Government, 1999 Country Report on Economic Policy and Trade Practices - South Africa (Released by the Bureau of Economic and Business Affairs U.S. Department of State, March 2000

([http://www.state.gov/www/issues/economic/trade\\_reports/1999/soafrica.html](http://www.state.gov/www/issues/economic/trade_reports/1999/soafrica.html))

<sup>138</sup> Ginsberg, Anthony South Africa's Future MacMillian Publishers Ltd., London, 1998) p.121

<sup>139</sup> The Commonwealth African Investment Almanac 1999, South Africa: Investment and Business environment (Provided by newafrica.com - for Africa © GGL.2000) (<http://www.newafrica.com/business/environment/safrica.htm>)

<sup>140</sup> Ginsberg, Anthony South Africa's Future MacMillian Publishers Ltd., London, 1998) p.138

<sup>141</sup> Ginsberg, Anthony South Africa's Future MacMillian Publishers Ltd., London, 1998) p.212

the debt became one of the government's largest expenditures.<sup>142</sup> "Based on the 1997/98 budget, South Africa spent double the amount of money paying off interest on its debt it spends on either health or welfare."<sup>143</sup> The government was spending 34.3 billion out of its 173 billion Rand revenue servicing the debt.<sup>144</sup> Debt inhibited the government's ability to fund the RDP's social and job creation programs. There was simply less money available to pay for housing, social services and education.

One of the government's largest financial burdens was the size of its bureaucracy. The largest government expenditure was the salaries of its civil servant.<sup>145</sup> While the ANC's bloated bureaucracy served to provide employment and redistribute income, it did little to reduce the debt. "The frightening reality [was] that the government, over the past two decades, remained the fastest growing industry in South Africa, outpacing manufacturing and mining".<sup>146</sup> The government faced a dilemma. It could not cut the salary bill of civil servants to free up more capital for redistribution and debt financing increasing unemployment. A 1997 government estimate stated that the government could only afford to employ 1 million civil servants. This would require cutting 300,000 jobs from the civil service of that time. Yet, 700 000 out of the 1.3 million employees were teachers, health workers and

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<sup>142</sup> Feinstein, Andrew A Contextualization of the Macro-Economic Strategy (UMRABULA, 4th Quarter, 1996) (<http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo1.html#art4>)

<sup>143</sup> Ginsberg, Anthony South Africa's Future MacMillian Publishers Lts., London, 1998) p. 213

<sup>144</sup> ANC, UNDERSTANDING GEAR, Growth, Employment and Redistribution, The Government's new economic strategy, 2nd Quarter, 1997) 2.2 (<http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo2.html>)

<sup>145</sup> ANC, UNDERSTANDING GEAR, Growth, Employment and Redistribution, The Government's new economic strategy, 2nd Quarter, 1997) 2.3 (<http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo2.html>)

police, all of whom served to support a positive rights regime. This meant that the 300,000 personnel reduction would have had to come from the remaining 600,000 in civil service, resulting in cutting the number of jobs in half.<sup>147</sup> In reality, the bureaucracy grew. The government increased the number of public servants employed by national departments by 0.4% between March 1996 and March 1997.<sup>148</sup>

### **Why the RDP failed**

It became apparent that the RDP had become unsustainable. While it had successfully realized some positive rights, the RDP had hindered the country's economic growth. At the heart of the emerging economic crisis was the country's lack of available capital. This originated from three sources, the culture of resistance, an investment crisis and a reliance on foreign sources of capital. This reliance on global capital gave neo-liberals abroad a greater degree of control over the ANC's economic policy while the ANC was left with few domestic alternatives. The necessity to appease foreign capital became acute with the Rand's devaluation in 1996.

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<sup>146</sup> Ginsberg, Anthony South Africa's Future MacMillian Publishers Ltd., London, 1998) p.75

<sup>147</sup> ANC, UNDERSTANDING GEAR. Growth, Employment and Redistribution. The Government's new economic strategy, 2nd Quarter, 1997)  
(<http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo2.html>)

<sup>148</sup> Ginsberg, Anthony South Africa's Future MacMillian Publishers Ltd., London, 1998) p.139

### ***Culture of Resistance***

The ANC was a product of its own history. It originated as a resistance organization committed to the elimination of Apartheid. In many ways, the failure of the RDP was a product of the successful fight against Apartheid. Munslow and FitzGerald argue that one of the largest internal obstacles the RDP faced was the same thing that helped bring down the Apartheid regime.<sup>149</sup> The ANC and other anti-Apartheid fighters throughout its struggle against the regime nurtured among many South Africans a “culture of resistance.” The objective of this policy was to resist government initiatives in an attempt to make the country ungovernable. Under Apartheid, rent boycotts and civil disobedience campaigns created a culture of opposition among the various civil organizations. There was an unspoken cooperation between non-governmental organizations to undermine the South African government. It was the ANC's successes in creating this local culture that helped end Apartheid. It also proved to be detrimental to the implementation of the RDP.<sup>150</sup>

When the ANC came to power, 90% of the black population were without piped water in their homes as opposed to only 0.1% of the white population. While the ANC managed to connect roughly 1 million blacks to water pipes; it fared far worse with the collection of fees. Despite the government's little consideration for market

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<sup>149</sup> Koelble, Thomas A. *The Global Economy and Democracy in South Africa* (Rutgers University Press, New Jersey, 1998) p. 108

<sup>150</sup> Koelble, Thomas A. *The Global Economy and Democracy in South Africa* (Rutgers University Press, New Jersey, 1998) p. 108

logic or later profits,<sup>151</sup> "even the meager fees supposedly charged [were] seldom collected" leaving the government with 99% of the cost.<sup>152</sup> Both receivers and collectors simply refused to comply with the payment of these services.

The introduction of rent controls and affordable public utilities did not stop many in townships to simply not pay their rent or mortgages. This was partly a response to the fact that when the government finally provided housing, "most beneficiaries felt that their costs had increased because prior to receiving housing they had minimal or non-existent housing fees. Owners of credit-linked homes felt that their general condition had worsened as a result (and are suffering from) increased indebtedness."<sup>153</sup> This also led to unwillingness by banks and other institutions to lend money to people in townships.<sup>154</sup>

In order to deal with this, the Mandela government introduced the Masakhane project, an appeal to township residents to pay their services. It failed to produce objectives.<sup>155</sup> In August of 1997, with ESKOM, the electric company falling R1.2 billion in the red because of back payments,<sup>156</sup> local councils in Guateng took the step of ripping out electricity lines to neighborhoods to enforce payments. The

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<sup>151</sup> The Economist Magazine (May 2, 1998)

<sup>152</sup> The Economist Magazine (May 2, 1998)

<sup>153</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p.122

<sup>154</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p.108

<sup>155</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p.109

<sup>156</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p.129-138



government came under attack by the South African National Civics Organization (SANCO) who protested the government's attempt to enforce payments arguing that many could not afford to pay for the services,<sup>157</sup> since more than 50% of citizens don't earn enough to pay for basic services.<sup>158</sup> Economic realities and positive rights began to clash.

The culture of resistance persisted even within the government rankings with the high degree of unaccountability over government funds. In 1997, the Minister of Health, Mr. Zuma, reported that over R796.8 million had been spent on school lunches. Among these, R4.3 million had been stolen or lost.<sup>159</sup> In KwaZulu/Natal, 1.36 billion Rand was spent paying 'ghost employees'.<sup>160</sup> "Struggle bookkeeping", deliberately incorrect accounting, survived well after the end of Apartheid. This effectively allowed organizations to function without the knowledge of the government. This unaccountability persisted long after the end of Apartheid and resulted in additional amounts of unaccounted funds.<sup>161</sup>

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<sup>157</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p.109

<sup>158</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p.108

<sup>159</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p.110

<sup>160</sup> ANC, UNDERSTANDING GEAR, Growth, Employment and Redistribution, The Government's new economic strategy, 2nd Quarter, 1997) article 2.1

<sup>161</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p.110

## ***Investment Crisis***

Poor bill payments and unaccountability were not the only obstacles to the RDP. High unemployment and persistent poverty served to worsen the situation. It was not so much the inequality that caused the problem, but, ironically, the ANC's strong push to rectify the situation.<sup>162</sup> The result was an investment crisis.

The RDP committed itself to a sustained growth rate of 5% in order to maintain its redistributive policies. To maintain this growth rate, investments would be required. Investment is simply another way of saying that the public needs to put money into savings that could otherwise be spent immediately. By saving a portion of their income, households make capital available for industries to expand their productions, thereby creating jobs and contributing to economic growth. An economy can only grow when more goods are manufactured. Money was required to be invested in new factories, better machinery, research and development.<sup>163</sup> Without the initial availability of savings, it would not be possible to expand and there could be no expansion. This is the starting point of all economic growth<sup>164</sup>

While total investment in South Africa grew steadily from World War II until the late 1970s reaching almost 28% of the GDP in 1980, it fell to a low of 17% in 1993.<sup>165</sup>

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<sup>162</sup> ANC, UNDERSTANDING GEAR. Growth, Employment and Redistribution. The Government's new economic strategy, 2nd Quarter, 1997)  
<http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo2.html>.

<sup>163</sup> ANC, UNDERSTANDING GEAR. Growth, Employment and Redistribution. The Government's new economic strategy, 2nd Quarter, 1997)  
<http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo2.html>.

<sup>164</sup> Ray, Debraj Development Economics (Princeton University Press, New Jersey, 1998) p.52

<sup>165</sup> Poverty and Inequality in South Africa/Report prepared for the Office of the Executive Deputy

The ANC inherited a country plagued by an extremely low savings rate. The ratio of gross domestic savings to GDP in 1994 was 17.1 per cent. Ginsberg argued that the rate of savings needed to sustain the required economic growth was a savings rate closer to 30%. "Without savings, we are not going to have capital available for investment", Finance Minister Trevor Manuel stated.<sup>166</sup> Without money for investment, growth would suffer and ultimately redistributive policies would become unaffordable.

In his book Development Economic, Debraj Ray argues that savings rates resulted from surplus income. In a country with a limited amount of capital, surplus income only exists where there is inequality. The minority that possesses this surplus income will use it as savings, creating a pool of investment capital that helps generate growth. "In an extremely poor country, redistributive policies may bring down the rate of savings and therefore the rate of growth."<sup>167</sup> This economic principle was proven correct. With its redistributive policy, the savings rate in South Africa decreased from 17.1% in 1994 to 14.2% in 1998.<sup>168</sup> This was attributed to the fact that black wage packets were shared extensively within family and kin

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<sup>166</sup> President and the Inter-Ministerial Committee for Poverty and Inequality/ Summary Report/ 13 May, 1998/ Sections 3: Macroeconomic Context)  
<sup>167</sup> Ginsberg, Anthony South Africa's Future MacMillian Publishers Ltd., London, 1998) p.196  
Ray, Debraj Development Economics (Princeton University Press, New Jersey, 1998) p. 215  
<sup>168</sup> The Commonwealth African Investment Almanac 1999, South Africa: Investment and Business environment (Provided by newafrica.com for Africa © GGL.2000) (<http://www.newafrica.com/business/environment/safrica.htm>)

circles, making almost all income earned used for consumption rather than savings.<sup>169</sup>

The government's large debt exacerbated the problem. In order to continue to fund the RDP while at the same time service the debt, the government borrowed money. The government debt in 1996 was owed 95,6% domestically.<sup>170</sup> This had the effect of reducing the amount of available capital for South African businesses. This resulted in an even lower savings rate, decreased investment and slower growth.<sup>171</sup>

Domestically, the ANC tapped its potential sources of revenue to fund the RDP. The government had raised income tax by as much as 72% between 1993 and 1997.<sup>172</sup> This not only proved to be an inadequate solution, but also added to the savings rate problem.<sup>173</sup> Increases in taxes results in even less income available for consumption or spending. The government was faced with a choice. It could seek to combat its investment crisis by combating the debt, reducing government spending and cutting taxes or seek investment capital abroad.

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<sup>169</sup> The Commonwealth African Investment Almanac 1999, South Africa: Investment and Business environment (Provided by newafrica.com for Africa © GGL.2000) (<http://www.newafrica.com/business/environment/safrica.htm>)

<sup>170</sup> (ANC, UNDERSTANDING GEAR, Growth, Employment and Redistribution, The Government's new economic strategy, 2nd Quarter, 1997) (<http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo2.html>).

<sup>171</sup> ANC, UNDERSTANDING GEAR, Growth, Employment and Redistribution, The Government's new economic strategy, 2nd Quarter, 1997) (<http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo2.html>)

<sup>172</sup> Ginsberg, Anthony South Africa's Future (MacMillian Publishers Ltd., London, 1998) p.197

## ***Reliance on Foreign Capital***

Because of the domestic investment crisis, the South African government's economic policies became dependent upon foreign export earnings and the influx of foreign investments.<sup>174</sup> During the years of the RDP, South Africa became the largest recipient of foreign direct investment in Sub-Saharan Africa, attracting \$1.7 billion. The country's economic policy was based on large, sustained flows of foreign investment into the country.<sup>175</sup> This wouldn't become a problem until the flow of foreign capital seized.

When it first came into office, the ANC and the South African government enjoyed what Thomas A. Koelble termed a 'Mandela bonus'. "Foreign investors pledged their support for the fledging democracy. Stocks and bonds soared. Exchange rates seemed to be relatively stable".<sup>176</sup> Foreign investment flowed into the country, lured by the optimism for a post-Apartheid country.<sup>177</sup>

While the 'Mandela bonus' helped give the RDP its initial boost, as South Africa re-integrated into the world economy it became more accountable and susceptible to neo-liberal principles. The 1990s were marked by a world economy dominated by

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- <sup>173</sup> Ginsberg, Anthony South Africa's Future (MacMillian Publishers Ltd., London, 1998) p.197  
<sup>174</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p.115  
<sup>175</sup> The Commonwealth African Investment Almanac 1999, South Africa: Investment and Business environment (Provided by newafrica.com for Africa © GGL.2000) (<http://www.newafrica.com/business/environment/safrica.htm>)  
<sup>176</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p.114  
<sup>177</sup> The Commonwealth African Investment Almanac 1999, South Africa: Investment and Business environment (Provided by newafrica.com - The Leading Information

free market economics arguing for a minimalist state.<sup>178</sup> The government was not supposed to be involved in creating employment, redistributing resources or creating growth, as these were all market functions.

The RDP depended on the government to take an active role in the economy. The RDP sought to pursue a policy with a “mixed market approach with promises to redress socioeconomic distortions.”<sup>179</sup> The ANC tried to walk the fine line between protecting the domestic economy and appeasing foreign capital.<sup>180</sup> While the RDP made vague commitments to neo-liberal principles, the ANC clearly stated that any free market policies had to comply with domestic employment and socioeconomic needs.<sup>181</sup> The ANC’s leadership recognized that it would require foreign capital to develop, but was determined not to pursue it at any cost.<sup>182</sup>

The ANC’s reluctance to privatize state industries, its bloated state apparatus, and lingering foreign exchange controls were all seen critically by foreign investors. Suggestions that the government might nationalize more industries, a rising crime rate, poor industrial competitiveness and labour productivity exacerbated these

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<sup>178</sup> Source for Africa © GGL.2000) (<http://www.newafrica.com/business/environment/safrica.htm>)  
Feinstein, Andrew A Contextualization of the Macro-Economic Strategy (UMRABULA, 4th Quarter, 1996) <http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo1.html#art4>

<sup>179</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p.105

<sup>180</sup> Padayachee, Vishnu “The International Monetary Fund and World Bank in Post Apartheid Africa: Prospects and Dangers” in Coetzee, Jan K. and Graaff, Johann Reconstruction, Development and People (International Thompson Publishing, New York, 1996) p. 369

<sup>181</sup> Reconstruction and Development Programme Article 4.3.3

<sup>182</sup> Payadachee, Vishnu “Development Implications for South Africa of Using IMF and World Bank Loans and Resources” in Pauline H. Baker, Alex Boraine and Warren Krafchik in South Africa and the World Economy in the 1990s (The Brookings Institution, Cape Town, 1993) p.184

fears.<sup>183</sup> One of the chief concerns among investors was the inflexibility of the labour market<sup>184</sup> caused by the strength of the labour rights in the country.

Foreign investors are generally wary of countries with strong union legislation.<sup>185</sup> Neo-liberalism supported the artificial suppression of the cost of labour. It looks to the growth model of the NIC (Newly Industrialized Countries) whose remarkable growth was often attributed to the willingness of the government to hold the price of labour artificially low.<sup>186</sup> The “savings generated from not having to pay wages appropriate to the level of development” would be an excellent source for investments and economic growth.<sup>187</sup> Labour market flexibility not only helps generate greater savings rates, but also increases corporate profit. “Anything that raises urban wages cuts into profits.”<sup>188</sup>

While the RDP openly admitted that its implementation would require strong state intervention and a large expenditure of government subsidies, foreign investors disapproved.<sup>189</sup> “The democratic government must play a leading and enabling role

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<sup>183</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p.114

<sup>184</sup> The Economist Magazine (Oct 3 1998)

<sup>185</sup> The Economist Magazine (Oct 3 1998)

<sup>186</sup> Jeffrey Herbst South Africa: Economic Crises and Distributional Imperative in Stephen John Stedman South Africa: The Political Economy of Transformation (Lynne Rienner Publishers, Boulder 1994) p.41

<sup>187</sup> Jeffrey Herbst South Africa: Economic Crises and Distributional Imperative in Stephen John Stedman South Africa: The Political Economy of Transformation (Lynne Rienner Publishers, Boulder 1994) p.41

<sup>188</sup> Gillis, Malcolm; Perkins, Dwight H.; Roemer, Michael and Snodgrass, Donald R. Economics of Development (W.W. Norton & Company, New York, 1992) p.94

<sup>189</sup> Sachikoyne, Lloyd M “Democracy, Civil Society and Social Movements an Analytical Framework” in Sachikoyne, Lloyd Democracy, Civil Society and the State (Sapes Books, Harare, 1995) p.10

in guiding the economy and the market".<sup>190</sup> Global finance also viewed the government's large subsidies as consuming too great a proportion of the economy.<sup>191</sup> While the world welcomed South Africa back into the global economy, it was a world "extremely hostile to socialist, collectivist and state interventionist models of development."<sup>192</sup>

## **GEAR**

With a domestic growing investment crisis, the culture of resistance and the heavy reliance on foreign capital, sustaining the RDP became an extremely elusive goal by 1996. The ANC needed to prioritize economic growth and demonstrate this commitment to international capital. "The RDP had seemingly collapsed by the beginning of 1996".<sup>193</sup> In March of that year, the RDP office was closed.<sup>194</sup> The ANC quickly moved to replace it with the Growth, Economy and Redistribution (GEAR) policy.

While GEAR did not officially replace the RDP, with the government still committed to the RDP's basic needs; it was a dramatic shift in economic policies.<sup>195</sup> GEAR

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<sup>190</sup> Reconstruction and Development Programme Article 4.2.3

<sup>191</sup> Ginsberg, Anthony South Africa's Future MacMillian Publishers Lts., London, 1998) p.197

<sup>192</sup> Padayachee, Vishnu "The International Monetary Fund and World Bank in Post Apartheid Africa:Prospects and Dangers" in Coetzee, Jan K. and Graaff, Johann Reconstruction, Development and People (International Thompson Publishing, New York, 1996) p.368

<sup>193</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p.103

<sup>194</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p.111

<sup>195</sup> Extracts from the address of the ANC president at the 10<sup>th</sup> Congress of the SA Communist Party, Johannesburg, July 2, 1998 (info@woza.co.za © WOZA Internet (Pty)



was an acceptance of neo-liberal principles and an abandonment of a government driven redistributive economic policy.<sup>196</sup> Thabo Mbeki replaced Jay Naidoo. Mbeki spoke out against the RDP saying its promises had been too grand and its strategies ill advised.<sup>197</sup> GEAR was designed to offer clear growth strategies for the country.

The biggest critique of the RDP was that it had no clear economic policy. Nobody was certain about which path the government would take. It made promises to provide basic needs and committed the government to a 5% growth rate, but did little to outline how this would be achieved. GEAR, conversely, was an economic policy first. It made no redistributive promises. This new economic policy would look to the market to distribute wealth and resources through the creation of sustainable jobs.<sup>198</sup>

The domestic savings rate would be increased to 22 percent of the GDP. This would be accomplished by reducing the tax burden for the upper and middle income tax brackets, which would serve to increase the gap in income between the rich and the poor, creating surplus income and a greater savings rate. The ANC openly

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<sup>196</sup> Ltd <http://www.woza.co.za/news/mbekisacpo1.htm>  
Ginsberg, Anthony South Africa's Future MacMillian Publishers Ltd., London, 1998) p. 36

<sup>197</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p.111)

<sup>198</sup> ANC, UNDERSTANDING GEAR. Growth, Employment and Redistribution. The Government's new economic strategy, 2nd Quarter, 1997) (<http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo2.html>)

acknowledged the contradiction this posed to the RDP objectives.<sup>199</sup> The increased inequality would serve to generate economic growth in the long run.<sup>200</sup>

The government would work to repay its debt and cut government expenditures. In an attempt to cut costs, GEAR implemented a 3-year program to reduce the number of jobs and salaries of its bureaucracy. It offered voluntary severance packages in order to create a fair job reduction policy and a public service salary adjustment.<sup>201</sup> The budget deficit would to be addressed with the goal of reducing it by 2% (from 5% to 3%) by 2000.<sup>202</sup> GEAR was committed to low inflation, fiscal discipline and a competitive economic environment.<sup>203</sup>

Foreign capital would constitute 4% of the GDP. This would be accomplished by creating market flexibility by compelling "the working class [to] have to accept wage restraint".<sup>204</sup> The ANC created the Labor Relations Act (LRA) to protect the rights to organize and bargain collectively, the LRA entrenched "organizational rights," such as trade union access to work sites, deductions for trade union subscriptions

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<sup>199</sup> ANC, UNDERSTANDING GEAR. Growth, Employment and Redistribution. The Government's new economic strategy, 2nd Quarter, 1997

(<http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo2.html>) Article 2.1.6

<sup>200</sup> ANC, UNDERSTANDING GEAR. Growth, Employment and Redistribution. The Government's new economic strategy, 2nd Quarter, 1997

(<http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo2.html>) Article 2.1.6

<sup>201</sup> ANC, Growth, Employment and Redistribution: A Macroeconomic Strategy (14 June 1996) Article 3.3

<sup>202</sup> Feinstein, Andrew A Contextualization of the Macro-Economic Strategy (UMRABULA, 4th Quarter, 1996) <http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo1.html#art4>

<sup>203</sup> Feinstein, Andrew A Contextualization of the Macro-Economic Strategy (UMRABULA, 4th Quarter, 1996) <http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo1.html#art4>

<sup>204</sup> ANC, UNDERSTANDING GEAR. Growth, Employment and Redistribution. The Government's new economic strategy, 2nd Quarter, 1997

(<http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo2.html>) Article 2.1.6

and leave for trade union officials. While the right to strike was given statutory effect by the LRA,<sup>205</sup> it was designed to reduce labour unrest and promote flexibility in the labour market to appease the interests of foreign capital.<sup>206</sup> In a show of support, in their 15<sup>th</sup> congress, COSATU and SAPC, the largest South African unions, voted unanimously to support GEAR despite its adherence to neo-liberalism.<sup>207</sup> The government committed itself to the reduction of tariffs and increased privatization of industry.

GEAR promised to reduce exchange controls as well as the state apparatus.<sup>208</sup> The new policy adopted the more reserved employment objective, promising to create 400 000 jobs by 2000 as opposed to the creation of a total of 500 000 jobs by 1999. It increased the projected economic growth rate from 5% to 6%, to be later tapered off to 4%.<sup>209</sup>

GEAR marked a shift in the ANC's policy towards neo-liberal economics.<sup>210</sup> The government "tailored its economic policies to the perceived needs of the private

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<sup>205</sup> U.S. Department of State, 1999 Country Report on Economic Policy and Trade Practices -South Africa Released by the Bureau of Economic and Business Affairs March 2000 ([http://www.state.gov/www/issues/economic/trade\\_reports/1999/soafrica.html](http://www.state.gov/www/issues/economic/trade_reports/1999/soafrica.html))

<sup>206</sup> ANC, Growth, Employment and Redistribution: A Macroeconomic Strategy (14 June 1996) Article 8.1

<sup>207</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p.192

<sup>208</sup> U.S. Department of State 1996 Country Reports- On Economic Policy and Trade Practices (submitted to the Senate Committees on Foreign Relations and on Finance and to the House Committees on Foreign Affairs and on Ways and Means, January 1997.

<sup>209</sup> ANC, UNDERSTANDING GEAR, Growth, Employment and Redistribution . The Government's new economic strategy, 2nd Quarter, 1997 1.3

<sup>210</sup> ANC, Growth, Employment and Redistribution: A Macroeconomic Strategy (14 June 1996) Article 3.4

sector, both local and international.<sup>211</sup> GEAR sent a clear message to both domestic and foreign investors that the government was committed to market growth strategies of open markets, labour restraint and privatization.<sup>212</sup> At the heart of this transformation was the realization that “while international capital destabilized Apartheid, it also has a potentially destabilizing effect on a democratic regime<sup>213</sup>

### **Summary**

When the ANC came to power, it had emerged as a victorious resistance organization capable of redressing the lingering effects of Apartheid. The implementation of the RDP reflected this goal. Within its first two years, the ANC underwent a steep learning curve, realizing the limitations of its economic policy options.<sup>214</sup> Where the RDP had claimed that worker rights were central to building the new economy,<sup>215</sup> GEAR aimed targeted labour flexibility. While the RDP focussed almost exclusively on redistribution, GEAR concentrated on economic growth.

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<sup>211</sup> The Commonwealth African Investment Almanac 1999, South Africa: Investment and Business environment (Provided by newafrica.com for Africa © GGL.2000) (<http://www.newafrica.com/business/environment/safrica.htm>)

<sup>212</sup> U.S. Department of State 1999 Country Report on Economic Policy and Trade Practices - South Africa Released by the Bureau of Economic and Business Affairs U.S. Department of State, March 2000 ([http://www.state.gov/www/issues/economic/trade\\_reports/1999/soafrica.html](http://www.state.gov/www/issues/economic/trade_reports/1999/soafrica.html))

<sup>213</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p. 19

<sup>214</sup> Koelble, Thomas A. The Global Economy and Democracy in South Africa (Rutgers University Press, New Jersey, 1998) p. 181

<sup>215</sup> African National Congress. A basic Guide to the Reconstruction and Development Programme (ANC, South Africa, 1994) (<http://www.anc.org.za/ancindex.html>)

**The adoption of GEAR acknowledged that the contention between growth and a strong commitment to positive rights was real as well as symbolic of a far deeper challenge for the new government. Having ratified a robust positive rights legislation, did this shift constitute an abandonment of its positive rights commitments? To what extent was this shift legally judicable?**

## **Chapter 5: The Judicability of Growth**

In 1994, the African National Congress (ANC) won South Africa's first fully democratic elections. While this marked the end of the political struggle against Apartheid, the lingering effects of the previous regime remained. The country was plagued with gross income inequalities, rampant poverty and disparities between the rich and the poor among the highest in the world.<sup>216</sup> Committed to the eradication of social and legal remnants of Apartheid, the ANC instituted two policy agendas, a new constitution and a distributive economic policy.

The drafting of the new constitution included a robust set of human rights designed not only to prevent the recurrence of future discrimination but to redress the legacy of the poverty, inequality and homelessness. These positive rights committed future governments to the progressive realization of social rights such as the right to health care, education and housing aimed at providing to those in greatest need. The ANC demonstrated its personal commitment towards these positive rights through its legislative policy. Most notable among these was its first economic policy, the Reconstruction and Development Programme (RDP). The RDP emphasized redistribution over growth, identifying the provision of housing, water, electricity, telephones, transport, environment, food, health care and welfare as priorities.<sup>217</sup> The constitution and the RDP served to complement the ANC's commitment to positive rights.

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<sup>216</sup> Lundhal, Mats The post Apartheid Economy, and after? in (ed.) Peterson, Lennart, Post-Apartheid Southern Africa (Routledge, New York, 1998) p.22

Within two years of implementing the RDP and in the same year they ratified the constitution, the ANC's legislation shifted. Responding to increased international pressure and a falling growth rate, the ANC abandoned its economic policy and introduced the Growth, Employment and Redistribution program (GEAR). GEAR marked a shift in the ANC policy away from redistribution, aimed at generating growth.

This chapter examines the political and legal significance of the shift from the ANC's policy towards growth in government policy. The adoption of GEAR is important for two reasons. First, it underscores the political existing tension that exists between economic growth and a strong a commitment to redistribution. It was the ANC's attempts and successes in redistribution that scared foreign capital and contributed to the government's poor savings rate, ultimately leading to a falling growth rate. As outlined in previous chapters, without growth, the funding for social services dries up and positive rights become less attainable.

Aside from policy issues, this shift raised a legal question as well. If the ANC had legally bound itself and future governments to positive rights, could it legally postpone their implementation in the pursuit of a sustainable growth rate? More specifically, does a commitment to positive rights necessitate strong redistribution, or can a government seek growth-oriented economics while still maintaining its

positive rights obligations? This question was touched upon in the Soobramoney case, but best outlined by the constitutional challenge of Mrs. Irene Grootboom. Grootboom was a resident of Cape Metro who argued that the government failed to uphold its positive rights obligations, under articles 26 (2) and article 28 of the constitution, to provide housing to her family and others she represented. (4)

This chapter argues that despite the tension and trade-offs that exist between growth and redistribution, positive rights legislations can be upheld by a capitalist economic policy. The South African example should be used to demonstrate to other nations that ratification of positive rights does not significantly reduce its power to pursue a capitalist economic policy. Positive rights are not only judicable, they can be enforced without bankrupting the state or infringing on the power of the government to act independently.

### **The Tension between Growth and Positive Rights**

The need for redistribution is perhaps no more apparent than in South Africa. Ravaged by the legacy of Apartheid, where 87% of the surface area of the country was legally reserved for the benefit and use of the whites<sup>218</sup>, the country suffered one of the worst income disparities in the world. In response to the legacy of Apartheid, the ANC implemented its first policy directives. Apart from Apartheid, the ANC was also faced with dealing with the country's faltering economy and

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<sup>218</sup> Sachs, Justice Albie, Speech, Social and Economic Rights: Can they be made Justiciable? Southern Methodist University, 2000



suffering growth rate. It would inadvertently be forced to test the validity of the tension between redistributive policies and a sustained economic growth.

From the beginning, the ANC saw no challenge in pursuing government funded social programs while generating the increasing growth rate necessary to fund them. In fact, the party considered both processes mutually beneficial and each would reinforce the other.<sup>219</sup> The foundation of the country's new economy would be homes, food and water.<sup>220</sup> Without these basic needs, the ANC contended and the economy could never recover.

While the RDP drew criticism from business leaders and foreign investors, it attracted wide support from the majority of South Africans. The critics of the program were not ideologically opposed to redistribution, but disagreed over the best means of promoting and sustaining it. In order to sustain redistribution, a consistent source of capital was required. South Africa was heavily reliant on foreign capital for the expansion of its economy, especially with the low domestic savings rate among its citizens. Therefore, the best means to provide for the poor was to appeal to foreign investment and increase domestic savings rates. With a global community espousing capital principles, labour flexibility and a withdrawal of the government from the economy would pose a problem for any country pursuing

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<sup>219</sup> Poverty and Inequality in South Africa/Report prepared for the Office of the Executive Deputy President and the Inter-Ministerial Committee for Poverty and Inequality/ Summary Report, 13 May, 1998, Sections 3: Macroeconomic Context

<sup>220</sup> Poverty and Inequality in South Africa/Report prepared for the Office of the Executive Deputy President and the Inter-Ministerial Committee for Poverty and

strong distribution programs. Furthermore, raising the savings rate demanded a tolerance for inequality to persist, at least in the short-term. "Not only does inequality contribute to growth, but attempts to redistribute income 'prematurely' runs the risk of stifling economic growth".<sup>221</sup> The ANC disagreed and believed that it was counter-intuitive and that the best way to redistribute wealth was to promote inequality.

Within two years of implementation, the ANC was forced to concede the failure of the RDP. The adoption of GEAR in 1996 was not an abandonment of the principles of RDP but rather recognition that in order to provide its citizens with minimum standards, a stronger commitment to economic growth was necessary. The devaluation of the RAND and robust labour rights had scared international investors. A continued poor domestic savings rate had made dependence on the influx and demands of international capital even more critical. A falling growth rate meant that the government could no longer provide the social services it had committed itself to in the constitution.

GEAR marked a dramatic shift away from redistributive social policy towards a neo-liberal based growth strategy. It offered tax breaks to those who were well off while "the working class would have to accept labour restraint".<sup>222</sup> Workers' rights were

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<sup>221</sup> Inequality/ Summary Report, 13 May, 1998, Sections 3: Macroeconomic Context  
Gillis, Malcolm; Perkins, Dwight H.; Roemer, Michael and Snodgrass, Donald R.  
Economics of Development (W.W. Norton & Company, New York, 1992) p.94

<sup>222</sup> ANC, UNDERSTANDING GEAR. Growth, Employment and Redistribution. The Government's new economic strategy, 2nd Quarter, 1997

no longer seen as an integral part of building an economy. Labour flexibility and stability were now the objectives of the government.<sup>223</sup> The ANC's new policy sounded much more like the demands of business than the demands of the resistance organization it had once been.

The significance of this shift should not be understated. The ANC was an organization with socialist roots, firmly committed to both negative and positive rights. It had struggled to ensure that the new constitution included a wide array of rights for present and future generations. It instituted an aggressive program to provide government-subsidized infrastructure and social services. GEAR was a sobering admission by the ANC that without growth, there could be no redistribution and that long-term growth required the allowance of short-term inequality. The most sobering aspect of this policy shift was the support it received from COASTU, the largest South African labour union. COASTU had voted to accept the adoption of this new policy including its calls for labour restraint. The tension between redistribution and growth performance was too real to be ignored.

### **Was it legal?**

While the need to limit redistributive policy to spur economic growth may have appeared disheartening, this raises a legal question. True to its commitment to redistribution and redressing the effects of Apartheid, the ANC had ratified a wide

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<sup>223</sup> (<http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo2.html>) Article 2.1.6  
ANC, UNDERSTANDING GEAR. Growth, Employment and Redistribution. The

range of positive rights into the constitution. What legal implications did the shift from the RDP to GEAR generate? While the constitution allows for the progressive realization of rights, did that government have the authority to willfully choose the speed of that progression? Does a government that has ratified positive rights have the legal flexibility to pursue a liberal economic policy and to what extent must a state commit its resources to positive rights?

These were the very issues raised by business leaders and other groups wary of the inclusion of positive rights into the constitution during the constitutional talks of the early 1990s. Those opposed to including positive rights in the constitution were not arguing that the gross inequality left over from the Apartheid regime should be ignored. They argued that socio-economic objectives should be included in a set of legislative directives passed by the government, not entrenched in the constitution.<sup>224</sup> Two main arguments were used to support this position.

First, if a government commits itself to an aggressive redistributive policy, it runs the risk of bankrupting the state of all available capital or steering capital reserves away from more long term projects for the sake of the immediate alleviation of poverty.<sup>225</sup> Long-term growth strategies would suffer. Many argued that any serious attempt to comply with positive rights would pour money into a hole that could not be filled.

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**Government's new economic strategy**, 2nd Quarter, 1997) Article 2.1.5  
(<http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo2.html>)

<sup>224</sup> South African Constitutional Talks 10, 1995 (<http://www.anc.org.za/>)

<sup>225</sup> South African Constitutional Talks 10, 1995 (<http://www.anc.org.za/>)

However, not making a serious attempt, the courts would find the government in violation of its legal obligation.<sup>226</sup>

Secondly, by ratifying positive rights, the drafters placed the courts in the position of watchdogs over the government. While this was effective when the court acts as a preventative mechanism, it was argued to be problematic when a court would have to order government action. Positive rights ran the risk of being ignored unless the courts took a proactive step to guide the legislation of a government. In this situation, the court may forsake their proper role of negatively testing government initiatives against clear legal standards in exchange for a dangerous assumption of positive command over the government's policy initiatives".<sup>227</sup> By doing so, the judges, a non-elected body, would begin to guide legislation out of the hands of the democratically elected parliament. The implications remained unclear at ratification; however, the judicability of the positive rights was questioned. Steiner and Alston define judicability as the degree to which the courts could provide remedy for positive rights.<sup>228</sup> What would the role of the constitutional courts in South Africa become?

The constitutional challenge launched by Irene Grootboom dealt directly with both these issues. Grootboom launched a class action lawsuit representing 390

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<sup>226</sup> Klare, Karl Legal culture and Transformative Constitutionalism (South African Journal on Human Rights, Volume 14, 1998) p.153

<sup>227</sup> Michelman, Frank The constitution, Social rights and Reason: A tribute to Etienne Mureiknik South African Journal on Human Rights, Volume 14, 1998) p.500.

<sup>228</sup> K. Vasak & P. Alston (eds.), The International Dimensions of Human Rights (Westport,

homeless adults and 510 children<sup>229</sup> claiming that the government of South Africa and Cape Metro failed to meet its constitutional obligations under articles 26(2) and 28. Article 26(2) guarantees to all citizens the right to housing and article 28 guarantees children the right to shelter (article 4). Grootboom sought a court order directing the government to provide adequate basic shelter or housing for herself and those she represented. She argued that they were in dire need of government relief with a housing shortage of roughly 100,000<sup>230</sup> and they could not wait the estimated seven years for housing.<sup>231</sup> The circumstances of her case highlight her needs.

Grootboom lived in a squatter settlement called Wallacedene on the edge of Oostenberg in Cape Metro, West Cape region.<sup>232</sup> She and her family lived in a shack roughly twenty square meters (A7). In Wallacedene, 25% of households had no income, sewage, water or refuse removal. Only 5% of the shacks had electricity.<sup>233</sup> They had applied for subsidized low-income housing. In September 1998, along with the other respondents, she moved out of Wallacedene to a nearby

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<sup>229</sup> CT: Greenwood Press; Paris: UNESCO, 1982) p.298  
Constitutional court of South Africa: Case CCT 11/00 the government of the Republic of South Africa versus Irene Grootboom and Others (Heard on: 11 May 2000 - Decided on : 4 October 2000) Article A4

<sup>230</sup> Constitutional court of South Africa: Case CCT 11/00 the government of the Republic of South Africa versus Irene Grootboom and Others (Heard on: 11 May 2000 - Decided on : 4 October 2000) Article A7

<sup>231</sup> Constitutional court of South Africa: Case CCT 11/00 the government of the Republic of South Africa versus Irene Grootboom and Others (Heard on: 11 May 2000 - Decided on : 4 October 2000) Article A8

<sup>232</sup> Constitutional court of South Africa: Case CCT 11/00 the government of the Republic of South Africa versus Irene Grootboom and Others (Heard on: 11 May 2000 - Decided on : 4 October 2000) Article A7

<sup>233</sup> Constitutional court of South Africa: Case CCT 11/00 the government of the Republic of South Africa versus Irene Grootboom and Others (Heard on : 11 May 2000 - Decided on :

private lot that was not only vacant, but also earmarked for low-income housing.<sup>234</sup>

On December 1998, the owner of that land received a court order to remove Grootboom and company from his land.<sup>235</sup> The respondents' homes were bulldozed and the government officials burnt their possessions. In the three months after they had left, other families had already occupied their homes in Wallacedene.<sup>236</sup> They were left with nowhere to go.

Grootboom launched her suit not to challenge the eviction but to demand that the government uphold its commitment to positive rights as identified by article 26(2) of the constitution, which guarantees to all citizens the right to housing and article 28 guaranteeing children the right to shelter (A4). Grootboom demanded that the court order the government to provide adequate basic shelter or housing to the respondents and their children pending they obtain permanent accommodations or basic nutrition, shelter healthcare and social services to the respondents who are children. (B13)

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<sup>234</sup> 4 October 2000) Article A7  
Constitutional court of South Africa: Case CCT 11/00 the government of the Republic of South Africa versus Irene Grootboom and Others (Heard on : 11 May 2000 - Decided on : 4 October 2000) Article A8

<sup>235</sup> Constitutional court of South Africa: Case CCT 11/00 the government of the Republic of South Africa versus Irene Grootboom and Others (Heard on : 11 May 2000 - Decided on : 4 October 2000) Article A9

<sup>236</sup> Constitutional court of South Africa: Case CCT 11/00 the government of the Republic of South Africa versus Irene Grootboom and Others (Heard on : 11 May 2000 - Decided on : 4 October 2000) Article A9

## **Significance of Grootboom**

The Grootboom case dealt with both the concerns of those wary of entrenching positive rights: the justiciability of positive rights and the resulting flexibility that the governments would possess once ratified. The obvious concern of the government was that it did not have the funding to provide all citizens housing on demand. Since article 2.8.1 of the 1996 final constitution clearly bound "the legislature, the executive, the judiciary and all organs of the state" to the bill of rights, her challenge mentions the state, regional and municipal levels of government.<sup>237</sup> For the sake of brevity, this analysis deals specifically with the obligations of the Cape Metro government. This was the level of government most familiar with the circumstances of the case and best prepared to deal with her case.

## **Judicability**

By agreeing to hear the case, the constitutional court sought to address Steiner and Alston's test of justiciability. The courts would attempt to provide remedy to the plaintiffs. The rationale for hearing the case lay in the fact that the interpretation of a right was dependent on its textual, social and historical setting of its drafting.<sup>238</sup> In an earlier ruling, Justice Chaskalson stated that the extreme poverty, income disparity, housing shortages and unemployment rates were not new phenomena to the country. These conditions "already existed when the constitution was adopted,

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<sup>237</sup> Klare, Karl Legal culture and Transformative Constitutionalism (South African Journal on Human Rights, Volume 14, 1998) p.153

<sup>238</sup> Constitutional court of South Africa: Case CCT 11/00 The government of the Republic of South Africa versus Irene Grootboom and Others (Heard on: 11 May 2000 - Decided on : 4 October 2000) Article E22



and a commitment to address them...lies at the heart of our new constitutional order."<sup>239</sup> Therefore, the intention of the drafters was specifically to deal with such situations.

A previous ruling laid the framework under which the Grootboom case would be heard. In 1998, Mr. Soobramoney was suffering from chronic renal failure aggravated by heart disease and blood sugar problems. He collapsed one day and was given emergency care. When he returned for treatment, he was told he would be put on a waiting list for treatment. Soobramoney charged that this violated his rights based on section 27(3) of the 1996 Constitution which reads '(n)o one may be refused emergency medical treatment' and section 11 'everyone has the right to life'. He argued that making him wait for treatment denied him both these rights. The court found that "if all chronic illnesses were to be treated emergency medical cases entitled to treatment on demand at state expense, then there would be no funds left over for mother and child care, nothing for health education or immunization, and desperately little for amelioration of AIDS -related illness, TB or cancer."<sup>240</sup>

In this ruling, the court not only acknowledged the financial limitations of providing positive rights, but its role as negatively testing positive rights. The court ruled that

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<sup>239</sup> Constitutional court of South Africa: Case CCT 11/00 The government of the Republic of South Africa versus Irene Grootboom and Others (Heard on: 11 May 2000 - Decided on : 4 October 2000) Article e25

<sup>240</sup> Sachs, Justice Albie, Speech, Social and Economic Rights: Can they be made Judicable? Southern Methodist University, 2000

as long as the waiting list was fairly established and non-discriminatory, it did not violate Soobramoney's rights. Instead, it created an opportunity for the realization of those rights. Soobramoney needed to wait in line like everyone else.<sup>241</sup> Sadly, two days after the ruling, he died. The ultimate decision of the court was that it could not have ordered Mr. Soobramoney to the front of the line without violating the rights of others to that medical service.

Grootboom's situation was similar to Soobramoney in that what Grootboom was attempting to do by occupying land earmarked for low-income housing was to jump the queue and occupy the land out of order. The court, however, had clearly ruled waiting in line was not a violation of rights. Grootboom and those she represented, however, no longer had a place to stay. In a speech given to the Southern Methodist University prior to the hearing of the Grootboom case, Justice Albie Sachs, one of the judges on the constitutional court, outlined the importance of the this case. In that speech, Justice Sachs stated that the court needed to be conscious of the role it would play in enforcing positive rights "otherwise people will ask what the point is of having social and economic rights in the constitution at all".<sup>242</sup> Her situation obviously needed rectification. The critical question was how.

The Grootboom case is of interest because the Cape Metro government was well aware of the desperate conditions to which Irene Grootboom had been subjected.

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<sup>241</sup> Sachs, Justice Albie, Speech, Social and Economic Rights: Can they be made Judicable? Southern Methodist University, 2000

<sup>242</sup> Sachs, Justice Albie, Speech, Social and Economic Rights: Can they be made J

In 1996, the year that the ANC adopted GEAR, the Cape Metropolitan Council conducted a "socio-economic profile of the Cape Metropolitan Area." A portion of the report highlighted the inequalities in the region. The unemployment rate was 22%, with white males constituting only 5% of the unemployed, white females, 6%. This was contrasted with black males who represented 33% of the unemployed and black females, 50%.<sup>243</sup> While the median income of whites was 48 000 Rand a year, blacks earned a median of 15,000 Rand. The government was not only aware of the poverty and unemployment problem, but the housing shortage as well. According to the report, the total backlog of housing in the Cape Metropolitan Region in 1996 amounted to approximately 134 000 units, the majority found in the Cape Metro Area. The situation was predicted to worsen because of the high rate of urbanization and population growth. The report estimated that the total housing demand by 2005 would be close to 345 000 units. With 80% of the Cape Metro Area earning under R2500 per month,<sup>244</sup> it was estimated that 189 414 families would not be able to house themselves that year.<sup>245</sup>

The government report not only acknowledged there was a problem but recognized the failure of government programs to deal adequately with the shortage. The "housing backlogs have yet to be significantly reduced by housing delivery systems.

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**Judicable?** Southern Methodist University, 2000  
<sup>243</sup> Source: "A Socio-Economic Profile of the Cape Metropolitan Area" by the Cape Metropolitan Council, based on the Population Census conducted by SA Stats/October 96  
<sup>244</sup> Cities Environment Reports on the Internet, ( a UNEP Initiative) Cape Metro council State of the Environment 1998 (Socio-Economy section)  
<http://www.cmc.gov.za/peh/soe/issues.htm>  
<sup>245</sup> Cities Environment Reports on the Internet, ( a UNEP Initiative) Cape Metro council State of the Environment 1998 (Socio-Economy section)

The current systems lack flexibility to address the differing needs of the poor communities."<sup>246</sup> For example, the cutoff point for households to qualify for housing subsidies was R2 500 per month, regardless of the size of household. This had the net effect of punishing households with combined families where there was more than one breadwinner.<sup>247</sup>

Despite these findings, the Cape Metro government's economic policy was based on a growth oriented economic policy that more closely resembled GEAR than the RDP. The core difference between GEAR and the RDP was that RDP attempted to solve the problems of inequality immediately, through government programs, and GEAR attempted to create the conditions necessary for the long term alleviation of poverty, through growth and job creation. A Cape Metro report outlined this policy. "Promoting global competitiveness will result in economic growth through trade, investment, and tourism promotion which is the prerequisite for job creation."<sup>248</sup> Did the Cape Metro government meet its constitutional responsibility?

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<sup>246</sup> <http://www.cmc.gov.za/peh/soe/issues.htm>  
Cities Environment Reports on the Internet, (a UNEP Initiative) Cape Metro council  
State of the Environment 1998 (Socio-Economy section)

<sup>247</sup> <http://www.cmc.gov.za/peh/soe/issues.htm>  
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<sup>248</sup> Cities Environment Reports on the Internet, (a UNEP Initiative) Cape Metro council  
State of the Environment 1998 (Socio-Economy section)  
<http://www.cmc.gov.za/peh/soe/issues.htm>

## **The Ruling**

The courts needed to walk a fine line between meeting its obligation to enforce positive rights and wresting legislative power away from the democratically elected government. The court stated conclusively that it would regard the positive rights in the same light as negative ones. Positive rights, the court ruled, were a mechanism towards the realization of negative rights. The court argued that all rights in the constitution were inter-related and mutually supporting (E22). "There is no doubt that human dignity, freedom and equality and the foundational values of our society denied those who have no food clothing or shelter" (E22). Therefore, while the Grootboom case was technically a case surrounding the government's obligation to the provision of housing, the significance to other positive rights as well as to negative rights were implied. The question emerged not as to whether socio-economic rights were judicable, but rather how to enforce them in any given case.<sup>249</sup>

The court chose to address two rights named in the suit separately. It quickly dismissed the state's obligation in article 28, the obligation to provide housing for children. This right, it ruled, applied to children who, for example, were removed from their families or did not have families to take care of them (G77).

**"Through legislation and the common law, the obligation to provide shelter in subsection (1)(c) is imposed primarily on the parents or family and only alternatively on the state. The state thus incurs the obligation to provide shelter to those children, for example, who are removed from their families."  
(G77)**

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Constitutional court of South Africa: Case CCT 11/00 the government of the Republic of South Africa versus Irene Grootboom and Others (Heard on : 11 May 2000 - Decided on : 4 October 2000) Article a(4) D20

Since the children were represented by their parents, the state's obligation to them did not fall under this article. The court's decision was a conscious effort to prevent people with children from using article 28 as a mechanism to leapfrog waiting lists for government subsidized housing. With regards to article 26, it required the government to develop and implement "a coherent, co-ordinated programme designed to meet its section 26 obligations" (I 95). The judges hearing this case make their point clearly. The right of citizens to housing, the court ruled that "neither section 26 nor section 28 entitled the respondents to claim shelter or housing immediately upon demand" (I 95).

The case then revolved around the issue of whether the government had met this obligation through its housing programme at the time. While the national housing program to which the Cape Metro government worked towards was a good step, the question for the court revolved around whether a housing program that did not take into account the immediate amelioration of those in crisis met the constitutional test of reasonableness. (F64) It was a challenge that the government lost. (I 95) It was decided that the government had failed to address the needs of those in dire situations and immediate need.<sup>250</sup>

At the time of the hearing, the court challenge, although applicable at the time of the incident, was already outdated. In June of 1999, 11 months before the Grootboom

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Constitutional court of South Africa: Case CCT 11/00 the government of the Republic of

case was heard, the Cape Metro government introduced the Cape Metro Land & Accelerated Managed Land Settlement Programme (AMLSP). This new housing policy was designed to expand the national housing program by dealing specifically with families in crisis situations. A crisis situation was defined as those families living in environmentally unsafe areas (in a floodline or an area that has recently incurred a fire), families who have been evicted from housing units or strategically located land or those in overcrowded conditions. The AMLSP would settle these families by involving the Metropolitan Local Council (MLC) identifying and purchasing a portion of land to which the identified families in the crisis would be relocated.<sup>251</sup> The final ruling of the court stated that the policy initiatives in place at the time of the Grootboom incident fell short of the obligation in section 26 of the constitution. The state was ordered to devise and implement a comprehensive and coordinated program, within available resources, to deal with those in immediate need.

### **The Reaction**

The Grootboom ruling fell under criticism from sides who argued that it overstepped the court's bounds by acting as policy makers. Steven Friedman, in an article in the Mail and Guardian, argued that entrusting a non-democratically appointed body with the power to guide or tell the democratic leadership how to spend its budget threatens democracy itself. Although the court may offer a resolution, it is not the

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South Africa versus Irene Grootboom and Others (Heard on : 11 May 2000 - Decided on : 4 October 2000) Article a(4) F64

court's position to determine if resources would be best spent on healthcare over housing or education over welfare.<sup>252</sup> "Had the residents appeared before a judge who believed the homeless should fend for themselves... the court would have handed down the opposite ruling."<sup>253</sup> Friedman describes a litigation approach to addressing housing and poverty akin to entering a lottery, albeit with better odds. In a democracy, the courts should not be in the process of making policies.

In response to Friedman, Stan Weiner of the Sunday Independent argued that the use of the court did not mean that the courts take over the business of running the government.<sup>254</sup> Rather, the limitations the court placed on government action meant, "if the government does not make these decisions and implement them effectively, the court will order it to do so."<sup>255</sup> This does not jeopardize democracy according to the Mail and Guardian. When a court order, for example, guarantees the right of an accused to legal defense, there are financial consequences for the state. If it is ruled that prisoners are entitled to vote, what the courts have effectively done was direct government spending.<sup>256</sup> What would occur if the government decided to spend money used to run courts on new submarines for the navy? The

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<sup>251</sup> Watkyns, Brian (councillor) Introductory Address to the CMC's first councillor workshop (Tygerberg Nature Reserve in April 1999)  
<sup>252</sup> Friedman Steven, Public policy in the hands of the court (The Mail & Guardian, 22 September 2000). <http://www.saep.org/forDB/forDBOct00/LAWPOLpolicyandcourtMG001006.htm>  
<sup>253</sup> Friedman Steven, Public policy in the hands of the court (The Mail & Guardian, 22 September 2000).<http://www.saep.org/forDB/forDBOct00/LAWPOLpolicyandcourtMG001006.htm>  
<sup>254</sup> Winer, Stan NGOs weigh their own Grootboom chances. , (Sunday Independent, October 15, 2000) <http://www.saep.org/forDB/forDBOct00/LAWPOLgrootboomSI001015.htm>  
<sup>255</sup> Winer, Stan NGOs weigh their own Grootboom chances. , (Sunday Independent, October 15, 2000) <http://www.saep.org/forDB/forDBOct00/LAWPOLgrootboomSI001015.htm>  
<sup>256</sup> Damned if it does, damned if it doesn't Mail and Guardian, October 13, 2000 <http://www.saep.org/forDB/forDBOct00/LAWPOLgrootboomNG001013.htm>



defense of democracy would require an empowered court to direct state spending back into the legal system.<sup>257</sup>

These arguments are not new and mirror the ones raised when the constitution was being drafted. The Grootboom decision's significance lies in the fact that it clearly outlined the way positive rights legislation could be legally enforced without the courts directing the policies. As with the Soobramoney case, the court did not deal with the specifics of the case, nor did it order the government to deal specifically with these cases. In Soobramoney, the notion of lining up for services was ruled to meet this criterion. In Grootboom, the court ruled that the policies in place to deal with the housing crisis were constitutionally inadequate. Just as a medical emergency needed to be dealt with immediately, so too should a housing crisis. The court, however, did not order a specific government policy or action with regards to Grootboom in particular. The specifics of the policy were left to the government.

This cautious ruling was ironically a significant disappointment articulated by some groups. Because the court decided to deal with the larger issue and corresponding government policy, it did not name a concrete group of beneficiaries to receive shelter in its ruling. The court identified the benefactors as those with no access to land [and] no roof over their heads. This was done to demonstrate the applicability

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<sup>257</sup> [Damned if it does, damned if it doesn't](http://www.saep.org/forDB/forDBOct00/LAWPOLgrootboomNG001013.htm) Mail and Guardian, October 13, 2000  
<http://www.saep.org/forDB/forDBOct00/LAWPOLgrootboomNG001013.htm>

of this ruling to all regions in the country and pragmatically to prevent a flood of suits dealing with similar cases. The net effect, some argued, was to diminish the desire for claimants to raise constitutional challenges against the government, where there may not be specific redress to their situation. "What community will litigate against the education department if it knows the court will not give it a school here and now?"<sup>258</sup> The answer to this remains to be seen.

### **Summary**

Where the transition from the RDP to GEAR signified the acknowledgement of the contention between aggressive positive rights and sustained growth, the Grootboom case answered the legal concern raised by the bill of rights. By hearing the case of both Grootboom and Soobromoney, the South African constitutional court had clearly shown that the positive rights were, in fact, judicable. However, was it legal for the ANC to deliberately postpone the full implementation of its positive rights commitment to generate sustained economic growth?

The court decision, although not as clear cut of a decision as many would have liked, demonstrated that capitalist theory did not constitute a violation of positive rights. The progressive realization of rights through the market mechanism, sustained growth and job creation satisfied positive rights criteria as much as direct government redistribution. The court successfully tested the legality of the

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<sup>258</sup> Court sparks revolution – or does it? Steinberg October 11, 2000  
Constitutional: <http://www.legalbrief.co.za/secure/archives/Grootsparks.htm>

government policies against the constitution, while deliberately choosing not to order government action. The death of Mr. Soobramoney was the clearest and perhaps most upsetting demonstration of the limits of positive rights rulings. The court could have extended his life, but only at the expense of democratic principles. It did not, and as a result he died. The consequences of the court ordering the state to provide care for Mr. Soobramoney was deemed too great.

In Grootboom's case, the court ruled that it was the state's responsibility to foster the "conditions to enable citizens to gain access to land"(194). Significantly, this ruling did not rule out a market-oriented approach. With the continued hostility to government intervention in the economy, it sent a message to other governments that the ratification of positive rights did not mean that capitalist economic policies would fall under scrutiny.

## **Chapter 6: Conclusion**

The election of the African National Congress in South Africa drew international attention. The negotiated transition and the handing over of power by a white minority government represented a watershed in the practice of contemporary politics. Focused not only on witnessing the transition to a democratic rule, the world community watched as the ANC sought to redress the wrongs of Apartheid. Winning the election left the ANC in control of a country suffering from a stagnating economy, rampant unemployment and gross inequality. The ANC was charged with the task of spurring economic-growth while simultaneously seeking to implement redistributive economic and social policies.

Inheriting a country with a stagnating economy and gross inequality, the ANC would be forced to implement redistributive policies while simultaneously attempting to spur economic growth. In order to ensure a long-term commitment by its party and future governments, one of the ANC's first tasks had been to draft and ratify a new constitution. One of the key aspects to this constitution was the entrenchment of one of the most far-reaching human rights legislations in the world. The new bill of rights was not only designed to prevent future crimes by government agencies, but as a guarantee of future government's commitment towards redistribution and equality. These positive rights committed the state to pro-active steps towards the eradication of the economic inequality created by Apartheid. Under the leadership of the ANC, South Africa emerged as one of the most progressive states with regards to rights and a state that "human rights scholars around the world [could] ill

afford not to pay attention to.”<sup>259</sup> The reliance of positive rights on the ability of the government to generate and sustain a steady stream of capital meant that the positive rights were closely linked to a successful economic policy. It was clearly understood that without economic growth, there could be no redistribution.

Optimistic in its ability to simultaneously generate economic growth and combat the massive poverty, the ANC launched the Reconstruction and Development program. This program committed massive state resources towards redistribution and positive rights realization.<sup>260</sup> In order to sustain its aggressive goals, the ANC also targeted a 5% growth rate as a key component of this program. The ANC argued readily that these twin goals could be accomplished simultaneously.

The rapid collapse of the RDP and adoption of GEAR was evidence that capital accumulation was a prerequisite to the full realization of positive rights. Despite its best efforts, the RDP failed to simultaneously address redistribution and sustain economic growth. In fact, every success at reducing inequality had the net affect of lowering domestic savings rates and stifling capital accumulation necessary for investment and economic growth. The ANC was forced to acknowledge that growth and redistribution were not complimentary. In a report prepared for the Office of the Executive Deputy President and the Inter-Ministerial Committee for Poverty and Inequality/ Summary Report, 13 May 1998, the South African government

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<sup>259</sup> Craig Scott and Phillip Alston Adjudicating Constitutional Priorities in a Transnational Context: A comment on Soobramoney’s legacy and Grootboom’s promise (South African Journal on human rights (volume 16, part 2, 2000) P.211

<sup>260</sup> Reconstruction and Development Program Article 4.2.9

acknowledged that “economic growth [was] crucial for the reduction of inequality....”<sup>261</sup>

This recognition raised another question with regards to the positive rights that the government had ratified. With the adoption of GEAR, had the ANC abandoned its positive rights obligations? The legal cases of both Soobramoney and Grootboom challenged the governments’ commitment to positive rights and demanded that more resources be made available to medical and housing programs. In its shift from the RDP to GEAR, the ANC had made a decision to commit less of its resources to direct redistribution programs. Rather, redistribution through job creation and corporate expansion paralleled more closely to the neo-liberal economic model. However, did this choice constitute a violation of the government’s positive rights commitment?

In both its rulings, the South African constitutional court sided with the ANC and found that the ANC had been within their constitutional rights to shift to a neo-liberal economic policy. Not only did the constitutional court in both Soobromoney and Grootboom state that positive rights were understood to be progressively realized, but to be done so within available resources. “In Grootboom, neither side disputed

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<sup>261</sup> **Poverty and Inequality in South Africa/Report prepared for the Office of the Executive Deputy President and the Inter-Ministerial Committee for Poverty and Inequality/ Summary Report/ 13 May, 1998/ Sections 3: Macroeconomic Context**

the fact that housing rights may only be realized progressively.<sup>262</sup> This did not, however, free the government from any positive rights obligations. The ANC was obliged to ensure that those in critical need had been accommodated for, although some degree of wait time was permissible. Also the government was obliged to foster the conditions to enable citizens to gain access to resources such as land, a requirement not necessarily to government directed redistribution, but that neo-liberal job creation policies met. These rulings are significant to both development and human rights theories.

The ratification of positive rights by the ANC did not require that the ANC aggressively implement redistributive social or economic policies. The progressive nature of these rights would allow governments a degree of flexibility in implementation that could be met within Neo-Liberal economics. As a result, the ratification of positive rights does not constitute an impediment to the legislative independence with regards to economic policies. Positive rights do not constitute a major barrier to capital accumulation, nor do they require governments to adopt a policy of state directed redistribution programs. Clearly, the experience of South Africa demonstrates that the constitutionalization of positive rights is compatible with capital accumulation and economic growth. While human rights have often been “ignored in the ‘struggle for development’”,<sup>263</sup> this paper intends to bring forth the example of the ANC’s encouragement to developing states to ratify positive

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<sup>262</sup> Craig Scott and Phillip Alston Adjudicating Constitutional Priorities in a Transnational Context: A comment on Soobramoney’s legacy and Grootboom’s promise (South African Journal on human rights (volume 16, part 2, 2000)) P.267

rights legislation, without concern that this may negatively affect their development projects. South Africa stands as proof of this fact.

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<sup>263</sup> Kiely, Ray Sociology and Development (UCL press, London, 1995) P. 164



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## **Curriculum Vitae**

**Name:** Ilan Judah Maurice Danjoux

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**Education:**

Sir Robert Borden H.S.  
Nepean, Ontario  
1989-1991

Vaughan S.S.  
Thornhill, Ontario  
1991-1993

York University  
B.A. (hon.) Political Science  
B.Ed. (Intermediate/ Senior)  
1993-1998

Queen's University  
M. A. Political Studies  
Kingston, Ontario  
1998-present

**Experience:**

York Region Board of Education – Teacher (Economics and History) 1998 - 2001

Relentless Productions – Web design and Multimedia developer  
1996 - 2001

Queen's University -Teaching Assistant (Political Studies)  
1998 - 1999

Magen David Adom, Jerusalem Ambulance Attendant  
1998

York University -Teaching Assistant (Mass Communication)  
1996 – 1997

Cultech – Educational Multimedia Developer 1996 - 1997

**Awards:**

Graduate Award Scholarship- Queen's University  
Dean's Honour List, York University  
Entrance Scholarship- York University (1992)

**Publications:**

Course Profile: Analyzing Current Economic Issues, Gr. 12,  
CIA4U (Queen's Printer for Ontario, Toronto, 2002)

Citizenship: Issues and Action Teacher Resource Package,  
(Pearson Education , Toronto, 2000)