

# Creating the Birth Certificate of a New South Africa

## Constitution Making after Apartheid<sup>1</sup>

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South Africa's first democratic constitution came into effect on February 4, 1997, bringing to a close a long series of events that defined the country's astonishing transition from oppressive minority rule and violent civil conflict to nonracial democracy. This constitution—the result of negotiations among political enemies at war not long before they joined together to chart the country's future—is both the symbol of South Africa's seemingly miraculous transformation and the anchor of its new order.

Albie Sachs, a justice of South Africa's first constitutional court, eloquently summarized the immensity of the challenge facing the country's constitution makers in looking back at the start of preliminary talks in 1990:

[South Africa] at that time was the epitome of division, repression, and injustice, a point of reference for anybody who wanted to condemn anything in the world. . . . It was a country that sent death squads across its borders to hurt and to torture people to death and that had an organized system of repression that extended into every village and into every nook and cranny

of society. It was a country that was racist, authoritarian, and narrow. This very South Africa had to be converted into a country—with the same people, the same physical terrain, the same resources, and the same buildings—into a country that was democratic and respected human rights. It had to be a country where people of widely different backgrounds would respect each other, where everybody could live in dignity, and where social peace prevailed. This was not a small task.<sup>2</sup>

The task also was not sure to be accomplished. The issues facing the constitution makers were extremely complex, the stakes were high for both the privileged minority and the disenfranchised majority, and the parties' positions had been hardened by years of conflict. Not surprisingly, both the basic principles for the foundation of a transformed democratic state, as well as the process for translating those principles into a final, fully ratified constitution, were highly contested.<sup>3</sup>

Nevertheless, despite tremendous obstacles, the parties found enough common ground to enable them to agree on a new constitution—

one that is widely regarded as being among the most substantively advanced constitutions in the world.<sup>4</sup> Remarkably, South Africa also has become the paradigm for a well-designed, successful constitution-making process intended to facilitate national dialogue and reconciliation and largely accomplishing these objectives. The South African process has become the reference point for many subsequent constitution-making exercises and has undergone extensive evaluation by constitutional scholars and practitioners.<sup>5</sup>

An examination of the South African experience is essential to a study of the significance of the process of constitution making, in part because an unusual degree of attention was paid to the process's design, and because the leading participants explicitly recognized the importance of process to a successful constitution-making exercise. The constitution makers saw a link between the nature of the process and the legitimacy of the outcome, and perceived that, at least for the final constitution, circumstances in South Africa demanded a transparent, inclusive, and participatory process. The emphasis on process was at least partly due to a typically South African obsession with consultation; South Africans tend to be suspicious of any process about which they have not been consulted. Consensus on the precise design of the process was not easily achieved, however. The history of the negotiations reveals that more time and energy were spent on negotiating the process of arriving at the final constitution than on negotiating the substance of it. Moreover, the most vigorous oppositions, disruptions, and disturbances took place in support of process-related demands.

The story of the South African constitution-making process cannot be separated from the larger story of the negotiated transition to democracy. Constitutional issues were integral to the set of substantive issues on the agenda in the transition negotiations, and indeed, the question how a new

constitution would be crafted and adopted was a principal item of debate. Moreover, the package of agreements produced by the multiparty transition negotiations included the first post-apartheid constitution: the interim constitution of 1993, which both prefigured much of the substance of the final constitution and defined the process for creating it.

Thus, while this chapter focuses mostly on the final constitution-making process, conducted by an elected constitutional assembly, it begins by looking at the historical context from which the transition process emerged and the transition negotiations themselves.<sup>6</sup> The seminal agreement concerning the architecture of the transition was that it would proceed in two stages: first, closed-door negotiations, in which all participating parties ostensibly would have an equal voice, would produce an interim constitution and arrangements for a transitional government of national unity; and second, an elected, proportionally representative body would create and adopt a final constitution. A feature of this design that was critical to drawing a wide range of parties into the process was the incorporation in the negotiated interim constitution of binding principles that would fetter the discretion of the democratically elected constitution-making body. This chapter discusses each of these architectural elements: the two-stage approach, the role of the interim constitution, and the use of constitutional principles. It then turns to a detailed discussion of the work of the constitutional assembly in drafting and adopting the final constitution, and the extensive and (from a comparative perspective) pathbreaking public consultation process undertaken by the assembly. The unique role of the constitutional court in certifying the final document's compliance with the constitutional principles, as required by the interim constitution, is then explored, as is the limited contribution of international players to the constitution-making process. The chapter concludes by assessing

the ways in which the constitution-making process can be regarded as a success, and the factors that contributed to that outcome.

## **Background and Early Stages of Negotiation**

### *Historical Context*

The demand for a democratic constitutional dispensation, finally met with the adoption of the new constitution in 1996, was as old as South Africa itself. Many of the constitution's provisions were the result of years of struggle and are imbued with historical significance. The first South African constitution—made by a whites-only national convention and then approved by the British parliament—took effect in 1910, and its legal entrenchment of racialism catalyzed the unification of black leadership and helped to shape the struggle of the majority for a system free of discrimination. The birth of the African National Congress (ANC) in 1912 provided the African majority with a united leadership that articulated their plight and led their resistance, but more important, it offered a vision of a better life.<sup>7</sup> Almost invariably, the Africans' struggles were against a constitutional dispensation that provided the legal basis for their oppression. Accordingly, their vision included a just and democratic constitutional order.

Throughout the first half of the twentieth century, nationalism rose on both sides of the racial divide. Along with industrialization and the development of the economy in this period came urbanization, greater segregationist laws, and a growing militancy among workers. In August 1941, Franklin D. Roosevelt and Winston Churchill signed the Atlantic Charter, containing eight principles that included self-government and freedom from fear and want. These principles inspired the emerging African nationalists of South Africa, for they raised the issue of basic rights

and the idea of self-determination in particular. Drawing from the Atlantic Charter, the ANC drafted its own African Claims, which demanded full citizenship, the right to land, and an end to all discriminatory legislation. This was the first time that the concepts of fundamental rights and self-determination became demands. In 1948, however, the National Party (NP) came to power, introduced the policy of apartheid, and enacted notoriously discriminatory laws.<sup>8</sup> Apartheid provoked resistance. In response to these laws, the African, colored,<sup>9</sup> and Indian peoples of South Africa found cause to unite in action and launched a defiance campaign in 1952.

By 1955, the historical antecedents of the constitution-making process that was to unfold at the end of the century had already emerged: the Congress of the People took place in that year, a meeting to which all political parties were invited. After nationwide consultation, several thousand delegates met in Johannesburg to draft the Freedom Charter, which was, in effect, the first draft of a new constitution for South Africa.<sup>10</sup> The political movement of the oppressed majority was maturing, and the charter it produced sketched a vision of the country's political landscape that was to become deeply etched in the thinking of several generations of leaders. Moreover, consultation and participation were already hallmarks of the movement's style.<sup>11</sup>

The vision of a democratic constitution as a vehicle for solving the problems of deep inequality and rising violence, as well as the touchstone for a new political order, thus developed long before the first tentative steps toward a negotiated transition in the mid-1980s. In 1961, the All-in Conference explicitly called for a national convention of elected representatives to adopt a new, nonracial democratic constitution for South Africa. The conference, which was attended by 1,400 delegates from all over the country, representing 150 different religious,

social, cultural, and political bodies, directed ANC leader Nelson Mandela to draw Prime Minister Hendrik Verwoerd's attention to its resolution. In a letter to the prime minister, Mandela referred to the rising tide of unrest in many parts of the country, stating that "it was the earnest opinion of Conference that this dangerous situation could be averted only by the calling of a sovereign national convention representative of all South Africans, to draw up a new non-racial and democratic Constitution."<sup>12</sup> In a letter to the leader of the parliamentary opposition, Mandela stated, "the alternatives appear to be these: talk it out, or shoot it out."<sup>13</sup>

Instead of heeding the call of the All-in Conference, the government banned the ANC and other organizations, leaving the majority of the population with no legal avenue to pursue its interests. By 1964, most of the ANC's leaders, including Mandela, were in jail, and others had fled into exile. As the ANC transformed from a nonviolent African nationalist organization into a revolutionary liberation movement, the country slid into thirty years of armed conflict.

By the late 1970s, with mounting resistance and increasing international condemnation of apartheid, the government was obliged to show some willingness to reform. Upon coming to power in 1978, Pieter Willem Botha—first as prime minister and later as president—began reorganizing the state. One of the significant developments at this time was the creation of a new government entity, the Department of Constitutional Development and Planning, mandated to introduce reforms while the security establishment took over the major strategic decision-making responsibilities of the state. Botha's strategy included, on one hand, modest constitutional reform intended to co-opt elements of the opposition, and, on the other, stepped-up repression to fend off real change. In 1983, the constitution was changed to divide the parliament into three houses: the

white House of Assembly, the colored House of Representatives, and the Indian House of Delegates; blacks were excluded. At the same time, the NP began to focus on cleavages that could be exploited within the black community. The reform packages of the 1980s aimed to create a small privileged African elite that could act as a buffer against the majority of black South Africans.

The "reform and repression" strategy had only limited success.<sup>14</sup> Armed resistance intensified, and by 1984, armed actions had risen to an average of fifty operations per year. In 1985, the ANC first deployed land mines and began to develop a presence in rural areas. As alternative township structures, street committees, and people's courts began functioning in many areas, the state struggled to govern much of the country. From 1986 onward, the number of attacks rose to between 250 and 300 per year.

### *The Negotiated Transition*

#### *Beginning the Search for Constitutional Solutions*

It was against this background that in 1985 Nelson Mandela, imprisoned since 1962, initiated the first secret exploratory discussions in the search for a negotiated solution with representatives of P.W. Botha's government. Botha had begun to realize that the crisis in South Africa was becoming unmanageable and that drastic political changes would have to be made, including constitutional changes. Botha's government floated constitutional proposals intended to resolve the crisis on its own terms and in cooperation with black leaders of its own choosing, but these went nowhere. Botha was not bold enough to launch genuine negotiations with representatives of the black majority, though following four years of secret talks between Mandela and other officials, Botha did meet directly, albeit inconclusively, with Mandela in July 1989.<sup>15</sup>



The environment for serious talks began to ripen when Frederik Willem de Klerk assumed the presidency in 1989. Soon after taking over, de Klerk committed himself to seeking a new constitution that would eliminate the domination of any one group by another. He recognized the need for inclusive negotiation among political party leaders, but—illustrating how far his party had yet to go—he remained implacably opposed to a one-person one-vote system, which, he argued, would lead to domination by the majority. In the last whites-only general election of September 1989, voters gave de Klerk's government a mandate to proceed with new constitutional proposals. The demand for constitutional negotiations was developing momentum, spurred in part by contemporary events in eastern Europe surrounding the collapse of communism. At the same time, the Department of Constitutional Development and Planning began looking at various constitutional models, and all major government speeches now spoke of a "new South Africa."

The accumulated pressure of South Africa's political crisis, right-wing resistance, economic concerns, the changing political situation in eastern Europe, and the international community's demands for change led de Klerk to the inescapable conclusion that clinging to power would only lead to increasingly bloody conflict. While the liberation movements could not defeat the government by armed force, the government also could not continue to govern as it had.<sup>16</sup> Thus, in November 1989, de Klerk called for an accord among all peoples of the country that would offer full political rights to everyone. The government had no choice but to accede to the demand to create a climate conducive to negotiation. Momentum toward a constitutional negotiation was further intensified by the Conference for a Democratic Future in December 1989, organized by the Mass Democratic Movement and attended

by more than 6,000 delegates representing 2,000 organizations throughout the country.

Meanwhile, the secret talks to explore the feasibility of negotiation that Mandela had initiated in 1985 continued, through as many as forty-seven meetings between Mandela and government leaders.<sup>17</sup> These meetings allowed both sides to see that the option of negotiation was real and could offer both the opportunity to realize their objectives. But as there was no guarantee of the outcome of the discussions, both sides saw secrecy as necessary to ensure that the talks did not appear as a sign of weakness.

Under Oliver Tambo's leadership in exile, the ANC sought to prepare itself for negotiation by successfully lobbying African governments in 1989 to adopt the Harare Declaration of the Organization of African Unity.<sup>18</sup> Tambo was keen to seize the initiative, for he knew that if the ANC did not, the international community would, and the ANC would lose control of the negotiating agenda. The Harare Declaration contained the first real vision of a transition to democracy. It called for creating a climate for negotiations by, among other things, lifting the state of emergency, releasing political prisoners, lifting the bans on organizations, and repealing repressive legislation. Once a conducive climate was created, the representatives of all parties could negotiate a new constitution.

In October 1989, the government unconditionally released an initial group of political prisoners—the first tangible result of Mandela's endeavors. The following month, Mandela met with de Klerk, who had recently taken office, and the government publicly reported the meeting. The pace of change, particularly in the government's posture, quickened from there, and 1990 opened with high expectations. A major milestone of the entire transition process was reached at the opening of parliament on February 2, 1990, when de Klerk made a dramatic speech—his so-called crossing the Rubicon speech—announcing

the unbanning of liberation movements, the release of political prisoners, and a series of measures intended to address obstacles to the process of negotiation.<sup>19</sup> By positively responding to a number of the demands in the Harare Declaration, and going further than any other minority party leader had ever been prepared to go, de Klerk signaled his commitment to negotiate and established his bona fides. Mandela was released the following week.

### *Talks about Talks*

Though the stage was set, the process of creating the conditions for substantive negotiations was lengthy; the parties entered into so-called talks about talks that lasted throughout 1990 and 1991. Political violence flared up regularly throughout this period of both hope and uncertainty, and the talks proceeded in fits and starts, with Mandela and de Klerk often needing to meet to put negotiations back on track. Both sides courted international opinion and support. De Klerk lobbied for lifting trade restrictions on the basis of the reforms and policy shifts instituted thus far, while Mandela urged countries to maintain sanctions until there was proof that the process of transformation was irreversible. But progress was made. The formal agreements reached in this phase—including the Groote Schuur Minute, the Pretoria Minute, and the D.F. Malan Accord—were the first to be signed by the government and the ANC. Mistrust remained high at this stage, however, and support for the process was not unanimous on either side.

The breakthrough agreements reached in this period, and the repeals of discriminatory legislation that followed, constituted a step-by-step dismantling of apartheid and lifting of repressive measures. In addition, the agreements addressed the release of political prisoners, return of exiles, and immunity from prosecution for political offenses. For

its part, the ANC agreed to suspend armed struggle. The agreements were not always implemented smoothly and quickly, but they cleared the way for constitutional negotiations by removing obstacles, and the personal contacts among former enemies that produced them had a tremendous confidence-building effect.

Nonetheless, vigorous debate arose over the central procedural issues concerning how a new constitution would be created, including whether an interim government was necessary to oversee an election before the drafting of a constitution, and whether the new constitution should be drafted by a constituent assembly. While these questions would not be resolved for some time, the battle lines had already been drawn. The NP view was that the present government should remain in place while political parties negotiated a constitutional pact, which would then be brought into effect by the white-dominated parliament. The ANC insisted that a new constitution be drafted by an elected body after the installation of an interim government. (In the end, as discussed below, the making of the interim constitution looked much like the process the NP proposed, while the making of the final constitution followed closely the ANC's preferred model.)

The challenge of dealing with potential spoilers, which dogged the negotiations until the final constitution was adopted, was already evident in the early stages. On the right, the Conservative Party, and on the left, the Pan Africanist Congress (PAC) and Azanian Peoples Organization, a radical liberation movement, rejected agreements reached by the ANC and NP. More concerning, Mangosuthu Buthelezi, the leader of the Inkatha Freedom Party (IFP), threatened that the escalating violence would not end until there was agreement between himself and Mandela; it seemed he felt that he was not being respected as a key player.<sup>20</sup> Mandela met with Buthelezi in early 1991, but IFP disruptions

and on-again, off-again boycotts continued throughout the process, despite repeated ANC and NP attempts to bring the party along.

By February 1991, formal talks had successfully removed obstacles to multiparty negotiations, but a further ten months of preparation followed before substantive negotiations finally commenced. The major stakeholders used the time to develop their negotiating positions, and as the ANC, NP, and Democratic Party unveiled constitutional proposals, it became apparent that some convergence was developing among the different parties' perspectives. This marked a historic shift in the country's politics, from conflict among competing forces to competing constitutional visions. But at the same time, the parties faced threats to and delays in the negotiating process emanating from the unrelenting spiral of violence, as well as complications caused by the government's effort to be both negotiating participant and process referee. These difficulties reinforced ANC insistence on an interim government as part of the transitional arrangements. In addition, major disagreement remained over questions concerning the process that would lead to a new constitutional order, particularly who would manage the transitional period and how. These questions of process and the framework for a transition—including whether an interim authority should be elected, what power it should have, and within what constitutional framework it should operate—dominated the agenda during the next phase of negotiation.

#### *CODESA I and II*

The first attempt at multiparty transition negotiations, the Convention for a Democratic South Africa (CODESA), was ultimately a failed one, but it produced progress on some substantive issues, as parties on both sides gradually shifted their positions, and it of-

fered procedural lessons for the successful effort that followed. Nineteen organizations and political parties plus the government, in a delegation separate from the NP, attended the first plenary (CODESA I), which convened in late December 1991. The agenda included, among other issues, general constitutional principles, a constitution-making body or process, and transitional arrangements.

On the procedure for making decisions, the forum agreed that where consensus failed, a principle of so-called sufficient consensus would be applied, a rule that carried over into subsequent negotiations. This approach proved to be controversial yet useful. Because parties were not mandated by an electorate and the process was designed to be as inclusive as possible—no matter how small a party may have been—it was agreed in principle that no decision would be made on any matter unless the government and the ANC, at the very least, agreed. This implied, however, that agreement by the ANC and government alone would not be enough for a decision to be made. The IFP felt so aggrieved by this procedure that the party challenged it in court; the Supreme Court ruled against its claim that all decisions arrived at on the basis of sufficient consensus be invalidated.

CODESA I adopted a declaration of intent that firmly committed all parties to the basic principles of genuine, nonracial, multiparty democracy, in which the constitution was supreme and regular elections were guaranteed. In the South African context, the statement was revolutionary, in a sense representing the preamble to the first democratic constitution.<sup>21</sup> The first plenary also established five working groups<sup>22</sup> and a management committee—a steering committee and full-time secretariat had already been created in preparation for the plenary—and resolved that the second plenary session, CODESA II, would take place in March 1992 (this was later postponed).

The negotiating structure was large and complex. Each party was entitled to two delegates and two advisers in each working group and one delegate and one adviser each in the management committee. Also, a daily management committee and a secretariat were mandated to assist the management committee and ensure implementation of its decisions. In all, CODESA involved more than 400 negotiators representing nineteen parties, administrations, organizations, and governments. Each working group had a steering committee that attended to its agenda and program of work. Also, each working group tabled its reports through its steering committee and was directly accountable to the management committee. Agreements concluded in this manner were then to be tabled at the CODESA plenary for approval and ratification. It became apparent, in hindsight, that this structure was flawed in several respects: There were no technical bodies to provide legal and constitutional advice, each party had to include its own technical experts in its delegation of advisers, the working groups were large and therefore cumbersome, and the negotiations occurred behind closed doors. The five working groups commenced discussions in January 1992, and CODESA soon became the most important locus of the country's political activity. The public was invited to submit views on constitutional proposals at this stage, but CODESA made little attempt either to educate the public about its work or to solicit seriously the views of important interest groups.<sup>23</sup>

In March 1992, the government held an all-white referendum to confirm the support of the white electorate for the negotiating process. The ANC opposed the referendum, but supported the CODESA management committee's decision to call on whites to take part and vote affirmatively.<sup>24</sup> The result was an overwhelming victory for the NP<sup>25</sup> and confirmation that the majority of white people

avored a negotiated settlement. The result had the unfortunate consequence, however, of encouraging the NP to overplay its hand and hold back on some necessary compromises.

At the same time, progress stalled in the CODESA working groups, as tensions developed over a number of issues related to leveling the playing field for elections as well as determining the shape and role of an interim government. In addition, continuing countrywide violence dampened the climate for political activity. The ANC's proposals in February 1992 for interim constitutional arrangements and a final constitution-making process resembled in many respects the result finally agreed upon twenty-one months later, but lengthy negotiations still were required to reach that end and fill in all the necessary details. Bilateral meetings between the ANC and NP were stepped up, and an eleven-member technical committee was established to push the CODESA process forward.

Once substantive agreements on some fronts concerning the interim government and the nature of the constitution-making body were achieved, the management committee set a date in May 1992 for the second plenary, CODESA II, to pressure the parties to wrap up other matters. The period leading up to CODESA II saw a cycle of deadlocks followed by breakthroughs followed by new deadlocks. With a mixture of tension and anticipation—and tremendous public and media attention—the two-day meeting went forward, but quickly reached an impasse on issues concerning the final constitution-making process, in particular the required majority for the constituent assembly to adopt the constitution. CODESA II adjourned without ratifying any agreements, but with the expectation of a further plenary.

#### *The Multiparty Negotiating Process*

After the failure of CODESA, the parties spent the better part of a year negoti-



ating an end to the deadlock and preparing the ground for a new round of multiparty talks. The months following CODESA were tumultuous. A massacre of forty persons prompted the ANC to break off all talks for a time,<sup>26</sup> and business and international interests applied pressure to put the talks back on track. This was followed by bilateral efforts to find compromises and, in August 1992, the biggest mass protests seen in the country since the 1950s. The latter mobilized the black population around the ANC's demands. At the same time, the ANC mandated Cyril Ramaphosa (later the chairperson of the constitutional assembly) and the NP mandated Roelf Meyer to establish a channel of communication with the purpose of maintaining some form of dialogue. In what came to be known as the channel bilateral, these two continued to serve as key interlocutors for the two sides through the end of the constitution-making process, even talking behind the scenes during periods in which talks were suspended.<sup>27</sup>

The deteriorating security climate and tumbling economy motivated the negotiators to move forward. The channel bilateral produced results, and, after last-minute bargaining between the two leaders, Mandela and de Klerk met in September 1992 to sign the Record of Understanding. This agreement, which represented a turning point in the negotiations, addressed major areas of deadlock and laid the foundation for restarting multiparty talks.<sup>28</sup> It also established important principles concerning constitutional arrangements, discussed further below.

The following month, the ANC adopted a position paper titled "Strategic Perspectives" that guided its negotiating strategy. The document laid out proposed phases to attain majority rule that ultimately came to be agreed upon and implemented: the establishment of a transitional executive council, the election of a constituent assembly, the establishment of an interim government of

national unity, the drafting and adoption of the new constitution, the phasing-in of the new constitution, and the period of consolidation of the new democracy.

To prepare for the resumption of talks, ANC and NP negotiators held a private meeting over several days at a nature reserve. In the two years since the ANC had been unbanned, this was the first opportunity that these individuals had to interact on a social level, and the rapport they developed later proved invaluable. In further bilateral meetings, the two parties resolved many outstanding issues, putting them in a good position to jointly drive multiparty negotiations forward.

The next round of formal multiparty talks—named the Negotiation Planning Conference—convened at the beginning of March 1993. To set parties on an equal footing, the conference was called on the basis of each party inviting one another. This two-day meeting called for negotiations to resume and resolved that a new forum—the Multi-party Negotiating Process (MPNP)—would begin meeting the next month. Establishing a new forum, involving twenty-six participating parties and organizations, enabled the parties to create a more efficient structure than CODESA and to look for ways to accommodate right-wing objections to CODESA.

The MPNP structure was more efficient than CODESA because, instead of negotiating issues in different working groups, a single negotiating council, composed of four delegates and two advisers per party, became the effective bargaining forum. Compared to the fragmented negotiations in CODESA's five working groups, this was an important improvement that contributed to the MPNP's better result.<sup>29</sup> The negotiating council initially reported to a negotiating forum, but this soon fell away, and all agreements reached in the council were ratified by the plenary, composed of ten delegates per party. Due to concern regarding the lack of

female participants at CODESA, each party was required to have at least one female delegate at every level.<sup>30</sup>

Another innovation was the establishment of five- to six-member technical committees, consisting of experts who had the confidence of the major parties, but who were not political party representatives.<sup>31</sup> In addition, instead of orally presenting their views in the negotiating council, parties made written submissions that were considered by the technical committees. This was a major improvement because these committees' reports accounted for everyone's views and the committees could serve as compromise-seeking and deadlock-breaking mechanisms. A ten-person planning committee played the same role as CODESA's management committee, and a subcommittee to the planning committee acted as secretariat. To deal with specialized issues, the council established two nonpartisan commissions to deal with demarcation of regions and with national symbols.

Despite the process's sound footing, circumstances were to severely test the parties' commitment to negotiation. On April 10, 1993, Chris Hani, one of the ANC's most popular leaders and general secretary of the Communist Party, was assassinated by a Polish immigrant with right-wing ties. This event prompted a violent backlash, a national strike involving 90 percent of the workforce, and further deepening of the economic crisis. An appeal for calm by Mandela, broadcast live on television on the night of Hani's murder, averted a national crisis.<sup>32</sup> In response to the demonstration of impatience unleashed by the assassination, the ANC and its allies resolved to speed up the negotiating process and to seek early announcement of an election date and other concrete measures. The NP, too, saw a need to instill the process with a new sense of urgency. Two immediate measures were thus agreed: a date for the country's first nonracial democratic election—and therefore a deadline for the conclusion

of multiparty talks<sup>33</sup>—and the establishment of the transitional executive council.

With the same types of setbacks<sup>34</sup> and breakthroughs that had characterized the negotiating process until this point, the MPNP then proceeded over the subsequent months to agree, before the end of 1993, on an interim constitution and the terms of a final constitution-making process. The MPNP's role in producing these results is considered further below in the discussion of the interim constitution.

## The Constitution-Making Process

### *Overview of the Structure of the Process*

The principal structural feature of the South African constitution-making process was its division into two phases. This division concretized a fundamental compromise between those who sought a swift transition to majority rule and those who sought to preserve some governmental influence and group privileges for the constituencies of the ancien regime.<sup>35</sup>

The first phase involved the adoption of the interim constitution, negotiated and agreed by the participants in the MPNP March to November 1993. The negotiations took place in a roundtable format and produced a pact among the key political parties that was then enacted by the last apartheid-era parliament. The interim constitution provided a framework for governing South Africa until the adoption of the final constitution, specified the process for writing the final document, and imposed certain substantive requirements for that document by including thirty-four "constitutional principles." A new constitutional court was created as well, which, in addition to being assigned the usual duties of such a body, was tapped to be the guarantor of the principles; it would have to certify that the final constitution complied with the principles for the constitution to come into effect.

In the second phase, a democratically elected (in April 1994) constitutional assembly wrote the final constitution, which it adopted in May 1996. While the first phase consisted only of closed-door negotiations, the second phase saw the implementation of an extensive public education and consultation process that opened the making of the new constitution to civil society and ordinary citizens. The constitutional assembly emphasized transparency and inclusiveness in its work. This phase concluded with a first certification decision by the constitutional court that sent the document back to the assembly for several modifications in line with the constitutional principles, and then a second certification decision approving the text.

Elaborate formal negotiation and technical support structures were constructed for both phases of constitution making, particularly the second, which had a larger number of players and more complex management needs. Parallel to the work of these structures, behind-the-scenes deal making—generally on a bilateral basis between the ANC and NP, sometimes in a multilateral format—occurred in both phases as well. The agreements reached out of the public eye, which would then be tabled in and ratified by the formal structures, pushed the process forward at numerous critical junctures.

The sections that follow describe in more detail the two-phase approach and the role of the interim constitution, the outcome of the 1994 elections, the work of the constitutional assembly in preparing the final constitution, the certification role of the constitutional court, and the (limited) foreign contribution to constitution making in South Africa.

### *The Two-Phase Approach and the Role of the Interim Constitution*

In the history of the South African transition, the creation of the interim constitution of 1993 was as important a milestone

as the adoption of the final constitution.<sup>36</sup> The interim constitution—the culmination of almost four years of concerted effort to reach a negotiated settlement—was effectively a peace treaty. It established transition mechanisms, specified the process for crafting the final constitution, and substantively constrained the final document through its embrace of thirty-four binding constitutional principles. While its operative effect was short-lived, its influence was peremptory due to the mandatory impact of the constitutional principles on the parameters within which the final constitution was written; also, the constitutional assembly used the interim constitution as the basis for its drafting work.<sup>37</sup>

The interim constitution was the practical embodiment of the transition from minority rule to democracy, adopted at the conclusion of a negotiating process in which political parties and homeland governments from across the political spectrum participated. It was the fruit of the first stage of constitution making and provided the basis for organizing government and regulating society during the transitional period from the April 1994 elections to the promulgation of the final constitution two years later.<sup>38</sup> Though a time-limited framework, it was a fully elaborated constitution that created the basic institutions of democracy.<sup>39</sup>

On a more theoretical level, the interim constitution also helped to bridge the illegitimacy of the apartheid regime and the legitimacy of the new constitutional system inaugurated in 1996. As Richard Spitz and Matthew Chaskalson have observed, the two-stage constitution-making process, of which the interim constitution was a central feature, resolved the traditional dilemma of whether the power of the day, the “constituted power,” has the legitimacy to serve as the “constituent power” by putting in place a new constitutional arrangement. If not, a new body must be created with the legitimacy to write and

adopt a new constitution. In South Africa, the constituted power was a minority regime lacking democratic legitimacy. In addition, the MPNP, the forum negotiating the transition, was unelected, and thus also lacked the democratic legitimacy to serve as the constituent power. These facts raised the question of how to ensure unimpeachable legitimacy for the new constitutional dispensation.<sup>40</sup>

The ANC and NP devised the answer of the interim constitution, which the existing parliament would approve.<sup>41</sup> This document would provide a link between the act of the constituted power in dissolving the existing order and the act of a newly elected constitutional assembly in adopting a final constitution.<sup>42</sup> To this, they added an important device unique to South Africa: constitutional principles, agreed in the MPNP and enshrined in the interim constitution, which circumscribed the power of the elected constitutional assembly. This approach “corrupted the notion of a constituent power creating a new order from nothing, but did so in a way that gave any party which willingly participated in the process a stake in its final outcome.”<sup>43</sup> The bilaterally agreed approach, subsequently adopted by the MPNP negotiating council, included a period of power sharing under the interim constitution before the transition to full majority rule, once the final constitution was adopted. This approach provided for an immediate political settlement, in the form of elections, the institution of a transitional government, and a new though temporary constitution. At the same time, it provided controls on the transition to democracy, which included a period of power sharing, binding constitutional principles, and a role for political parties in the final constitution making. In this way, the two-stage framework and the interim constitution “reconciled the ANC’s desire for a swift transfer to majority rule with the NP and other parties’ concerns for structural guarantees and long-term influence in the constitution-making process.”<sup>44</sup>

As the product of a political negotiation and an enactment of the apartheid regime’s parliament, the interim constitution’s democratic credentials can be seen as weak, as is often the case with interim measures in transitional and postconflict settings. Given the control the interim constitution exercised over the final constitution through the constitutional principles, that weakness is not insignificant. More important in the circumstances, however, was that the document embodied a deal that ended apartheid; drew a range of parties into the constitution-making process; ensured that the final constitution would be created by a democratically elected body; and, by providing legal continuity, prevented the emergence of legal or administrative uncertainty.<sup>45</sup> Substantively, the interim constitution had to satisfy the distinct imperatives of laying a foundation for democracy and accommodating those parties whose cooperation was necessary for a smooth transition. In doing so, as Cyril Ramaphosa later observed, the document “created the conditions which allowed the final Constitution to be written in a less volatile climate and far more considered manner.”<sup>46</sup>

The interim constitution itself characterized its role as “a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy, and peaceful co-existence and development opportunities for all South Africans, irrespective of color, race, class, belief or sex.”<sup>47</sup> The most important building blocks in the construction of that bridge were the constitutional principles, the idea of which was agreed between the ANC and NP in the September 1992 Record of Understanding.<sup>48</sup> The first eleven of the principles were developed during the CODESA phase of the transition negotiations; during the MPNP process, the number of principles grew to thirty-four.<sup>49</sup> The basic purpose of the principles was to guarantee the protection of



certain fundamental interests of minority groups, thereby gaining those groups' acceptance of a process in which the final constitution would be adopted by a democratically elected assembly.<sup>50</sup> The principles' binding nature was assured by giving the constitutional court the role of certifying the final constitution's adherence to them before the document could come into effect (discussed further below). Neither the principles nor the certification requirement in the interim constitution could be repealed or amended.<sup>51</sup>

Albie Sachs later observed that it was not difficult for the ANC to agree, in principle, to binding constitutional principles: It wanted language, cultural, and religious rights to be protected, and it wanted everyone "to feel at home in this new South Africa."<sup>52</sup> Reaching agreement on the content of the principles, however, was more challenging. Those who stood to lose power wanted to "pack as much as possible into the principles," while those who clearly would gain power after elections wanted to leave as much as possible to the discretion of a legitimately elected body.<sup>53</sup>

More than any other issue, the substance of the constitutional principles concerned the allocation of powers between the national and provincial levels of government.<sup>54</sup> One legal adviser involved in the constitution-making process calculated that the thirty-four numbered principles actually included fifty-one principles and subprinciples, of which twenty-three dealt with the division of powers. By comparison, only one prescribed, in very general terms, the content of a bill of fundamental rights.<sup>55</sup>

Another key feature of the interim constitution was the establishment of a framework for a government of national unity to exercise power during a transitional period following elections. (For the period between the interim constitution's adoption and the elections, a transitional executive council was established to oversee the existing government and provide for a level electoral playing field.<sup>56</sup>)

The text provided that cabinet posts—up to twenty-seven of them—would be allocated proportionally on the basis of the election results to political parties garnering at least 5 percent of the vote. The purpose of this procedure was to produce a broad governing coalition to facilitate national reconciliation.<sup>57</sup> After much debate, not only over the form of power sharing, but over its duration, it was agreed—at first bilaterally between the ANC and NP and then in the MPNP—that coalition government could continue for five years until 1999.<sup>58</sup> (In the event, the NP exited the government of national unity in 1996.)

The story of the negotiation of the interim constitution illustrates many of the dynamics of the overall transition negotiations and final constitution-making process, including the parallel use of formal multiparty procedures and informal bilateral talks between the main parties, the use of deadlines to maintain momentum, and the main parties' persistence in trying to keep potential spoilers involved in the process. One aspect of the first phase of constitution making that differed significantly from the second phase, however, was the secrecy of the process. Closed-door meetings were essential at certain junctures of the final constitution making, especially toward the end of the process,<sup>59</sup> but the entire process in the first phase was closed to the public.<sup>60</sup>

A brief summary of the negotiating history of the interim constitution during the MPNP reveals these similarities and differences. In June 1993, the negotiating council of the MPNP, which had commenced two months earlier, determined that sufficient progress had been made for it to set April 27, 1994, as the date for South Africa's first ever nonracial elections. To proceed with elections, the council instructed the technical committee on constitutional issues to prepare a draft of a transitional constitution. At the same time, on the basis of a previous agreement between the ANC and NP, as noted above, the

council agreed that the constitution-making body for the final document would be bound by constitutional principles negotiated in the MPNP.<sup>61</sup>

Having set a date for elections before agreeing on the text of an interim constitution, the parties effectively set a tough deadline for themselves: Agreement would have to be reached by the middle of November to leave sufficient time for a special session of the parliament before the end of the year to enact the necessary legal changes, and then for elections preparations.<sup>62</sup> The rush meant little rest: While parties were negotiating outstanding issues, technical experts were drafting proposals and the administration was preparing for the plenary. The atmosphere at the World Trade Centre, the site of the MPNP, was electric.

The first draft of the interim constitution was published in July 1993. In it, the technical committee recommended establishing both a constitution-making body, made up of the joint sitting of a national assembly and a senate, and a constitutional court. The interim constitution would be the supreme law, and the elected constitution-making body would be sovereign and entitled to draft and adopt a new constitution subject only to the constitutional principles. The final constitution would have to be adopted within two years and by a two-thirds majority.

By late October 1993, the ANC and the NP were ready to finalize the interim constitution. Jointly, in the MPNP's technical committee on constitutional issues, the parties tabled agreements on the text that they had reached on a bilateral basis. Their agreements included arrangements for a government of national unity. The main compromise in these agreements lay in the powers of provinces; the ANC had shifted its position to accommodate the federalist demands of the NP, IFP, and others. Both the IFP and the right-wing Freedom Alliance remained intransigent despite the compromises in-

tended to bring them on board, but the ANC and NP resolved to proceed with the interim constitution despite this, leaving the door open for others to join the process later.<sup>63</sup>

The main parties' resolve to keep the constitution-making process moving forward was manifest also in the decision-making procedure used in the MPNP. Under the rules of procedure, all decisions in the plenary, negotiating forum, and negotiating council were to be reached by consensus, but if this could not be achieved, sufficient consensus (described above) would do. The rotating chairperson would rule on whether consensus or sufficient consensus had been obtained. Not surprisingly, this procedure was controversial in the MPNP, as smaller parties frequently were frustrated by their inability to gain concessions; nevertheless, this highly subjective decision-making rule enabled the negotiators to reach a historic political settlement.<sup>64</sup>

By November 16, 1993, the outstanding issues were narrowed to a handful, and Mandela and de Klerk met to resolve them in a crucial bilateral meeting. Mandela persuaded de Klerk to shift from insisting on a minority veto on government decisions and an enforced coalition to voluntary co-rule. The outcome showed that de Klerk had come to accept that he would have to rely on the ANC's commitment to national unity. In the four-hour meeting, the two leaders, assisted by their chief negotiators, Cyril Ramaphosa and Roelf Meyer, agreed in principle on all the outstanding issues. The NP agreed to decisions being taken by a simple majority in the cabinet. The ANC compromised on the deadlock-breaking mechanisms for adopting the final constitution, agreeing that if a referendum failed, a newly elected constitutional assembly would be able to adopt a final constitution by a reduced, 60 percent, majority. It also agreed to provisions protecting the powers of the provinces, and—in a concession to the Democratic Party—agreed that six of the ten constitutional court judges would be ap-

pointed from among ten nominated by the judicial services commission.<sup>65</sup> The ANC made a further concession by agreeing to guarantee the white minority a substantial share of power in local government. The agreement called for local government elections within two years, and guaranteed whites at least 30 percent of seats on each council, as well as an effective veto for budget decisions.

The final political agreement on the text of the interim constitution was reached in the early hours of November 18; nineteen of the twenty-one parties still participating in the MPNP (the IFP and others had previously walked out) voted in favor; the left-wing PAC and right-wing Afrikaner Volksunie voted against.<sup>66</sup> Party leaders signed the agreement, bringing about the single most dramatic political and constitutional change ever experienced in South Africa, which would take effect on the date of the elections.

The document that the MPNP plenary passed was not quite complete, however. The plenary thus instructed the negotiating council to finalize outstanding technical issues and refer the document to the parliament for its formal passage into law. On December 22, the debate on the interim constitution in the last white parliament completed its course. The NP had firmly demanded that the existing parliament adopt the interim constitution; this procedure represented a significant concession on the part of the ANC, which until then had resolutely denied the legitimacy of the organs of the apartheid regime.<sup>67</sup> Once adopted, the Department of Constitutional Affairs and Planning initiated a campaign to promote the new constitution, including advertisements in a variety of media and the distribution of booklets about the constitution. As further confirmation of South Africa's burgeoning democracy, an independent electoral commission and independent media commission were established in January 1994 to prepare the ground for elections.

The ANC and NP later supported amendments to the interim constitution, in February 1994, in a bid to draw the right wing into the process and, in particular, to secure full participation in the upcoming elections.<sup>68</sup> All mention of concurrent powers was removed and the provinces were granted powers that would prevail over those of the national government in all areas within their competency. The Electoral Act, which had been adopted just after the interim constitution, also was amended to extend the date for registration of political parties. Ultimately, the right-wing Freedom Front participated in the elections.

Changes to the interim constitution, including guaranteeing the position of the Zulu king, also were made in an effort to overcome the objections of the IFP, the greatest potential spoiler of the election process.<sup>69</sup> While the IFP sought more, on the basis of a tripartite agreement reached among the ANC, NP, and the IFP only a few days before April 27, it finally agreed to participate in the election. In the end, all major political stakeholders and parties took part in the elections, held on April 27–29, 1994; only the white ultraright wing did not participate.<sup>70</sup> The inclusiveness of the elections was the product of tremendous perseverance by the parties committed to a peaceful transition in their efforts to bring the more extreme elements of South Africa's polity into the process.

### *South Africa's First Democratic Elections*

South Africa's first nonracial elections were an overwhelming success, confounding the prophets of doom. Though violence spiked before the polls—hundreds of people were killed each month in politically related violence and there were several bombings in the final days intended to scare people away from polling stations<sup>71</sup>—the elections themselves proceeded without any major incidents.<sup>72</sup> An overwhelming majority of eligible voters

**Table 5.1 Constitutional Assembly Election Results**

Party	Number of seats	Leader
African National Congress	312	Nelson Mandela
National Party	99	F.W. de Klerk
Inkatha Freedom Party	48	Mangosuthu Buthelezi
Freedom Front	14	Constand Viljoen
Democratic Party	10	Tony Leon
Pan Africanist Congress	5	Clarence Makwetu
African Christian Democratic Party	2	Kenneth Meshoe

*Note:* This table is drawn from Ebrahim, *Soul of a Nation*, 181. For detailed data on the results of the 1994 elections, see the Web site of the Independent Electoral Commission, <http://www.elections.org.za/Elections94.asp> (accessed April 25, 2009).

came out, standing patiently in long lines to cast their votes.<sup>73</sup> Despite enormous logistical problems, some occasioned by the IFP's late decision to participate, as well as ordinary election squabbles, the Independent Electoral Commission, a new body established during the transition process, judged the election substantially free and fair.<sup>74</sup> That judgment was, of course, important to the credibility of the resulting constitution-making body.<sup>75</sup>

The election handed the new leaders two separate and distinct mandates: to govern a newly democratic society and to draft the final constitution. These were not entirely compatible tasks, as a political leader's engagement in one of them was often a detriment to the other. The major problem was one of available time. On the one hand, political leaders were expected to establish a functioning democratic government, for which there was neither precedent in South Africa nor experience. On the other, they were expected to engage in extended negotiations with many different stakeholders to draft the final constitution.

The election produced 490 political leaders at the national level: 400 in the national assembly, elected by proportional representation using national and provincial candidate lists, and 90 in the Senate (ten from each of the nine provinces). In accordance with the

interim constitution, a joint sitting of these parliamentary bodies made up the constitutional assembly. In addition, the interim constitution gave parliament the function of choosing the president, who in turn was required to select cabinet members from the ranks of parliament, in accordance with the formula for the government of national unity described earlier. An indirectly elected president was settled upon to avoid potential gridlock between competing centers of power and to break with South Africa's history of highly centralized rule, experienced through colonial structures, traditional leadership, and in the underground resistance.<sup>76</sup> The president chosen, of course, was Nelson Mandela (see Table 5.1).

The successful elections and wide acceptance of the results set the stage for the second phase of constitution making, to be conducted by the constitutional assembly.

## **The Constitutional Assembly and Creation of the Final Constitution**

### *Structural Framework for Negotiations*

In drafting the final constitution, the constitutional assembly had to work within both political and legal parameters. These shaped the process and determined the document's content. In the main, the assembly sought to



produce a constitution that would be both legitimate and enduring. Legitimacy was seen to depend on the extent to which the drafting exercise was considered credible. It was also seen as important that the final text be as widely accepted as possible.

Three politically imperative fundamental principles guided the way in which the assembly designed the final constitution-making process to ensure its credibility. First was inclusiveness. The constitution had to integrate the ideas of all the major players, including the political parties represented in the assembly, organized civil society, and political parties outside the assembly, as well as individual citizens. The second principle was accessibility. The assembly invested a great deal of energy and resources in ensuring that the process was as open as possible. This principle suggested that it was not good enough merely to invite submissions; it was necessary to reach out and solicit views deliberately. To this end, an elaborate media campaign was devised to reach as many South Africans as possible. Accessibility also was seen as relating to both the nature of the language of the text and the ability of ordinary citizens to obtain physical copies of it. The argument was that the ordinary citizen should be able to read and understand the document. The third principle was transparency. All meetings of the assembly and its sub-bodies were open to the public, though a large number of bilateral and multilateral meetings took place in private, with no media or public access. The closed nature of these meetings raised objections, especially from certain civil-society groups.<sup>77</sup>

Several important requirements set out in the interim constitution helped to define the process as well: a two-thirds majority for adoption of the text, complete adoption of the document within two years of the first sitting of the national assembly, and compliance with the thirty-four constitutional principles. The supermajority requirement meant

that the dominant party, the ANC, did not have enough votes to adopt the final text on its own.

The strict deadline was imposed to ensure that the final constitution would be drafted within a reasonable period of time. To deter parties from withholding their support for the new constitutional text within the tight time frame, the interim constitution contained elaborate deadlock-breaking measures, including the possibility of sending a completed draft text to a referendum if the assembly failed to adopt it.<sup>78</sup> Negotiators on both sides considered the prospect of a referendum undesirable, as it would signal their political and personal failures to reach agreement, entail an inevitably adversarial campaign, and possibly reopen contentious issues.<sup>79</sup> At the start of the assembly's work, some raised concerns that there might not be sufficient time to complete the task, but, because an extension would have required amending the interim constitution, agreement was reached to complete the work within the time allocated.

The use of the constitutional principles was novel. Namibia provided a precedent, in which a set of principles determined the parameters for drafting a new constitution, though in Namibia the principles were guidelines.<sup>80</sup> In South Africa, they were binding on the negotiators, and, as noted above, the constitutional court would assure their adherence to the principles. The principles had emerged from the negotiating process as a compromise; thus, they were sufficiently precise to guarantee that the constitution-making body did not stray from certain fundamental, agreed-upon notions, but not so detailed as to preempt the work of that body. The constitutional principles guided both the structure and the substance of the assembly's debates. As discussed further below, six theme committees were established to facilitate the assembly's work, and these were given terms of reference based on a division of the thirty-four principles.

The formal organizational structure used for the negotiation and drafting process in the assembly was complex. At the highest level was the constitutional assembly, which, as mentioned, consisted of the 490 members of the two houses of the parliament. These members represented seven political parties in proportion to the results of the 1994 elections. Cyril Ramaphosa of the ANC served as chairperson of the assembly and Leon Wessels of the NP as deputy chairperson.<sup>81</sup>

Within the assembly, and reporting directly to it, the constitutional committee was the main negotiating and coordinating structure. It consisted of forty-four members, appointed by parties on a proportional basis. The committee met at first on a weekly basis to receive reports from the theme committees (described below), but met less frequently after the establishment of its subcommittee. It continued to function, however, as the decision-making structure.

The subcommittee of the constitutional committee was established in June 1995 to better facilitate negotiations. With Ramaphosa as its chairperson and Wessels as its deputy chairperson, the subcommittee proved to be extremely effective and important because of its small size and ability to meet frequently and more easily than the full constitutional committee. Though it was not a decision-making forum, the subcommittee improved the efficiency of the constitutional committee, and unlike the latter, could meet at the same time as the national assembly without affecting the quorum. At any one time, the subcommittee consisted of about twenty members, some of these were permanent members, and others were nominated by parties from time to time to deal with specialized matters. Its membership, therefore, depended on the issue at hand.

The constitutional assembly also established a management committee to deal with the day-to-day management of the negotiations and matters of process rather than

substance. The twelve-member management committee met once a week throughout the proceedings. One of its specific responsibilities was to ensure that the constitutional assembly worked according to an agreed schedule. While not as glamorous as the issues of political debate, timekeeping was essential for all the structures to adhere to the overall plan and meet the May 8, 1996, deadline.

The aforementioned theme committees were established to work on different parts of the constitution<sup>82</sup> and to ensure the involvement of as many members of the assembly as possible. Each theme committee consisted of thirty members nominated by political parties in proportion to their representation. However, due to the difference in numbers between the largest and smallest parties, a bias in favor of the smaller parties was agreed upon. Each committee's members elected three chairpersons to ensure that no single party chaired meetings of all the committees. Together with a core group of seven or eight members, the chairpersons were responsible for managing and coordinating the committee's work.

In addition to ensuring that the constitution-making process was as inclusive as possible of the members of the large constitutional assembly, the theme committees functioned to ensure inclusiveness in a broader sense. They were the assembly's initial interface with the public and were used to receive views from the public and civil society (discussed further below in the section on public participation). The work of these committees also had the beneficial effect of giving politicians who had not been involved in the first phase of constitution making the equivalent of an intensive course in constitutional issues.<sup>83</sup> A technical committee, consisting of three or four experts in particular fields, supported each theme committee, and some theme committees were assigned additional technical advisers to deal with specialized matters, such as local government, self-

determination, and the role of traditional leaders. Some committee members also participated in workshops with international experts, though this was not a major feature.

To illustrate the nature of the theme committees' work, Theme Committee 1, which dealt with the character of the democratic state, held fifty-six meetings from September 19, 1994, to September 11, 1995, and processed 3,000 submissions from the public. It held six orientation workshops to facilitate the preparation of submissions. And it held public hearings on the seat of government, languages, names and symbols, the secular state, equality and affirmative action, and the character of the state.<sup>84</sup> Overall, the theme committees began producing reports in February 1995 and tabled their final reports, accompanied by draft constitutional texts, in September 1995.

In addition to the various committees just described, three other structures established in accordance with the requirements of the interim constitution supported the constitutional assembly's work. First was an independent panel of constitutional experts, which advised the constitutional assembly through its chairperson.<sup>85</sup> The panel, composed of two practicing and five academic lawyers, also had a deadlock-breaking function under the terms of the interim constitution, but was not called upon to perform this role.<sup>86</sup> Second was a commission on provincial government, the main task of which was to help formulate new arrangements for provincial government. This commission also advised the constitutional assembly on provisions in the new constitution regarding boundaries, structures, powers, functions, and transitional measures for the provinces.

Finally, a *volkstaat* council was established to enable proponents of the idea of a *volkstaat* (that is, an Afrikaner homeland) to pursue this option constitutionally. The provision in the interim constitution calling for the council was a compromise that helped convince right-

wingers to participate in the 1994 elections and seek to advance their interests within the framework of the constitution.<sup>87</sup> The council gathered information and reported to both the constitutional assembly and the commission on provincial government. In short, the *volkstaat* council was principally a mechanism to ensure the greatest possible consensus and inclusiveness; it provided a back door to participation for the right wing and served as a face-saving device.

### *Negotiating and Drafting the Final Constitution*

At the outset, the constitutional committee settled on a work program that envisaged three broad phases. The first phase would involve a public participation program and the development of a draft text. The second phase would include the publication of the first draft and further solicitation of public comment. In the third phase, the constitutional assembly would finally negotiate and adopt the constitution.

During the first phase, the assembly struggled with the question of how much detail to include in the constitution. The invitation to the public to submit comments and ideas elicited a wish list of provisions to include in the text. Smaller political parties and lobby groups as well as the broader public were naturally inclined to seek to secure particular interests by addressing them in the constitution. The technical committees organized all the submissions and prepared reports based on them for consideration by the theme committees, which, in turn, produced reports for the constitutional committee reflecting the major trends in the submissions and whether they demonstrated consensus or considerable differences of opinion. Often these reports were supported by a set of draft formulations, but invariably, the reports begged the question of how much detail should be included.

To address the question, the chairperson of the constitutional assembly asked the in-

dependent panel of constitutional experts to draft a document setting out criteria that should be applied when considering issues for inclusion in the constitution. Nevertheless, the debates in the theme committees were repeated in the constitutional committee, often without any progress. The sometimes cumbersome and redundant proceedings were part of the price that had to be paid for trying to involve as many of the 490 members of the assembly as possible in negotiating the constitutional text. Regardless, however, at this early stage, parties were not yet ready to make the necessary compromises.

As these debates progressed, the management committee appointed a team of experts, including law advisers, language experts, and the members of the panel of constitutional experts, to prepare the first working draft of the constitution. The draft was essentially to serve as a report on how the constitutional assembly had addressed the submissions made, and the format was intended to draw attention to areas that remained contentious or were outstanding. This document, referred to as the Refined Working Draft, was produced for discussion by the constitutional committee in October 1995. It provided the first glimpse of what the final text might look like and clearly set out the agenda for further negotiation. After a year of meeting to consider different views and submissions, political parties were sufficiently primed and ready to plunge into closing negotiations. The constitutional committee addressed a vast number of issues and reached many agreements at this stage, reflected in the version of the draft that was ultimately published in November 1995. To solicit a second round of public comment, more than 4.5 million copies of the draft were distributed in tabloid form throughout the country. Meanwhile, guided by the discussions of the constitutional committee, and after further research (including some consultation with foreign experts), the drafters prepared a further edi-

tion of the working draft in December; revised drafts were then produced at regular intervals to reflect the latest agreements.

While the second broad phase of the work program—the solicitation of comment on the Refined Working Draft—proceeded, the subcommittee of the constitutional committee continued to negotiate outstanding issues. As would occur at critical junctures throughout the negotiations (as intermediate deadlines approached, or as stumbling blocks were reached), the parties engaged in bilateral and multilateral meetings behind closed doors to seek agreement on a next edition of the draft. While the parties themselves privately arranged the bilateral meetings, multilateral meetings among parties were facilitated by the constitutional assembly's administration. These meetings held behind closed doors did not sit well with members of civil society or the media, but they were important vehicles for enabling the parties to make compromises gracefully without appearing publicly to have betrayed their constituencies. The meetings also allowed for very frank discussions without negotiators having to make statements purely for the media's benefit.

The major issues requiring resolution at this stage related to the bill of rights, the council of provinces, national and provincial competencies, courts and the administration of justice, and local government. By mid-March 1996, there were deadlocks on five issues: the death penalty, whether the right to strike should be balanced by a right to lock-out, the right to education in single-language schools, the appointment of judges, and the appointment of the attorney general. Fifty-four further issues remained in contention, and twenty-five matters required technical attention.

Rounding out the second phase, the constitutional assembly produced a further edition (the fourth) of the working draft on March 20, 1996, which contained a detailed study of the submissions made in response



to the publication of the Refined Working Draft. This document included endnotes intended to facilitate consideration of the public submissions. The fourth edition of the text was published in limited quantities and distributed to those who had made submissions. In part, the publication was an attempt to prove that the assembly was giving due consideration to the views of the public.

In the third phase of the work program, during March 1996, it became clear that it would be extremely difficult to adopt the constitution by the May 8 deadline. To expedite the process, the negotiators accepted a proposal mooted by the assembly's administration to hold a multilateral meeting in an isolated area over several days. This would allow parties, with the benefit of experts being present, to hold intensive negotiations without the disruptions occasioned by remaining in close proximity to their work environments. The meeting, held in Arniston at the beginning of April 1996, proved extremely successful, as most of the outstanding issues were resolved. Important issues remained in contention, however, including the death penalty, education, and lockout provisions; formulations on the preamble and local government were still in progress as well. Nevertheless, for the first time, negotiators began to see the light at the end of the tunnel.

As it turned out, the issues on which the parties were deadlocked proved to be serious enough to throw into question the adoption of the final constitution by general consensus, as the NP and Democratic Party felt strongly enough about them to consider voting against the entire constitution. Most extraordinary, however, was that none of the major political debates that had raged among parties for several years—namely, the question of a government of national unity, whether to establish a senate, and national and provincial competences—were among these issues.<sup>88</sup>

Based on the progress achieved at Arniston, a fifth edition of the working draft was

produced, together with the first draft of transitional arrangements, by the middle of April 1996. At this point, the negotiation process intensified as pressure mounted on the parliament. Despite a full regular legislative agenda, it was agreed that the work of the constitutional assembly would take priority, and a hectic series of bilateral, multilateral, and subcommittee meetings ensued. Party caucuses and meetings of the policy-making structures were regularly convened to renew or obtain fresh negotiating mandates. Generally, meetings took place at all hours, even stretching late into the night. During this period, the Ramaphosa and Meyer-led "channel bilateral" was resumed as well.

Mixed into the intense activity was a great deal of lobbying by interest groups, particularly those of business and labor. Adding to the pressure on the side of labor, thousands of workers marched to support their demands. Consultations were held with the Congress of Traditional Leaders as well regarding their concerns about the treatment of their authority and of customary law in the new constitution.

By April 18, negotiators entered the final stretch. In a marathon meeting of the constitutional committee that started that day, the basic text of the constitution was agreed upon. This meeting heralded some of the most dramatic breakthroughs in all the negotiations, including agreement among the ANC, NP, and right-wing Freedom Front that the new constitution would feature a commission to promote and protect the rights of cultural, religious, and language groups. In addition, a clause was added acknowledging the principle of collective rights for cultural, religious, and linguistic communities. This was vitally important to bringing the right-wing constituency on board. Major issues unresolved at Arniston remained unresolved,<sup>89</sup> but the text was rapidly polished with respect to all agreed matters and published in bill form on April 22.

A milestone in the process was reached on April 23, when the draft constitution was tabled in the constitutional assembly and a two-day plenary debate began. In tabling the draft, assembly chairperson Ramaphosa observed that the country had come a long way since 1909, when the first Union constitution was passed in the British House of Commons; in his opinion, the new constitution would be the birth certificate of the new South African nation.

The procedures at this stage focused on amendments to the constitution bill tabled by parties in the plenary. The constitutional committee began meeting on April 25 to consider 298 proposed amendments tabled by various parties, including twenty-eight that were jointly tabled by the ANC and NP, reflecting agreements reached between them. In the main, the amendments were of a technical nature; others were no more than a restatement of well-known party positions that had been asserted in the previous two years. The constitutional committee agreed to move the debate on amendments into various subcommittees, but unfortunately, even the subcommittees failed to make much progress on the unresolved issues and the parties remained deadlocked. Ultimately, the formal public procedures in the constitutional committee were insufficient on their own to overcome the final obstacles, though the committee and its subcommittees continued to meet to resolve the issues that they could and to record progress in the negotiations overall. Bilateral discussions between the ANC and NP were critical from this point to the end of the process, as the parties worked to bridge their outstanding differences. For example, an important series of deadlock-breaking meetings took place on Sunday, April 28, when President Mandela and de Klerk met at Mandela's official residence in Pretoria. Overshadowing these particular side talks was a threat of a national strike on April 30, and the fact that the rand was at an all-time

low. Delegations of labor and business leaders joined the talks, and significant agreements in principle on some issues, including the lockout clause, were reached, though the parties remained deadlocked on the property clause.

As the May 8 deadline loomed, the intensification of the negotiation process began to take its toll. After mid-April, negotiators found themselves involved in a hectic round of bilateral talks, subcommittee meetings, extensive consultations, and continuous reporting to policymaking bodies of their parties. Signs of physical strain and stress emerged. The smaller parties were particularly disadvantaged, as they did not have sufficient members to field in the various meetings or to engage other parties in lobbying for support. Thus, they often found themselves led by agreements between the ANC and NP. Despite some irritation this dynamic produced, and even though it was necessary ultimately to arrive at agreements multilaterally, the important deadlocks were, in fact, essentially between the two largest parties.

By May 1, the constitution-making process was effectively into overtime. The delay in finalizing the text was beginning to cause significant problems for the administration and drafters. For example, language experts were recruited from different parts of the country to carry out the translations in the hope that the final text would be presented to the constitutional assembly for adoption in all eleven official languages, but the continuous amendments completely frustrated their efforts. As time ran short with no agreement in sight on deadlocked issues,<sup>90</sup> the tension reached a fever pitch.

Though consensus remained the goal, as the constitutional committee completed its work, the ANC found it necessary to assert itself as the majority party to determine formulations on the final issues, and its preferences prevailed on several points. Thus an amended constitutional bill was drafted by

May 4. It was still not clear, however, how the political parties would vote on the text, as not all provisions of the draft were fully agreed. Bilateral meetings continued over the next two days to iron out differences, and on Monday, May 6, the constitutional assembly sat in plenary to debate the amended bill.

The opening of the final plenary irreversibly set in motion a process that would oblige parties to either adopt the text or allow the deadlock-breaking mechanisms to come into effect. As noted earlier, these included the possibility of the independent panel of constitutional experts taking thirty days to develop compromise formulations to which the parties might agree, and the possibility of resorting to a referendum on the draft text.<sup>91</sup> The implications of the latter, which would jettison the process of multiparty constitution writing and thus jeopardize the compromises that had been reached, were a source of considerable concern to the negotiators.

Both the plenary session and bilateral meetings continued through May 7, interspersed with meetings of the constitutional committee to consider new amendments; an eleventh-hour modification of the assembly's rules was needed to allow further amendment procedures. When the committee members assembled at 10:45 p.m. that day, an incredible air of excitement ran through the room. By this time, many of the assembly members who were attending the plenary debate had squeezed into the old assembly chamber to hear the parties report on the outcome of the bilateral discussions. Though reluctantly in some cases, final compromises were reached on the right to education in languages of choice, the exclusion of a constitutional right to lockout, the nature of the right to collective bargaining, the property clause (balancing land reform with property rights), and several more minor matters. At 11:30 p.m., the committee adjourned to allow the constitutional assembly to complete its debate. Several hours later, sufficient support for

adopting the constitution was confirmed, and the constitutional assembly went on by a vote of 87 percent in favor<sup>92</sup> to adopt the resolution containing amendments reflecting the final agreements. Around 11:00 a.m. on May 8, the new constitution was adopted.

### *The Public Participation Process*

One of the most distinguishing—and from a comparative constitutionalist perspective, precedent-setting—aspects of the South African process was the intensive effort the constitution makers made to solicit and reflect on a wide range of citizens' views about the document being produced. A guiding principle, upheld throughout the drafting process, was that the development of a new constitution must involve the greatest possible number of South Africans representing the broadest possible range of views. This approach was intended to give real effect to the notion of participatory democracy. Though the constitutional assembly's mandate entitled it to draft the final constitution on its own, its members believed that broader involvement was needed to ensure the popular legitimacy of the outcome.

One of the assembly's stated objectives was to make the constitution-making process transparent, open, and credible.<sup>93</sup> Moreover, the final constitution had to enjoy the enduring support of all South Africans, regardless of ideological differences. Credibility was an important aim for a document born out of a history of political conflict and mistrust. Achieving that aim was thought to depend on a process through which people could claim ownership of the constitution. Not only did the South African people have to feel a part of the process, but the content of the final constitution had to represent their views. In addition, the process had to be *seen* to be transparent and open.

The assembly's main challenge was to find ways to enter into effective dialogue and

consultation with a population of more than forty million people. South Africa had a large rural population, most of which was illiterate and without access to print or electronic media. Moreover, South Africa had never had a culture of constitutionalism or human rights, which made it difficult to consult with people who did not recognize the importance of a constitution. Meeting this challenge thus had to include raising awareness to empower people to be able to participate meaningfully in the process.

The timing of the public participation program heightened the challenge. First, the time available for the project was short. It was not until the second quarter of 1995—well into the constitutional negotiations—that the full complement of necessary staff was in place to implement the program. Second, the constitutional drafting exercise followed closely after South Africa's "liberation" election. Therefore, the program of public participation had to compete for public attention with the broader process of transformation. In particular, the program overlapped with two local government elections and various government campaigns aimed at involving communities in reconstruction and development programs. In addition, it was difficult to make clear to the general public the distinction between, on the one hand, constitutional dialogue, and on the other hand, articulation of growing demands on government for delivery of basic services and other results promised in elections.

The participation program was conducted at two stages in the process. The first occurred during the negotiations leading up to the constitutional assembly's production of the Refined Working Draft. The second followed and was focused on that draft. Public education about constitutions and the constitution-making process was an integral—and simultaneously undertaken—element of both phases of public participation. This two-stage process avoided the usual

dilemma of whether to consult the public before a draft is prepared, at which point the solicitation of input may be, and may be *perceived* to be, wide open, or whether to consult after preparation of a draft, at which point the range of solicited input may be more constrained but also more constructively focused.

The first phase, which ran from January to November 1995, involved a wide variety of means to communicate and interact with the general public and organized interest groups. To create awareness of the constitution-making process and constitutional issues, and to stimulate public interest in participation, a media campaign was launched in January 1995. As part of the outreach strategy, a national advertising campaign included messages such as "you've made your mark"—a reference to voting in the 1994 elections—"now have your say," and "it's your right to decide your constitutional rights." Advertisements were run on television, on radio, in local newspapers, and on outdoor billboards. The constitutional assembly commissioned a national survey to assess the penetration and impact of this media campaign as well as ascertain public attitudes on key constitutional issues.<sup>94</sup> The results revealed that the assembly's media campaign reached 65 percent of all adult South Africans in the three months between January 15 and April 19, 1995. However, the survey also revealed that the public was clearly skeptical about the seriousness of the assembly in calling for their involvement and the treatment their submissions would receive. The credibility of the process obviously needed some attention. In addition, the survey made clear that the public still needed education about the nature and function of a constitution, as well as information about the assembly and the constitution-making process.

To communicate with the public throughout the entire constitution-making process—in other words, not limited to the two phases of the public participation program,



but overlapping with them—the constitutional assembly also employed a newsletter, and television and radio programs, all bearing the title Constitutional Talk; a telephone talk line; and an Internet Web site. The newsletter, usually published every two weeks in an eight-page format, provided detailed information about the constitution-making process. One hundred thousand copies were distributed through taxi ranks, and another 60,000 were sent to subscribers. A series of twenty-five television programs ran from April to October 1995, and a series of twelve ran from February to May 1996. The format allowed representatives of civil-society groups to engage a multiparty panel of assembly members on topics including the bill of rights, separation of powers, the national anthem and flag, freedom of expression, traditional authorities, and the death penalty.

Radio was a particularly effective information delivery mechanism because it could reach large numbers of people in both rural and urban areas. In collaboration with the South African Broadcasting Corporation's (SABC) educational directorate, the constitutional assembly launched a weekly radio talk show in October 1995. The hour-long programs were broadcast on eight SABC stations in eight languages, with constitutional experts appearing as studio guests. These programs reached over ten million South Africans each week.

The constitutional talk line enabled people with access to a telephone to obtain a briefing on political discussions and to leave messages requesting information or to record comments. The service was available in several languages. While over 10,000 callers used the talk line, the effectiveness of this mechanism was limited. With insufficient time to prepare for the talk line's use, the system to update information and monitor responses was not very efficient. The assembly's Web site, established in conjunction with the University of Cape Town, which maintained it, included a

database of information containing minutes, drafts, opinions, and submissions. More than 6,600 users from forty-six countries accessed the site during the period from January 1 to April 17, 1996.

To engage the public directly in the process in the first phase of the participation program, the constitutional assembly solicited submissions and held public meetings, participatory workshops, and public hearings. These procedures were publicized through the public outreach mechanisms described above. Between February and August 1995, twenty-six public meetings were held in all nine provinces, focused mostly on rural and disadvantaged communities, which had limited access to other means of following the process. The meetings involved a total of more than 200 assembly members in face-to-face interactions with the public. The meetings served two functions: Political actors in the assembly reported on various issues in the negotiations, and members of the public were invited to voice their views on those issues. Each oral submission of views was recorded and transcribed for consideration by the structures within the assembly. Public meetings were preceded by smaller participatory workshops with an educational orientation, mostly involving non-governmental organization (NGO) and other civil-society representatives, to equip participants to contribute substantively to the public meetings. In all, 20,549 people and representatives of 717 civil-society organizations attended the public meetings.

For most participants, the meetings were the first occasion on which they could interact directly with their elected representatives. More important, this was the first time in South Africa that public events were held involving politicians who were previously at war with one another, talking jointly to the people. The meetings were extremely successful: Discussions were lively, ideas original, and the exchange of views appreciated.

In addition to the public meetings, a national-sector public hearing program was conducted to enable the theme committees (discussed above) to consult civil-society groups on particular issues, such as certain rights to be included in the bill of rights. In an effort to ensure broad representation at the hearings, the assembly sought to prepare for the hearings in partnership with civil-society organizations. The partnership was not entirely successful, however, as few organizations—with the notable exception of the trade union movement—made a concerted effort to draw their members into discussions about the constitution-making process. Most of the hearings took place within four weeks during May and June 1995. Despite the limited time available for this element of the participation program, 596 organizations were consulted. In addition, theme committees hosted many seminars and workshops, at which expert opinion was sought on particular issues. Many of these workshops included international experts.

Numerical data indicates the huge scale of the assembly's effort to engage the public in the first phase of consultation, as well as the swell of popular interest in participation. Altogether, this phase of the public participation program involved direct interaction with 117,184 people; 807 public events; regular liaison with 1,588 civil-society organizations; twenty-six public meetings, which 20,549 people attended and in which 717 organizations were represented; thirteen public hearings involving 1,508 representatives from 596 organizations; 486 constitutional education-oriented participatory workshops preceding public meetings; and 259 briefings by politicians reporting to their constituencies on progress in the constitution-making process. In terms of percentages of South Africans, the participation numbers are not huge—a survey indicated that only 13 percent of the population was even aware that meetings on the constitution had taken place<sup>95</sup>—but as a

sampling of the public's views, the numbers are significant and reveal a serious effort to involve the public.

The success of the effort to solicit public input can be seen in the number of submissions made: Close to two million were received. The bulk of these were signatures on petitions promoted by various civil-society structures, however, rather than original written submissions presenting individuals' views, though the latter also arrived in large numbers. The petitions dealt with a wide variety, though limited number, of issues, among them language rights, animal rights, abortion, the death penalty, and the location of the seat of parliament.<sup>96</sup> Of the submissions received, just over 11,000 were substantive rather than petitions. The substantive submissions ranged in length from a few handwritten lines to printed reports over 100 pages long.<sup>97</sup> These were often wide-ranging wish lists that arrived at an early stage in the process, when the political parties were still developing their thinking on many issues. Many people discussed issues that confronted them in everyday life, such as spousal abuse or problems with cattle.<sup>98</sup> In whatever form, though, the submissions reflected the views of a large number of people.

The overwhelming number of submissions made in the first phase led to concern, especially among civil-society organizations, about whether the views expressed would be seriously considered.<sup>99</sup> There was some doubt on this score among the public at large as well.<sup>100</sup> As a result of this concern, civil society sustained pressure for openness in the constitutional assembly to the end of the constitution-making process.

In hindsight, the figures regarding the extent of participation obscure both the "vitality and energy of the public participation program" as well as the fact that the program's goals and "concrete results" were not entirely clear.<sup>101</sup> Some critics argued that the program was designed to hide the reality that like the

interim constitution, the final constitution would be a negotiated document. The huge number of submissions—too many to be reviewed by any of the politicians—and the vagueness of many of them appear to support the critics to some extent.<sup>102</sup> However, such criticisms miss the fundamental significance of the submissions as responses to the first invitation that many previously disenfranchised people had received to voice their aspirations. Even vague requests to address poverty represented expressions of a desire for the constitution to ensure a better future. As Christina Murray, a member of the panel of constitutional experts, has pointed out, the participation program had broader, less instrumental goals than providing a list of matters that should be included in the document, such as fostering a sense of ownership of the new constitution by all South Africans, and facilitating communication between politicians and the citizens they represented.<sup>103</sup>

The second phase of public participation, which ran from November 1995 to February 1996, centered on the Refined Working Draft, a complete set of textual formulations produced at the end of the theme committees' work. The draft provided alternative options for contentious formulations, as well as supporting notes explaining the options, and was effectively a progress report on the negotiation of the final constitution. It also reflected the ways in which the ideas and submissions put forward during the first phase of public consultation were addressed.

Over four and a half million copies of the working draft, printed in user-friendly tabloid form, were distributed throughout the country on November 22, 1995. The distribution means included newspaper inserts, door-to-door delivery, and supply of copies to taxi kiosks at major centers. A survey conducted a couple of months after the draft was released found that, by then, 8 percent of all South African adults had seen the document, while 5 percent had read some or all of it. The

public education effort in this phase utilized posters, the Constitutional Talk newsletter, a booklet titled *You and Building the New Constitution*, and a pamphlet titled *Constitutions, Democracy, and a Summary of the Working Draft* to provide information about constitutions and the constitution-making process.

A supporting media campaign was launched with the publication of the working draft and ran through the period of public debate to February 20, 1996. Through this campaign, the public was invited to make further submissions and was asked to comment specifically on the provisions of the draft. As a result, the 250,000 submissions received in the second phase were much more focused than those received in the first phase, though the vast bulk were again ordinary petitions rather than substantive submissions. The petitions dealt with many of the same issues as they did in the first phase—the death penalty, sexual orientation, and animal rights, in particular. Some of the submissions expressed skepticism about the assembly's invitation to the public for written comments, wondering whether the politicians would take them seriously.

After considering the views contained in the submissions,<sup>104</sup> the assembly produced a further edition of the working draft. This edition recorded where the submissions came from and the formulations that were affected, as well as reports by the experts who had processed the submissions. A copy of this new draft was sent to each person or party that had made a submission.

The participation program was not without practical imperfections. For example, in distributing the copies of the revised working draft to those who had made submissions in the second phase, many complained that they did not make any submissions and could not understand why they had been identified as having done so. Upon investigation, it became apparent that a number of submissions had been sent under names from the con-

gregation lists of churches. In addition, some schoolteachers encouraged students to make submissions by dictating one to them.

The degree to which the text was modified solely in response to public submissions is difficult to measure, as the issues that were the subject of popular debate were generally the same as those pursued by the contesting political parties, and the views of the parties and elements of the public often coincided. Some submissions from civil society did directly affect the text, including the constitution's recognition of religious personal law, as well as its recognition of certain languages such as Gujarati. But ultimately, the textual formulations were in the hands of the elected officials who were legitimately mandated to negotiate the final constitution.<sup>105</sup>

Nevertheless, the consultation program had a strong effect on the public's perception of being included in the constitution making. Survey data revealed that within one year of the process of public participation, just less than half (48 percent) of all adult South Africans felt part of the assembly's process, while just over a quarter (28 percent) did not. Notably, positive feeling about the assembly process was expressed nearly evenly across formal metropolitan areas (48 percent) and formal urban areas (49 percent),<sup>106</sup> as well as more disadvantaged areas, including rural areas (46 percent) and informal metropolitan and urban areas, such as shantytowns (43 percent). The legacy of these perceptions can be seen in the South African experience since the adoption of the constitution. In that period, there have been no political or legal challenges to the legitimacy of the constitution. Though public political debate may be vigorous, it has not encroached on the fundamental tenets and principles set out in the constitutional framework. The inclusiveness, legitimacy, and ownership engendered by the public participation program can be credited for this.

After the second phase of the public participation program came the period, discussed earlier in this chapter, in which the issues threatening deadlock began to crystallize. This development constrained the openness of the process. To facilitate resolving the contentious issues, parties held various bilateral and multilateral meetings behind closed doors, which did not sit well with the media or civil society. Consultations with affected interest groups during this period were limited to areas of deadlock only, and when these consultations took place, they occurred with very little time to plan or prepare. The assembly had prided itself throughout on excellent relationships with civil-society groups. However, several of these saw themselves as being outside the process, particularly when political parties found it necessary to hold closed bilateral or multilateral meetings.<sup>107</sup>

The assembly continued its public outreach effort even after adopting the final constitution. In keeping with the assembly's focus on the educational aspect of its communications with the public, as well as with the principle of accessibility, the final project the assembly carried out was to distribute seven million copies of the final constitution in all eleven official languages. This took place during the week of March 17–21, 1997, which was dubbed national constitution week. The project was intended to help ensure that the constitution would become a reference point for all South Africans, to create a sense of ownership of the document, and to engender enduring respect for it.

The distribution strategy for this final project emphasized accessibility, particularly for historically disadvantaged sectors of society. Four million copies were distributed to secondary schools; two million were made available at post offices countrywide; 500,000 were distributed to all members of the South African police service and national defense force, as well as all members of the Depart-



ment of Correctional Services and prisoners; and 500,000 were distributed through civil-society organizations. Each copy of the constitution was accompanied by an illustrated guide in the same language, highlighting key aspects of the document and explaining many of the legal concepts. Other related publications included one million copies of a human rights comic, which was distributed to all schools and adult literacy organizations, and a teacher's aid to introduce the constitution to students, which was provided to all secondary schools. In addition, taped and Braille versions of the constitution and guide were available for visually impaired persons.

Given its scale and publicity, the assembly's public participation program understandably has been the principal focus of attention by those considering the role of participation in the South African constitution-making process. But other types of outreach occurred at earlier stages of negotiation as well. In particular, though consultation with key members is not unusual for political parties engaged in negotiations,<sup>108</sup> the ANC at times sought wide-ranging involvement by its constituency in developing its constitutional proposals. For example, in 1990, during the period of talks about talks, the ANC's constitutional committee launched a public debate on the party's constitutional proposals and proposed bill of rights. Between 1990 and 1993, the committee held a series of about ten broadly inclusive conferences to discuss the proposals in detail in a format that invited participation. Participants included ANC and Communist Party members, trade union activists, NGO and community-based organization representatives, and foreign and local academics.<sup>109</sup> This mediated form of participation was important to bringing ideas into the process.<sup>110</sup>

In addition, a wholly different type of participation—or at least popular influence—was evident during the negotiation of the

interim constitution, even though the negotiations themselves involved rather undemocratic elite bargaining. Mass action, demonstrations, and petitions supported the efforts of the ANC and its allies to shape the transition, and “various forms of public display of claims, outrage, and strength continued to be employed by groups on all sides, trying to ensure that their concerns or demands be placed on the agenda at the multiparty talks.”<sup>111</sup> The interim constitution ultimately accommodated many of these claims.<sup>112</sup>

### *Special Role of the Constitutional Court*

As noted earlier, the agreement during the multiparty negotiations to give the constitutional court—a new body established during the transition—the role of certifying the constitution was a compromise essential for reaching the goal of a consensus-based settlement.<sup>113</sup> The specific task handed to the court was to certify that the text adopted by the constitutional assembly complied in all respects with the constitutional principles. In other words, the court in effect had to determine the constitutionality of the new constitution.<sup>114</sup> The interim constitution that both incorporated the constitutional principles and established the constitutional court gave the court absolute discretion in interpreting the principles and deciding on the validity of the final text: “A decision of the Constitutional Court . . . certifying that the provisions of the new constitutional text comply with the Constitutional Principles, shall be final and binding, and no Court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof.”<sup>115</sup> Compared with most other constitution-making processes, in which either a popular referendum or the vote of an elected body constitutes the final validating act of a new constitution (an executive signature may be required as well), the South

African process, which substituted judicial affirmation of compliance with a political agreement for final democratic authorization, was unusual. Indeed, using a judicial body for such a purpose appears to be unprecedented.<sup>116</sup>

The court that undertook this role was "different from any other South Africa had seen," with members chosen through a transparent process intended to reflect the ideals of the new democracy, and with regard to the interim constitution's prescription that the court be representative in terms of race and gender.<sup>117</sup> In accordance with the interim constitution, the court's president, Arthur Chaskalson, was chosen directly by the president of South Africa; four judges were drawn from the existing judiciary; and six more were chosen after being publicly interviewed by a new judicial service commission, subject to the president's final decision. The resulting bench was still overwhelmingly male and white, yet it was the most mixed court then sitting in the country.<sup>118</sup> In political terms, the court was not as broad-based as the government of national unity; from the start of the selection process, it was clear that no candidate whose "background was in any way touched by too close an association with apartheid or discredited views or institutions would be seriously considered."<sup>119</sup>

The constitutional court was intent on dealing with the certification process expeditiously and also on ensuring that the process of testing the adopted text was handled in the same open manner as the drafting. It was, however, in a difficult position, as the constitutional principles were essentially political agreements among parties bringing an end to conflict. To make matters worse, a fair number of the thirty-four principles could be interpreted in various ways. Moreover, the court had to undertake its task against the background of the text already having been adopted by an overwhelming majority of a democratically elected body. Whichever way

it decided, the court risked jeopardizing the credibility it had established as well as public acceptance of the outcome.<sup>120</sup> The stakes were extremely high.

To the court's credit, the process adopted in the directions issued by the judge president assured openness and transparency.<sup>121</sup> The directions allowed about six weeks for submitting written arguments, to be followed by oral arguments commencing on July 1, 1996. They provided for written argument on behalf of the constitutional assembly to be lodged with the court and invited the political parties represented in the assembly to present written grounds of objection and oral argument if they wished. The directions also invited any other body or person wishing to oppose certification to submit a written objection. With the help of the constitutional assembly, the court published notices in all official languages inviting objections and explaining the procedure. Objectors were required to specify the grounds of objection and indicate the constitutional principles allegedly contravened. The court then invited detailed written argument with respect to those objections that raised new issues germane to the certification.

Five political parties tabled objections to certification: the African Christian Democratic Party, the Democratic Party, the IFP (joined by KwaZulu/Natal province), the NP, and the Conservative Party. Eighty-four private parties lodged objections as well.<sup>122</sup> The assembly, the political parties, and twenty-seven of the private parties were afforded a right to present oral arguments. In the court's words, "in deciding whom to invite to present oral argument, we were guided by the nature, novelty, cogency and importance of the points raised in the written submissions. . . . The underlying principle was to hear the widest possible spectrum of potentially relevant views."<sup>123</sup> The court's hearings, which ran from July 1 to July 11, were open to the press and public and were summarized

each day on television, together with visual footage of the proceedings.<sup>124</sup>

The novelty and the burden of the court's task were at times apparent in the course of the proceedings. According to one first-hand observer, "during the hearing, the judges occasionally gave the impression of being uncertain about the role in which they had been cast. Their questions about the approach they should adopt, the nature of the task they were carrying out, and the extent of their latitude to check the will of the Constitutional Assembly combined to convey a sense of the stress under which they were working."<sup>125</sup> One of the judges, Albie Sachs, later commented on the complexity of the issues presented to the court, which included "the entire ground of what a constitution is, what it can be, what it ought to be, what international practice is, what the principles require, and how to interpret this text of over two hundred articles that comprised the new constitution."<sup>126</sup>

Two months after the hearing, the court delivered its judgment. The judges found that the text adopted on May 8 did not comply with the constitutional principles in nine respects.<sup>127</sup> The court was mindful, however, not to cast too dark a shadow on the text. The judgment concluded with two observations: "The first is to reiterate that the Constitutional Assembly has drafted a constitutional text which complies with the overwhelming majority of the requirements of the Constitutional Principles. The second is that the instances of non-compliance which we have listed . . . although singly and collectively important, should present no significant obstacle to the formulation of a text which complies fully with those requirements."<sup>128</sup> The court deliberately said as little as possible in its judgment. According to Sachs, the judges were "very aware of the fact that our decisions would be binding in the future, and that here we were, most unusually, interpreting a constitution from beginning to end and already

establishing perspectives and fundamental interpretations. So we were reluctant to go beyond the absolute minimum necessary to answer the questions that were asked."<sup>129</sup>

The judgment did not spark any controversy; instead, it was hailed as a victory for constitutional democracy. The court's ability to assert itself in this manner, barely eighteen months after it had heard its first case, indicates that most political actors during the transition period had come to accept constitutional supremacy, the rule of law, and the subordination of parliamentary sovereignty to the principles of a constitutional state.<sup>130</sup> The court's decision to invite the general public, rather than just the political parties, to participate in the certification process may partly explain the widespread support for the outcome.<sup>131</sup> Also, during the life span of the interim constitution, South Africans had begun to take for granted constitutional democracy in general and the institutional role of the constitutional court in particular.<sup>132</sup>

Ironically, the return of the text presented the constitutional assembly with some valuable opportunities: Principally, it was possible to attempt once again to bring the IFP on board. One of the more serious flaws the court found in the adopted text was that the powers of the provinces were substantially reduced compared with those in the interim constitution; this was an issue of particular interest to the regionally based IFP. In addition, the drafters had a chance to clean up the text, as continual amendment of the document during the pressure-filled two weeks preceding May 8 had introduced a number of inconsistencies.

Within days of the court's judgment, the assembly's management committee met to decide on a way forward. The committee members sensed that it was necessary to finalize the constitution as soon as possible to allow assembly members to redirect their time to the crucial demands of governance and transformation. The management com-

mittee therefore agreed that the constitutional committee should be convened to negotiate the amendments and table its report with the assembly for adoption at its earliest possible convenience. The management committee proposed the formation of two subcommittees of the constitutional committee to handle the actual negotiation of the amendments; these divided the work along subject matter lines. To save time, when the subcommittees began their work on September 25, technical experts supporting them tabled two sets of draft formulations. One suggested amendments to address the defects that the court had identified, and the other proposed a technical refinement of the text.

Agreement on some amendments, such as the addition of special procedures for constitutional amendment, was not difficult to achieve, given the court's clear guidance and the relatively straightforward changes needed. The most critical and challenging issue that had to be addressed at this stage concerned provincial powers. The court found that in several respects, the provinces' powers were substantially less than and inferior to the powers they had enjoyed under the interim constitution and that the revised scheme thus violated the constitutional principles. The court's guidance made it immediately apparent which amendments ought to be made, though negotiating some of the needed revisions, particularly concerning the structural design of local government, proved difficult. Nevertheless, the process moved swiftly at this stage.

The IFP toyed with joining in the amendment process; its members attended a number of meetings and participated in bilateral and multilateral discussions with the ANC and other parties. But when the IFP insisted that meetings renegotiate matters long settled that did not offend any constitutional principle, these requests were rejected. Thus, shortly before the completion of the amend-

ment exercise, the IFP for the last time abruptly withdrew its participation.

The constitutional committee approved for adoption the amendments tabled by the subcommittees, and the constitutional assembly met at its last sitting on October 11, 1996, to pass the amended text. The text was adopted with the same overwhelming majority as on May 8, and then immediately tabled before the constitutional court. The interim constitution required the court to examine afresh whether the text complied with the constitutional principles. Nevertheless, the judges had to approach the second-round certification exercise in the context of their previous judgment.

The court issued directions similar to those given for the first certification exercise, and ordered the assembly to publish the directions as widely as possible and to make copies of the amended text freely available. Hearings were scheduled for November 18. While any objector could raise any issue, whether previously considered or not, the court made it clear that because of the extensive written and oral submissions in the first round, it believed it was unlikely that any important issues had been overlooked.

By this point, the opposition parties had clearly won as much ground as they could.<sup>133</sup> Only two political parties represented in the constitutional assembly lodged objections, the Democratic Party and IFP; the NP formally announced that it did not intend to object to the amended text. The province of KwaZulu/Natal and eighteen private individuals and interest groups also lodged objections, while the assembly in turn filed submissions supporting certification. The hearing lasted two and a half days, and on December 4, 1996, the court delivered its unanimous judgment certifying the amended text.<sup>134</sup> The court noted that the amended text bore every sign that the assembly took the court's previous judgment, which had carefully spelled out



the reasons for its finding of noncompliance, as the blueprint for modifying the text.

Handed a historically significant and politically charged task, the constitutional court performed its role with transparency, extreme care, and scrupulous fairness. A less well-executed performance might have made the court's decisions more difficult to accept. Moreover, the certification procedure may have been accepted as valid at least in part because the function was given to a court with a "growing reputation for independence," and because the final result was seen as a legal rather than political decision.<sup>135</sup>

### *The International Dimension*

Unlike the constitution-making experiences in various other countries in transition from authoritarianism or conflict after the Cold War,<sup>136</sup> the international community—in the form of international or regional organizations or even individual constitutional experts—played a relatively insignificant role in the constitution-making process in South Africa. Some limited consultations with foreign experts occurred<sup>137</sup> and parties used comparative research and knowledge in preparing their proposals,<sup>138</sup> but both the design and substantive outcome of the process were homegrown. One particular foreign experience that the South African constitution makers looked to for lessons was that of Namibia; in Albie Sachs' words, "it was like a trial run." In particular, Namibia's use of fundamental principles that served as the foundation of the final settlement, the use of proportional representation, and the structure of the constitution served as positive models.<sup>139</sup>

The international community neither directly catalyzed nor mediated in the negotiated transition. The 1989 Harare Declaration of the Organization of African Unity had envisioned a prominent role for the international community and the PAC supported a

prominent place for it in the process, but in the event, such a role never materialized.<sup>140</sup> Early on, when both sides were developing a commitment to negotiation, the ANC recognized that unless it seized the initiative in preparing for negotiation, the international community would play this role. To lose this initiative would have meant losing the ability to determine the agenda of the process, as happened in Zimbabwe and Namibia. The NP likewise opposed international involvement, having found the experience of U.S. and British pressure in the Namibian negotiations humiliating.<sup>141</sup>

However, the international community did help to shape the broader environment in which the negotiated transition was launched. Apartheid South Africa had been treated as an international pariah in many quarters for decades and was subjected to various sanctions, even as Cold War priorities, combined with South Africa's profitable investment environment for international business interests, encouraged many Western governments to treat the NP government as an ally.<sup>142</sup> But as the Cold War ended, Western allies, encouraged by the ANC,<sup>143</sup> began to intensify pressure for change, thus helping to weaken the regime's untenable grip on power after de Klerk took the helm. For example, by October 1989, British prime minister Margaret Thatcher looked to the South African government to provide her with sufficient grounds to stave off demands by Commonwealth leaders for tougher sanctions. And in the United States, the State Department demanded that the South African government unban political parties, lift the state of emergency, allow for the return of exiles, remove all discriminatory legislation, and begin negotiating with credible black leaders on a new constitutional order by June 1990.<sup>144</sup> Weeks later, the government unconditionally released several senior political prisoners.

### **Conclusion: The Impact of the Constitution-Making Process and Factors Contributing to Success**

The signing ceremony for the final constitution was infused with symbolism. The event was held on December 10, International Human Rights Day; the venue chosen was Sharpeville, in Vereeniging, where on May 31, 1902, the Treaty of Vereeniging between the Boers and British was signed, ending a bitter anti-imperialist war and allowing South Africa to be united as one sovereign territory from four independent states. The treaty had paved the way for the first constitutional dispensation, one that sealed the disenfranchisement of the black majority. Signing the final constitution in this location provided a bookend to a history that started in division and conflict and ended in reconciliation. Vereeniging also represented more recent South African history: It had been the scene of much political conflict and strife, gaining international notoriety after the Sharpeville massacre on June 16, 1960.

President Mandela's signing of the new constitution—the birth certificate of a new South Africa—was undoubtedly a remarkable moment. What were the key characteristics of the negotiating process and the conditions in the country that enabled this moment to come about? And what, so far, has been the constitution-making process's lasting impact?

#### ***Impact of the Constitution-Making Process***

The constitution-making process produced both a document of unquestioned legitimacy and high substantive quality and a form of democracy that has become increasingly stable and institutionalized. The 1996 constitution has been implemented and respected in actual practice. Moreover, the constitution making was an integral part of the broader

process of dismantling the abhorrent apartheid system, and, in effect, concluding a peace treaty between black and white South Africans. The constitution-making process was the heart of a transition that, against the odds, was essentially peaceful, despite extremist-instigated political violence during the multiparty negotiating process. While the country today suffers many social woes associated with the legacy of colonialism and apartheid, including severe economic disparities and very high crime rates, political violence is largely absent.<sup>145</sup> In these important and enduring respects, the outcome of the process must be regarded as a success.

The nature of the process—its qualities, on the whole, of inclusiveness, transparency, and participation—was clearly instrumental in producing the outcome. Indeed, the process and the substantive outcome were two sides of the same coin. A high degree of consensus was achieved among parties representing a wide range of ideological perspectives both because the design of the process emphasized the necessity of consensus and because the parties crafted substantive compromises that they could actually agree upon. In other words, reconciliation between the black majority and white minority—in the sense of creating a political system that both could accept and use to settle differences peacefully—was achieved, and in tracing the source of that achievement, process and substance cannot be distinguished. The process was structured and conducted in a way that enabled both sides to achieve important objectives and to create a South Africa that all could live in; the substantive agreements reached through the process were the concrete manifestation of those satisfied objectives. The process and substance were of a piece in another sense as well. As Heinz Klug observes, the parties' substantive goals shaped their procedural preferences,<sup>146</sup> and thus, the agreements negotiated with respect to the design of the

constitution-making process automatically implicated certain substantive ends.

However, the constitution-making process did not achieve reconciliation between the ANC and IFP, and the country suffered subsequent violence between supporters of these two groups. These parties could not find common ground through the process, despite ANC as well as NP negotiators' persistent efforts to bring the IFP on board. It may be that the IFP's positions were not reconcilable with the consensus achieved among other parties; or perhaps IFP leader Buthelezi was simply too obstreperous. The IFP showed that it felt alienated by elements of the process, including the sufficient consensus procedure and the use of parallel bilateral meetings. The party's own orientation may have been to blame for this alienation, or it may be that it is difficult in any situation for a constitution-making process to satisfy relatively minor players with outlying positions. The IFP's lesser negotiating skill also might have been a factor in the failure to make the party part of the process. More than any other party, during the interim constitution negotiations, the IFP "locked itself into positions which were out of the mainstream negotiating process."<sup>147</sup>

While the impact of the nature of the process on its immediate result may be clear, assessing precisely how the process has, in a lasting way, affected the nature of politics and governance in South Africa is more difficult. In particular, what impact has the inclusiveness and participatory quality of the constitution-making process had on the political process in South Africa?<sup>148</sup> One concrete effect is that the success of the public participation program influenced the constitution makers to insert a constitutional requirement that all new legislation be accompanied by a process of public participation and public hearings. More broadly, the continuing political stability in South Africa—

despite a history of conflict—surely reflects the legitimacy of the constitutional system, which, in turn, is a consequence of the nature of the process.

### *Ingredients of Success*

A confluence of conducive conditions, key events, and wise choices explains the successful outcome of the constitution-making process. It is impossible to do more than catalogue the factors contributing to success, as their relative importance cannot be ascertained objectively. Regardless, such a catalogue can be a highly useful resource for those wishing to assess whether the techniques applied in South Africa can be translated into other contexts.

The relevant factors may be organized into three somewhat overlapping general categories: political, practical, and personal. Regarding political circumstances, the parties' commitment to negotiating a transition and a new constitutional dispensation was born of a stalemate. The ANC recognized that it could not defeat the government by force,<sup>149</sup> and the NP recognized that it could no longer rule the country as it had without entirely ruining it. This factor combined to good effect with other factors, such as the presence of wise leaders on both sides of the divide who perceived the need for negotiation in these circumstances, and who understood that negotiations could deliver results that each side could live with. Pressure from the international community, especially trade partners, contributed as well to the NP's appreciation of the need to negotiate.

A strong sense of South African identity on both sides contributed as well. Especially after the 1994 elections, negotiators across the spectrum espoused a common nationalism. This removed from the agenda the issue of national identity, which has bedeviled other constitution-making processes, and

facilitated the finding of common ground. In addition, a strong legal tradition in South Africa—which, surprisingly, both the oppressed and oppressor respected—helped the constitutional engineers to resolve many serious divergences of interests through legal formulation and provisions calling for resort to legal institutions, such as the constitutional court.<sup>150</sup>

Finally, the presence of two dominant players on the political scene facilitated agreement. The ANC and NP drove the negotiating process through their bilateral contacts and worked in concert to broaden consensus to include other players.<sup>151</sup> For the most part, they successfully performed a difficult balancing act between forging agreements between themselves and keeping the more peripheral, and often more ideologically extreme, players on board to prevent spoiling.

As for practical factors, including both the procedural choices the participants made and the technical arrangements they put in place, the priority given to achieving consensus was critical. For example, while the ANC did not have sufficient votes in the constitutional assembly to adopt the constitution on its own, its relative strength—63.7 percent of members—weighed heavily on its negotiating partners. Nevertheless, it repeatedly demonstrated willingness to compromise to gain wider support for particular provisions. Closely related to the focus on consensus was the parties' emphasis on inclusiveness as a means of clothing the constitution in legitimacy. In the constitutional assembly phase, the principle of inclusion produced a cumbersome process in some respects because it meant involving a large number of people. The assembly had 490 members, many of whom were directly engaged in negotiation and drafting. But any inefficiencies that resulted from this approach were a fair price for the legitimacy of the final document, and the commitment to inclusiveness was not permitted to derail progress. While one

objective of this commitment was to draw potential spoilers into the process, the main parties moved ahead when necessary, even when the IFP and others walked out.

Furthermore, though some of the most important aspects of the process were the least open and democratic—specifically, the negotiation of the constitutional principles, the extensive use of private bilateral meetings, and the constitutional court's certification of the final result—the public's involvement in other aspects seems to have contributed to the respect that the final document enjoys. One analyst of the process has observed a feeling of loyalty to the constitution spanning political ideologies that seems connected to the sense of ownership that emerged from the process, including from the lack of international mediation.<sup>152</sup> Participation enabled ordinary people to begin to realize that they could influence laws and the government. In the course of the process, there was a groundswell of interest among citizens in matters that were previously the exclusive preserve of those in power. In this way, the process may have helped to foster a culture of constitutionalism in South Africa.

The parties' decision to establish a two-stage structure for the process was of perhaps paramount importance to the realization of the fundamental compromise between the interest of the majority in a swift transition to democracy and the interests of the minority in a guaranteed role in the transition and in certain lasting protections. This structure proved to be an effective conflict management device. The graduated nature of the approach created the opportunity to bring potential spoilers into the constitution-writing process and transitional governance arrangements, as well as to build the confidence of minorities in the prospect of an ANC-led government before that eventuality occurred.

Another practical factor was the very long lead-up to adopting the final constitution. The preliminary negotiation stages, CODESA,



and the MPNP all resolved many procedural and substantive obstacles to final agreement, with the consequence that the final constitution-making process was not overburdened with issues. The slate was cleaned as much as possible, in effect, before the assembly ever started its work. The length of the overall process also enabled parties to hone their negotiating skills and fully develop their substantive positions. Moreover, direct contacts throughout the slow buildup to substantive negotiation gave interlocutors the opportunity, on the Afrikaner side, to shed their demonized perceptions of the ANC, and on the ANC side, to become sensitized to white fears.<sup>153</sup>

In addition, the generally efficient negotiating structures that the parties created played a positive role. The use of lessons learned at CODESA to build better structures for the MPNP, and the care taken in devising the assembly structures, enabled those forums to translate disparate positions into agreed-upon results.

The contribution of personal factors, it is widely agreed, cannot be overstated. There is no question that the right people were on the scene at the right historical moment, and that those individuals exercised mature and effective leadership. The quality of leadership shown by Mandela and de Klerk, as well as Ramaphosa, Meyer, and others, has rarely been matched in such difficult circumstances. The maturity of the top leaders was evidenced in part by their recognition that they had to tolerate a certain amount of crowing by the other side about successes achieved at the negotiating table, even if exaggerated; each side realized that they needed the other to be able to deliver the support of its constituency.<sup>154</sup> Exceptional personal qualities were exhibited by the members of the constitutional court as well. If they had been any less skillful and scrupulously fair in playing their unusual role, the result of their work might not have been as well accepted as it was.

Furthermore, the personal chemistry that developed among negotiators, and their willingness to develop personal relationships across the divide, facilitated their ability to find compromises.<sup>155</sup> The length of the process, noted as a contributing practical factor above, helped create opportunities for these relationships to develop. Over the course of negotiations, key participants spent a great deal of time together and came to know one another personally. This shared time humanized political opponents, and negotiators began to learn to separate their political differences from their growing respect for each other as people. In a sense, the long process enabled reconciliation between the leaderships of the parties.

The essentially equal sophistication of the main actors on both sides contributed significantly as well.<sup>156</sup> Both sides had skilled negotiators and well-developed positions and proposals. The depth of expertise and organizational experience on the ANC's part was born of years of operation in exile as well as the participation of highly skilled individuals. The NP had the experience of running the country for almost half a century. Without this depth of political and technical expertise on both sides, it might not have been possible for the complex negotiating and drafting structures put in place to have operated as effectively as they did.

Finally, a *sine qua non* of South Africa's success was the commitment of both sides to negotiating a solution to the country's need for a new constitutional dispensation. This factor is a personal one because it required a commitment to negotiation on the part of individual participants, as well as the capacity of those individuals to transcend their past experiences as oppressed and oppressor, and to work patiently and persistently over a long period of time to reach the desired end. But it is also a factor resulting from those individuals' appreciation of political realities. The commitment to negotiation, and concomi-

tant willingness to compromise, constitutes the necessary condition for any successful negotiation: political will. That condition was manifest in South Africa in the fact, for example, that parties on both sides moved their positions during the process, realizing that they had to recognize and respect the diversity of interests involved. The presence of political will to see the process through to a conclusive end was supported by the parties' shared belief that they could achieve their main objectives through negotiation, and, in turn, supported the parties' efforts to overcome the many obstacles that South Africa faced in moving from apartheid to democracy.

\* \* \*

Whether or not the South African experience can be a model for future constitution-making exercises depends at least partly on whether the conditions contributing to success in this case can be created elsewhere, and whether those future circumstances are ripe for the constructive procedural choices made in South Africa. Certainly, the South African case offers practical ideas regarding procedural design that can inform and inspire future constitution makers. Perhaps above all, the South African constitution-making experience can serve as a source of hope for others seeking to bridge seemingly unbridgeable divides.

Glossary of Acronyms

ANC	African National Congress (main party opposing the apartheid regime; ruling party postapartheid)
CODESA	Convention for a Democratic South Africa (first attempt at multiparty talks)
IFP	Inkatha Freedom Party (led by Mangosuthu Buthelezi, opposed to unitary state and to use of elected constitutional assembly)

MPNP	Multi-Party Negotiating Process (multiparty talks that culminated in adoption of the interim constitution and other transitional measures)
NP	National Party (ruling party of the apartheid regime)
PAC	Pan-Africanist Congress (left-wing extremist party, formed by ex-ANC members)

Notes

1. Significant portions of this chapter are adapted from Hassen Ebrahim, *The Soul of a Nation: Constitution-making in South Africa* (Cape Town: Oxford University Press, 1998). Hassen Ebrahim served as the executive director of the South African constitutional assembly and previously as national coordinator for the African National Congress's negotiations commission.
2. Albie Sachs, "The Creation of South Africa's Constitution," *New York Law School Law Review*, vol. 41 (1997), pp. 669–70.
3. Nico Steytler, "Constitution-Making: In Search of a Democratic South Africa," in *Negotiating Justice: A New Constitution for South Africa*, ed. Mervyn Bennum and Marilyn D. Newitt (Exeter: University of Exeter Press, 1995), pp. 62–63.
4. Fink Haysom, "Special Features and Mechanisms in Negotiating the South African Constitution," in *Constitution-Making and Democratization in Africa*, ed. Goran Hyden and Denis Venter (Pretoria: Africa Institute of South Africa, 2001), p. 93.
5. The body of literature on the South African constitution is large; many of the texts pertinent to the process of making the interim and final constitutions are cited herein.
6. For a detailed and fascinating telling of the history of the transition negotiations, see Allister Sparks, *Tomorrow Is Another Country: The Inside Story of South Africa's Road to Change* (New York: Hill and Wang, 1995).
7. The racial and ethnic landscape of South Africa is, of course, more complex than black and white. For reasons of economy and confinement to the scope of this chapter, such complexities are not explored here.
8. Like the racial landscape, the political landscape and history of South Africa are more complex than the treatment in this chapter reveals.

As the ANC and NP were the main actors in the constitution-making process, their roles and perspectives are given the lion's share of attention here.

9. This is a term used in South Africa to refer to persons of mixed race.

10. The consultation involved thousands of volunteers, who "went from door to door to document people's grievances and aspirations." Cyril Ramaphosa, "Negotiating a New Nation: Reflections of the Development of South Africa's Constitution," in *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, ed. Penelope Andrews and Stephen Ellmann (Johannesburg: Witwatersrand University Press, 2001), p. 81.

11. See Eldred de Klerk, "South Africa's Negotiated Transition: Context, Analysis and Evaluation," *Accord*, no. 13 (2002), pp. 14–19. De Klerk observes that the Congress of the People "was a unique experience of mass participation in a political visioning process amidst hostile political circumstances and shaped the implicit expectation for public participation in creating a new South Africa." See also Sparks, *Tomorrow Is Another Country*, p. 61, pointing out that consultation was "an obsessive requirement within the internal resistance movement."

12. This letter is reproduced in Ebrahim, *Soul of a Nation*, Document 9, p. 429.

13. This letter is reproduced in Ebrahim, *Soul of a Nation*, Document 10, p. 433.

14. Regarding Botha's half-hearted reforms and the intensified resistance they provoked, see Sparks, *Tomorrow Is Another Country*, pp. 68–75.

15. See Sparks, *Tomorrow Is Another Country*, pp. 53–56.

16. See Ramaphosa, "Negotiating a New Nation," p. 72.

17. See Sparks, *Tomorrow Is Another Country*, p. 36. Toward the end of this period, ANC leaders in exile and government officials also held secret talks in Switzerland. Sparks, *Tomorrow Is Another Country*, chap. 9.

18. The Organization for African Unity declaration adopted August 21, 1989, at the suggestion of the ANC, is available at [www.anc.org.za/ancdocs/history/oau/harare.html](http://www.anc.org.za/ancdocs/history/oau/harare.html) (accessed April 25, 2009).

19. For a discussion of de Klerk's speech and its context and significance, see Sparks, *Tomorrow Is Another Country*, pp. 5–14.

20. Despite their rejection of the homeland system, ANC leaders approved of Buthelezi's accep-

tance of the position of chief minister of KwaZulu, the Zulu tribal homeland, in the hope that he would establish "an internal political platform for their outlawed movement. But the relationship soured and Buthelezi turned Inkatha into a Zulu ethnonationalist party opposed to the ANC." Sparks, *Tomorrow Is Another Country*, p. 125. Regarding government complicity in Inkatha-instigated violence, see, e.g., Sparks, *Tomorrow Is Another Country*, pp. 163–78.

21. See "Planning a New Nation," *Star*, December 21, 1991.

22. The first working group considered the creation of a climate for free political participation and the role of the international community, the second was mandated to explore constitutional principles and the constitution-making body, the third dealt with an interim government, the fourth was to debate the future of the homelands, and the fifth was to deal with time frames.

23. See "Codesa to Call for Submissions on New Constitution," *Citizen*, February 5, 1992.

24. "Support for Talks is Vital—Codesa," *Business Day*, February 26, 1992.

25. Of more than 2.8 million voters, 68.7 percent endorsed the reform program. John Hatchard and Peter Slinn, "The Path towards a New Order in South Africa," *International Relations*, vol. 12, no. 4 (1995), p. 7.

26. Regarding the Boipatong massacre of June 1992 and other violence committed by IFP supporters after the collapse of CODESA, as well as government complicity, see Sparks, *Tomorrow Is Another Country*, pp. 140–47.

27. See Roelf Meyer (as told to Hennie Marais), "From Parliamentary Sovereignty to Constitutionality: The Democratization of South Africa, 1990–1994," in *The Post-Apartheid Constitutions*, p. 56.

28. Haysom notes that this was arguably the most important of the accords reached in the period leading up to substantive constitutional negotiations, because it reflected both major parties' acceptance that the basic preconditions for substantive talks had been met, as well as their agreement on the fundamentals of the process ahead. "Special Features and Mechanisms," p. 101. Regarding the significance of the Record of Understanding, see also Meyer, "From Parliamentary Sovereignty to Constitutionality," pp. 56–58.

29. Meyer, "From Parliamentary Sovereignty to Constitutionality," p. 63.

30. Hatchard and Slinn, "Path towards a New Order," p. 8.

31. See Haysom, "Special Features and Mechanisms," pp. 104–05. Haysom notes that substantive negotiations were conducted "under the guise of a technical umbrella" to avoid the public posturing that had characterized CODESA. See also Richard Spitz with Matthew Chaskalson, *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* (Oxford: Hart Publishing, 2000), p. 48. In remarking on the importance of the technical committees, these authors note, "One of Codesa's legacies was the lesson that working groups comprising 76 politicians were singularly incapable of discussing and settling core issues on a rational, technical basis."

32. Ramaphosa, "Negotiating a New Nation," p. 78. According to Ramaphosa, the broadcast of Mandela's appeal "signaled for many people that the balance of forces in South Africa had changed irrevocably. Nothing could illustrate more clearly that Mandela had become the *de facto* head of state in South Africa."

33. Ramaphosa ("Negotiating a New Nation," p. 78) points out that there was no such deadline until this moment.

34. In one particularly dramatic event, several hundred armed right-wingers stormed the site of the MPNP and invaded the negotiating chamber. Several people were injured, and a great deal of property was damaged. See Meyer, "From Parliamentary Sovereignty to Constitutionality," pp. 63–64, regarding violence during the MPNP.

35. Sachs explains that during the debates over the design of the constitution-making process, one group of parties sought a roundtable style format for negotiating and drafting the constitution, followed by a popular referendum to confer legitimacy on the negotiated document. The other group, led by the ANC, "argued that the basic problem all along in South Africa had been the complete failure of self-determination." Thus, a small, self-appointed set of negotiators could not produce a legitimate document. Legitimacy was "a fundamental element of the psychological, cultural, and historical transformation that the country needed," and making a constitution by dealing around a table "could result in a precarious situation, for the new constitutional order, leaving it without the sense of destiny and historical evolution, intensity, or drama that one needs for an event of this kind." Sachs, "Creation of South Africa's Constitution," pp. 671–72.

36. The opinion page of the *Sunday Times* on November 21, 1993, just after political party leaders signed the interim constitution, captured the moment: "We, the people of South Africa, have wrought a miracle. We have accomplished what few people anywhere in the world thought we could do: we have freed ourselves, and made a democracy, and we have done so without war or revolution."

37. See Nicholas Haysom, "Federal Features of the Final Constitution," in *The Post-Apartheid Constitutions*, p. 511 ("The final constitution in most respects constitutes a refinement of the interim text."); and Haysom, "Special Features and Mechanisms," p. 109 (the main innovations in the final constitution were the National Council of Provinces, the chapter on cooperative governance, and, to some extent, the elevation of local government to a level or sphere of government).

38. Spitz, *Politics of Transition*, pp. 2–3.

39. Sachs, "Creation of South Africa's Constitution," p. 673.

40. Spitz, *Politics of Transition*, pp. 3 and 74, the latter explaining the theory underlying the two-stage approach.

41. Haysom points out that the ANC had, in fact, prepared a full draft of the constitution, as well as supporting research and submissions on supplementary legislation, prior to the MPNP. This gave the ANC an advantage in establishing the terms and direction of the debate. Haysom, "Special Features and Mechanisms," p. 103.

42. The ANC and NP agreed upon the two-phase framework for the transition in the September 1992 Record of Understanding. Spitz, *Politics of Transition*, p. 69.

43. Spitz, *Politics of Transition*, p. 3.

44. *Ibid.*, p. 69. Other parties envisioned the two stages differently, while the right-wing Concerned South Africans Group alliance insisted on a one-stage transition, with a new constitution negotiated by an unelected convention of political parties. See Spitz, *Politics of Transition*, pp. 69–72. Ultimately, as with many other issues, ANC-NP agreements held sway. More to the point, it was the moderate camp in both parties that prevailed, as neither the ANC nor the NP leaderships were unanimous in their views on the negotiating and transition processes. See Spitz, *Politics of Transition*, p. 77.

45. See Spitz, *Politics of Transition*, p. 416: "Although neither of South Africa's post-apartheid Constitutions would be the product of a perfectly



legitimate, democratic and unfettered process, a two-stage process afforded enough continuity, enough democracy, and enough legitimacy to satisfy the main political forces.”

46. Ramaphosa, “Negotiating a New Nation,” p. 80. See also Siri Gloppen, *South Africa: The Battle over the Constitution* (Aldershot: Dartmouth/Ashgate, 1997), p. 269, noting that an advantage of the two-stage process is that it delinked, to some extent, the final constitution from the transition negotiations, in which the creation of a well-functioning constitutional framework was secondary to reaching a deal to achieve peaceful change.

47. Chapter 15, Constitution of the Republic of South Africa, Act 200 of 1993, available at [www.concourt.gov.za/site/constitution/english-web/interim/ch15.html](http://www.concourt.gov.za/site/constitution/english-web/interim/ch15.html) (accessed April 25, 2009).

48. Agreement on the device of the constitutional principles resolved an impasse between the ANC, which wanted a democratically elected body to draft the constitution, and political and racial minority groups, which sought a process in which all existing political parties would agree unanimously on a new constitution. Haysom, “Federal Features,” p. 509.

49. Meyer, “From Parliamentary Sovereignty to Constitutionality,” p. 66.

50. Haysom, “Federal Features,” p. 509.

51. Sec. 74, Constitution of the Republic of South Africa, Act 200 of 1993, available at [www.concourt.gov.za/site/constitution/english-web/interim/ch5.html](http://www.concourt.gov.za/site/constitution/english-web/interim/ch5.html) (accessed April 25, 2009).

52. Sachs, “Creation of South Africa’s Constitution,” p. 672.

53. *Ibid.*, pp. 672–73.

54. The principles are contained in Schedule 4 of the Constitution of the Republic of South Africa, Act 200 of 1993, available at <http://www.concourt.gov.za/site/constitution/english-web/interim/index.html> (accessed April 25, 2009). For a general description of each of the principles, see Spitz, *Politics of Transition*, pp. 81–82.

55. Haysom, “Federal Features,” pp. 509–10. See also Haysom, “Special Features and Mechanisms,” p. 102, in which he notes that, surprisingly, principles concerning the issues that had divided South Africans for 300 years were brief and universally accepted, while the issue of the status and powers of provincial governments overwhelmingly dominated the principles and attracted the sharpest contestation.

56. Regarding the role of the transitional executive council, see Hatchard and Slinn, “Path towards a New Order,” pp. 9–12.

57. See Spitz, *Politics of Transition*, pp. 87–89.

58. Spitz notes that power sharing in South Africa was not consociational, as it was not a system for the representation of various ethnic groups. The election results revealed that only Inkatha was an ethnically based political power: “The power-sharing arrangement had little if anything to do with South Africa’s ethnic and racial diversity, and all to do with the pact negotiated between the key political forces at that moment.” Spitz, *Politics of Transition*, p. 99. Heinz Klug also makes the point that, compared to a consociational arrangement, the proportional participation scheme for the government of national unity was “less static and more representative.” Heinz Klug, “Participating in the Design: Constitution-Making in South Africa,” *Review of Constitutional Studies*, vol. 3, no. 1 (1996), p. 40.

59. Christina Murray, “Negotiating beyond Deadlock: From the Constitutional Assembly to the Court,” in *The Post-Apartheid Constitutions*, pp. 113–14.

60. See Spitz, *Politics of Transition*, p. 55: “It may be that the secrecy during the MPNP was necessary because at Kempton Park [the location of the talks] the very future of the negotiating process was tenuous, partly because of the mutual suspicions but principally because there was no formal political framework that guaranteed that negotiations would continue to completion.”

61. See Meyer, “From Parliamentary Sovereignty to Constitutionality,” p. 65.

62. Scheduling the election also had the effect of slowing progress in reaching compromises, because parties began to try to score political points. Meyer, “From Parliamentary Sovereignty to Constitutionality,” p. 66.

63. While the IFP’s walkouts throughout the process were problematic in certain respects, they did have the salutary effect of enabling agreements to be reached more quickly than might have been the case had they participated, given their positions. See Haysom, “Special Features and Mechanisms,” pp. 109–10.

64. See Spitz, *Politics of Transition*, pp. 56–61, and Haysom, “Special Features and Mechanisms,” p. 105.

65. The Democratic Party had insisted that the appointment of judges involve the judiciary and legal profession; the opposing argument was that

neither the judiciary nor legal profession were representative of the country's population, since their members were overwhelmingly male and white.

66. Meyer, "From Parliamentary Sovereignty to Constitutionality," p. 69.

67. Hatchard and Slinn, "Path towards a New Order," p. 9.

68. Ramaphosa explains that the ANC continued after the MPNP to engage right-wing groupings and encourage them to participate in the election process in order to defuse the threat to stability that they posed. Ramaphosa, "Negotiating a New Nation," p. 79.

69. See Ramaphosa, "Negotiating a New Nation," p. 79.

70. Hatchard and Slinn, "Path towards a New Order," p. 14.

71. See Sparks, *Tomorrow Is Another Country*, p. 226.

72. Jessica Piombo, "Politics in a Stabilizing Democracy: South Africa's 2004 Elections," *Strategic Insights*, vol. 3, no. 5 (May 2004), available at [www.ccc.nps.navy.mil/si/2004/may/piomboMay04.asp](http://www.ccc.nps.navy.mil/si/2004/may/piomboMay04.asp) (accessed April 25, 2009). Piombo notes that the highest number of pre-election violent incidents occurred between members of the ANC and IFP. In the runup to the election, violence also broke out over the status of the Bophuthatswana homeland, illustrating the alliance of convenience between the white right-wing and certain black homeland leaders. See Sparks, *Tomorrow Is Another Country*, pp. 206–19.

73. Eighty-six percent of eligible voters turned out. For these elections, all South Africans over the age of eighteen could vote, without any registration requirement (the 1996 Constitution required a voters' roll for future elections). Piombo, "Politics in a Stabilizing Democracy."

74. See International Republican Institute, "South Africa: Campaign and Election Report, April 26–29, 1994" (October 1994), available at [www.iri.org/africa/southafrica/pdfs/South%20Africa's%201994%20Presidential%20and%20Parliamentary%20Elections.pdf](http://www.iri.org/africa/southafrica/pdfs/South%20Africa's%201994%20Presidential%20and%20Parliamentary%20Elections.pdf) (accessed April 25, 2009); and Haysom, "Special Features and Mechanisms," p. 108.

75. See Steytler, "Constitution-Making," pp. 71–77. Steytler notes that the questions of how the elections should be managed and who should administer them had been highly contested.

76. Sachs, "Creation of South Africa's Constitution," pp. 673–74.

77. For example, the Human Rights Commission, the Gender Project, and the South African Council of Churches. The media voiced strong objections to being excluded from multilateral meetings.

78. The full panoply of deadlock-breaking procedures provided in Section 73 of the interim constitution can be summarized as follows:

- (a) If the constitutional assembly failed to adopt the draft text by a two-thirds majority of all members, but a simple majority supported the draft, the panel of constitutional experts would have thirty days to propose amendments;
- (b) An amended draft unanimously recommended by the panel would be sent to the constitutional assembly, which would have fourteen days to approve it by a two-thirds majority;
- (c) If the panel could not make a unanimous recommendation, or if the two-thirds majority vote requirement was not met for a recommended amended draft, the constitutional assembly could adopt any proposed draft before it by simple majority; however, in this case, after certification of the adopted text by the constitutional court, the text would have to be submitted to popular referendum;
- (d) A referendum would have to be held within ninety days of being called, and 60 percent of votes cast would be needed to approve the draft constitution;
- (e) If none of the above measures produced a final approved constitution, the president would have to dissolve parliament; in this situation, a newly elected constitutional assembly would have one year to adopt a final constitution by a 60 percent majority of all members.

Sec. 73, Constitution of the Republic of South Africa, Act 200 of 1993, available at [www.concourt.gov.za/site/constitution/english-web/interim/ch5.html](http://www.concourt.gov.za/site/constitution/english-web/interim/ch5.html) (accessed April 25, 2009).

79. Murray, "Negotiating beyond Deadlock," 118–19.

80. As described in the chapter on Namibia in this volume, the constituent assembly there in November 1989 formally adopted UN Security Council Resolution 435, which incorporated a set of constitutional principles laid down in 1982 by the Western contact group.

81. In the constitutional assembly's decision-making procedures, a vote was called only when the terms of the rules or the interim constitution required one. Otherwise, all matters were decided by consensus. However, whenever a vote was called, the resolution concerned was passed unanimously.

82. Theme committees each were assigned to deal with the issues implicated by specific constitutional principles. In general terms, the topics covered by each numbered committee were as follows: 1—character of the democratic state (preamble, representative government, state name and symbols, separation of powers, etc.); 2—structure of government; 3—relationship between levels of government; 4—fundamental rights; 5—judiciary and legal systems; and 6—specialized structures of government (i.e., public administration, financial institutions and public enterprises, transformation and monitoring, and security services). See Ebrahim, *Soul of a Nation*, pp. 183–86 for a detailed list of the subject matter mandate of each committee.

83. Murray, "Negotiating beyond Deadlock," p. 113.

84. For data on the work of the other theme committees, see Ebrahim, *Soul of a Nation*, notes 26, 28, 30, 32, and 34–37, pp. 338–43.

85. For an example of substantive advice from the panel concerning rights of noncitizens, see Jonathan Klaaren, "Contested Citizenship in South Africa," in *The Post-Apartheid Constitutions*, pp. 308–09.

86. Murray, "Negotiating beyond Deadlock," p. 118. Christina Murray was a member of the panel.

87. See Ramaphosa, "Negotiating a New Nation," p. 74.

88. As Ramaphosa explains, though the final obstacles may seem minor compared to the broader issues already resolved, they "lay at the heart of what the ANC was trying to achieve, and what the NP was trying to prevent. The question of single-medium instruction in schools, property rights and the employer's right to lock out, all represented in some way the National Party's desire to maintain through the Constitution some of the privileges and inequalities that had characterized apartheid. . . . These were not matters on which the ANC was prepared to compromise." Ramaphosa, "Negotiating a New Nation," p. 82.

89. These included the lockout clause, the property clause, the death penalty, the appointment of judges, the attorney general, language, local gov-

ernment, the question of proportional representation, and the bar against members of parliament crossing the floor.

90. At this point, deadlock remained on the lockout, property, and education clauses. Specifically, the NP continued to demand a right for employers to lock out striking workers (ultimately dropped at the eleventh hour), a guaranteed right to property in the Bill of Rights (in the end, settled with a compromise limiting the circumstances in which property could be expropriated), and a right to education in one's own language (resolved by providing a right to education in the language of one's choice, with single-medium schools being one option for the government to consider). See Ramaphosa, "Negotiating a New Nation," pp. 83–84.

91. See note 78 laying out the full set of deadlock-breaking mechanisms.

92. The other 13 percent comprised the members from the IFP, who had boycotted the negotiations since April 1995; the Freedom Front members, who abstained; and the two African Christian Democratic Party members, who voted against the constitution because it failed to subject all government and law to the law of God. See Spitz, *Politics of Transition*, p. 425, and Murray, "Negotiating beyond Deadlock," p. 119, note 35.

93. Constitutional assembly resolution, October 11, 1995.

94. The survey, designed and analyzed by the Community Agency for Social Enquiry (CASE), was carried out in April 1995. Later surveys were conducted throughout the process. The results of the CASE survey appear in an unpublished volume titled *Taking the Constitution to the People: Evaluating the Constitutional Assembly*, compiled by David Everett (Johannesburg: CASE, 1997).

95. Community Agency for Social Enquiry, "A New Constitution for a New South Africa," (Johannesburg: CASE, 1996), cited in Heather Deegan, "A Critical Examination of the Democratic Transition in South Africa: The Question of Public Participation," *Commonwealth & Comparative Politics*, vol. 40, no. 1 (March 2002), p. 47. To the question "Have there been any meetings?" 13 percent answered yes, 63 percent answered no, and 24 percent did not know.

96. About half the submissions (1,001,246) petitioned for Afrikaans as an official language, 650,000 to keep the parliament in Cape Town, 186,376 in favor of the death penalty, 42,069 against South Africa as a secular state, 19,854 against the legalization of abortion, 17,209 against including



sexual orientation in the antidiscrimination clause, 17,778 for constitutional protection of animal rights, and 14,475 for the right to own firearms. Gloppen, *Battle over the Constitution*, pp. 257–58.

97. Catherine Barnes and Eldred de Klerk, “South Africa’s Multi-Party Constitutional Negotiation Process,” *Accord*, no. 13 (2002), pp. 26–33. The authors note that about 10 percent of submissions came from organizations, about 0.6 percent from political parties, and the vast majority from individuals.

98. Remark by Heinz Klug at working group session of the U.S. Institute of Peace/UN Development Program Project on Constitution Making, Peacebuilding, and National Reconciliation, September 28, 2001, p. 143 of transcript (on file with the U.S. Institute of Peace). See also Deegan, “A Critical Examination,” pp. 49–51, noting that the issues most South Africans wished to see addressed in the constitution concerned practical matters, such as the need for more jobs, more housing, better schools, and crime control.

99. Barnes and de Klerk state that submissions from organizations with links to parties or with specialized knowledge were seriously considered, but the drafters did not use submissions from individual citizens systematically in the first phase, in part because of the huge volume of submissions and in part because some of the issues raised seemed unrelated to the negotiating agenda. Barnes and de Klerk, “South Africa’s Multi-Party Constitutional Negotiation Process.”

100. According to the CASE opinion survey (1996), only 38 percent of the population over the age of fifty, but 57 percent of the population ages eighteen to twenty-four, believed that the government genuinely sought participation. Cited in Deegan, “A Critical Examination,” p. 48.

101. Murray, “Negotiating beyond Deadlock,” pp. 107–11.

102. *Ibid.*, p. 112.

103. Murray asserts that it was always clear that the constitutional assembly would mediate the public’s views rather than directly incorporate them in the constitution. In Murray, “Negotiating beyond Deadlock,” p. 112.

104. The procedure for processing the submissions was improved in the second phase over the first, making their consideration more manageable. These submissions were summarized, organized according to the relevant section, and presented as

endnotes to the working draft. Gloppen, *Battle over the Constitution*, p. 261.

105. One analyst finds very few signs that the public submissions directly influenced the text of the constitution. For example, of the major subjects of the petitions, only one—in favor of Afrikaans as an official language—is consistent with the final text, though it is unlikely that this result is attributable to the petitions. Gloppen, *Battle over the Constitution*, pp. 260–62. In comparison, Ramaphosa writes: “Clearly not every submission had an impact on the final product, nor did they substantially influence some of the positions taken by the various parties. But they did highlight some of the key concerns shared by ordinary South Africans, and allowed South Africans to engage directly with the process of shaping their future.” Ramaphosa, “Negotiating a New Nation,” p. 81.

106. Metropolitan areas are urban areas that include commercial zones; urban areas are generally residential in nature.

107. For example, Professor Jeremy Sarkin of the Human Rights Committee, in a letter to the president of the constitutional court dated April 18, 1996 (on file), argued that “the final stages of the constitution-making process have been characterised by closed political party negotiation (referred to as bi- or multilaterals), and it is in these forums where political agreement on contentious issues has been reached. . . . Thus civil society has been effectively excluded from the last and crucial phases of the process. This is particularly true of more marginalized groups. Moreover, civil society has not been afforded the opportunity to comment on whether the final package complies with the principles which underlie a democratic nation.” Ironically, the Human Rights Committee, despite having filed an objection to the certification of the constitution, failed to appear at the court to argue its case.

108. In the South African case, many of the parties participating in the multiparty talks that led to the interim constitution “used their membership structures to consult with their constituencies on key issues in the negotiations and to ‘bring them along’ in the process, thus involving them indirectly in the negotiations.” Barnes and de Klerk, “South Africa’s Multi-Party Constitutional Negotiation Process.”

109. Klug, “Participating in the Design,” pp. 34–36. Klug observes that the debates and discussions initiated by the constitutional committee contributed significantly to the development of the ANC’s constitutional vision.



110. Remark by Heinz Klug at working group session of the U.S. Institute of Peace/UN Development Program Project on Constitution Making, Peacebuilding, and National Reconciliation, September 28, 2001, pp. 178–79 of transcript (on file with the U.S. Institute of Peace).

111. Klug, “Participating in the Design,” p. 42.

112. Klug, “Participating in the Design,” pp. 42–43.

113. See Carmel Rickard, “The Certification of the Constitution of South Africa,” in *The Post-Apartheid Constitutions*, p. 224. Carmel Rickard was responsible for reports on the certification process as legal editor of the *Sunday Times*.

114. See Sachs, “Creation of South Africa’s Constitution,” p. 676.

115. Constitution of the Republic of South Africa, Act 200 of 1993, sec. 71(3).

116. Samuel Issacharoff, “Constitutionalizing Democracy in Fractured Societies,” *Journal of International Affairs*, vol. 58, no. 1 (Fall 2004), p. 83; Spitz, *Politics of Transition*, p. 427.

117. Rickard, “Certification of the Constitution,” pp. 224–25.

118. *Ibid.*, p. 225.

119. Rickard, “Certification of the Constitution,” pp. 225–26, also p. 209, note 7: “Initially, some concern was voiced by those disappointed in the make-up of the Court that it might be a lackey of the ruling African National Congress. However, even before the certification case was heard, the Court had handed down judgments indicating that these criticisms and concerns were misplaced.”

120. See Rickard, “Certification of the Constitution,” p. 285.

121. As the interim constitution gave no details of the procedures to be followed, the court had to define its own approach to its task. Gloppen, *Battle over the Constitution*, p. 210.

122. Submissions from the IFP and a cluster of white right-wing groups including the Conservative Party and various religious, farming, and other organizations was particularly significant because they “might have been expected to stay aloof from the process.” Rickard, “Certification of the Constitution,” p. 286.

123. Judgment of the Constitutional Court, CCT 23/96, September 6, 1996. *In re: Certification of the Constitution of the Republic of South Africa*, 1996, 1996 (10) BCLR 1253 (CC) (First Certification judgment).

124. Sachs, “Creation of South Africa’s Constitution,” p. 676. Sachs also notes that the voice-over summary approach to televising the proceedings was a compromise between banning television altogether and allowing what some feared would be play-acting for the cameras.

125. Rickard, “Certification of the Constitution,” p. 285.

126. Sachs, “Creation of South Africa’s Constitution,” p. 677.

127. Several elements of the text, in the court’s judgment, failed to comply with the principles. First, the right of individual employers to engage in collective bargaining was not recognized and protected. Second, the text failed to provide that constitutional amendments require special procedures involving special majorities and did not ensure that the fundamental rights, freedoms, and civil liberties protected in the constitution were entrenched by giving the relevant provisions enhanced protection from amendment. Third, the text did not adequately provide for and safeguard the independence and impartiality of the public protector and the auditor general. Fourth, the failure to specify the public service commission’s powers and functions rendered it impossible to certify that the commission could exercise its powers independently. Fifth, chapter 7 of the text failed to provide a “framework for the structures” of local government, did not provide for appropriate fiscal powers and functions for local government, and did not provide for formal legislative procedures to be adhered to by legislatures at local government level. Sixth, the text did not provide for “appropriate fiscal powers and functions for different categories of local government.” Seventh, the text purported to place the Labor Relations Act beyond constitutional scrutiny, but did not incorporate the act’s provisions, thus impermissibly shielding those provisions from constitutional review. Eighth, the text similarly and impermissibly purported to place the Truth and Reconciliation Act beyond constitutional scrutiny. Finally, the powers and functions given to the provinces were substantially less than or inferior to those which the provinces enjoyed under the interim constitution. See summary of the September 6, 1996, judgment of the court in Ebrahim, *Soul of a Nation*, Document 36, pp. 627–30, and Spitz, *Politics of Transition*, pp. 426–27.

128. Judgment of the Constitutional Court, CCT 23/96, September 6, 1996, para. 31.

129. Sachs, “Creation of South Africa’s Constitution,” p. 677.

130. Spitz, *Politics of Transition*, p. 427.
131. Rickard, "Certification of the Constitution," p. 286.
132. Spitz, *Politics of Transition*, p. 425. Regarding the important role of the constitutional court, particularly during its first eight years, in settling questions concerning the transition to democracy, see Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004), pp. 29–30.
133. See Rickard, "Certification of the Constitution," p. 288.
134. On the critical issue of provincial powers, the court found that "the powers and functions of the provinces in terms of the amended text are still less than or inferior to those accorded to the provinces in terms of the interim Constitution, but not substantially so." Judgment of the Constitutional Court, CCT 37/96, December 4, 1996.
135. Rickard, "Certification of the Constitution," pp. 288–89.
136. See, e.g., the chapters on Namibia, Albania, Bosnia, Cambodia, East Timor, Afghanistan, and Iraq in this volume.
137. For example, the panel of constitutional experts traveled to Europe in November 1996 to attend workshops in Britain and Germany in order to exchange ideas with international experts on technical issues in the new constitution. Other examples are provided elsewhere in this chapter.
138. Haysom, "Special Features and Mechanisms," p. 106.
139. Sachs, "Creation of South Africa's Constitution," p. 689.
140. Over the years, there were several failed attempts at international mediation, including an effort proposed by the Commonwealth Eminent Persons Group in 1986. See Hatchard and Slinn, "Path towards a New Order," p. 2.
141. De Klerk, "South Africa's Negotiated Transition."
142. Ibid.
143. Haysom notes that the ANC used its international credibility to leverage international resolutions and declarations on the route negotiations should follow from the Organization for African Unity, the United Nations, and the Commonwealth. See Hayson, "Special Features and Mechanisms," p. 95. See also Ramaphosa, "Negotiating a New Nation," p. 75, noting that the ANC successfully pressured the international community to maintain sanctions against the South African regime in the period leading up to multiparty negotiations on the transition.
144. "Deadline for Big Changes June—U.S.," *Star*, October 4, 1989.
145. One observer has commented, "It is safe to say that the dialogue processes at the heart of the transition helped to establish a culture of peaceful negotiations entrenching and affirming a habit of constructive cooperation and coexistence, politically as well as economically." De Klerk, "South Africa's Negotiated Transition."
146. Klug, "Participating in the Design," pp. 31–33.
147. Spitz, *Politics of Transition*, p. 419.
148. See Heather Deegan, "A Critical Examination of the Democratic Transition in South Africa: The Question of Public Participation," *Commonwealth and Comparative Politics*, vol. 40, no. 1 (March 2002), pp. 43–60. Deegan observes that the South African government since the transition in 1994 has stressed participatory democracy, but she finds uneven results.
149. Moreover, Haysom observes that "the liberation movements recognized the futility of inheriting a wasteland, of capturing the bank only to find the safe empty. The members of the liberation movements in exile had seen at first hand how neighbors such as Angola and Mozambique had been reduced to extreme poverty as a result of a flight of capital and skills, and a long and debilitating civil war." See Hayson, "Special Features and Mechanisms," p. 93.
150. Remark by Nicholas (Fink) Haysom at working group session of the U.S. Institute of Peace/UN Development Program Project on Constitution Making, Peacebuilding, and National Reconciliation, September 28, 2001, pp. 162–63 of transcript (on file with the U.S. Institute of Peace).
151. Remark by Haysom at working group session, pp. 174–75 of transcript (on file with the U.S. Institute of Peace).
152. Ibid., pp. 163–64 of transcript (on file with the U.S. Institute of Peace).
153. See, e.g., Sparks, *Tomorrow Is Another Country*, pp. 81–84.
154. Remark by Haysom at working group session, pp. 181–82 of transcript (on file with the U.S. Institute of Peace).

**155.** A number of participants in the process have commented on the importance of personal encounters across the political divide to the success of the process. See, e.g., Leon Wessels, “The End of an Era: The Liberation and Confession of an Afrikaner,” in *The Post-Apartheid Constitutions*. See also Meyer, “From Parliamentary Sovereignty to Constitutionality,” p. 69, in which Roelf Meyer comments that “you must create personal interactions with your opponents,” and that “it was impor-

tant to build a relationship of trust with [the ANC]. It was therefore essential that I should establish such a relationship with Cyril Ramaphosa.” Meyer and Ramaphosa were their respective parties’ chief negotiators.

**156.** See, for comparison, the chapter on Iraq in this volume, in which the author identifies problems associated with the Sunni negotiators’ lesser negotiating skill and preparation than their counterpart Shia and Kurds.

