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A CONSTITUTIONAL BEGINNING: MAKING SOUTH AFRICA'S FINAL CONSTITUTION

Christina Murray*

South Africa's history is familiar to many people. Although race distinctions and racially-based legislation had been part of government in the region since the beginning of colonial rule, in 1948, the Afrikaner-based National Party came to power on an overtly racist ticket with plans to deepen the racial divide in the country—apartheid. or separateness, became the unashamed ideal. By 1980, the franchise had been removed from the small number of black people to whom the 1910 Union Constitution gave it, and millions of black people in both rural and urban areas had been removed to ensure the racial purity of white areas. In addition, the movement of Africans was severely restricted by an elaborate pass system, and millions of black people were restricted to poverty-stricken homelands. Black people, who comprised about eighty percent of the population, possessed just twenty percent of the land. Four purported independent states where blacks could exercise purported full political rights had been carved out of the greater South Africa. The education system had been corrupted to ensure first-class education for white people and meager (and "more appropriate") education for blacks. Discrimination in jobs was legally required in some industries, and a given in all others. Social welfare benefits and health services were scaled according to need-with the understanding that black people needed less. Political opposition was viciously quashed through draconian legislation that paid no attention to the rule of law and through extra-legal action by security forces.

The 1980s saw some changes in government policy and has been characterized as a period of both reform and repression. Black trade unions had just been legalized in the late 1970s giving black workers an important political platform. Both pass laws and restrictions on the purchase of land were lifted. New attempts were made to bring mixed-race, or "coloured" and Indian people (but not Africans)¹ into the

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^{1.} In South Africa, apartheid divided the population into four main groups: whites, who are people of European descent; coloureds, who are people of mixed race; Indians, who are descendants of people who came to South Africa from the Indian

political process. At the same time, however, security forces acted with increased brutality to suppress any opposition to the apartheid government, and two long and vicious states of emergency were imposed on large areas of the country.

In its 1998 Report, the South African Truth and Reconciliation Commission² found the apartheid government to have been responsible for gross violations of human rights. The Report documents the cases of thousands of victims of murder and torture by state security forces; it describes a strategy, supported by the South African Cabinet, to deal with opposition to apartheid by eliminating or "taking out," to use the state's euphemisms, those in opposition. Security force action ranged from relatively minor harassment, such as dumping manure on a person's front lawn, to elaborately planned murders. The recently revealed actions of cardiologist Dr. Wouter Basson were particularly grotesque. Basson, whom the South African press dubbed "Dr Death," headed a program, which, among other things, worked on a method of making all black people sterile. He was also responsible for supplying nerve gas and other poisons which killed hundreds of people.

Against this background, the gathering on May 7, 1996 of about fifty politicians to negotiate the final provisions of a democratic constitution for South Africa was a miracle. Late that night, Cyril Ramaphosa, the Chairperson of the Constitutional Assembly, pleaded with the group in his characteristically ironic fashion: "I know it's late but just twenty minutes more, just twenty minutes—for our constitution which is for the next twenty years, no, fifty years, 100 years, 200 years" He may just as well have said, "Another twenty minutes for we have come so far already."

The preceding six years had seen a painful and rocky, sometimes violent, process of negotiated transition for South Africa from a racist oligarchy to a fledgling democracy. Prisoners had been released;

subcontinent; and Africans, who are indigenous South Africans belonging to a number of ethnic groups.

^{2.} An agreement in the negotiating process established the Truth and Reconciliation Commission ("TRC"). Its purpose is to enable South Africans to come to terms with their violent and lawless past on a morally acceptable basis and to advance the cause of reconciliation. It carries out its mission through three committees: the Amnesty Committee, the Reparation and Rehabilitation Committee, and the Human Rights Violations Committee. The TRC is based on the Promotion of National Unity and Reconciliation Act. See Promotion of National Unity and Reconciliation Act, No. 34 (1995), available at http://www.truth.org.za/legal/act9534.htm. The TRC Report, its decisions, and a full description of its work can be found at its website. See TRC, Welcome to the Official Truth and Reconciliation Commission Website (last modified Mar. 8, 2001) http://www.truth.org.za.

apartheid government security forces and members of the armed wings of the two liberation movements were given amnesty; democratic elections were held; armed forces were merged; and racism was outlawed.3 A coalition known as the "Government of National Unity" replaced the National Party government, which had ruled the country for forty-six years. The African National Congress ("ANC") dominated the new government after the ANC had won 63.7 percent of the vote in the 1994 elections and, accordingly, held twenty of the thirty cabinet positions. In the preceding fourteen months leaders from both sides negotiated an entire constitution; designed executive, legislative, and iudicial branches; agreed upon a Bill of Rights; and settled provincial and local government powers. Additionally, they dealt with all the seemingly minor issues so critical to a negotiated change. They made a tiny and carefully limited space for self-determination for Afrikaners. They established a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities to reassure Afrikaners of their place in South Africa's future, and they put in place a Gender Commission to advance women's interests. They secured the rights of traditional leaders, chiefs and headmen, and they drafted detailed provisions relating to the financial management of the state to reassure the business community, both at home and abroad, of the intention of the new South Africa to run a clean government.

Ramaphosa's plea for twenty minutes was, of course, successful. Past secretary-general of the powerful National Union of Mineworkers,

^{3.} The violence in the country at the time should not be underemphasized. Politically motivated killings were commonplace, and the ANC leadership in particular was under a great deal of criticism from followers for speaking to what many considered the enemy while bloodshed continued. The government security forces were suspected of deliberately instigating violence and behaving in a partisan way in the conflict between Inkatha and the ANC. See THE LONG JOURNEY: SOUTH AFRICA'S QUEST FOR A NEGOTIATED SETTLEMENT 139 (Steven Friedman ed., 1993) [hereinafter LONG JOURNEY]. A number of particularly serious incidents almost brought the peace process to an end. In June 1992, shack dwellers in Boipatong were massacred by raiders assumed to be Inkatha members supported by the police. In September 1992, Ciskei Defense Force soldiers opened fire on ANC supporters marching on the capital of Ciskei, Bisho, and 28 people were killed. See PATTI WALDMEIR, ANATOMY OF A MIRACLE: THE END OF APARTHEID AND THE BIRTH OF THE NEW SOUTH AFRICA 207-08 (1997). The Afrikaner right wing threatened war if majority rule was implemented. Amazingly, negotiations were back on course in early 1993, but they were nearly brought to an end once again when a right wing gunman assassinated Chris Hani, a popular and charismatic leader of the South African Communist Party and the Umkhonto we Sizwe. See NIGEL WORDEN, THE MAKING OF MODERN SOUTH AFRICA: CONQUEST, SEGREGATION AND APARTHEID 134-41 (1994); see also Mary de Haas, Political Violence, in 5 South African Human Rights Yearbook 222 (1995).

a veteran of South Africa's negotiation process, and the African National Congress's chief negotiator, Ramaphosa had steered the Constitutional Assembly through some difficult times and had earned the respect of everyone in the process.⁴ Foreign visitors were often surprised to see a politician chairing the process, expecting instead a judge or someone else who was clearly non-partisan. But Ramaphosa's chairmanship more than vindicated the decision to put a politician in the chair. His insistence that the Constitutional Assembly was no place for rhetorical speeches and political grandstanding, his patent evenhandedness, and his sheer political skill ensured results.

By May 7, 1996, a plea for "just twenty minutes longer" had become Ramaphosa's mantra, and he got a laugh as always. But May 7 was different, for it was a day before the deadline established in the interim constitution for drafting what was dubbed the "final constitution." The draft had to be finished, printed, and put before the entire Constitutional Assembly of 490 politicians the next morning. The last of the most difficult matters-education, property, and labour rights—had been settled over the previous couple of days. But twenty minutes became three or four hours as last-minute concerns were raised and details of drafting revisited. Just as the last "i's" were dotted and the last "t's" crossed, the governing party of apartheid, De Klerk's National Party, remembered that it had forgotten to protect the parliamentary pensions in the new constitution. ANC politicians groaned at the sight of the old white government trying to cling to the vestiges of privilege and power once again. But another twenty-minute recess was announced, another set of caucus meetings held, and another bilateral negotiation between the ANC and the National Party took place before the proposal failed. Patience was essential, for the new constitution needed the support of two-thirds of the Constitutional Assembly to pass. Nine months later, early in 1997, South Africans put into operation a new constitution that they now boast is the most progressive in the world.

^{4.} By the time he was appointed Chair of the Constitutional Assembly in 1994, Ramaphosa, then just 41, was an experienced negotiator. In the 1980s, initially as legal adviser to the Council of Unions of South Africa, he played a critical role in establishing and then running the National Union of Mineworkers. He was centrally involved in the negotiations that led to the 1994 elections as head of the ANC's negotiating team. See ANC, Cyril Ramaphosa (visited Mar. 30, 2001) http://www.anc.org.za/people/ramaphosa_c.html>.

I. AN UNCONSTITUTIONAL CONSTITUTION

Of course, the constitution-drafting process was only part of the story. Negotiations between the apartheid government and the banned ANC started in the mid-1980s.⁵ A new constitutional order was only one of the requirements for transforming the country from a racial oligarchy to a democracy. First, the main negotiators had to develop trust; violence both by the South African security forces and liberation movements had to end; prisoners had to be released; and exiled South Africans, particularly political leaders, given an opportunity to return to the country. By June 1, 1993, after many meetings, breakdowns in negotiations, apparently insurmountable disagreements, and significant compromises on all sides, the negotiators reached a landmark decision. They agreed on an election date, opening the way for the first serious constitutional negotiations.

A fundamental question in the 1993 negotiations was how to accommodate conflicting views on constitution-making. The governing National Party wanted to settle everything before elections were held and power slipped from its grasp. On the other hand, the ANC insisted that constitution-drafting was the prerogative of a democratically elected body—in which it was justly confident of a substantial majority—and not the arbitrary group that sat around the negotiating table in 1993.

The outcome of this debate was typical of the entire process—a compromise. The parties to the 1993 "Multi-Party Negotiating Process" would negotiate an interim constitution, which would become binding immediately after the elections. The interim constitution would set up a process for drafting a so-called final constitution, which would start immediately after the elections. The newly elected politicians were to draft the final constitution, but, critically, it was to conform to a set of principles, which were to be settled in the 1993 Multi-Party Negotiating Process.⁶ Finally, a newly established

^{5.} See LONG JOURNEY, supra note 3, at 95; SOUTH AFRICAN REVIEW 7: THE SMALL MIRACLE (Steven Friedman & Doreen Atkinson eds., 1994); WALDMEIR, supra note 3; Hugh Corder, Towards a South African Constitution, 57 MOD. L. REV. 491 (1994).

^{6.} The Namibian independence process with which many South Africans were familiar had also used constitutional principles to guide and constrain its constitution-making process. United Nations Security Council Resolution 435, adopted by the Security Council at its 2087th meeting in September 1978, required a Constitutional Assembly to be elected, which was to draft a constitution in accordance with eight principles listed in the resolution. See S.C. Res. 435, U.N. SCOR, 33rd Sess., 2087th mtg. (1978). The constitution was to be adopted by a two-thirds majority of the

Constitutional Court would have the job of certifying that the final constitution adopted after the elections complied with the agreed-upon principles.⁷ Only after the new constitution was certified could it be put in force.

The interim constitution contained further details.⁸ All members of the bicameral Parliament elected in the 1994 elections were to act as a Constitutional Assembly for the purpose of drafting the final constitution. The constitution required a two-thirds majority for passage; and, if agreement could not be reached within the stipulated period of two years, a series of deadlock-breaking mechanisms would execute, including, as a last resort, new elections. If a constitution was adopted but the Constitutional Court found that it did not comply with the Constitutional Principles, the Assembly would have a chance to amend it and resubmit it to the court.

For constitutional lawyers, the role of the Constitutional Court introduced an "Alice in Wonderland" element to the process. It meant that it was possible for the Constitutional Assembly to adopt an unconstitutional constitution. But, as I shall describe later, it was a godsend for the negotiating process, not only because it provided the basis for successful negotiations in 1993, but also because it introduced some unexpected room to manuver in subsequent negotiation of the final constitution.

The agreement to bifurcate the constitution-making process allowed negotiations to move ahead. The list of thirty-four Constitutional Principles⁹ with which the final constitution had to comply included many familiar provisions: constitutional supremacy; judicial review; an independent judiciary; the protection of the right to equality; separation of powers with checks and balances; protection of human rights; and a division of powers between national and provincial government. Some of the principles reflected very South African concerns. For instance, Principle XXXI demanded that security forces

Namibian Assembly. See LIONEL CLIFFE ET AL., THE TRANSITION TO INDEPENDENCE IN NAMIBIA 49 (1994).

^{7.} The Constitutional Court is based on the Continental model. It has constitutional jurisdiction only. One of the main reasons for having a separate constitutional court and not simply giving the most senior existing court jurisdiction in constitutional matters was that it was important that newly appointed judges should deal with constitutional matters, and not judges appointed under the apartheid regime. In fact, of the 11 judges first appointed to the court, six had served on the Supreme Court Bench under apartheid.

^{8.} See S. AFR. INTERIM CONST. (Act 200, 1993).

^{9.} The Constitutional Principles were included in the interim constitution as Schedule 4. See id. at sched. 4 (Constitutional Principles).

act in the national interest and not in the interest of any particular party. This principle was a direct response to the brutal experiences of many South Africans at the hands of the police and army under apartheid. Apartheid had distorted the role of traditional leaders; chiefs who would not cooperate were deposed and replaced with more compliant Accordingly, a principle protecting the traditional roles of chiefs and headmen promised a better future. 10 The principle that demanded that the future constitution protect the right to equality responded to foreign-and particularly American-experience in implementing equality, specifically stating that affirmative action should not be interpreted to infringe the guarantee of equality. 11 But the principles also carry the mark of the negotiated settlement, and include provisions that sound out of place in a constitutional document. For instance, Principle XXXI reflects the jitteriness of those about to lose power to a future black government. It states, "every member of the civil service is entitled to a free pension."12 The principles describing the division of power between the national government and provinces contain complex, and sometimes apparently contradictory, detail.¹³ This state of affairs resulted partly because the National Party believed that, although it could not hold on to national power, a provincial system would allow it to retain a power base. Constitutional Principles were to ensure that provincial power would be real power. Similarly, in an attempt to ensure that the KwaZulu-Natal-based Inkatha Freedom Party ("IFP") would participate in both the 1994 elections and the constitution-writing process, the principles were amended in early 1994 to ensure that the new constitution would not prohibit provinces from recognizing the "role, status and authority" of a traditional monarch.14

The last-minute attempts to persuade the IFP to participate in the process were not successful. Although it did contest the elections—and won a majority of seats in the KwaZulu-Natal provincial legislature and three places in the national Cabinet of the Government of National

^{10.} See id. at sched. 4, Principle XIII.

^{11.} See id. at Principle V.

^{12.} Id. at Principle XXXI.

^{13.} Ambiguity in an agreement is, of course, not uncommon. It reoccurs in the final constitution in a number of places where agreement was hard to reach. For an interesting discussion of the uses of ambiguity in agreements and the response of mediators, see Christopher Honeyman, in *Defense of Ambiguity*, NEGOTIATION J., Jan. 1987, at 81.

^{14.} S. AFR. INTERIM CONST. (Act 200, 1993), sched. 4 (Constitutional Principles), Principle XIII(2), amended by Act 3 of 1994, § 2.

Unity—it withdrew from the constitutional negotiations in a dispute about the use of international mediators. Thus, the Constitutional Assembly's dream that the new constitution should incorporate the aspirations of all South Africans was undermined at the outset.

II. THE CONSTITUTIONAL ASSEMBLY GETS DOWN TO WORK

The 1994 elections gave the ANC a huge majority in Parliament, but not the two-thirds that was necessary to pass the constitution. From the outset it was apparent that the ANC sought the balance of the necessary support from its long-standing opposite in the negotiating process, the National Party. But it was also clear that the final constitution could not be the negotiated deal that the interim constitution was. It needed to be drafted in a more open process that involved rather than excluded the public. Accordingly, the Constitutional Assembly set up two parallel processes: an enormous public participation programme and a programme of political discussions. In addition, as the constitution started taking shape, the Assembly administration put together a technical team to work on the technical issues in the text of the constitution.

A. You've Made Your Mark Now Have Your Say: The Constitutional Assembly's Public Participation Program

The Constitutional Assembly's slogan "You've made your mark now have your say" invited the many millions of South Africans who had voted for the first time in 1994 to contribute to the country's first democratic constitution—and over two million did so.

The public participation scheme was intended to provide both basic education on democracy and constitutionalism and to elicit the public's opinion on what the constitution should say. To do this it used the press, radio and television, the Web, and its own publicity campaign.

Radio is one of the most important means of communication in South Africa because it reaches people in both rural and urban areas—it is estimated that eighty-two percent of the population over eighteen listens to the radio some of the time. Each week, over ten million people heard the jaunty voice of Constitutional Talk's announcer welcoming them to the constitutional talk-line in one of five

of the country's eleven official languages.¹⁵ In addition, the Constitutional Assembly's eight-page newsletter was distributed to 160,000 people each fortnight and, in mid-1996, twenty percent of a sample group said that they had seen it. In just under four months—January 1 to April 17, 1996—6,655 people, or 107 people a day, consulted the Constitutional Assembly's home page on the Web,¹⁶ and a series of thirty-seven television programs reached thirty-four percent of television viewers.

In April 1996, an independent nationwide survey of 3,800 South Africans suggested that the Constitutional Assembly media campaign had succeeded in reaching seventy-three percent of all adult South Africans, or 18.5 million people.¹⁷ Equally important, the statistics showed that people had not merely heard about the constitution and the constitution-making process, but that they were interested in it. Eighty-four percent of survey respondents said they would be interested in reading the completed constitution.¹⁸

The fact that the Constitutional Assembly received over two million submissions from the public reflected this interest. Certainly, the bulk of these were in the form of petitions (mainly dealing with abortion, the death penalty, pornography, and animal rights). Nevertheless, over 11,000 substantive submissions were received, varying from general pleas that the constitution contribute to an improvement in the quality of life by, for instance, guaranteeing running water, housing, education, and health care, to more specific submissions sometimes dealing with very technical matters such as the status of the central bank, the precise role of the Public Protector (or Ombudsman),

^{15.} See HASSEN EBRAHIM, THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA 246 (1998); South Africa: Making the Constitution, ECONOMIST, Jan. 13, 1996, at 42

^{16.} See EBRAHIM, supra note 15, at 246 n.16. The website is Constitutional Assembly (n.d.), <www.constitution.org.za>.

^{17.} See Constitutional Talk, April 22-May 8, 1996, No. 3 (reporting on the results of an independent survey by the Community Agency for Social Enquiry (CASE)).

^{18.} See EBRAHIM, supra note 15, at 358 n.19.

the appropriate size of Parliament, and the structure of local government.¹⁹

Statistics almost never convey the full picture. In this case they obscure two things. First, they fail to convey the vitality and energy of the public participation program. Foreign visitors most often commented on the large and bright Constitutional Assembly advertisements on busses encouraging people to "have their say" or, later in the process, reminding them that the constitution was to be "one law for one nation." People in rural areas are more likely to remember lively public meetings at which basic education in constitutional matters accompanied reports from politicians on progress in the Constitutional Assembly and opportunities for participants to record their views.²⁰ Parliament itself was also often the venue for workshops and public hearings, and on a number of occasions tribal leaders, dressed in splendid traditional garb, converged on Cape Town to discuss their constitutional future.

The success of the program is also captured in the variety of submissions received by the Assembly. Some were technical and abstract, while others captured the aspirations of a young nation on the brink of change. Thus, in response to the call for submissions, Anita Mogoasa wrote:

WHAT MY PROBLEMS/ ISSUES/ CONCERNS ARE . . .

We need a higher primary school in our village.

We also need water.

We need electricity.

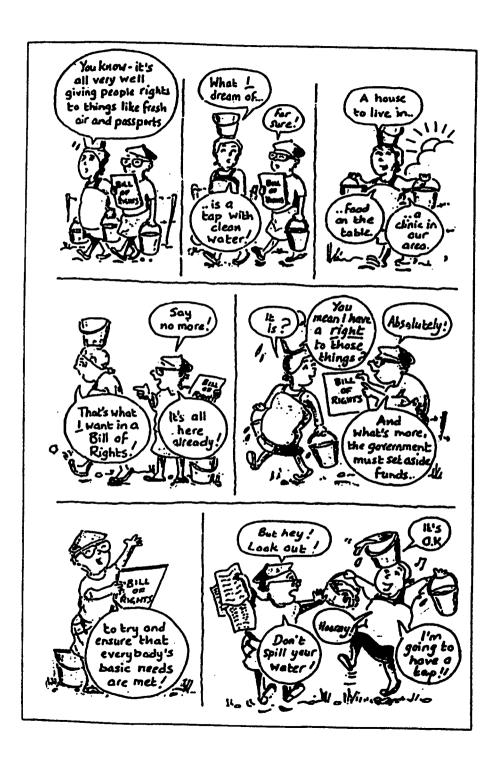
We also need fields where we can plant crops so that when we are hungry we can find food.

We also need bursaries for furthering our education so that we may be like the people of other areas who are enlightened.

We need teachers.

^{19.} See id. at 242-49. Ebrahim states that over 1.7 million submissions were made in the first part of the process. Although most of these were petitions, over 11,000 were substantive. The Constitutional Assembly called for submissions once again when over five million copies of the "Refined Working Draft" of the constitution were distributed in November 1995. On this occasion the Assembly received over 250,000 submissions. Again, many of these were in the form of petitions but many were not; because these submissions were made in response to a draft text, many were more specific than those that had been received in the first part of the process.

^{20.} See EBRAHIM, supra note 15, at 244 ("Between February and August 1995, twenty-six public meetings were organized . . . and more than 200 members of the Constitutional Assembly became involved in them. It was calculated that 20,549 people attended workshops, and 717 organizations participated.").





Those are our needs in our villages.21

And Sampson Moholoane wrote:

I want to stress one area which I believe as a citizen of South Africa one should have access to at all times.

That is a welfare programme that will leave no South African from being able to afford three square meals a day. It must be a citizen's right to be able to have shelter and food even when he is not working, even if he is a destitute. The new Constitution must make this compulsory ²²

Children wrote about child abuse and the need for shelter and food. Churches proposed the protection of church property and recognition of God as the highest authority in the land. South Africa's own gun lobby demanded the right to bear arms. Education was high on many people's lists. And traditional leaders spelled out what their relationship should be to their people and to municipal structures. The submissions reflected South Africa's diversity—and some of its idiosyncrasies. A well-known nudist demanded the right not to wear clothes, and one David Mavubukwana, writing Poste Restante the Hombe Store in rural Lusikisiki added to his demand of electricity, education, and a monthly pension that "[w]e must be allowed to sell our dagga [marijuana]."²³

Like the submissions, the Constitutional Assembly's own publicity conveyed some of the energy that infused the process. Thus, the newsletter, Constitutional Talk, carried a cartoon strip that introduced the most complex constitutional concepts to its readers and enlivened more well known ones. But the most popular image that the Constitutional Assembly produced was of our greatly loved President, Nelson Mandela, standing outside his Cape Town offices, one hand casually in his suit pocket, and speaking on a cell phone. The bubble above his head says, "Hello, is that the Constitutional Talk-line? I would like to make my submission."

If the first problem with the statistics is that they do not do justice to the public participation program, the second is that they conceal the fact that its goals were not always clear and leave the concrete results of the program obscure. In fact, some commentators were openly

^{21.} See Constitutional Assembly (n.d.), http://www.constitution.org.za.

^{22.} See id. This particular submission was dated May 16, 1995.

^{23.} Id.

skeptical, describing the entire program as an elaborate hoax, designed to hide the fact that even the final constitution was to be a negotiated document and not the democratically determined one that the ANC claimed it would be. In support of this argument, people pointed to the huge volume of submissions and asked if any politicians could be expected to review them all. Moreover, these critics might have added, if the politicians had reviewed the submissions, they would have found vague wish lists, more often concerned with poverty and the standard of living, than with matters appropriately dealt with in a constitution.²⁴

This criticism of the process is not entirely unwarranted. Even those who read through the submissions found repetition rather than inspiration, and, in many painful requests based on deep poverty, they found the legacy of apartheid rather than a design for the future. But the public participation program was not intended to provide a list of matters that should be included in the constitution. Advertising which suggested this, like the Constitutional Assembly poster asserting, "The constitution is being written by the most important person in the country: You!" might be criticized for being misleading. In any event, it is unlikely that many people thought that their ideas would find their way directly into the constitution. Instead, the program had broader, less instrumental goals. One goal frequently invoked was that the new constitution should be "owned" by all South Africans. Ramaphosa this meant that the constitution should be one which South Africans "know" and which they "feel belongs to them." To Baleka Mbete-Kgositsile, now Deputy Speaker of the National Assembly, public participation would ensure that the constitution would "be sensitive to and shaped by [the] realities" of the people of South Africa." Under this approach, the public participation program would facilitate "ownership" of the constitution by all South Africans by ensuring that it was not drafted by an isolated political elite, and by fostering an active interest in it in all communities. Secondly. like programs encouraging the participation of the public in ordinary legislative processes and in the drafting of regulations, the participation of the public in the constitution-making process gave the politicians another way of keeping in touch with the people that they represent and gave citizens an additional way of reaching those politicians. Nevertheless, it was always clear that the newly elected representatives in the

^{24.} Criticism was registered in a number of articles in the press. See also SIRI GLOPPEN, SOUTH AFRICA: THE BATTLE OVER THE CONSTITUTION 259 (1997).

Constitutional Assembly would mediate the views of the public in crafting the constitution.

B. The Political Process: Meetings, Hearings, Bilaterals and Multilaterals

When the new government took office after the 1994 elections, it faced huge challenges. For instance, it had to convert the old apartheid state into an open democracy. It had to reorganize government so that it could deliver services to all South Africans rather than the small number who had benefited in the past. And it had to transform the police service and integrate the apartheid defense force with the armies of two liberation movements, the ANC's Umkhonto we Sizwe and the PAC's Apla. Constitution-making was one of many tasks. But the interim constitution required the final constitution to be drafted in just two years. In fact, by the time the Constitutional Assembly got properly into gear, only fifteen or so months remained.

Soon a relatively small group of politicians was allocated to the six theme committees that did the initial work in the Constitutional Assembly. The theme committees established the parameters of the discussion in each of their areas through debate, public hearings, and workshops. Non-governmental organizations ("NGOs") and members of civil society with a specific interest in the issues participated in the public hearings, and the workshops included both local and foreign experts. For politicians who had not been involved in the constitutional negotiations that preceded the elections, this process provided an intensive course in constitutional issues. For organizations outside Parliament and the public, it offered the first opportunities to engage the constitution-makers. The theme committees met regularly in the first half of 1995, but progress was very slow. By July 1995, a smaller committee of forty or so politicians, backed up by various advisers appointed by the Assembly and by their own political advisers, and divided into subcommittees, had taken over. This group produced a first draft of the constitution in September 1995 and a Working Draft, which was widely circulated for comment, in November.

Some viewed the first composite draft, a compilation of the work of the initial six committees, with skepticism. Full of gaps and often offering a number of alternatives, it suggested that the Constitutional Assembly was unlikely to get its job done on time. But the process was gathering momentum. Slowly gaps were filled and alternatives eliminated. Certainly, some issues were decided and then revisited, but

the repeated production of "full" drafts provided everyone involved in the process with a sense of progress. As the final May 1996 deadline drew nearer, earlier deadlines were set for the resolution of specific matters. Long meetings stretching into the night became common, and the Constitutional Assembly's practice of providing a meal or snacks every two hours was a lifesaver.

Initially the process was open. The public had access to meetings, and the press and NGOs made some use of this opportunity. The Constitutional Assembly was justly proud of the transparency of the process. But as the Assembly faced the most controversial issues, such as language rights, the right to education and the language of education. property rights, and labour rights, politicians started engaging in closed bilateral or multilateral meetings with their political counterparts. Sometimes these meetings were very informal. "May I suggest," Ramaphosa said on occasion from the chair, "that we take an early tea break so that Mr. Ackermann [the National Party politician responsible for the disputed issue] and Mr. Ngcuka [his ANC counterpart] can discuss this matter." "Mr. Ackermann and Mr. Ngcuka," he might add, "I expect you to come back with a solution." And often they did.25 Occasionally one would encounter Ramaphosa himself settled comfortably with a whisky discussing ways of resolving seemingly intractable problems with his National Party counterpart, Roelf Meyer. But the bilaterals and multilaterals that characterized the later part of the process were often more formal and less relaxed. And whatever their form, they excluded the public.

Despite the Assembly's commitment to transparency, meetings away from the watchful eye of the press were probably essential if matters that had divided the country for a century were to be resolved. An ambitious multilateral meeting at the isolated beach resort of Arniston demonstrated this reality. Here, over three days, some of the most difficult issues of the process were resolved. The results of the Arniston multilaterals and ensuing negotiations were reported at a marathon meeting of the Constitutional Committee which met from 8:35 p.m. on April 18 to 5:47 a.m. on April 19. As always, the meeting was punctuated by adjournments for negotiation and discussion. But there were also moments of applause, such as when the agreement to include in the Constitution a Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Commu-

^{25.} See EBRAHIM, supra note 15, at 254 (commenting on tea breaks during the 1992 negotiations).

nities was announced. It was "an historic occasion and the beginning of a better future for all South Africans," Mr Beyers of the National Party said. The ANC's Vali Moosa said that it "captured in a progressive and democratic manner the aspirations of the people." And the Freedom Front's leader, General Constand Viljoen, emotionally welcomed the agreement as a "brave step" and a recognition that group rights and not only individual rights had a place in South Africa in the future. 26

C. Getting the Language Right

At the outset of the drafting process, the Constitutional Assembly made a decision that the constitution should be drafted in plain language. South Africans, perhaps like Americans, clothe most legal documents in heavy-handed and repetitious prose. For instance, we "revoke, cancel, and annul" wills, we "confirm, ratify, and adopt" agreements, we "pledge, cede, assign, transfer, deliver, and make over" our "right, title, and interest in and to payment" of debts, and we "constitute and appoint" people to be our "attorney, agent, and representative." The constitution was to repudiate this tradition because it was to be readable.

A Canadian plain-language expert assisted in the process and a small team of lawyers worked with him.²⁷ But this Technical Refinement Team confronted a burden far greater than the task of transforming the constitutional text into clear English. Plain language drafting encompasses more than grammar and word choice. We changed negatives to positives to give the text an active and enabling tone rather than a regulatory tone. We carefully ordered provisions to make them more coherent and to lead readers logically through processes that the constitution sets up. And we paid attention to using words consistently, accurately, and grammatically.

Some of the results were astounding. We changed negative wording to positive so that the constitution would be cast as an

^{26.} See Gehieme Gesprek Lei Tot Deurbraak [Secret Talks to Breakthrough], DIE BEELD, Apr. 20, 1996 (referring to the three weeks of negotiation which preceded this decision); Minutes of the 38th Meeting of the Constitutional Committee (Apr. 18-19, 1996).

^{27.} The core membership of the Technical Refinement Team was Gerrit Grove, Phil Knight, Christina Murray and Johan van der Westhuizen. The deputy chair of the Constitutional Assembly's administration, Louisa Zondo, chaired it. Hassen Ebrahim, the executive director of the Assembly, participated in many of its meetings, and a number of other people participated at various times.

enabling and empowering document rather than as one focused on restrictions and limitations. In the following example, this also reduced 33 words to 20:

Original Text:

Only South African citizens qualified to vote in elections of the National Assembly and who are not otherwise disqualified in terms of this section are eligible to be members of the National Assembly.

Refined text:

Every citizen who is qualified to vote for the National Assembly is eligible to be a member of Assembly except ²⁸

Some changes allowed greater clarity as in section 172(1)(b):

Original text:

[A] court may suspend a declaration of invalidity for a specific period to allow the competent authority to correct the defect and impose such conditions in that regard as it may decide

Refined text:

[A] court may make . . . an order suspending [a] declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

We also changed language to improve readability by removing words that added padding, but no new meaning. See, for example, sections 49 and 50.²⁹

^{28.} S. AFR. CONST. ch. 4, § 47(1).

^{29.} The refined text given here is not that in the final constitution. The approach to the dissolution of Parliament and votes of no confidence changed later in the process and the provisions, now sections 50 and 102, read as follows:

^{50. (1)} The President must dissolve the National Assembly if-

⁽a) the Assembly has adopted a resolution to dissolve, supported by a majority of its members; and

⁽b) three years have passed since the Assembly was elected.

⁽²⁾ The Acting President must dissolve the National Assembly if-

⁽a) there is a vacancy in the office of President; and

⁽b) the Assembly fails to elect a new President within 30 days of the vacancy occurring.

^{102. (1)} If the National Assembly, by a vote supported by the majority of its members, passes a motion of no-confidence in the Cabinet excluding

Original text:

The National Assembly as constituted in terms of a general election shall continue for a term of five years as from the date of such election, unless dissolved before the expiry of its term in terms of this Constitution.

The National Assembly may be dissolved before the end of the term for which it was elected if a vote of no confidence in the Cabinet is passed by the National Assembly.

Refined text:

The National Assembly is elected for a term of five years.

The National Assembly may be dissolved before the end of its term if it passes a vote of no confidence in the Cabinet.

We rearranged text to present events in a chronological order. See, for example, section 51(1):

Original text:

The National Assembly may determine the time and place of its sittings and its recess periods. The first sitting for the National Assembly after an election shall take place

Refined text:

After an election, the first sitting of the National Assembly must take place at a time and on a date . . . The Assembly may determine the time and duration of its other sittings and its recess periods.

Issues of gender equality were prominent through the entire drafting process. This concern is particularly evident in the Bill of Rights provisions, which protect gender equality and spell out that the right to security of the person includes a right to be free from private forms of violence and to make decisions concerning reproduction.³⁰

the President, the President must reconstitute the Cabinet.

⁽²⁾ If the National Assembly, by a vote supported by the majority of its members, passes a motion of no-confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign. S. AFR. CONST. ch. 4, §§ 50, 102.

^{30.} Section 9 of the South African Constitution is the equality provision. It states:

⁽¹⁾ Everyone is equal before the law and has the right to equal protection and benefit of the law.

⁽²⁾ Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures

But we also attempted to reflect this concern for the equality of women and men in the language of the constitution with two decisions. First, we changed language to make the text generally free of specific gender references. Thus, section 43 of the Interim Constitution read: "A member of the National Assembly shall vacate his or her seat if he or she" while the equivalent provision in the final Constitution states that, "[a] person loses membership of the National Assembly if that person" Gender neutrality did lead to one decision that many English speakers find difficult to accept. The constitution uses the word "their" in the singular—the epicene pronoun. Thus, section 10 states that "[e]veryone has inherent dignity and the right to have their dignity respected and protected."

But gender neutrality did not only irritate the purists who were uncomfortable with the singular use of the word "their." Removing all references to both men and women also brought with it the danger of excluding women in much the same way that the traditional legal assumption that the masculine includes the feminine does. This danger results from our stereotypical assumption that the actors in politics

designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

- S. AFR. CONST. ch. 4, § 9. Section 12 deals with freedom and security of the person:
 - (1) Everyone has the right to freedom and security of the person, which includes the right:
 - (a) not to be deprived of freedom arbitrarily or without just cause;
 - (b) not to be detained without trial;
 - (c) to be free from all forms of violence from both public and private sources:
 - (d) not to be tortured in any way; and
 - (e) not to be treated or punished in a cruel, inhuman or degrading way.
 - (2) Everyone has the right to bodily and psychological integrity, which includes the right:
 - (a) to make decisions concerning reproduction;
 - (b) to security in and control over their body; and
 - (c) not to be subjected to medical or scientific experiments without their informed consent.
- S. AFR. CONST. ch. 4, § 12.
 - 31. S. AFR. CONST. ch. 4, § 47(3).

⁽³⁾ The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.

⁽⁴⁾ No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

⁽⁵⁾ Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

must be men. To counteract this, the constitution expressly refers to men and women whenever it deals with appointments to office, thereby emphasising that either a woman or a man could hold the office. Section 46 provides an example:

Original text:

The National Assembly consists of . . . members.

Refined text:

The National Assembly consists of . . . women and men elected as members . . .

But it is in section 207, "Control of police services," that the point is really driven home. It states: "The President . . . must appoint a woman or man as the National Commissioner of the police service, to control and manage the police service." Most politicians viewed this as a futuristic flight of fancy.

Should it be "men and women" or "women and men," we wondered at one point, or should we alternate the phrases? Ramaphosa resolved that issue briskly from the chair. It was to be "women and men, throughout."

The plain-language drafting process was controversial, particularly among lawyers. In berating the decision to use "plain language" and alluding to the Canadian expert who assisted in the process, a prominent academic lawyer suggested that the text had been through a "Canadian Laundromat." And a member of the Technical Refinement Team, who was a long-standing member of the South African Department of Justice with substantial experience in drafting, worried that changes to traditional language would have unanticipated consequences. Thus meetings of the Team involved both complicated discussion about what the often fuzzy text generated in the political process actually meant and intense debate about what language is appropriate in a constitution.

One particularly heated discussion concerned the archaic term "office of profit." In accordance with the principle of separation of powers, South African constitutions have always excluded from membership of the legislature, people who hold an "office of profit" in the executive.³² The technical committee dealing with the membership

^{32.} See, e.g., S. AFR. CONST. (Act 110, 1983), § 54(e); S. AFR. CONST. (Act 200, 1993), § 42(e).

of Parliament had proposed using this traditional phrase. "But what exactly is 'an office of profit'?" we asked late one night as we were preparing the text for the committee. "It is absolutely essential that we retain those words," the state law adviser told us, "they come from our common law and have a well-established meaning, spelt out in many cases. If they are changed legal uncertainty will result." The committee deferred, but when the provision was discussed in committee, the politicians sprung on the words "office of profit." They asked, "Why is this obscure phrase here?" We did not have an answer that satisfied the committee. "It must be changed," we were directed.33 Later, as we attempted to clarify the provision, we read the cases and found them deeply confusing. The new provision excludes from membership of a legislature "anyone who is appointed by, or is in the service of, the state and receives remuneration for that service." It is perhaps longwinded, but the concepts of employment and service are familiar to modern readers and at least the new wording does not carry with it the convoluted jurisprudence of the past.

The language of the constitution is still both praised and derided. Some hold it up as a model; others claim that it has led to legal uncertainty and ambiguity. However, thus far there is no evidence that courts have had any greater difficulty with the language of the constitution than other legal texts, and significantly, the provisions that critics claim demonstrate the wrong-headedness of plain-language drafting are usually provisions that were not drafted in plain language at all, but were the result of last minute compromises, with wording sometimes hastily cobbled together, reflecting the ambiguity of those agreements.

III. DEADLOCK OR AGREEMENT AND THE CONSTITUTIONAL COURT

The interim constitution established a convoluted process for breaking deadlocks. First, the Panel of Constitutional Experts was to review the new constitution.³⁴ The Panel had a month to come up with "deadlock-breaking" ideas. But the Panel, of which I was a member, consisted of two practicing lawyers and five academic lawyers. From an early stage it was apparent to the panelists and, presumably, also to the politicians, that a group of lawyers was unlikely to broker a

^{33.} See Draft Minutes of the Thirty-Second Meeting of the Constitutional Committee, at ¶ 5.4.1 (ii) (November 9-10, 1995). See also http://www.constitution.org.za/cgi-bin/vdkw_cgi/xb4f1f88a-6.

^{34.} See S. AFR. INTERIM CONST. (Act 200, 1993), §§ 72, 73.

settlement when the veteran negotiators involved in the process were unable to do so.³⁵ Thus, when the deadline drew near and the resolution of a number of critical issues seemed elusive, it was another element of the deadlock-breaking process, a referendum, which politicians anticipated.

The interim constitution said that if a draft constitution did not command two-thirds of the vote but did gain the support of the majority of the members, it could nevertheless become the country's constitution if it was supported by sixty percent of the voters in a referendum.³⁶ But a referendum was not attractive to any of the parties.³⁷ First, it would publicly announce an inability to agree and, in doing so, cast doubt on claims that South Africa had found a constructive and inclusive way of resolving its political differences. This could only have a serious impact on the country, both undermining investor confidence and undermining the important, albeit complex, partnership of the old and the new that was smoothing the transition. Second, a referendum campaign would inevitably be adversarial, and, although tensions had run high in the Constitutional Assembly at times, overall the process was marked by restraint and a commitment to resolve issues rather than score points and impress an electorate. The process in the Assembly had often had a non-partisan flavor and the public participation program, organized by the administration of the Assembly rather than individual parties, accentuated that. Campaigning for a referendum would inevitably be deeply partisan. The partisan nature of such a campaign would also mark a failure to draft a constitution that all South Africans "owned." Rather than being a unifying document, it would divide. Third, recourse to a referendum would mean personal failure for many of the politicians involved. Those who had been involved in the negotiations from the beginning were deeply committed to a successful transition—and to demonstrating their ability to achieve it. Fourth, politicians had reason to fear the kind of issues that would form the focus of a referendum. Some of the matters that

^{35.} There was, however, a point in the process when a colleague of mine on the panel said that he thought we had created a deadlock. One of the more tricky provisions to draft was that relating to amnesty for past actions by both the apartheid government and liberation movements. We suggested that an early version of the provision which reflected a particularly thorny agreement was itself problematic, thus opening up the entire debate again. In fact, the Constitutional Court rejected the provision finally settled on and adopted in the May 1996 version of the constitution. Schedule 6, item 22 of the constitution now deals with the matter.

^{36.} See S. AFR. INTERIM CONST. (Act 200, 1993), § 73(6).

^{37.} See GLOPPEN, supra note 24, at 209.

seemed to defy resolution in the Constitutional Assembly would certainly have been part of the debate, but a number of others that the Assembly had managed to settle might have come up as well. For instance, the ANC was firmly committed to outlawing the death penalty, while the National Party was equally firmly in favor of retaining it. In spite of the huge majority of the vote held by the ANC, evidence from polls suggested that the majority of the population probably supported the National Party on this matter. It had been resolved in the constitution-drafting process by leaving it to the Constitutional Court; the right to life clause is silent on the matter of the death penalty and simply says, "[e]veryone has a right to life." Senior negotiators would not have desired to add this contested matter to their list of differences. Finally, a referendum would be costly and interfere with the urgent tasks that faced the new government.³⁸

In short, neither of the major parties in the negotiations had much reason to choose a referendum. And so, in spite of rumors and press reports that the Assembly could not make the May 9 deadline, and threats of deadlock by both the ANC and the National Party, the Constitutional Assembly voted to pass the new constitution with only two nays and ten abstentions.³⁹ The Assembly broke into applause and song and, that evening, exhausted negotiators joined their political colleagues and Constitutional Assembly staff at a huge "Adoption Day" party, hosted by President Mandela.

But those most closely involved in the process knew that this was not the end. The constitution was still to be certified by the Constitutional Court, and there were a number of issues that might block certification. In fact, although they had voted in favor of the constitution, the National Party and the Democratic Party, among others, had already given notice of their intention to challenge certain provisions before the Constitutional Court.⁴⁰

This tactic had been anticipated for some time, and it meant that certification had come to play an additional role. Certification was no

^{38.} As it was, almost country-wide local government elections which were held in November 1995 had absorbed the attention of politicians and hampered the program of the Constitutional Assembly.

^{39.} The two members of the African Christian Democratic party voted against the new constitution because it failed to subject all government and law to the law of God. The Freedom Front abstained. In addition, the Inkatha Freedom Party remained outside the process and did not vote.

^{40.} The Democratic Party stated in its speech in Parliament on adoption day that although it would vote for the constitution, it intended to contest certain elements before the Constitutional Court.

longer merely a way of ensuring that pre-election deals were kept; it allowed parties to move some issues from the negotiating forum to the Constitutional Court and to take their chances there.

The dispute concerning the most appropriate way to deal with labour relations in the Bill of Rights provides an example. Labour rights, and particularly the right of employees to strike and the right of employers to exclude workers from the workplace ("lockout"), were an issue over which the Constitutional Assembly came as close to a fatal deadlock as it could.

Constitutional Principle XXVIII stated, "the right of employers and employees to join and form employer organizations and trade unions and to engage in collective bargaining shall be recognised and The political, social, and economic background to the principle and the subsequent difficulties in negotiating provisions agreeable to both sides are obvious. Organized black labour had been in opposition to the apartheid government for over a decade, 41 and the ANC was in an alliance with the trade union alliance, the Congress of South African Trade Unions ("COSATU"), depending heavily on the support of labour. On the other hand, the National Party and other opposition parties depended on the support of the largely white business community. No one disputed that the constitution would include a right to strike, but the right to lockout was controversial. White business demanded a right to lockout as a necessary counterpart to the right of workers to strike; but the predominantly black trade union alliance disagreed. In addition, the opposition parties argued that Principle XXVIII provided an express protection of the right of individual employers to engage in collective bargaining and not merely a right entitling associations of employers to engage in collective bargaining. The ANC would not concede this point.

As the deadline for adoption of the final constitution drew near, pressure on the Constitutional Assembly concerning these labour rights grew. COSATU threatened to strike if their constitutional demands were not incorporated in the constitution. Business responded by complaining that COSATU was not using the established labour negotiating chamber to discuss these matters and, citing the need to reassure potential foreign investors, the vulnerable state of the currency and the loss in production that a strike would mean, said, "mass action could not come at a worse time." By the end of April, deadlock had

^{41.} Since black trade unions had been legalized in 1979.

^{42.} COSATU Strikes a Blow, WKLY. MAIL & GUARDIAN (Apr. 26, 1996), available at http://web.sn.apc.org/wmail/issues/960426/BUS44.html. See also Frank Nxumalo,

been declared on the labour issues, as well as the property clause and the language in which schooling should be offered.⁴³

Negotiations continued, however, with politicians determined not to scupper the entire process over a few clauses, and the apparent impasse was bridged. In announcing agreement on the labour provision that was reached on the eve of the deadline, the ANC politician involved in the negotiations commented that "he did not expect anybody to be very happy." Indeed, the provision was pure compromise, avoiding saying anything explicit about lockouts and instead immunizing the recently adopted and generally supported Labour Relations Act from constitutional scrutiny. The winning element was apparently the assurance that existing labour legislation would not be amended without proper consultation with business.

Obvious problems resulted from this approach. The Constitutional Principles anticipated a constitutional regime in which statutory provisions were subject to the supremacy of the constitution. The labour-rights compromise immunized a statute from constitutional scrutiny. When this solution to the dispute over the labour provision was announced, the National Party spokesperson made it clear that his party was not satisfied. They would vote for the constitution with this provision in it, he said, but would nevertheless contest it in court because they did not believe that it complied with the Constitutional Principle that dealt with labour rights. And so, the battle over the constitution moved to the Constitutional Court.

COSATU to Go Higher Over Right to Strike, INDEP. ONLINE (May 12, 1996), at http://www.iol.co.za/html/frame.news.php.

^{43.} See EBRAHIM, supra note 15, at 205-11. See also Constitutional Assembly, Minutes of the Forty-Second Meeting of the Constitutional Committee (May 1-2, 1996), available at http://www.constitution.org.za; High Drama in Constitutional Danger Zone, WKLY. MAIL & GUARDIAN (May 1, 1996), available at http://web.sn.apc.org/wmail/issues/960501/NEWS58.html.

^{44.} Minutes of Constitutional Committee Meeting (May 7, 1996).

^{45.} See EBRAHIM, supra note 15, at 216 (describing the meeting). The provision, section 241 of the draft constitution, was headed "Labour Relations Act, 1995." It stated:

⁽¹⁾ A provision of the Labour Relations Act, 1995 (Act No. 66 of 1995) remains valid, despite the provisions of the Constitution, until the provision is amended or repealed.

⁽²⁾ A Bill to amend or repeal a provision of the Labour Relations Act, 1995 may be introduced in Parliament only after consultation with national federations of trade unions, and employer organisations.

⁽³⁾ The consultation referred to in subsection (2), including the identification of the federations to be consulted, must be in accordance with an Act of Parliament.

The court had little difficulty with the provision and held that it did not comply with the Constitutional Principles because it undermined the supremacy of the constitution. But the court offered something positive to each side in holding that the principles did not require a constitutionally protected right to lockout, supporting the position that labour had taken, but adding that the principles did require an unambiguous protection of an employer's right to engage in collective bargaining. In the second round of negotiations, this matter resolved quite easily.

The Constitutional Principles thus not only provided a way of resolving a fundamental disagreement about the process of constitution-making; they also allowed certain problems to be shifted out of the formal political process to another forum during the constitution-making process—this time, the Constitutional Court. The certification process also provided an opportunity for the IFP to rejoin the constitutional debates. Although it had not participated in the process of formulating the constitution, it took part in the certification process, challenging a wide range of provisions, particularly those that dealt with the division of power between the national and provincial governments.

The Constitutional Court judgment announcing that it could not certify the newly adopted constitution was lengthy, comprising 150 printed pages in the South African Law Reports.⁴⁷ It also set out in fairly unambiguous terms the changes that were necessary if the constitution was to meet the test of the principles.⁴⁸

As soon as the Constitutional Court decision was handed down the Constitutional Assembly reassembled. Some politicians found some

^{46.} Of course, it is too simplistic to assume that the ability of parties to shift matters to the court was the only reason for various compromises in the constitution. From the governing ANC's point of view at least, the fact that constitutional amendment provisions and the ANC's large share of the vote make amendment relatively easy at present may have meant that compromises were not necessarily forever. The National Party, on the other hand, had clearly won in the 1993 round—the Constitutional Principles encapsulated many of its most important positions.

^{47.} See In re Certification of the Constitution of the Republic of South Africa, 1996, 1996 (4) SALR 744 (CC).

^{48.} A side effect of the Constitutional Court's role in the certification process was that the court gained credibility in the white legal community. When the court was first established, the overall attitude of the white press and white lawyers seemed to be that it was biased towards the ANC. People believed that it would simply rubber-stamp ANC decisions. The willingness of the court to take the Constitutional Principles seriously pointed in the opposite direction. While the court (like all constitutional courts) has not been free from allegations of being executive-minded, the certification judgment reassured many people.

aspects of the decision annoying, but they accepted it, and a rather weary group resumed work in September 1996.⁴⁹ The timetable was once again tough. If the new constitution was to be put into operation in early 1997, as many hoped it would be, the Assembly needed to submit it to the Constitutional Court for certification in early October. This timeframe gave the Assembly just three weeks for the revision. A series of long and intense meetings took place and the Assembly finished amending the constitution just in time.

Although the constitution was revisited because the court had held that it did not comply with the Constitutional Principles in certain ways, the resumption of the work of the Assembly created two important opportunities unrelated to the principles. First, advisers to the Assembly were able to introduce a list of technical amendments to the text aimed at tidying up provisions that had been hastily drafted, and to deal with inconsistencies and other errors that had been picked up since the draft was first passed.

Second, the resumption of the Constitutional Assembly process gave the IFP another chance to participate. A substantial number of IFP politicians had regretted the party's decision not to participate over the past fifteen months. On one occasion, an IFP MP wandered absent-mindedly into an Assembly meeting. With his characteristically wry humour, Ramaphosa welcomed her warmly from the chair, and she fled to the chuckles of the group. But on another occasion she had confided that she longed to participate. Many people speculated on the impact that IFP participation might have had on the process and concluded that it would surely have been marked. So it was not a surprise that, after its success in the Constitutional Court in challenging certain of the regional arrangements in the draft constitution, the IFP indicated an interest in taking part in the second process. Members of the party

^{49.} The aspect of the court's decision that caused the most resentment was that on local government. The Constitutional Principles described the way in which the new constitution should deal with local government in some detail. There was little doubt that the first draft of the constitution had relied on a liberal interpretation of this requirement and so the court's decision that the constitution did not comply with the principles was not totally unexpected. But the Assembly was not really ready to provide the detail in the constitution that the court said it needed. Policy concerning the future of local government was unsettled, and the government was in the middle of a long and thorough process of consultation. The difficulties that had been encountered drafting the local government provisions in the first round were not so much related to political disagreement between parties as to a lack of decision on what was desirable. The first draft had accordingly tried to leave leeway for future developments. The second draft had to be more concrete and, because the Assembly did not want to risk another non-certification, it needed to provide a great deal of detail.

attended various meetings, but they soon withdrew, partly because their requests to reopen issues that had not been impugned by the Court were routinely rejected. The National Party and ANC were determined not to encumber the process with discussions that might undermine delicate compromises reached in the preceding months of negotiations. It may have also been part of the lingering dispute about international mediation that provoked their withdrawal at the outset. It was almost surely also caused by the fact that they were outsiders in the process. The intensity of debate and decision-making over the fifteen months that the Constitutional Assembly was active had established patterns of behavior, modes of responding to problems, and relationships among participants with which the IFP was unfamiliar, and this isolated it and undermined its ability to influence decisions.

On December 4, 1996, the Constitutional Court certified that the amended draft of the constitution complied with the principles.⁵⁰ The President signed it on International Human Rights Day, December 10, and it came into effect on February 4, 1997.

IV. CONCLUSION: A NEW BEGINNING

In March 1997, about seven million copies of the new constitution in pocket book size were distributed in South Africa. Four million went to high schools, two million were made available at post offices and another million were distributed to the police, army, prisons, and through civil organizations. These copies of the constitution were available in all eleven official languages and were accompanied by an illustrated guide, *You and the Constitution*, which, in thirty cheerfully illustrated pages, provided an introduction to the constitution.⁵¹

The constitution, You and the Constitution tells South Africans, "helps to make sure that there will always be democracy in South Africa." The Preamble to the constitution itself conveys the same idea but contextualizes it, and links it to the aspirations of South Africans. The Preamble looks back to past suffering, and to the struggle for justice and freedom, and looks forward to "a united and democratic South Africa" in which "government is based on the will of the people," in which "every citizen is equally protected by law" and in which "the quality of life of all citizens" is improved.

^{50.} See Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, 1997 (2) SALR 97 (CC).

^{51.} See EBRAHIM, supra note 15, at 249-50. You and the Constitution was written by Greg Moran and produced by the Constitutional Assembly in 1996.

But, a constitution on paper is hardly a constitution at all, however progressive its contents and however careful its design. It must draw its life from the society that it orders and from the people who have committed themselves to the values that it enshrines. This process started in the open and transparent way in which the constitution was drafted and in the massive education programmes that accompanied the drafting process and followed the adoption of the constitution. But a great deal more is needed. The constitution has to demonstrate that it provides a blueprint for effective government, able to make and implement the policies needed to effect transformation in South Africa. Strong leaders, committed to the principles of constitutionalism, are Commenting on politics in South Africa since the 1994 elections. Tom Lodge has written that "[i]n new democracies the quality of political leadership matters more than in established political systems, however carefully scripted the constitutional safeguards may be against abuse of power. Institutions are still fluid and susceptible to being shaped by dominant personalities."52 Until constitutional government is deeply entrenched in the practice of governing in South Africa, the constitution will be especially vulnerable to choices that undermine rather than entrench the values that it enshrines. This means that the task of South Africans has only just begun.

^{52.} TOM LODGE, SOUTH AFRICAN POLITICS SINCE 1994, 110 (1999).