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Chapter Four

Principle born of pragmatism?
Central government in the constitution

Doreen Atkinson

Two seemingly contradictory tasks face framers of a democratic order – to ensure that the majority rules, and that minorities are included in the game. In most modern democracies, this twin task is achieved by a constitution which spells out the rules of political fair play. Supporters of constitutionalism argue that some issues should not depend on the outcome of elections: while the majority must govern, it must do so within rules which prevent it from restricting the rights of the opposition. Both to protect and restrain the right of the majority is not, they add, contradictory: on the contrary, it ensures democratic government.

For South Africa's negotiators, these rules were particularly important: decades of apartheid had ensured that the majority's desire to rule – and the minority's concern for protection – was unusually strong. At issue was not only a search for a system of government, but for the terms on which the minority would concede power to the majority over which it had ruled.

This chapter examines the attempt to agree on rules to underpin the compromise. It focuses on interaction between the ANC and NP, which dominated the debate. The views of other parties are included only if they affected the outcome.

The constitutional compromise

The background against which the country's two major political parties negotiated a constitution is crucial to an understanding of the product which emerged.

The NP, which presented itself as the champion of constitutionalism, has a history of cavalier treatment of constitutions. In the 1950s it bypassed the constitution to disenfranchise coloured voters; in the late 1970s it scrapped the existing constitution and introduced the tricameral system, against widespread resistance. By 1993, however, the ANC stood

to inherit power and the NP, as a future minority party, discovered constitutionalism – not necessarily as a means of ensuring 'good governance', but of securing the interests of a specific racial minority.[1]

The ANC tended to stress the rights of the majority, rather than the need to constrain it: before 1990, there was some scepticism in the ANC about allowing judges to challenge laws made by those elected by the majority.[2] This was not surprising: ANC thinking had emerged in a fight against minority rule, and attempts to curb the majority were often seen as ploys to preserve a detested past. It had less incentive to seek rules which constrained the majority than any other party. Where it did so, this was often a concession rather than a preference. Nevertheless, some ANC constitutional lawyers argue that its repeated battles against racial constitutions indicate that it took political rule-making seriously: the Freedom Charter which guided ANC thinking from 1955 should also, they add, be seen as an attempt to prescribe the way in which governments may, and may not, use their power.[3] Well before negotiations began, the 1990 report of the ANC constitutional committee – its first attempt at constitution-making – urged the adoption of a bill of rights, a written constitution and a constitutional court.[4] While this did not meet NP concerns for group protection, it could be seen as evidence that the ANC was more open to constitutionalism than its opponents claimed.

This may explain why, at the 1993 negotiations, government negotiators strongly argued for – and won – a *rechtstaat*, a rigid system of constitutional sovereignty which contrasted sharply with a past in which parliament reigned supreme. But they won this only in exchange for abandoning much of the thinly disguised racial protection they had demanded through the negotiating process. Constitutionalism was born out of the ANC's willingness to constrain majority rule, as long as the NP abandoned its demand for veiled racial privilege.

Seeds of compromise

The chief aim of the two parties was not to break new constitutional ground, but to negotiate a compromise which reflected the balance of power between majority and minority.

Between the collapse of Codesa and the resumption of negotiations in 1993, the gap between the NP and ANC began to narrow, while they retained enough of their positions to make them feel that compromises were significant victories.

The government had begun shifting at Codesa, where it accepted the principle of an elected constituent assembly. After June 1992, its concep-

tion of a constituent assembly began to include features which provided common ground with the ANC. It accepted that constituent assembly minorities would not enjoy automatic vetoes, and that means should be found to ensure that a non-racial constitution would not be indefinitely delayed by negotiation.[5] This change was prompted partly by talks with the PAC towards the end of 1992: in return, the PAC agreed to give up the 'armed struggle'[6] – something the NP urgently needed to reassure the white electorate.

But the government needed guarantees against possible excesses by an ANC majority in the constituent assembly. By the end of Codesa, there was growing agreement on two issues. The first was that the constituent assembly would be constrained by constitutional principles agreed to beforehand: this agreement to limit the constituent assembly majority was an early ANC concession to constitutionalism. The second was that there would be some kind of constitutional continuity during the transition. The government also insisted that while the new rules were being written, a constitutional authority had to govern. Either the existing parliament would continue to rule, or an interim constitution was needed. It increasingly opted for the latter, proposing a minimum three-year interim constitution[7] to bind an elected interim government which would also draft the final constitution. The ANC reciprocated by endorsing a 'two-stage' transition. In the first phase, a non-elected negotiating body would draft an interim constitution; it would bind the elected constituent assembly, which would also make law until it drafted the permanent constitution. ANC president Nelson Mandela said the organisation supported 'measures to ensure that there is no constitutional void', as long as these did not pre-empt constituent assembly decisions.[8]

This illustrated a growing accommodation between the ANC and NP. The ANC increasingly realised that a majority party needs to submit to checks and balances to prevent abuses of power. The government steadily scaled down its demands for minority protection, conceding that a majority party has – even in the interim – the right to govern. In September 1992, the Record of Understanding between De Klerk and Mandela consolidated the common ground. It was agreed that an elected constituent assembly would draft a constitution within a set period in terms of principles agreed beforehand. Deadlock-breaking mechanisms would be created. An interim government of national unity would govern in terms of an interim constitution.[9]

The main force for compromise was the 'channel' set up between Roelf Meyer and Cyril Ramaphosa who agreed, after Codesa, that 'there (should be) no problem we cannot resolve'.[10] But Meyer recalls that

progress was also possible because NP constitutional advisers had begun to think about power in a new way. At Codesa, the NP still gave the impression that it was trying to protect pockets of power. After Codesa, it began to pin its hopes, he suggests, on its own indispensability in a future order, rather than guaranteed protection. It therefore became interested in a fair constitutional order, in which it would play by the same rules as its opponents: this would also indicate confidence in its ability to sell its values to a non-racial electorate.[11] Gradually, De Klerk was persuaded that this was a realistic vision.

The ANC had also moved. By September 1992, it accepted that the constitutional principles would be justiciable: a seven-member panel should adjudicate disputes over whether they were being honoured.[12] This suggested an embryonic consensus on constitutionalism.

Unity rules

Despite this progress, the gap needed to narrow further before the two were ready to negotiate an interim constitution.

Neither seemed yet to have grasped the challenge. In April 1993 De Klerk speculated that it would take six weeks to draft an interim constitution.[13] In fact, it took six months of multiparty talks and another five of negotiations with the IFP. The ANC released a draft Transition to Democracy Act which proposed merely that 'mechanisms must ... provide for the governance of the country as from the date of the elections and until a new constitution has been adopted ...'[14] This hardly indicated an expectation that detailed rules would be agreed.

But both were moving towards positions which would force them to negotiate more detailed rules. The NP still insisted on a guaranteed place in government. But it was beginning to accept – at least in theory – that its negotiating partner would not grant it a permanent place. It therefore became more interested in redefining 'power-sharing', from a compulsory coalition government (which it now demanded for the interim period only) to constitutional checks and balances, a bill of rights, and devolution of power to regions. It was moving from *consociationalism*, which stresses power-sharing between groups, towards *constitutionalism*, a set of rules on which it could rely if it became an opposition party.

For its part, the ANC had committed itself to 'sunset clauses' – temporary rules to guarantee minority participation.[15] It also offered the crucial assurance that there would be no election immediately after a new constitution was approved. This met NP concerns, since a multiparty government of national unity would remain in office for at least five

years. But a five-year government could not simply govern according to 'mechanisms'; detailed rules would be needed for the interim period.

This assurance of five years of joint government was rejected by militant ANC intellectuals[16] and the PAC, who saw it as an unwarranted lease of life for apartheid's architect, the NP.[17] It also enraged the IFP's Buthelezi, who viewed it as another example of exclusive ANC-NP deal-making.[18] But this was not an ANC-NP pact to share power for five years. It provided for a government of national unity consisting of all parties which won a certain percentage of the vote.[19] To qualify, the NP had to win voter support. And since any party which won the agreed vote would qualify, it allowed all parties, including the IFP, the prospect of a share in government – something the IFP later won. The agreement was a pact by the two players who commanded most power, and who needed each other's co-operation to progress: the support of smaller parties was welcome but not indispensable. But this reliance on rules which applied equally to all parties was another sign of the NP's growing interest in constitutionalism.

After heated debate within the ANC, the idea of a government of national unity was accepted with the qualified support of the SACP and the ANC Youth League, two of its more militant constituencies. Pragmatists such as Jacob Zuma argued that it simply recognised that 'there are other people representing different powers which they can use to sabotage the direction of a new government'.[20] The doubters did impose a rider which was to become important later – that cabinet decisions be taken by simple majority, denying minority parties a veto. Nevertheless, acceptance indicated ANC acknowledgment that the minority, if not accommodated, had enough power to threaten its capacity to govern. The idea of a five-year government of national unity was not foisted on a truculent ANC: its constitutional thinkers had begun considering it in 1990, and its merits were strong enough for the idea to take hold in ANC circles.[21]

Another ANC shift involved the realisation that the transition required legal certainty.[22] If resistance and secession were to be avoided, the country as a whole had to make a transition; it could not simply be a power grab by the ANC. This, too, argued for an interim constitution.

This convergence cleared the way for substantive (interim) constitution-making. On 30 April, the negotiating council at Kempton Park committed itself to reaching agreement on constitutional principles, the constitutional framework and the constitution-making process in terms of which elections would be held.

Technocratic consensus: the technical committee

In early May, the negotiators began the task by appointing a technical committee on constitutional issues. Following a device used at Codesa, this was supposed to ensure progress by allowing issues to be thrashed out in a small group. In contrast to the Codesa model, the committee was made up not of negotiators but lawyers, ostensibly appointed for their expertise rather than their political sympathies. It was instructed simply to provide documentation and work through the submissions of the parties. But, over time, it came to play a more substantial role, seeking to clarify options and promote particular solutions.[23]

The claim that technical committee participants were apolitical 'facilitators' was partly illusory. The committee included, for example, ANC adviser Arthur Chaskalson; Francois Venter, a Department of Constitutional Development consultant; Dikgang Moseneke, former vice-president of the PAC; and Marinus Wiechers, a former adviser to the IFP.[24] But participants say that despite their political differences, they agreed to find consensus before submitting reports to the negotiators. Technical committee debates were often intense, but its participants managed to work as a team.

Committee members offer various reasons for their ability to find consensus. They were legal professionals, trained to maintain some objectivity. They saw themselves as facilitators:[25] thus the technical committee never took instructions from parties directly, even after bilaterals; it took its orders from the negotiating council. Members tried to maintain neutrality, often arguing against the parties with which they were associated. And they could translate the political debates in the negotiating council into abstract intellectual questions on which they could find common ground. The group also developed a corporate loyalty and pride in its work, and knew that its influence would diminish if minority reports were submitted. Over time, one phrase became very important: 'I can live with it.' This meant that members did not agree, but knew they had to make a decision.[26] They were seriously divided on issues such as regionalism and customary law.[27] But, with some effort, they found consensus.

How influential was the technical committee? Members insist that it tried to avoid presenting solutions: it formulated options which the parties could debate, and followed instructions closely. They add that they sometimes had to include ideas with which they did not agree, such as enforced power-sharing, or the methods of appointing the constitutional court.[28] Some negotiating council members implicitly agree that the

technical committee mainly gave form to political deals arrived at elsewhere.[29] But one technical committee member offers a different view, suggesting that it operated by stealth, influencing negotiators while allowing them to feel that they owned the product.[30]

The evidence suggests that the influence of the committee varied. Initially, it gave effect to the approach which the ANC and government had agreed upon before the negotiations began. During a second phase, it came into its own, helping to guide debates. Finally, in the rush to complete the draft constitution before 15 November, it simply carried out orders emerging from bilaterals between the parties.

The technical committee became a key force for constitutionalism. According to one member,[31] there was an initial division between members (such as Chaskalson and George Devenish) who favoured the Anglo-Saxon tradition of flexible constitutions, and those (such as Venter, Wiechers and Willem Olivier) who preferred the continental tradition of rigid and detailed constitutions.[32] Over time, the latter view dominated. The technical committee argued repeatedly for the supremacy of a rigid constitution, with all laws and acts of government subject to the constitution, which would be guarded by an independent judiciary. Some members believe that prompting a similar shift by negotiators was the technical committee's key achievement.

Rules about rules

A key negotiating task was to decide the rules which would bind the fashioning of the final constitution. Although this did not directly affect the shape of the interim constitution, it raised issues which tested negotiators' enthusiasm for constitutionalism.

A matter of principles

Some critics viewed the NP's insistence on constitutional principles which would bind a constituent assembly as an attempt to hobble an ANC majority. But for the technical committee, they were crucial precisely because they constrained the majority: they were a first commitment to constitutionalism. The technical committee urged negotiators to discuss the content of such principles urgently, to ensure the constitution's supremacy.[33]

Early evidence that the ANC would honour its commitment to minority participation came when it accepted principles providing for minority party participation in law-making, and special majorities for constitutional changes.[34] But a gulf remained on the status and enforcement of the principles. In its submission to the technical committee, the government proposed stringent measures to ensure that constitutional legislation be consistent with the principles. Such legislation should not even be considered by parliament, it said, unless a constitutional court certified that it conformed to the constitutional principles. And any member of parliament who believed that a bill contained clauses incompatible with the principles could refer it to the court, whose decision would be final and binding. The principles could only be amended if four-fifths of all members of parliament consented.[35] The ANC, by contrast, wanted as much latitude as possible for the constituent assembly.

The technical committee sought to fashion a compromise. It urged that the principles should be formulated in clear language which would allow a court to rule on them. But they should also be broad enough to allow the constituent assembly scope to frame a constitution within them.[36] In September the divide was resolved, but not by the technical committee. Eager to secure progress on the establishment of the TEC, the ANC hastened to finalise adoption of the interim constitution by agreeing to detailed principles, open to adjudication by a court. This shift ended a key dispute over the right of a court to intervene in constituent assembly decisions.

In July the technical committee, consistent with its support for constitutionalism, endorsed NP and DP demands that the court enjoy the power to overrule constituent assembly decisions if they conflicted with the principles. It proposed that any constitutional proposal could be referred to the court by the constituent assembly's chairperson if petitioned by one third of its members to do so.[37] And the final text would only come into operation once the court had certified that its provisions conformed to the principles. The decision of the court would be final and binding.

The government wanted even more latitude for the court: it felt that the one-third stipulation for petitions was too high. But the ANC and PAC rejected the court's right to fetter constitution-making by the majority:[38] allowing it the final say was elitist, and would infringe the constituent assembly's sovereignty.[39] The PAC argued that allowing members to petition the court would permit the constitution to be decided by the courts, not the constituent assembly.

The technical committee remained firm on the need for certification by the court, insisting that it would prevent later court challenges to the constitution.[40] Gradually, the ANC softened. By August it objected

merely to automatic certification; it proposed that it take place only if a party requested the court to certify the draft.[41] And it would accept the right of one third of members to petition the court, but would accept no lower figure.

Eventually, the ANC gave more. It finally agreed that any provision tabled at the constituent assembly could be referred to the court if one fifth of members petitioned it.[42] And the court's decision would be binding.

However, neither the technical committee nor the negotiators were able to find a compromise on another key divide: the demand by Cosag parties that the form of state – federalism – be agreed before constitutional principles could be framed. These parties refused to endorse principles which referred to a 'sovereign state' or 'national unity'[43] until the form of state was settled. Although the principle of regional government was agreed, and the technical committee did propose a role for regions in constitution-making,[44] Cosag objections were repeatedly defeated in negotiating council votes. The form of state was decided – if at all – by default, the negotiators settling for a state far more unitary than the Cosag parties wanted.

But ANC acceptance that the constituent assembly majority would be subject to a court was a victory for the NP, and indirectly for De Klerk's ideal of a *rechtstaat*: it laid the theoretical foundations of constitutionalism.

Breaking a tie

It was the question of a mechanism to break a constitution-making deadlock which ostensibly ensured stalemate at Codesa. The issue soon resurfaced at Kempton Park.

In May the ANC, retreating from a Codesa concession, proposed that a new constitution be passed by a two-thirds majority (rather than the 70 per cent it had previously suggested). If it did not achieve this within nine months, fresh elections would be called – an inducement for members to agree. The second constituent assembly would have a further six months to complete its task: if it failed, a proposed constitution would be put to a referendum, and would be adopted if it attained 55 per cent approval. If not, a third election would be held and a new constitution adopted by a *simple majority* of the third constituent assembly.[45] This, it argued, would prevent endless stalemate.

The SAG, also abandoning its Codesa position, accepted the two-thirds proposal, adding that regional government issues should require

two-thirds approval by the senate. It also proposed new mechanisms to encourage agreement. Should the constituent assembly nevertheless fail to reach a two-thirds majority, the draft would be referred to a panel of experts for advice on amendments.[46] If its proposals did not obtain the required majority, the president would refer the draft constitution to a referendum. If a draft achieved 60 per cent of the votes, it would become the constitution. If it did not, the president would dissolve parliament and hold fresh elections; the same procedure would then apply. This formula had no definite cut-off point, and could conceivably carry on for ever.

The technical committee first avoided choosing between these options. But in July it entered the fray. It accepted the SAG proposal for a panel of specialists who would seek to frame a draft which would gain two-thirds support. If this failed, a constitution, once it was certified by the court, would be put to a referendum, in which it would need 60 per cent support. If it failed to achieve this, a new constituent assembly would be elected. But it then tilted towards the ANC, suggesting that the new constituent assembly be given a year to approve a draft by an ordinary majority – an idea which prompted the DP to complain that the majority party would have no incentive to compromise: 'If it holds out long enough, it will be able to write its own constitution.'[47] The NP and Cosag also rejected this suggestion.

The issue was ultimately settled in bilaterals. In September the ANC dropped its demand that a simple majority in the constituent assembly be sufficient to break the final deadlock.[48] And it later accepted a 60 per cent majority in a referendum. This agreement also settled another key divide – how long it should take to draft a constitution. The SACP and PAC insisted that it take no more than three years 'to draft a constitution for which the people of South Africa have been waiting for a long time'.[49] The DP and Solidarity argued for a longer process, which would enable durable compromises and solutions. The NP and ANC agreed on two years – provided the interim government lasted for five years.

This compromise met the ANC's concern to prevent indefinite delays to a final constitution, which it hoped would draw the curtain on interim arrangements. But it did this in a way which again constrained majoritarianism. Recognition that a simple majority would not suffice to approve rules which would bind the whole society was another gain, albeit limited, for constitutionalism.

Regional rights

The role of regions in approving the constitution was another key issue, since it would partly determine how federal the new rules would be. For the technical committee, one option was to require a specified majority in each regional legislature – a system with similarities to that in the US. The other was to require a special majority in a chamber of parliament composed of regional representatives (the senate).[50] The first method would ensure a more rigid constitution, the second would lend itself to quicker approval and encourage a more unitary ethos. In the event, neither idea was adopted – the negotiators agreed that the constitution would be put to the national assembly and senate sitting together, an idea which weakens the regions' role. It also, perhaps, answered Cosag's question – the form of state would fall far short of its demand for radical devolution to regions.

By supporting constitutional principles, the right of the constitutional court to intervene, and specified deadlock-breaking mechanisms, the technical committee steered the debate towards the *rechtstaat* ideal. Both the constitution and constitution-making would be subject to strict rules. But what sort of rules? This would depend on the details of the interim constitution.

Constitutionalism of a special type

The new constitution might be an 'interim' one, but it was to last for five years. It would also be the founding document of the new democracy. It would represent so sharp a break from the past that the difference between it and previous constitutions would be far greater than that between it and the final document: the 'interim' document might differ only marginally from the 'permanent' one. This meant that the interim constitution was taken extremely seriously by negotiators, and that the agreed document tells us a great deal about the final shape of the new order.

As noted above, the context in which the constitution was fashioned ensured that it was primarily a bargain between two parties representing major power blocs. Its chief purpose was not to fashion rules for society in general, but to encode the deal between the blocs. The key question, then, is what sort of general constitutionalism the particular deal produced.

A key example of the tension between general principles and specific bargains is the doctrine of the separation of powers,[51] which holds that government should not be a monolith. Political liberty requires that the three functional branches of government – the legislature, executive and judiciary – be firmly separated from each other, and that each branch act as a check on the others: 'ambition must be made to counteract ambition'. This is meant to ensure that no single group will be able to control the state. While the extent of separation varies between democracies – in many, for example, cabinet members are also members of parliament – some degree is common to all.

All Kempton Park parties agreed on the need to separate power to prevent a dictatorial regime. But their enthusiasm for measures which would do this depended on how proposals affected the central issue – an ANC-NP compromise. Thus, as one negotiator put it, separation of powers 'meant anything to anybody'.[52] In the US, where the separation of powers is most pronounced, there were no parties when the constitution was framed. Here there were, and they were more interested in checking each other – and the black majority and white minority they sought to represent – than the branches of government.

This translated into a primary concern not with the separation of powers but with the terms of what can be referred to as 'mixed government', a system which assumes that the major interests in society must take part jointly in government to prevent any one from imposing its will. This term was first used to describe the English state of the 18th and 19th centuries, which sought to balance class interests.[53] In South Africa in 1993, the central issue was the balancing of racial interests. To some extent, debate on functional separation of powers was overshadowed by the need to produce a balance of social interests.

Nevertheless, the central compromise between the NP and ANC discussed earlier shows that one party had a clear interest in curbing majority power, the other in ensuring that the rules were not clearly biased towards its negotiating partner. This made it possible for constitutionalism to emerge from a bargain about something else.

Sharing the executive

Having agreed on the need for minority participation in government, the negotiators still needed to decide its form. An initial key NP plank had been its insistence on a presidency shared by the three largest parties. It began to retreat from this in January, in the face of ANC opposition and a growing belief within the NP that the proposal was untenable. But a

role in government remained a non-negotiable NP demand – hence the ANC's agreement to a five-year government of national unity.

As noted above, this was not necessarily a grudging compromise, since the ANC acknowledged that a minority presence in government would lessen white resistance and prevent the alienation of the civil service. It could also partly insulate it from pressure to meet post-'liberation' popular expectations on its own. Nor, as the DP argued, was minority participation necessarily a negation of democracy[54] if the minority could not veto the majority, and a role in government depended on winning a specific share of the vote.

There were signs that De Klerk was having difficulty in accepting the NP shift,[55] which meant that he would be unlikely to enjoy a share in the presidency: by May he still clung to the idea of an executive committee of party leaders, with a rotating chair, to deal with fundamental principles.[56] But the tide was running against him, and in August negotiators were to unanimously accept a technical committee recommendation that the executive be headed by a single executive president.[57] A multiparty cabinet was thus the only viable means of ensuring an NP role in government.

In February, the ANC proposed that all parties which received 5 per cent of the vote should qualify to nominate cabinet ministers. But the president would be able to veto nominations.[58] Ironically, the former proposal was more expansive than NP thinking, which flirted with a 10 per cent cut-off: it probably expected to be stronger in a two- party coalition than a multiparty one. But the ANC was sensitive to charges that it was 'getting into bed with the Nats': a more inclusive coalition would resemble a formula for national reconciliation rather than a two-party deal. In any event, it was the 5 per cent figure which appeared in the technical committee's first draft proposal on the executive:[59] it was accepted by all parties except the PAC.

But who would appoint minority ministers – their parties or the president? And would ministers drawn from parties with competing policies be expected to take joint responsibility for decisions? The latter problem illustrated, as one negotiating council chairperson, Martheanne Finnemore, put it, that 'we haven't yet come to grips with what a government of national unity is actually going to mean'.[60] At issue, in a sense, were the terms of national reconciliation.

Precisely because the function of a unity government was so central, it could only be resolved by the two major players. ANC negotiator Mohamed Valli Moosa told the negotiating council that this issue had to be seen as a 'package';[61] he proposed extensive bilaterals and consultations

among the parties to resolve these questions – which is precisely how they were resolved.

Ultimately, the major parties agreed on a strict formula for allocating cabinet posts according to parties' representation in parliament. The president would have the right to decide on the portfolios which would be allocated to other parties, while party leaders would decide whom to appoint to their portfolios.[62] What was agreed on cabinet responsibility is unclear, since the constitution requires ministers to administer their portfolios in conformity with cabinet decisions,[63] but does not require them publicly to support those decisions. The terms of unity may, therefore, depend on the conventions which develop in the cabinet.

The negotiators rejected the ANC view that the president should be entitled to veto ministers nominated by minority parties. But what if minority ministers refuse to obey cabinet policy? The constitution asks the president to use statesmanship: 'The President shall with dignity provide executive leadership in the interest of national unity.'[64] Failing this, the president may ask the minister to conform with policy and, if ignored, remove the minister after consulting the minister and the minister's party leader.[65]

These issues were, however, far less central than how decisions were to be taken in the cabinet. This crystallised the key divide between the ANC concern for majoritarianism and the NP's desire for a guaranteed role in decisions. The NP's first choice was for all decisions to be taken by consensus, giving minority parties a veto. But it accepted that this would paralyse decision-making, and therefore argued for consensus only on broad policy issues, such as the economy and security.[66]

The ANC accepted that minority parties would need a role in decisions. But it was concerned to prevent paralysis, and so it wanted the degree of consultation left up to the majority party: the NP balked, fearing that the ANC would not honour a voluntary agreement once it had tasted power.[67]

The technical committee's first draft on this topic proposed that cabinet decisions, 'insofar as it is attainable, be taken by consensus'. If this could not be achieved, a 'specified majority' (to be decided later) of ministers present would suffice. On financial and security matters, at least an absolute majority of all ministers would be needed.[68]

A later report[69] addressed a related issue, the power of the president, who would of course be leader of the majority party. The technical committee suggested that the president be able to take some decisions alone but, on all actions, would have to consult the cabinet. This prompted

heated debate:[70] at issue was whether the president would be bound by cabinet views – something which the ANC rejected.

As the negotiators rushed to meet their November deadline, the government and ANC were still struggling to set the percentages required for cabinet decisions. It was reported, after a Mandela-De Klerk summit, that Mandela was holding out for a simple majority; De Klerk wanted 60 per cent. It seemed they would compromise on 55 per cent, with 60 per cent for security and finance-related issues.[71] According to other reports, the NP was holding out for two thirds in the hope that it could marshal support from other parties to block ANC decisions.[72]

The issue was only resolved as part of a package tabled by Meyer and Ramaphosa in the last minutes before the plenary session of the negotiation forum:[73] a simple majority was agreed, allowing the majority party to control the executive. The NP would not enjoy a guaranteed say.

This was widely interpreted as an ANC victory:[74] Ramaphosa claimed that the government had 'completely collapsed' during the last days of negotiations.[75] There were reports of growing rifts in the government delegation. Analysts such as Robert Schrire saw it as a 'strategic surrender', reflecting the SAG's growing understanding that it would not be a major force under black majority rule.[76] Put another way, it may have accepted that, if the majority would not work with it, forcing it to do so would simply destroy the unity government. Thus political analyst Hermann Giliomee argued that the NP had merely retreated to a more defensible position, accepting that it would have to use influence rather than constitutionally entrenched power to shape decisions.[77]

In any event, the constitution does not specify a percentage for decisions. And it requires the president to decide 'in consultation with' both deputy presidents and the cabinet on most issues – which implies an obligation to heed their views.[78] The constitution also urges the cabinet to heed 'the consensus-seeking spirit underlying the concept of a government of national unity as well as the need for effective government'; the prerogatives of the majority are therefore partly diluted. But once again, statesmanship will be crucial.

Agreement on the form of cabinet left outstanding one other measure designed to enhance minority participation – the deputy presidency. In apparent response to NP demands for some mechanism to dampen white resistance to change,[79] the technical committee proposed that the vice-president be chosen from different parties during the transitional period, since this would help unify the country. After a series of bilaterals, this vague formulation was changed to an agreement that every party holding at least 80 seats in the assembly would be entitled to an executive

deputy president: if no party or only one qualified, the parties holding the largest and second largest number of seats would qualify.[80] The effect was the same – a role for De Klerk – but again a clear rule had bridged an ANC-NP divide.[81] And again, while the PAC[82] and Cosag (now the Freedom Alliance)[83] branded the clause another example of secret ANC-NP deal-making, since it seemed tailor-made for the NP, it did make the deputy presidency dependent on electoral outcomes which could be achieved by any party.

The agreed form of 'mixed government' in the executive was a masterpiece of political compromise. It gave the NP a role in the cabinet and presidency. It gave the ANC the majority party right to take decisions if consensus could not be reached.[84] And, by relying on formulae which were, in principle, available to any party which could achieve a required share of the vote, it reconciled 'mixed government' with democratic constitutionalism.

A second house

The choice between one house of parliament or two dominated debate on the law-making body.

The traditional argument for an additional house or senate is that it forces legislators to have second thoughts, thereby reducing arbitrariness and injustice in law-making. This is based on the view that elected majorities can be tyrannical, since voters who choose a party may not endorse its policy on all issues.[85] While supporters of a majority party may agree on broad approaches, they may disagree on specific issues. An upper house or senate allows for a 'second opinion', ensuring more considered law-making. But this only holds if the composition of the senate is different to that of the lower house, and this requires that it be chosen in a different way.

The NP's concern to limit the power of a majority government made it a natural champion of a senate. Its challenge was to find criteria for choosing the upper house which would ensure that its composition would differ from that of the national assembly, but would satisfy constitutionalism's demand for rule-making which did not overtly favour a particular group. It found this in a demand for a regionally based senate: in July 1992 De Klerk proposed a senate consisting of an equal number of representatives from each region, allocated in proportion to their party's share of the vote in that region.[86] The unstated NP rationale was that this would give regional ethnic parties greater representation. However, it was joined by the DP which, for different reasons, proposed a

strong senate, able to veto laws affecting the regions and approve senior public service and judicial appointments.[87]

De Klerk's proposal was a retreat from an earlier NP suggestion that parties in each region receive equal representation if they won 10 per cent of the vote – an idea which would clearly distort the will of the electorate. Despite the retreat, the ANC remained anxious about the SAG's intentions: it saw the proposal as the thin edge of a wedge which would be used to ensure veto rights for each region. Since two of the proposed regions could be (and ultimately were) controlled by parties other than the ANC, this was seen as a 'back door' for minority vetoes.[88] The ANC accordingly argued for a single chamber.[89] By February, after a sequence of bilaterals, the ANC shifted its position: it would not oppose a second house after a final constitution was drafted.[90] It was also prepared to accommodate regional representation by allocating half the national assembly seats to regions in proportion to the share of the vote cast in each region.[91] Regional vested interests in each party would accordingly have a special voice in parliament.

This proposal was incorporated in the constitution, but the question of an upper house remained unresolved. The technical committee initially took a neutral stance,[92] but later argued that a second chamber would 'provide an important link' between regions and parliament.[93] Gradually, the ANC also came to accept a regionally based senate. Faced with pressure to concede strong powers to regions, it preferred to grant blocking rights to a senate in which regions would come together as a nation,[94] rather than allowing the regional legislatures to block laws separately.

The powers of the senate remained a point of controversy: the NP and DP argued for stronger powers, the ANC for weaker ones. Increasingly, the technical committee argued for a vigorous role,[95] proposing that legislation should generally be passed with a majority in both the assembly and senate. But it tilted towards the majoritarian position by suggesting that if there was a dispute, legislation could then be passed by a majority at a joint sitting. This, Roelf Meyer argued, would ensure that the upper house could be outvoted by the lower one.[96] The problem was resolved by the technical committee, which suggested that disputes be settled by a joint committee consisting of members of both houses.

Even though the senate cannot stop ordinary legislation, it can delay it. In addition, bills dealing with aspects of provincial government require senate approval. It was agreed that senators would be chosen by regional legislatures, giving a further regional dimension to parliament.

Provision for a senate was a triumph for the regionalists at Kempton Park. They were later joined by ANC and SACP negotiators, who argued that regional democracy must be reflected at the centre of power. But, as a check on majority power, the senate has limited value. The ANC's chief concern was not to prevent a senate, but to ensure that it did not block assembly decisions. Although the senate retains strong powers on regional bills, and the power to delay ordinary laws, it has no power over money bills which, Cosag negotiator Rowan Cronjé argued, ensures that regions remain dependent on central government money.[97]

The ANC criterion was largely met. And the first senate has a larger ANC majority than the assembly. Thus, unless ANC senators develop different concerns to their assembly counterparts, the senate is unlikely to play the role expected by constitutional theory.

Unintended consequences? The 'anti-defection' clause

When, early in the negotiations, the ANC joined the NP in endorsing proportional representation, this was seen as a breakthrough for minority interests since it made it less likely that one party would pile up a huge parliamentary majority by winning a slim majority of votes. But proportional representation had an unforeseen consequence – the 'anti-defection clause'.

This stipulation that MPs who leave their parties must resign from parliament was later seen as a ploy by power-hungry party leaders. But it was proposed by the technical committee. The ANC quickly supported the proposal, arguing that it would prevent people from gaining a place on the list of a party with strong support and then leaving it after winning a seat. But the DP's Colin Eglin argued[98] that this would 'freeze politics in a pre-election mould' by preventing otherwise inevitable realignments, and would help party bosses control their MPs. The NP adopted a middle position: it supported the clause as a means of promoting parliamentary stability, but suggested that if a substantial portion of a party (say 20 per cent) wished to break away, this should be allowed and that parties should be able merge. 'In the first five to ten years there will be major realignments in (our) politics, and that will be good for the system,' Dawie de Villiers argued.[99]

The technical committee, however, persuaded the parties to accept the provision: a key rationale was Francois Venter's argument that proportional representation does not cater for by-elections, and MPs wishing to leave their party cannot return to their constituency for a new man-

date. (The measure does not apply to senators, because they do not have to belong to parties at all).

The clause will strengthen party leaderships and prevent new alliances across party lines. But those who see it as a sinister ploy ignore the fact that it is largely a consequence of the particular system chosen by the negotiators, in which voters vote for parties rather than for individuals. The view that defections might frustrate the will of the electorate is not, therefore, sinister – even if it may well have undemocratic effects. And, as technical committee member George Devenish argued, the key beneficiaries may be smaller parties, since there is far less incentive to leave a majority party than a minority one.

President and parliament

The agreement that a single executive president would be elected raised questions about the head of state's powers which were crucial to the major parties' interests. Both the DP and technical committee also saw that they were crucial to the separation of powers, which the DP strongly favoured[100] and the technical committee urged negotiators to consider.[101]

Debate first crystallised around the method of electing the president. The DP initially argued for direct election, because this would mean a stricter separation of powers. The technical committee felt that direct election might exacerbate party conflicts and undermine the spirit of the government of national unity.[102] The council agreed unanimously, with the DP adding that it was concurring as an interim measure only and would press for direct election at the constituent assembly.[103] Curiously, given the NP's concern to constrain majoritarianism, the president was to be elected by simple majority.

More crucial was the power of the presidency, which was raised indirectly by a debate over whether the head of state should be a member of parliament. The technical committee said no, and the NP agreed: '... we believe for good government the executive should be separated from the legislature'.[104] Eglin went further, arguing that cabinet ministers should also not be MPs, as in the US system. An exchange between him and Joe Slovo showed the extent to which 'separation of powers' came to mean anything negotiators wanted it to mean. Eglin argued for separation between executive and legislature; Slovo supported the 'separation of powers', but added that ministers should therefore 'be members of parliament and be answerable to (it)'.[105]

The PAC and Cronjé responded that the president should be accountable to parliament, which would elect the head of state.[106] As a compromise, the technical committee proposed the appointment of a prime minister, who would be an MP, thus accountable to parliament, would act as a link between parliament and the president, and manage the executive on a day-to-day basis. Eglin supported this, arguing that it would imply some welcome dilution of the powers of the president.

This remark linked the proposal to a key divide. Having reluctantly abandoned the shared presidency, the NP wanted the president to have fewer powers than the incumbent.[107] The ANC saw this as an attempt to relegate Mandela to a figurehead;[108] intensive bilaterals in March had failed to narrow the gap.[109] While the NP and DP position was consistent with a desire to prevent absolute rule, it raised fears which were pinpointed not by an ANC negotiator but the House of Delegates' Amichand Rajbansi: 'Let us not be accused of making a lame duck president when this country is going to have a president who is not going to be white.'[110]

By early November the issue had been resolved, like so many others, in bilaterals.[111] All laws had to be assented to by the president, but he or she could only refer them back to parliament 'in the event of a procedural shortcoming in the legislative process', not veto them. Parliament also retained the right to impeach the president.[112] No prime minister was provided, and the president would vacate his or her seat in parliament. Ministers would retain their seats, and would vote in the house of which they were a member. The president and ministers would be entitled to sit and speak in any house.

The outcome was a partial victory for the separation of powers. But it also showed that despite constitutional compromise, constraints on majority power could easily be seen as attempts to preserve racial power. This also affected another key debate – that over the constitutional court.

The constitutional court

A constitutional court is crucial to the idea of the constitutional state. But, perhaps because the idea was so new to South African politics, the technical committee had to prod the negotiating council into dealing with the issue. In June it framed three questions it believed to be crucial to the debate. Should there be a special constitutional court, or should constitutional matters be left to ordinary courts?[113] How should judges be appointed? And what should the court's function be?

The first issue revealed that many of those who opposed a separate court wanted to maintain continuity with the existing judicial system.

Those who favoured a special court – including the technical committee[114] – wanted a break from it. The negotiators opted overwhelmingly for a separate court.[115]

The second issue sparked a celebrated controversy. On one side was the view that the long-standing tradition of executive appointments to the judiciary – common practice in many countries – ought to be changed, since it allowed the ruling party to hand-pick judges. Instead, as in some Commonwealth countries, a judicial service commission, comprising lawyers, judges and elected politicians, should have a major say over appointments. The opposing view stressed what the technical committee called the 'white male problem': almost all lawyers and judges were white men, and if they chose the constitutional judges, the court's legitimacy would be reduced.[116]

The technical committee proposed, therefore, that parliament enjoy the major say in appointing constitutional judges. A multiparty committee could propose a panel of judges to parliament, which would have to approve it *en bloc* by a 75 per cent majority. The DP, Justice minister Kobie Coetsee and Rowan Cronjé objected, saying that this would still mean political interference – the task should be left to judges and lawyers.[117] This view stressed a strong separation of powers, but was open to the charge that its advocates wanted an unelected elite to perpetuate itself.

The ANC, in contrast, insisted that the president appoint the head of the court after consulting the parliamentary committee.[118] This position was either badly phrased or was later to embarrass ANC lawyers: a key ANC legal strategist insisted later that it had never believed judges should be chosen by the executive – they should be chosen by MPs.[119]

On the third question, a key issue was whether the court should pronounce on *bills* before they became law. This raised the same issues, and the same reactions, as the debate over whether constituent assembly members could petition the court to intervene.

These issues largely disappeared from the public eye, as they were referred to ANC-government bilaterals at which three important agreements were reached. Firstly, it was agreed that all constitutional questions would be decided by the constitutional court. Secondly, the court would consist of a president and ten judges, of whom four would be chosen from the *ranks of judges* by the president in consultation with the chief justice and cabinet. The rest would be appointed by the president after consulting the president of the court, and with the agreement of the cabinet.[120] This placed appointments largely in the executive's hands. In exchange, it compromised the principle that the court should signal a

clean break with the old judicial order. Thirdly, a judicial service commission would be appointed; it would be consulted by the president when the chief justice was appointed, and would also recommend supreme court appointments.

For Coetsee, the arrangement was a suitable compromise – his chief aim was to ensure continuity with the old judicial system, and the appointment of four existing judges secured this. In exchange, he had offered the ANC a prize it had not expected to win – the presidential appointment of judges. The ANC grabbed the offer, which then found its way into the 25th report of the technical committee, presented at the very end of negotiations.[121]

The agreement provided one of the last great controversies of the negotiation process. While the ANC's willingness to trade the presence of four of the old order's judges on the court for the prize of presidential appointment made sense, there was much speculation about why Coetsee gave so much: explanations ranged from incompetence to pressure to reach agreement before the final plenary at which the constitution was to be adopted.[122] The real reason may be simpler, and more revealing – that Coetsee was far less interested in sealing off the judiciary from the executive than in ensuring that as many existing judges as possible were appointed to the court.

In one sense this may have been short-sighted, since he may have traded short-term gain for a long-term brake on majority government. But if his prime goal was to protect his constituency rather than to secure the future of constitutionalism, the concession seems more logical. For there was no guarantee that a judicial services commission would appoint four existing judges to the court. In many cases, the main negotiators' concern to protect their constituencies was consistent with constitutionalism; in this case it was not.

It was logical that the DP should lead the fight against the deal.[123] It saw itself as the party of constitutional principle and had little to gain from a compromise between the big blocs. It objected heatedly to the idea that the court, which would play a key role in shaping the new order, could be a handmaiden of the president. This was particularly ominous, it said, because this court alone would decide constitutional issues. It urged that the president of the court be appointed strictly on the advice of the JSC, subject also to confirmation of the judges by three quarters of senators. It also wanted the court to be part of the existing judicial system – all courts would hear constitutional issues, and the court would hear appeals on these. This might also entail appointing

appellate judges to the court – Coetsee's proposal, which was also supported by much of the legal profession.[124]

Coetsee responded – revealingly, given this analysis – that the appointment of four existing judges was a victory for stability and continuity.[125] The ANC, equally significantly, accused the DP of wanting to 'make the court a creature of the law barons'.[126] It implied that a cosy white club was insisting on power over the constitution.

Nevertheless, the DP had won favourable media coverage which placed the ANC and NP on the defensive. It proceeded to win the day – but in a manner which compromised its profile as the party of principle. The issue was settled by means of horse-trading, in which DP leader Zach de Beer, who chose this delicate moment to enter negotiations, agreed to sacrifice the DP's insistence on two ballots in the April election in exchange for the appointment of constitutional judges by the JSC. In effect, one issue of principle was sacrificed for another. De Beer's critics later asked whether the compromise was necessary, since the ANC had already resigned itself to two ballots, and the DP's concession would heighten ANC-IFP conflict for months to come.

The compromise did not change the procedure for appointing the court's president, or the chief justice. The court remained separate from the rest of the judiciary, and Coetsee's insistence on four existing judges remained. But it did oblige the president to choose the constitutional judges from a list drafted by the JSC. It therefore entailed a retreat by the ANC, but only a partial one. And a casualty was the proposal that parliament – by a big enough majority to ensure that the majority party alone could not decide – appoint the court: this was perhaps the only suggestion which had sought to balance concerns that the court would be subservient with those that the old judicial order would decide the composition of the new.

Treating with tradition

The divide between the major parties so overshadowed negotiations that it obscured a key issue: that of traditional leadership which, some analysts believe, is crucial to the stability of African democracies. While it is not directly linked to our main theme, it does raise similar questions, since it touches on the tension between the search for stability and that for democratic principle.

A related issue involved indigenous or customary law, which the technical committee urged should be accommodated, arguing that it would assist the African family system to remain the custodian of moral

and traditional values and that cultural diversity should be recognised in the constitution.[127] But hereditary leadership was potentially in conflict with democratic principle – and customary law discriminated against women, creating a clash with the emerging bill of rights.

All parties agreed that traditional leaders should be accommodated. They were less clear on how this was to be achieved: the technical committee recognised their status in a constitutional principle, but in very vague terms, referring only to their being 'acknowledged and recognised in an appropriate manner in the constitution'. And it argued for a place for customary law but added, equally vaguely, that 'a symbiotic approach between indigenous law and fundamental rights may be developed'.

Traditional leaders, who had gained a seat at the table after the IFP had sought a place for the Zulu king, demanded more, insisting on direct representation 'in the constitution-making body and at all levels of government'.[128] While they had potential allies in the NP and IFP, both saw the need to accommodate traditional leadership as a rationale for granting regions the right to write their own constitutions, not an issue in its own right.[129] The ANC faced a dilemma: it realised the danger of ignoring traditional leaders, but key elements in its constituency saw a decision-making role for traditional rulers as a threat to democracy, and customary law as a denial of women's rights. Its constitutional planners agonised at length over a solution.[130]

The technical committee's first draft in July 1993 granted no role to traditional leaders. When Eastern Cape Chief Nonkonyana protested,[131] he was supported by Cyril Ramaphosa,[132] who later proposed that a subcouncil on local and regional government be responsible for paying traditional leaders.[133] This clearly did not satisfy Nonkonyana, who complained a month later that the technical committee only provided for traditional leaders at local level.[134] The technical committee responded in part in its constitutional draft of 20 August by listing traditional authorities and indigenous law as one of the exclusive legislative competences of regional government.

While the negotiators applied their minds to other matters, Nonkonyana, who emerged as the chief advocate of traditional concerns, was becoming more vociferous, accusing the negotiators of urban bias[135] and extolling the virtues of traditional law. Cape, Free State and Transvaal traditional leaders followed this with a document arguing the democratic credentials of traditional leadership[136] and urging councils of traditional leaders at local, regional and central level, where a house of traditional leaders should be established. They maintained that 'the overwhelming

majority of people owe allegiance to traditional leaders': ignoring them would ensure continuing resistance to a new government.[137] In November Nonkonyana raised the stakes, urging that traditional leaders be granted 30 per cent of senate seats and that regional houses of traditional leaders enjoy delaying powers over legislation for 30 days. (The PAC also felt that traditional leaders should be accommodated in the senate).

It was, however, not these demands which generated most heat but the status of customary law, which was now under sustained assault in the technical committee on human rights by the women's lobby. This committee initially proposed a 'sunset clause' allowing customary law free rein for a time. Some chiefs accepted this, but a group led by Nonkonyana rejected it in such uncompromising terms that an enraged women's lobby persuaded negotiators to drop the compromise and insist that the constitution's equality clause override customary law.

In November, to placate traditional leaders for this defeat, they were offered a role at all levels of government, including guaranteed seats in local government, but not parliament.[138] Traditional leaders' forums which will advise law-makers, nationally and in the provinces, are provided. But much of the issue remains unresolved by negotiators, who saw this question as a secondary concern. It may well re-emerge.

Conclusion: a constructive compromise?

The interim constitution is a victory for constitutionalism, but of a peculiarly South African nature. While many of its features subject government to clear rules, it chief aim was to fashion a compromise: 'pure' constitutionalism, such as the DP's enthusiasm for the separation of powers, was sometimes a victim of the country's racial history. The result is an inner tension: 'Whatever compromise is reached between the requirements of constitutionalism and the demands of democratism will remain tenuous and a constant source of tension and controversy,' argues analyst Carl Friedrich.

But this is not necessarily destructive. There are no perfect constitutions; they are intended to cope with circumstances. The real test of this one will be whether it succeeds in its main aim – to build a stable democracy out of compromise between contending power blocs. And this will depend partly on whether political leaders can adapt their conduct to the new set of rules. Old habits will have to be broken, and new political conventions developed.

The parties will also confront two tasks simultaneously. The first is to conduct day-to-day politics, with its temptation to score short-term victories; the second is to build long-term consensus. Visionary leadership will be crucial.

Notes

1. See Friedman S, *Shapers of Things to Come: National Party Choices in the South African Transition*, Centre for Policy Studies, Johannesburg, 1992.
2. Interview, senior ANC negotiator, 24/3/94.
3. Interview, senior ANC negotiator, 5/4/94.
4. Interview, senior ANC negotiator, 5/4/94.
5. *Weekly Mail*, 4-10/9/92.
6. *The Cape Times*, 19/8/92. The PAC's commitment to end the armed struggle took at least another year to consolidate.
7. *Sowetan*, 3/7/92.
8. *Business Day*, 10/7/92.
9. *Sowetan*, 28/9/92.
10. Interview, NP cabinet minister, 14/3/93.
11. Interview, NP cabinet minister, 14/3/93.
12. *Business Day*, 4/9/92.
13. *Eastern Province Herald*, 22/4/92.
14. ANC submission to the technical committee on constitutional issues, 12/5/93, p 5.
15. *The Star*, 25/7/92.
16. *Sunday Times*, 14/2/93; *Eastern Province Herald*, 16/2/93.
17. *The Citizen*, 15/2/93.
18. *The Star*, 14/2/93. The circumstances under which the agreement was announced reinforced the impression of back-room dealing. The agreement had been made public earlier than the negotiators had intended. Ramaphosa had to reassure his constituency that his team had managed to extract a significant concession from government; he therefore let slip that the ANC and SAG had decided that the constituent assembly would decide the powers, functions and boundaries of the regions. In response, Constitutional Development deputy minister Fanus Schoeman announced publicly that the SAG had won significant concessions in turn (five years of power-sharing), to placate his own outraged constituency. For the next few days, Mandela and De Klerk had to perform furious semantic contortions to pacify their respective constituencies as well as the irate Mangosuthu Buthelezi (Sunday Times, 21/2/93).
19. *Daily Dispatch*, 17/2/93.
20. *The Citizen*, 20/2/93.
21. Interview, senior ANC negotiator, 24/3/94.
22. Interview, senior ANC negotiator, 24/3/94.
23. Interview, technical committee member, 10/3/94.
24. Other members were BM Ngoepe, a largely independent thinker but with PAC leanings; Willem Olivier, who was thought to lean to the IFP; Michelle Olivier of the Department of Foreign Affairs; George Devenish of the University of Natal; and Marinus Wiechers of Unisa.

25. Interview, technical committee member, 10/3/94.
26. Interview, technical committee member, 13/1/94.
27. Interview, technical committee member, 9/4/94.
28. Interview, technical committee member, 7/3/94.
29. Interview, SAG official, 25/3/94.
30. Interview, technical committee member, 13/1/94.
31. Interview, 23/3/94.
32. Interview, technical committee member, 13/1/94.
33. Technical committee, first report to negotiating council, 13/5/93.
34. Minutes, negotiating council meeting, 3/6/93.
35. SAG submission to technical committee, 27/5/93.
36. Technical committee, second report, 19/5/93.
37. First constitutional draft presented to negotiating council, 26/7/93.
38. *Sowetan*, 29/7/93.
39. Transcript, negotiating council meeting, 26/7/93.
40. Transcript, negotiating council meeting, 29/7/93.
41. Transcript, negotiating council meeting, 10/8/93.
42. Section 71, Act 200 of 1993.
43. Minutes, negotiating council meeting, 3/6/93.
44. Minutes, technical committee meeting, 13/5/93.
45. Draft Transition to Democracy Act, submitted by negotiating council to technical committee, 12/5/93.
46. Transcript, negotiating council meeting, 28/7/93.
47. *Business Day*, 27/7/93.
48. Transcript, negotiating council meeting, 15/9/94.
49. Essop Pahad, SACP, negotiating council debate, 10/8/93.
50. Technical committee, report to negotiating council, 26/7/93.
51. Vile MJC, *Constitutionalism and the Separation of Powers*, Clarendon Press, Oxford, 1967, p 13.
52. Interview, senior ANC negotiator, 24/3/94.
53. Vile MJC, *Constitutionalism and the Separation of Powers* (1967), p 33.
54. DP submission to technical committee, 13/5/93.
55. *Beeld*, 8/2/93.
56. *Business Day*, 27/5/93.
57. Technical committee, 11th report, 20/8/93.
58. *Daily Dispatch*, 19/2/93.
59. Technical committee, 11th report, 20/8/93.
60. Transcript, negotiating council meeting, 14/9/93.
61. Transcript, negotiating council meeting, 14/9/93.
62. Section 88, Act no 200 of 1993.
63. Section 92, Act no 200 of 1993.
64. Section 81, Act 200 of 1993.
65. Section 92, Act 200 of 1993.
66. *The Star*, 21/2/93.
67. *The Star*, 28/5/93.
68. Technical committee, 11th report, 20/8/93.
69. Technical committee, 19th report, 1/11/93.
70. Transcript, negotiating council meeting, 2/11/93.

71. *The Citizen*, 17/11/93.
72. *The Citizen*, 11/11/93.
73. *Beeld*, 18/11/93.
74. *Business Day*, 18/11/93.
75. *The Citizen*, 19/11/93.
76. *The Citizen*, 19/11/93.
77. *The Star*, 26/11/93.
78. Section 82, Act 200 of 1993.
79. *The Citizen*, 26/10/93.
80. Technical committee, 19th report, 1/11/93; Section 84 of the final draft.
81. *The Star*, 29/10/93.
82. *Eastern Province Herald*, 25/8/93.
83. *The Star*, 31/10/93.
84. An insight derived from the work of Ivor Sarakinsky.
85. WH Riker, 'The justification of bicameralism', in *International Political Science Review* (1992), vol 13, no 1, 101-116.
86. *Business Day*, 6/7/92.
87. DP submission to technical committee, 13/5/93.
88. *Business Day*, 27/7/92.
89. *Financial Mail*, 17/7/93.
90. *The Star*, 6/2/93.
91. Submission to technical committee, 12/5/93.
92. Technical committee, fifth report, 15/6/93.
93. Technical committee, eighth report, 21/6/93.
94. Interview, senior ANC negotiator, 24/3/93.
95. Technical committee, eighth report, 21/6/93.
96. Transcript, negotiating council meeting, 29/7/93.
97. Transcript, negotiating council meeting, 26/7/93.
98. DP submission to technical committee, 13/5/93.
99. Transcript, negotiating council meeting, 20/8/93.
100. Technical committee, fifth report, 15/6/93.
101. Technical committee, fifth report, 15/6/93.
102. Technical committee, 11th report, 29/8/93.
103. Transcript, negotiating council meeting, 14/9/93.
104. Transcript, negotiating council meeting, 14/9/93.
105. Transcript, negotiating council meeting, 14/9/93.
106. Transcript, negotiating council meeting, 14/9/93.Ibid.
107. *Weekly Mail*, 4-10/9 1992.
108. *The Star*, 21/2/93.
109. *The Citizen*, 29/3/93.
110. Transcript, negotiating council meeting, 14/9/93.
111. Transcript, negotiating council meeting, 1/11/93.
112. Section 87 of the final draft of the constitution.
113. Technical committee, fifth report, 15/6/93.
114. Technical committee report, 26/7/93.
115. Transcript, negotiating council meeting, 14/9/93. In an earlier submission to the technical committee on human rights, Justice minister Kobie Coetsee argued

strongly for the constitutional court to be part of the Appellate Division (8/6/93).

116. Submission to the technical committee on fundamental human rights, 8/6/93.
117. Transcript, negotiating council meeting, 14/9/93.
118. Transcript, negotiating council meeting, 14/9/93.
119. Interview, senior ANC negotiator, 24/3/93.
120. 'Draft submission reflecting discussions between the SAG and the negotiating council on the proposed chapter on the judicial power and the administration of justice, as contemplated in the 12th report of the technical committee on constitutional issues', 15/9/94.
121. Technical committee, 25th report, 15/11/93.
122. Interview, negotiating council member, 14/2/94.
123. DP statement, 12/11/93.
124. *Sunday Times*, 14/11/94.
125. *Sunday Star*, 14/11/93.
126. *Business Day*, 16/11/93.
127. Technical committee, first supplementary report on constitutional principles, 15/6/93.
128. Minutes, negotiating council meeting, 3/6/93.
129. See speech by Dr Tertius Delport, budget vote on Constitutional Development, 21/5/92. KwaZulu government submission to technical committee on constitutional issues, 28/5/93.
130. Interview, negotiating council constitutional planner, 28/3/94.
131. Transcript, negotiating council meeting, 26/7/93.
132. *Sowetan*, 29/7/93.
133. *The Star*, 17/8/93.
134. Transcript, negotiating council meeting, 10/8/93.
135. Submission to technical committee on fundamental human rights, 23/7/93.
136. Submission by Chief Nonkonyana, MB Mota (Orange Free State) and LM Mokoena (Transvaal) to technical committee on fundamental human rights, 27/7/93.
137. Submission by Chief Nonkonyana *et al*, 27/7/93.
138. *Business Day*, 12/11/93.