South Africa *and the case for* Renegotiating *the* Peace

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Introduction

South Africa's democracy got off to an auspicious start. Formal negotiations for a democratic constitution started in late 1991 with the Conference for a Democratic South Africa (CODESA) assembly in Kempton Park. After a tumultuous two years, the CODESA forum was scrapped and in 1993 replaced with the Multi-Party Negotiating Forum (MPNF). They adopted the interim constitution of 1993, which served as the basis for South Africa's first democratic election in April 1994, which led to Nelson Mandela being inaugurated as President. Parliament would from then on convene as the Constitutional Assembly (CA) to draw up the permanent constitution.

Rapid progress was made in the CA, which culminated with the passage of the final Constitutional Bill in late 1996. The multi-party Constitutional Assembly passed the Bill with a resounding 85% majority when the vote was taken on 11 October 1996. The African Christian Democratic Party was the only party that voted against the Bill, while the Freedom Front abstained from voting. Objections to the Bill were raised, but on 4 December 1996 the Constitutional Court certified the text as being compliant. And on 10 December 1996, International Human Rights Day, the Bill was signed into law by President Nelson Mandela and became operational.[1] The Constitution was hailed by many analysts and described by some as being among the "best in the world". A more stable foundation for constitutional democracy could hardly have been asked for.

Yet two consistent themes emerged in the public arena time and again over the next two decades, each of which cast doubt on the apparent solidity of this constitutional foundation. One was ongoing discord about what the negotiated transition was *about*, and following from that, what the negotiated outcome, in the form of the democratic constitution, stood *for*. One early example surfaced in 1998 in statements made by the then Secretary General of the ANC, Kgalema Motlanthe. The *Sunday Times* of 3 May 1998 reported that he said that should the ANC gain a two-thirds majority in the next (1999) election, it would review the constitutional constraints posed by the independent watchdogs such as the Auditor General, the Public Protector and Attorney General in order to enable the ANC to govern "unfettered by constraints".[2] He later retracted these statements, but this incident brought into the open the question of the durability of the negotiated agreement and of the essence of the process of a negotiated transition to democracy.

These issues receded from the public domain over the next few years, as democratic electoral politics and parliamentary representative democratic rule took hold. The ANC won every national election in the first 20 years of democracy, up to and including that

of 2014. It also won most, but not all, of the provincial legislative sites of power and most of the elections for local governments.

By President Jacob Zuma's first term of office, starting in 2009, however, the terminology of "transformation" came to be increasingly used by ANC spokespeople as being part and parcel of the National Democratic Revolution (NDR). This concept in turn was (and is) central to the vision of the South African Communist Party (SACP) of how South Africa should move to a fully socialist/communist state.

One of the first oblique rebuttals of this notion of transformation came from former President FW De Klerk. In a speech in early 2011 commemorating the events of 2 February 1990, when he announced the unbanning of the ANC and SACP, De Klerk defined the essence of the constitution as follows:

> ... our constitution was much more than simply a blueprint for how the new society would be governed and a shopping list of the rights that would be assured. In a very real sense it was a solemn compact on how the issues that had divided South Africa for generations would be resolved.

In the rest of his speech he went on to describe the substance and nature of the compromises that had been negotiated into the Constitution and then expressed the following concern:

> There are those who think that the 1996 Constitution was simply an expedient to accommodate the prevailing exigencies and balance of forces of the time. They imagine that with the passage of time it will be possible to ignore or dispense with elements of the Constitution that do not accord with their personal or party agendas.[3]

A few months later he repeated this warning even more stridently:

> The main force seeking to disturb the constitutional balance is the ANC's National Democratic Revolution. According to the ANC's Strategy and Tactics analysis, the establishment of our non-racial constitutional democracy in 1994 was not the end of the liberation struggle – but only a beach-head on the way to the ultimate goals of the revolution. The struggle has continued relentlessly since then – and it has been directed primarily against our constitutional accord.[4]

The debate then moved to focus more directly on the nature of these negotiated constitutional compromises, on their status and on whether they were core defining aspects of the Constitution, and therefore more or less inviolate, or whether they were merely adjuncts, to be easily discarded. In September 2011 an article by Adv. Ngoako Ramathlodi, then a member of the ANC's National Executive Committee (NEC), described these compromises made by the ANC as "fatal concessions". For him the Constitution embodies a "great compromise" which largely favours the "apartheid forces" aiming to retain "white domination". This was achieved, according to him, by these forces "giving up elements of political power to the black majority, while immigrating (sic) substantial power away from the legislature and the executive and investing it in the judiciary, Chapter 9 institutions and civil society movements".[5]

Dave Steward, on behalf of the FW de Klerk Foundation, interpreted Ramathlodi's claim as follows:

> It is difficult to view the proposed assessment as anything but a clear warning to the judiciary: firstly, that it should henceforth interpret the Constitution in conformity with the government's transformation ideology – and secondly, that it should remain firmly on the side of the separation of powers fence when it comes to decisions to review the constitutionality of government policy.[6]

The discord was aggravated further by comments ascribed to Irvin Jim, General Secretary of the National Metal Workers of South Africa (NUMSA), who is quoted in another document issued by the FW de Klerk Foundation as stating that the 1996 Constitution was a compromise, adding that "only a fool would think that a compromise is a permanent solution".[7]

The issue of constitutional durability and the "second transition" gained more attention in 2012. Jeff Radebe, then ANC Policy Chief, elaborated on the concept as follows: "Our first transition embodies a framework and a national consensus that may have been appropriate for political emancipation, a political transition, but has proven inadequate and inappropriate for our social and economic transformation phase".[8] The De Klerk Foundation argued that this meant that some of the "cornerstones" of the Constitution, such as property rights and the independence of the judiciary, would be threatened. The ANC position was officially endorsed in June 2012 at the ANC's 4th National Policy Conference, held in Johannesburg. Here President Zuma announced that the ANC would now move into the "second transition" (quickly re-drafted by the ANC as the "second phase" of the NDR). By this he meant that the ruling party would take "the difficult decisions we could not take in 1994", entailing more radical policies of redistribution of wealth and economic resources.[9]

Greater clarity about this perspective on the nature of the compromises written into the text of the 1996 Constitution was also forthcoming from Solly Mapaila, 2nd General Secretary of the SACP. Writing online in late 2014, he elaborated on the party's position with the following categorical statement:

> The circumstances in the late 1980s and early 1990s forced us to adopt certain compromises in order to remove apartheid and take a major step forward. *We never had any intention of remaining forever in the compromise position of the early 1990s.* This is why we are talking about the second radical phase of the transition (emphasis added).[10]

Another twist to this ongoing dispute came in 2014 with an altercation between former president FW de Klerk and Cyril Ramaphosa, who was at the time the Deputy President of the ANC. In a speech made on 31 January 2014 De Klerk claimed that the NDR contradicted the Constitution, anchoring his analysis primarily in his interpretation of the equality clause, section 9 of the Constitution, and the ANC's successive Strategy and Tactics documents.

He further de-legitimised the ANC position by insisting that the NDR was not part of the agenda about which the parties negotiated at CODESA or the subsequent MPNF in Kempton Park. He concluded: "We did not agree to the NDR during constitutional negotiations, it is irreconcilable with the Constitution, we, who are the intended victims, have not been consulted, and we do not accept it".[11] Ramaphosa's response was to make the case for the NDR to be entirely compatible with the constitutional framework, and built his argument on his own rival interpretation of section 9, the equality clause. And he concludes that his own (and therefore the ANC's) interpretation of how equality would be imposed: "As the ANC, we will continue to do everything we can to advance transformation – whether De Klerk has signed up to it or not".[12]

A second theme running through the events of the first twenty years of democracy in South Africa has been the repeated calls, from many divergent sources, for a "new CODESA". The first decade of democracy saw few calls of this nature, but then, as policy events started to play out, the idea of another CODESA started to surface. In early 2004 Dr Edward Lahiffe, a senior researcher at the Programme for Land and Agrarian Studies (PLAAS), was reported to have called for a CODESA on land reform, in response to what he considered at the time to be an incoherent land reform policy.[13] A year later Bantu Holomisa, leader of the United Democratic Movement (UDM), raised the point of the need for another economic CODESA in Parliament. The then President, Thabo Mbeki, responded with the idea that parliament itself can serve as such a forum, where clashing interests of national importance can and should be reconciled.[14]

Similar calls for a new economic CODESA subsequently included those from the likes of Max du Preez, Allister Sparks and Clem Sunter, for a CODESA on public education by Franklin Sonn, for one on the mining industry from Group Five CEO Mike Upton, and for one on transformation by the Solidarity labour union. And then in early 2014 columnist Henry Jeffreys called for a CODESA on the National Development Plan (NDP).[15]

The most recent instance, at the time of writing, followed the week of unprecedented upheaval in parliament during the State of the Nation address by President Jacob Zuma in February 2015. During his presentation the proceedings were disrupted by the Economic Freedom Fighters (EFF), who were then dismissed from the chamber by the Speaker. When they refused to leave, the police, in civilian dress, intervened and forcibly removed them on the instructions of the Speaker. In protest against police action within the House, the Democratic Alliance (DA) then also walked out. These events lead to many commentators expressing shock and disgust, and one, former parliamentarian Ben Turok, concluded that the only way to remedy the polarisation within parliament would be a new CODESA-style summit of leaders from all parties.[16]

Every one of these calls, whether to address a specific issue (land, education, mining etc.), or to express a general concern about the state of the economy and/or society, arose from a distressing sense of uneasiness or *malaise* about the direction being taken by the South African political economy and politics in general. While some striking successes have been

achieved with respect to the extension of school enrolment and the provision of basic services such as water, electricity and sanitation to poorer communities, as well as the implementation of a very extensive social grant system, the nagging question remains of whether the cup is half full or half empty. Some of the instances of emerging stress lines within the social fabric of society emerged in the first two decades of democracy and are vividly present in the following snapshots.

- Over the course of 21 years from 1994/95 to 2014/15 a total of 427 162 people were murdered in democratic South Africa. Another 493 209 escaped death by the skin of their teeth, but register in the statistics as victims of attempted murder.[17]
- Over the same period 1 221 678 people were the victims of reported sexual offences, 4 716 049 experienced serious assault, and 2 262 879 experienced robbery with aggravating circumstances.[18]
- Matric pass rates have risen, but with lower qualifying standards. According to Stats SA, many black Africans benefited from the 5.3 million jobs that have been created since 1994, but skills levels have actually declined among young people.[19]
- The official unemployment rate for the country stood at 25.0% in 2015, a total of 5.23 million work seekers. The expanded, unofficial rate stood at 34.9%, indicative of 8.37 million unemployed.[20]
- Real Gross Domestic Product (GDP) growth rose impressively from 0.5% in 1998 to 5.6% in 2006, followed by a rapid drop and rebound after the global financial crisis. After 2010 there was a continuous decline, with a rate of 2.1% achieved in 2013, 1.5% in 2014 and 1.3% in 2015.[21]
- Social dislocation has reached calamitous proportions. In 2011 there were 18.57 million children in the country. About three out of every ten (34.8%) of them (6.46 million) were living in families with both parents. Almost four of every ten (38.8%) of them (7.2 million) were living with their mother only, and another 1.44 million in skip-generation households, where grandparents or uncles or aunts were the caretakers.[22]
- Abject poverty has declined dramatically with the establishment of the social grant system in 1996. Through its rapid expansion it reached 16.78 million beneficiaries by 2015. This is a remarkable achievement, but its sustainability can be seriously questioned as the number of people on this kind of welfare already exceeds the number of people with formal jobs, who numbered 15.65 million by 2015.[23]
- The tax base of the state is also of some concern. Personal income tax made up 35.9% of national tax revenue in 2014/15, and remains the biggest source of tax revenue for the state, followed by value added tax at 26.5%. However, this contribution was extracted from only the 4.9 million individuals who actually submitted tax returns in 2014.[24]

Some analysts argue that some policies, and some policy failures, are the result of specific interpretations of the Constitution that are contested by other stakeholders in society. The

result is then that these policies are implemented without clarity of purpose and this has in turn led to a debilitating loss in state capacity. This has become very costly for South African society, thus inhibiting the necessary growth and development. We are not the first to raise this issue. In a press release of 6 June 2014 the Institute of Race Relations (IRR) claimed a direct causal link between the policies of affirmative action and the deaths of three babies in a hospital in the town of Bloemhof. In their words:

> The Bloemhof municipality 'lost its capacity' to maintain the sewer plant. People drank contaminated tap water and three babies aged 7, 9 and 13 months died, while scores were hospitalised. There is no doubt that the officials responsible for deaths were appointed, at least in part, on grounds of race-based affirmative action and that *a direct causal link therefore exists between the policy and the deaths*" (original emphasis).[25]

The ruling ANC implements the policies of affirmative action in general and of cadre deployment in particular (placing loyal ANC members in positions that are filled according to racial criteria) on the basis of its own interpretation of two specific constitutional rules, section 9, the "equality clause", and section 195, the "representivity clause", which is widely considered to be at the heart of the declining capacity of state agencies to deliver basic services to tax-paying citizens. This section stipulates that the composition of the labour force of all sectors of the public administration of the country should be "broadly representative of the South African people". The ruling ANC alliance has come to interpret this in the strictest possible racial terms, where a numerical target has been set up with an 80-9-9-2 ratio for African, white, Coloured and Indian racial categories respectively. In the South African Police Services, for example, the 2010 target was set at 79-9.6-8.9-2.5. By March 2015 the actual employment ratio was 75.8% African, 10.9% white, 10.7% Coloured and 2.6% Indian.[26]

The practice of cadre deployment has arguably had the most devastating effect on the modernisation and development of almost every aspect of society through its impact on education. A recent task team established by the Minister of Basic Education found that in six of the nine provinces the South African Democratic Teachers Union, SADTU, a COSATU affiliate, had gained control over the administration of schools from the Department of Basic Education. This was achieved by developing the capacity for getting loyal members to be appointed to key administrative positions. The mechanism used to acquire this capacity is that of "undue influence", defined by the task team as "bribery and corruption", with an inevitable collapse in professionalism. The key point here is the rationale for such actions: one provincial branch of SADTU expressed the view that those members who secured the dominance of SADTU and who "advance it as a political entity should be those who have priority for appointment".[27] This entitlement can in turn only be derived from a particular understanding of the constitutional bedrock from which the power of the ruling alliance of the ANC/SACP/COSATU derives, and it is not one that draws on the conventional notion of the rule of law.

"Ordinary" democratic electoral politics, the essence of the democratic experience, are also affected at a fundamental level by this apparently deep-seated discord about constitutional principles. In the run-up to the 2014 national elections top ANC officials campaigned in the Western Cape, the one province in which the ANC has not been able to gain a 50% +1 majority thus far. ANC Secretary General Gwede Mantashe explained the need for such concerted action in this province as follows: "We have never won the Western Cape since 1994 ... it is the only province we have never won ... The Western Cape should taste the freedom ...."[28] What meaning does Mantashe then invest in the concept of political freedom? That only a vote for the ANC is one that can deliver freedom? And what meaning does he import into the concept of elections – free, fair and regular? What is the range of choice that he considers legitimate, and what do election results stand for?

Taken together, these and other similar indicators point to ongoing and deep-seated problems of development, and even instances of de-modernisation. To these data we can add results from national opinion surveys that show how far the levels of interpersonal trust have dropped, how low the levels of confidence in some public institutions have become, and also the declining levels of tolerance among South Africans.[29] To that can be added the persistent civil unrest in the form of so-called "service-delivery protests", and the challenge to standing rules and procedures of institutions such as those for dealing with labour issues. Since 2014 the challenges to the standing rules of conflict regulation have also been coming from within parliament itself, which shows that after twenty years of liberty South Africa, despite its promising flying start in 1994 and the auspicious inauguration of the 1996 Constitution, is clearly still an unconsolidated democracy.

Is this the standard route to democratic stability and durability? Some pundits would say so. For some of them squabbles about how to interpret the Constitution are the normal stuff of open democracy, and policy failures are open to revision on an ongoing basis. The very essence of democratic rule is the perpetual process of "muddling through" with ongoing and interminable incremental changes in policies.

Our response is that the above description of policy making may be appropriate for *already secure* consolidated democracies, but not for newly democratised, unconsolidated, post-conflict societies, such as South Africa. Here the stakes are very high and rival interpretations of constitutional rules carry implications for policy making that have ramifications for the way in which society and the economy are ordered. Implementing one policy option (derived from one particular interpretation of a constitutional rule over another interpretation) may also carry greater risks of policy failure, with severe costs being incurred, to be borne by citizens who often were not party to the actual policy-making process.

We argue in this book, firstly, *that the current discord over policy details has its origin in the (celebrated) negotiated transition*. Unfinished business, in the form of unsettled disputes about the nature, intent and substance of the 1996 negotiated constitutional settlement, is a reflection of a (partially) flawed negotiation process. We hold that the vote count of an 85%

majority in the Constitutional Assembly in 1996 obscured some basic differences which had not been resolved during the negotiations, and which are fundamental to democratic success. We show in the chapters to follow that many negotiators agreed to vote "yes" for the 1996 Constitution, but held divergent interpretations of what the document stood for, represented and embodied. The result was that South Africa, from the very start of the democratic era, lacked a national consensus on how to go about consolidating democracy, and on how to develop society and the economy. From that discord followed about what the current status and intended future objectives of the written constitution are, and what it authorises the new rulers of the day to do and not to do.

We do not aim to produce an extended policy analysis through which to elaborate on the causal link between how constitutional interpretations inform specific policies, similar to what the IRR found to be the case in Bloemhof. Instead, as our second aim, *we intend to present an analysis which shows how long-standing discord over the framework for understanding the Constitution can and does lead to situations in which policy failure can become chronic, with attendant escalating costs for all South Africans. We argue that should we then experience national crisis conditions, South Africa is unlikely to be able to meet the challenge.* We show that under such conditions of discord and uncertainty about such constitutional basics, stakeholders tend to prefer to interpret the Constitution as a contract which contains in writing the various deals that were made at the negotiating table, and when policy outcomes do not produce the promised *quid pro quos*, which are presumed to be the essence of the Constitution, then policies are easily judged as failures.

Thirdly, we argue that in order to break out of the spiral of democratic failures and de-legitimisation briefly outlined above, the major stakeholders in South Africa will have to *jointly renegotiate the meaning of the Constitution*. This is not a novel concept and was first introduced into the public sphere in South Africa in 2002.[30] It is also not a call for a new CODESA. CODESA was a conference to establish a new democracy. This is a call for a process to salvage that very democracy. It entails that stakeholders will have to clarify, once again (if not for the first time), what the pillars of the 1996 Constitution are. A fundamental reconsideration of the nature of the negotiated transition is due: is it a compromise, and if so, is it temporary or not, and what other terms and conditions apply? If the Constitution is open to revision through amendments (which it is), is there a core of constitutional rules that are permanent and beyond such revision, unless agreed to by all stakeholders? If such core elements are nonetheless amended, will that constitute "breach of contract", so to speak, in the sense that the essence of the entire negotiated settlement is destroyed? In our view, answers to these questions have to be found in order to create a convergence of ideas about the framework for understanding the Constitution.

Only after this has been done can clarity be found on what the concept of an open and democratic state – subsumed within the concepts of rule of law, separation of powers, supremacy of the constitution, judicial independence and representation – *stands for*. This will include finding agreement at the most basic level on what the rights to dignity, equality and freedom, the cornerstones of the Bill of Rights, entail.

Why the need for such renegotiation? We find the case for renegotiation in South Africa essentially conforms with that presented by Zachary Elkins, Tom Ginsberg and James Melton in their book *The Endurance of National Constitutions* (2009). In their comparative study they incorporated every democratic constitution in the world from 1789 to 2005, except that of Britain, which has an uncodified constitution. This yielded 935 distinct constitutional systems that were implemented in more than 200 national states that had either operated in the past or were still operating at the time of the study. In their study they find that 746 of these constitutions have been replaced and 189 were still in force at the end of 2005. These documents range in length from that of India, at 140,000 words the longest, to Mauritania's 1985 constitution, which is the shortest at a mere 865 words. The authors use a medical metaphor to describe what they call the life cycle of constitutions, and found that the median life span of constitutions is 19 years. This is the age at which one half of constitutions they studied are expected to have died.

After reaching that age, their likelihood of continued survival improves with every additional year of persistence. The current South African constitution was implemented in 1997, which, statistically speaking, takes us very close to the threshold of successful constitutional endurance. Their comparative analysis also shows that once a constitution is in mortal decline, or is in grave danger of becoming so, the conditions for renegotiation accumulate.[31]

Firstly, negotiated constitutions invariably address standing disputes of the day, and these are dealt with amicably by way of a compromise settlement in which mutual concessions and mutual gains are traded. The terms of these trades are invariably found in the text of the constitution. These agreements are always clinched under conditions of incomplete information of two kinds. The first consists of unknown factors, such as future economic conditions and political factors that could impact on the capacity of the state and other stakeholders to deliver on the commitments made in the various trades. Always and everywhere, contingent factors intervene in how the actual pay-offs accrue to the opposing contenders. Often the result is that expected returns do not materialise for one or more parties, and the fairness of the initially negotiated settlement then comes to be questioned. There is always incomplete information about the impact of contingent factors that often arise from the international context and which can upset such anticipated fair exchanges. These factors can range from volatile global commodity prices for oil, liquid petroleum gas, copper, or gold, or to financial crises. Overt conflict and its outcomes from the American invasion of Iraq in 2003, to those that unfolded from the 2011 Arab Spring, from Russia's annexation of Crimea in 2014 and the ongoing civil war in Syria – all generate global economic and political uncertainty which can affect the likelihood of whether long-anticipated and -promised rewards at the national level will materialise.

The second kind of incomplete information can be found where negotiators conceal their true intentions from the other side for various strategic reasons. This impacts on the relationship of good faith between negotiating parties, and also tends to undermine the overall framework within which parties have to assess their ongoing gains and losses,

and tends to weaken the basis of the legitimacy of the entire process of constitutional change itself.

Elkins, Zachary and Melton have found on the basis of their comparative research that some more or less standard constitutional devices have emerged to deal with these two kinds of incomplete information. One way of dealing with uncertain pay-offs, in anticipation thereof, is to write loosely defined, less clearly specified terms of trade into the constitution, thus increasing the flexibility of the agreement. This is problematic, however, as it raises the problem of moral hazard. Aggrieved parties may be tempted to contrive arguments for higher claims because of any number of new circumstances that have disadvantaged them subsequent to the closing of the deal, even if these claims jeopardise the claims of others.

Another way of dealing with hidden intentions is to go the other way and to write ever more highly detailed specifications into the document, explicitly identifying future, anticipated pitfalls and contingencies. In this way some potential threats to constitutional durability may be lessened by closing down some tempting avenues for escaping the constraints of constitutionalism. Parties can then be held more stringently to the letter of the agreement, even if the temptation is there to abandon its spirit. The constitution then becomes, in effect, a constitutional contract, a default position to revert back to as a way of gaining certainty under conditions of incomplete information.

A third commonly used solution to the problem of hidden intentions, compatible with the one above, is to delegate the problems of incomplete information to third parties, in this case the constitutional courts, who have to interpret what the constitutional bargain and its outcomes would have been had there been more information about contingent factors or about the true intentions of opposing negotiators. Their rulings then become standard fall-back positions that all parties should be able to abide by. When such courts become politicised, however, aggrieved parties who anticipate adverse rulings which they would prefer to shy away from are then exposed to the temptation of undermining the judicial branch of government, with implications for the law and the rule of law.

Renegotiation becomes opportune, according to Elkins, Ginsberg and Melton, when parties, especially hitherto winning parties, calculate that the future costs of remaining in the negotiated bargain exceed the future benefits of staying, plus the costs of renegotiating. The costs of unequal pay-offs delivered by the standing constitutional agreement may build up gradually, as losing parties rail against the unfairness of the terms of trade, sensing their gains won to be incommensurate with the concessions made. Dissatisfaction may escalate into simmering unrest and then into open revolt. The costs of hidden intentions emerge in the form of constitutional discord about policy, both in the details and in the basic objectives. The direct costs are often found in policy failure, which can then merge with, and aggravate, the existing dissent stemming from those who sense that they were the victims of unequal pay-offs in the initial bargain. The tipping point, the authors found, occurs when such a stressed constitutional regime has to confront crisis conditions, whether deriving from external shocks, or from internal conflicts, or both.[32]

We proceed in applying this framework in the following steps. In Chapter 1 we present a framework within which to classify constitutions. The first category is that of a constitutional contract, which provides clearly stipulated descriptions of the negotiated outcome as a "bargain". When read in this way, the erstwhile negotiators can ascertain from the constitution the details of who conceded what in return for corresponding concessions from the other side. The second category is that of a social contract, which may also contain details of the negotiated settlement, but the aim is not to seal into writing the *quid pro quo* of the outcome. Instead, the aim is get into writing the rules, procedures, agreements, trades and stipulations that institutionalise a process of continued negotiation, so as to deal with current and also with future yet to be anticipated disputes. The essence of the social contract is not found in the document of the written constitution, but in the political culture of the stakeholders who are the incumbents of the political system. Nonetheless, the written constitution provides the building blocks of the social contract. The most useful rules are those that generate incentives for the politics of accommodation, such as can be found in justiciable charters of human rights and in electoral systems.[33]

We also add another category of constitutional accord, which we call the benchmark interpretation. In this kind of settlement, one (or more) of the negotiating parties views the negotiated transition as being a mere episode within a longer, ongoing relationship between contending parties. This means that the negotiated outcome, in the form of the written constitution, has no durability beyond the significance of that particular fleeting historical moment. Even if the event is one as significant as a negotiated transition from the authoritarian racial oligarchy of apartheid into democracy, the constitution remains but a benchmark on the ongoing road of subsequent events that reflect the fluid power equation in the ongoing relationship between adversaries.

In Chapter 2 we examine the emergence of the two forms of incomplete information (hidden intentions and uncertainty about outcomes) as they emerged in the negotiating process of 1991-1996 and afterwards in South Africa. We consider the negotiated outcome in the form of, first, the 1993 Constitution and the attendant 34 constitutional principles in terms of which the next "final' constitution had to be negotiated, and then consider the 1996 Constitution itself. We do so by way of an overview of some of the crucial aspects of the conflict that preceded the 1990 breakthrough to negotiations, with a focus on the policy positions, strategies and long-term views of both the then incumbent National Party (NP) and its challengers, the ANC and the SACP. We present this within a slightly longer timeframe than that of the formal negotiations themselves, and take 1948, when the National Party took power, as the point of departure. We then provide a short survey of key events and documents. These include the 1955 *Freedom Charter*, key to the ANC's vision for South Africa, and the SACP's 1960 document, *The Path to Power*, where they set out their plan for a two-stage revolution in South Africa, as well as the ANC's declaration in 1961 of the armed insurrection ("the struggle") against the South African state. We briefly go over the formal negotiations themselves, by now a very thoroughly researched topic. We do not intend to recount once again the chronology of events from 1990 to 1996, but

aim to highlight aspects of the negotiated transition relevant to the condition of incomplete information under which the negotiators worked.

In order to establish whether any of the negotiators' interpretations of the constitutional process subscribed to the benchmark perspective, we have to consider the longer-term views they held about the future of the constitution. For the purposes of this book, we then have to take into account the vision of the ruling ANC about the long-term status of the 1996 Constitution. This vision has been expressed in various policy documents of the party, especially the *Strategy and Tactics* documents produced by their National Conferences in 1997, 2002, 2007 and 2012.

Discord can then easily lead to policy dissonance, because divergent expectations derive from each interpretation of the Constitution and each can be expected to have different strengths and weaknesses. The most fundamental difference from which expectations can be derived is differing understandings of the concept of democracy itself, with its core concept of the rule of law. In Chapter 3 we present two different interpretations of what democracy entails – one that can be depicted as a liberal understanding of the concept, and the other as a social interpretation – and show where support for each one is present within the South African political landscape.

We also argue that these frameworks for understanding the concept of the rule of law are not necessarily mutually exclusive, but that they do clash when three issues are at stake. The first has to do with the question of whose interests are to be served by the rule of law: those of all individuals in society, or of some specific communities? This question has an obvious bearing on policies of redistribution within the context of democratic South Africa.

The second question is about the public good. Is the rule of law supposed to promote ideas about what constitutes the public good as seen by one specific community, or should it rather promote the conditions where each and every individual can pursue her/his own ideas about what is the public good? Again, this question looms large in the politics of democratic South Africa. Where do we find a description of the ideals and objectives that meet the requirements of a public good? Is it in the Freedom Charter, or in the Human Rights Chapter of the 1996 Constitution, or in the Universal Declaration of Human Rights, or the Bible, or the Qur'an, or is each and every one of us entitled to decide for ourselves where to find the public good, and should the rule of law then allow each and every one of us to voice our own ideas about the public good within the democratic public sphere?

The third question is whether the rule of law should be geared to establishing norms for achieving a better rule-based society with a view to the future, or should it be geared to correcting the historical injustices of the past. This question is again relevant to policies of transformation, and to the symbolic politics of reconciliation and restitution. We provide instances where support for both these conceptions of the rule of law is present, yet again indicative of hidden information about the real intentions of the negotiators which were not clarified during the formal negotiations.

When contracts have to be read and interpreted, the fine print carries a lot of weight and the strict interpretation of the written text tends to become the subject of very close reading. Invariably, constitutional courts end up having to deal with this task of revealing hidden information and providing new rules for unanticipated contingencies that inhibit the execution of fairly traded goods. The task, however, is so heavily laden with the stakes of (re)distribution that it quickly becomes politicised and the judiciary tends as a consequence to be overloaded. Furthermore, as the stakes rise, parties tend to take more rather than fewer issues to court in the search for favourable rulings. In this way the courts become the centre of political action rather that performing their originally intended role of adjudication, and hence control of the judiciary by the executive becomes one of the most coveted sites of power. In Chapter 4 we analyse this process in South Africa.

In Chapter 5 we take the position that major stakeholders in South Africa have indeed gravitated towards interpreting the Constitution as a contract, and we show the consequences of politics conducted on the basis of such a premise.

One of the most common shortcomings of constitutional contracts is that of incommensurables. Problems emerge when one or more parties find that the promised fair trade does not materialise, that one party is seen to have won more than the other, and that overall the outcome is incommensurate with expectations. We show how this has happened in South Africa, where the so-called peace dividend has produced unanticipated winners and losers, and where losers feel aggrieved, betrayed and exploited. We consider the resulting "crisis of expectations" that has established itself within society and then present scenarios that have been produced on how South Africa could conceivably reach the moment of crisis that could produce the constitutional tipping point, where conditions would be opportune for renegotiation.

In Chapter 6 we present the case for renegotiating the peace, that is, renegotiating what the Constitution embodies, stands for, and is tasked to achieve. We do so by way of comparisons with relevant cases, both of instances where renegotiation took place and where this was not done, despite favourable circumstances. Lebanon, Malaysia, India and Zimbabwe are taken as outlying cases that serve to frame the range of possible ways of renegotiating constitutions. We then conclude by spelling out the necessary conditions for such renegotiation to take place. These include potential crisis conditions, which would conceivably place enormous strain on the (by then) already stressed democratic regime.

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CHAPTER 1

What Constitutions Represent

Conflicts within deeply polarised societies that do end at the negotiating table usually produce a written constitution. This happened in recent years in Northern Ireland, Bosnia-Herzegovina, Namibia and South Africa. This does not mean that every participant in these negotiations that endorse such a constitution does so for the same reasons, or that they consider the end product in the same light. Constitutions rarely speak for themselves in the sense that they might include a written statement offering a framework for interpretation that is to be used to make sense of the written text. We therefore offer three perspectives on frameworks for making sense of South Africa's negotiated constitution. These are not frameworks for jurisprudence, or for guiding the reader through the text so as to establish through close reading what the written words convey. They are rather frameworks for making sense of what the Constitution as a whole represents in the bigger political landscape of democratic transition and consolidation, and what these new rules authorise the new democratic rulers to do and not to do.

These perspectives allow for divergent interpretations of the constitution to be grouped into three categories. Two of these, the *constitutional contractarian* view and the *social contractarian* view, stand close to one another in meaning, and in some ways can be said to overlap. The most distinct difference between them is found in the way elections and electoral rules are understood. The third view, which takes constitutions as mere benchmarks, is entirely incompatible with any aspect of the other two. None of these imply that constitutional rules are unimportant and can be violated at will, but there are deep differences as to the significance of such rules and procedures within each perspective.

Our broad aim is to clarify these three perspectives in this chapter and to show how they affect the understanding of constitutional rules. We also show that some of the South African negotiators appeared to be in two minds as to what they were trying to construct during the formal talks of 1991-1996. We find some of them to have been wavering between the contractarian and social contractarian interpretations.

Constitutional Contracts

One of the prominent characteristics of constitutional contracts is the codification of trade-offs, where one item is traded for another in a give-and-take exchange, when one party wins on one issue, the other loses, only to win on another yet different issue. Parties may choose to concede on a certain issue in order to 'win' on another which is deemed more important. Parties can also meet in the middle, both making concessions to get there. The various sections of a constitution are then understood within the framework of this written record of trades, which is a highly specified text.