A Framework for Constitutional Settlements: An Analysis of Diverging Interpretations of the South African Constitution

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Declaration

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Abstract

South Africa's transition to democracy has been hailed as exemplary in the field of conflict resolution and constitution-making. The negotiated settlement was expected to serve as a consensual constitutional framework boding well for the newly democratic regime, but by 2014 evidence was accumulating of an emerging dissensus on the South African Constitution.

The literature on the South African transition does not anticipate this emerging constitutional dissensus, or address the possibility that the constitution meant different things to different stakeholders. While there was widespread endorsement of the ratification of the constitution, an apparent divergence has emerged about its meaning and what is stands for. Many studies addressed the process of constitutional negotiations and the outcome thereof, but few examine the meaning that the original negotiators invested into this outcome.

The study aimed to address whether this dissensus was present during the negotiating process (1990 - 1996), and whether the negotiators' agreement on the formal text of the constitution obscures fundamentally diverging interpretations. The study is in the form of a qualitative, descriptive case study. This study created a novel conceptual framework within which to classify diverse interpretations. Perceptions of negotiated compromises in deeply divided societies were conceptualised in the form of Constitutional Contracts, Social Contracts and Benchmark Agreements. Original negotiators' views and opinions were analysed in order to identify dispositions reconcilable with each of the concepts identified.

This framework proved significantly helpful in identifying whether the views of the negotiators were divergent – on several levels, differences between negotiators during the negotiating period came to the fore. It became evident from the findings that there were indeed present among the ranks of the negotiators of the South African Constitution diverging interpretations of this outcome.

It became clear that certain interpretations were more easily categorised than others: while being able to locate the views of some negotiators within the concepts of Constitutional Contract or Social Contract, identifying those views congruent with the Benchmark Agreement proved more difficult. Also, some negotiators' views can be located within one, two or all of the categories. It became evident that while negotiators may be categorised

within all three concepts of the framework, their opinions are not necessarily specific to the indicators of one single concept.

This study brought significant insight into several concepts, including the Social Contract in a changing society. The Social Contract is identifiable within a system that fosters process over institutions, with specific focus on the working of the electoral system. The Social Contract is vested in the political culture as opposed to in the written text, but the written text does facilitate these types of processes by entrenching mechanisms for ongoing negotiation and revision. However, while some of these mechanisms exist within the Constitution, it does not mean that they are effectively used. Characteristics associated with the Social Contract, such as flexibility and an inclusive process, tend to be associated with longer lasting constitutions. The question remains whether South Africans should be actively seeking to build a Social Contract, and whether a Constitutional Contract can evolve into a Social Contract.

Opsomming

Suid-Afrika se oorgang na demokrasie word beskou as 'n uitnemende voorbeeld in die veld van konflikoplossing en die skryf van grondwette. Daar is verwag dat die onderhandelde skikking sal dien as 'n ooreengekome grondwetlike raamwerk vir die nuwe demokratiese regime, maar teen 2014 het bewyse begin akkumuleer van 'n opkomende *dissensus* oor die grondwet.

Die literatuur oor die Suid-Afrikaanse oorgang antisipeer nie hierdie ontluikende grondwetlike dissensus nie, en spreek nie die moontlikheid aan dat die grondwet verskillende dinge vir verskillende rolspelers beteken nie. Alhoewel daar wydverspreide onderskrywing van die bekragtiging van die grondwet was, het daar 'n klaarblyklike verdeeldheid na vore gekom oor wat die grondwet beteken, en waarvoor dit staan. Die proses van onderhandeling, sowel as die uitkoms in die formaat van die grondwet, is deur baie studies aangespreek, maar min ondersoek die betekenis wat die oorspronklike onderhandelaars in die uitkoms belê het.

Dié studie is daarop gerig om ondersoek of hierdie onderliggende dissensus reeds tydens die onderhandelingsproses (1990 – 1996) teenwoordig was, en of die onderhandelaars se ooreenkoms oor die formele teks fundamenteel uiteenlopende interpretasies daarvan verberg. Die studie is in die vorm van 'n kwalitatiewe, beskrywende gevallestudie. 'n Nuwe konseptuele raamwerk is ontwikkel waarbinne die diversiteit van opinie hieroor geklassifiseer kan word. Persepsies van onderhandelde kompromieë in diep verdeelde samelewings is gekonseptualiseer in die vorm van *Grondwetlike Kontrakte*, *Sosiale Kontrakte* en *Maatstaf Ooreenkomste*. Oorsronklike onderhandelaars se standpunte en opinies is geanaliseer om gesindhede versoenbaar met elk van die konsepte te identifiseer.

Hierdie raamwerk was nuttig om te identifiseer of die menings van die onderhandelaars uiteenlopend was. Verskille op verskeie vlakke het tussen die onderhandelaars tydens die onderhandelingstydperk na vore gekom. Dit is duidelik dat daar wel uiteenlopende interpretasies van hierdie uitkoms teenwoordig was binne die geledere van die onderhandelaars.

Sekere interpretasies is makliker geklassifiseer as ander: die menings van sommige onderhandelaars kan as kongruent met die Grondwetlike Kontrak of die Sosiale Kontrak geidentifiseer word, maar dit was moeiliker om sienings ooreenstemmend met die Maatstaf Ooreenkoms te identifiseer. Sekere onderhandelaars se standpunte kan ook in een, twee of al

drie kategorieë geplaas word. Dit het duidelik geword dat terwyl sekere onderhandelaars se opvattings binne al drie konsepte van die raamwerk geklassifiseer kan word, hul menings nie noodwendig spesifiek binne die aanwysers van 'n enkele konsep val nie.

Hierdie studie het beduidende insig in verskeie konsepte gebied, insluitend die Sosiale Kontrak in 'n veranderende samelewing. Die Sosiale Kontrak is identifiseerbaar binne 'n stelsel wat die belangrikheid van proses oor instellings beklemtoon. Die Sosiale Kontrak berus in politieke kultuur, maar die geskrewe gondwetlike reëls fasiliteer hierdie tipe van prosesse deur die vestiging van meganismes vir voortgesette onderhandeling en hersiening. Hierdie verskynsel is tipies meer duidelik sienbaar in die werking van verskillende kiesstelsels. Alhoewel hierdie meganismes kan bestaan binne 'n grondwet, beteken dit nie dat hulle doeltreffend gebruik word nie. Eienskappe wat verband hou met die Sosiale Kontrak, soos buigsaamheid en 'n inklusiewe proses, is geneig om verband te hou met 'n duursame en standhoudende grondwet. Die vraag bly staan of Suid-Afrikaners aktief op soek moet wees na die bou van 'n Sosiale Kontrak, en of 'n Konstitusionele Kontrak kan ontwikkel om 'n Sosiale Kontrak te vorm.

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List of Abbreviations

ACDP	African Christian Democratic Party
ANC	African National Congress
AWB	Afrikaner Weerstandsbeweging (Afrikaner Resistance Movement)
AZAPO	The Azanian People's Organisation
CA	Constitutional Assembly
Codesa	Convention for a Democratic South Africa
COSAG	Concerned South African Group
COSATU	Congress of South African Trade Unions
CP	Conservative Party
DP	Democratic Party
FBP	Fall Back Position
GNU	Government of National Unity
IEC	Independent Electoral Commission
IFP	Inkatha Freedom Party
IS	Ideal Settlement
LRA	Labour Relations Act
MK	Umkhonto we Sizwe
MPNP	Multiparty Negotiation Platform
NDR	National Democratic Revolution
NIS	The National Intelligence Service

NP   National Party

PAC   Pan-Africanist Congress

PFP   Progressive Federal Party

PLO   Palestinian Liberation Organisation

RS   Realistic Settlement

SACP   South African Communist Party

SADF   South African Defence Force

SCC   Special Cabinet Committee

SPRs   States/provinces/regions

STV   Single Transverable Vote

TBVC   Transkei, Botphutatswana, Venda, Ciskei

TEC   Transitional Executive Council

UDF   United Democratic Front

UN   United Nations

Chapter 1: Introduction

1.1. Rationale for the Study

1.1.1. Why this study? Claims to Originality

South Africa's transition to democracy has been hailed as exemplary in the field of conflict resolution and constitution-making by authors such as Ramsbotham, Woodhouse and Miall (2011); Harris and Reilly (1998); and Darby & MacGinty (2003 & 2008). The negotiated settlement was expected to serve as a consensual constitutional framework boding well for the newly democratic regime, but by 2014 evidence was accumulating of an emerging dissensus, or lack of convergence of interpretation of agreement, on the South African Constitution.

One earlier example is found in the *Sunday Times* of 3 May 1998 shortly after the implementation of the 1996 Constitution. The then secretary general of the ANC, Kgalema Motlanthe claimed that the ANC would 'review the power held by independent watchdogs if it won a two-thirds majority' in the 1999 election (Paton & Schmidt, 1998). Motlanthe is quoted in this article as stating that by winning this majority, the ANC could govern 'unfettered by constraints.' The Judicial Service Commission, the Auditor General, the Attorney General as well as the Reserve Bank would become subject to transformation. This statement casts doubt on the actual, authentic intentions of the ANC as to the status of the new negotiated constitutional regime. Motlanthe later retracted his comment, but this apparent element of discord has persisted into 2014.

In a speech made on 31 January 2014, F.W. de Klerk warned of the ANC's intentions regarding the Constitution and the National Democratic Revolution (NDR), a goal De Klerk claims is superior to the Constitution in the eyes of the ANC. De Klerk finds that:

> *The ANC sees itself, not as an ordinary political party, but as a national liberation movement with an uncompleted revolutionary mandate. It sees 'the continuing legacy of colonialism and white minority rule' as the 'defining reality' in our society… Unlike its negotiating partners, the ANC did not view the constitutional negotiations as the means to achieving a final national constitutional accord. Instead it saw them as a means to achieving a beachhead of state power – which*

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would enable it to shift the balance of forces further to its own advantage. In the process it admits that it had to make constitutional compromises that it regarded as temporary expedients necessitated by the then-prevailing balance of forces.

De Klerk (2014) continues by saying that 'we' – implying himself and the other parties who helped to draft and eventually ratified the final Constitution – did not 'sign on for the NDR'.

In a reply to De Klerk's comments, Cyril Ramaphosa (2014) cites the fact that the Constitution was drawn up by a democratically elected constitutional assembly, which he notes 'represented the collective will of the South African people'. He speaks specifically to De Klerk's criticism of the way on which the ANC have been implementing the Equality Clause. He argues strongly that 'those who wrote the Constitution understood that equality cannot be achieved by proclamation', mentioning that 'deliberate and sustained action' is needed to achieve this (Ramaphosa, 2014). He goes on to say that 'As the ANC, we will continue to do everything we can to advance transformation – whether De Klerk signs up to it or not.'

The argument about the meaning of the Constitution leads to policy with vital, life-altering consequences. An example of this is found in the Policy Bulletin of the South African Institute for Race Relations (2014). The article refers to the deaths of three babies in Bloemhof, and establishes a 'direct causal link between the policy [affirmative action] and the deaths' (Kane-Burman, 2014:2). Kane-Burman (2014:8) quotes Cyril Ramaphosa, deputy president of the ANC and the country, as saying that 'race will remain an issue until all echelons of our society are demographically representative', which does not bode well for South Africans given its 'skills profile', leading to 'dire consequences.'

This persisting discord about the nature and purpose of the Constitution has not yet been systemically investigated, though it proves a puzzle that this discord exists over a widely supported Constitution. This study will aim to create a novel conceptual framework within which to classify this diversity of opinion and will examine whether it was present as early as during the substantive negotiations. No published research has made use of this conceptual framework in order to describe and classify this initial discord.

1.2. The Research Problem

According to Elkins et al (2009:97), '[a]ctors are more likely to enforce the constitution if there is consensus about what the law of the land is, and what it should be.' A clear dissensus between De Klerk and Ramaphosa regarding the nature of the Constitution is apparent. The puzzle is that this 'dissensus' follows from a widely supported negotiation process that brought a peaceful end to a long, drawn-out conflict: the ratification of the 1996 Constitution received an 85% yes vote in the Constitutional Assembly (Ebrahim, 1998:3). The literature on the South African transition does not anticipate this emerging constitutional dissensus, or address the possibility that the constitution meant different things to different stakeholders. While there was widespread endorsement of the ratification of the constitution, an apparent divergence has emerged about its meaning and what is stands for. Many studies addressed the process and the outcome, but few examine the meaning that the original negotiators invested into this outcome except for Sisk (1995). However, Sisk's study was completed before the outcome of the negotiations was reached.

Was the condition of dissensus about what the constitution means already present at the outcome of the negotiating process (1990-1996), despite the wide-ranging endorsement thereof in 1993 and 1996? Did the negotiators' agreement on the formal text of the constitution obscure fundamentally diverging interpretations thereof, that is, disagreement on what this document stands for, represents and embodies, and therefore about what was achieved through negotiations? This study examines this puzzle and in doing so, aims to address this gap in the literature.

1.3. Research Questions

- Can a conceptual framework be constructed with which to classify and categorise the range of divergent interpretations that constitutional negotiators can assign to negotiated democratic institutions which are aimed at resolving long-standing internal conflicts?

- Was there present among the ranks of the negotiators of the South African Constitution diverging interpretations of what this outcome embodied at the time of concluding the settlement, that is, did the constitution have different meanings to different negotiators?

- If divergent, can these interpretations be categorised according to the conceptual framework constructed for this purpose?

- On the basis of the findings to the questions above, does the case study validate the said conceptual framework devised for classifying interpretations of consensually negotiated constitutions?

1.4. Research Design and Methodology

1.4.1. Descriptive, Qualitative Study

The study is in the form of a descriptive case study, looking at the *what* and not the *why* or *how*. The objective is to establish if there were divergent opinions as to the nature of the negotiated outcome, that is, the 1993 and 1996 constitutional texts. It is not about the process that culminated in this outcome except if the negotiators are of the opinion that the nature of the negotiations process affected the substance and meaning of the outcome.

This study is qualitative, not quantitative. This study will 'create new concepts and theory by blending together empirical evidence and abstract evidence. Instead of testing a hypothesis, a qualitative analyst may illustrate or color in evidence showing that a theory, generalization, or interpretation is plausible' (Neuman, 2000:440). The researcher's goal is to organize specific details into a coherent picture, model, or set of interlocked concepts' (Neuman, 2000:440). The following figure represents the research design:

Figure 1.1: Schematic Representation of Research Design

Theory Development: Development of the Conceptual Typology

⬇

Contextualise the Conceptual Typology: Embed the conceptual typology in other works relating to democratic transitions and constitutional outcomes. Address issues relating to face and criterion validity.

⬇

Case Study: Empirically investigate the conceptual typology by applying it to a specific case. Address issues relating to external validity. Accept, revise or discard conceptual typology based on the findings.

Source: Adapted from Swart (2013:9) by the author.

1.4.2. Unit of Analysis

The unit of analysis will comprise of individual negotiators during the South African democratic transition, more specifically, those negotiators engaged in the drawing up of the texts of the 1993 and 1996 constitutions. For the 1993 Constitution, the units of analysis are the members of Codesa I, Codesa II and the Multi-Party Negotiations Process (MPNP), and for the 1996 Constitution, it is the members of the Constitutional Assembly (CA).

1.4.3. Case Study

Case studies can be used to test a theory, or components of theories such as concepts. Case studies are essential in understanding complex social phenomena (Yin, 1984:14). According to Yin (1984:14) 'the case study allows an investigation to retain the holistic and meaningful characteristics of real-life events.'

The case study finds strength in being able to include a wide variety of evidence, including documents, interviews and observations. By formulating a conceptual framework prior to the case study, the direction of data collection and analysis is guided instead of haphazard (Yin, 2009:18). 'Case studies… are generalizable to theoretical propositions' (Yin, 1984:21) and as such provide a basis for this study. This single-case study aims to expand and test a conceptual framework instead of making statistical generalisations. By using a single, critical case, the conceptual framework will be confirmed, challenged or extended (Yin, 2009:47).

According to Yin (2009:11), case studies provide a good basis for the study of 'contemporary events, but when relevant behaviours cannot be manipulated'. Different from a simple chronological retelling, this case study includes interviews with persons directly involved in the events being studied (Yin, 2009:11).

Several concerns have come to light with case studies. Yin (2009:14) identifies 'the lack of rigor of case study research' as the greatest concern. In order to avoid this pitfall, this study aims to be rigorous by employing a typology, creating classifications and assessing these by means of a case study. This produces findings that can be tested for validity and reliability.

Another concern is that case studies 'provide little basis for scientific generalisation' (Yin, 2009:15). This study does not aim to make generalisations to populations of universes, but

rather to a conceptual framework. The aim of the case study, and more specifically, this case study, is to 'expand and generalise theories (analytic generalisation) and not to enumerate frequencies (statistical generalisation)' (Yin, 2009:15). It has also been said that case studies result in long, unreadable documents (Yin, 2009:15), but the delimitations of this study keeps this in mind.

Yin (2009:40) mentions several criteria for judging the quality of research designs, including construct validity; external validity and reliability. Construct validity refers to the identification of the 'correct operational measures for the concepts being studied' (Yin, 2009:40). External validity pertains to the definition of the domain within which the findings of the study can be generalised. A high external validity means that findings from a small group can be generalised to a larger group of findings, or a more broad range of studies (Neuman, 2000:172). Reliability is measured by ascertaining whether the operations of the study can be repeated and achieve the same result, meaning that the method is reliable and can be reproduced (Neuman, 2000:172; Yin, 2009:40).

Different types of validity come into question: face validity; content validity; construct validity. According to Neuman (2000:183), face validity is measured by the 'judgment of the scientific community' and asks the question: Does the indicator really measure the construct?

Content validity is concerned with the question: 'is the content of a definition represented in a measure?' (Neuman, 2000:183). Neuman (2000:183) identifies three steps to content validity:

1. Specify the content in a construct's definition.
2. Sample from all areas of the definition.
3. Develop an indicator that taps all of the parts of the definition.

The content validity of this study will be maintained by using several sources of evidence; and by establishing a clear chain of evidence, as suggested by Yin (2009:41). By using a conceptual framework supported by previous studies and tested theories, the external validity of the study will be tested. If validated, this will also enable analytical generalisation, as this study aims to 'generalise a particular set of results to some broader theory' (Yin. 2009:43).

Construct validity 'is for measures with multiple indicators', which is relevant to this study. It addresses the question: 'If the measure is valid, do the various indicators operate in a

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consistent manner? It requires a definition with clearly specified conceptual boundaries' (Neuman, 2000:184).

The reliability of this study can be upheld by using case study protocol and developing a case study database, as suggested by Yin (2009:41). By doing this, the study will aim to be replicable in all aspects. The use of the 'case study protocol' helps to anticipate problems and deal with how the study will go forth (Yin, 2009:82). This is done in part in this first chapter and in the third chapter by laying out in detail how the study will be conducted. The development of a 'case study database' as a 'formal assembly of evidence distinct from the final case study report' also helps to increase the reliability of a study (Yin, 2009:45). This study has set out in detail the data sources to be used and will systematically capture all data sources in a bibliography, including interviews and sources other than published documents in the public domain.

In the conclusion of this study, the conceptual framework will be assessed and either validated, revised, amended or discarded depending on the validity of the case study.

1.5. Definitions

Edward Hall introduced a clear distinction between low-context and high-context cultures in 1976. Cohen (1997) goes on to use this distinction in elaborating his cultural theory of negotiating styles. High-context cultures are associated with allusive communication and being communally minded, while low-context cultures prefer direct communication and are generally less sensitive to nonverbal communication (Cohen, 1997:31-33). This distinction will also be used in the conceptual framing of this study, as explained below.

1.5.1. Low-context cultures: Negotiated outcomes as Constitutional Contracts or Social Contracts

Protracted conflicts in societies marked by deeply held communal solidarities often tend to be settled by way of a 'grand settlement' in the form of a constitutional contract. Such comprehensive agreements that effectively end mutual hostilities also tend to follow from or accompany historic events, such as independence, or major shifts in global politics. These agreements tend to formalise some form of an ethnic bargain between adversaries, where a trade is made in the form of reciprocal concessions given, and benefits received. This amounts to a constitutional contract, with the Lebanese "National Pact" of 1943 – 1975 and

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the Malaysian "bargain" of 1956/7 – 1969 as definitive examples. These ethnic bargains conform to the conventional conceptual descriptions of both 'constitutions' and of 'contracts'.

In the case of Lebanon, a comprehensive power-sharing agreement was reached between various communities, proportional to their relative population size as established by the 1932 census. On the basis of these ratios, it was agreed that the President would be a Maronite Christian, the Prime Minister a Sunni Muslim, the Chair of the Legislature would be a Shia Muslim, and the deputy chair would be drawn from the Greek Orthodox community. Parliamentary seats were appointed on a sectarian basis, a 6:5 ratio of Christians to Muslims. Civil service appointments and public funding decisions would also be based on sect, in keeping with the 6:5 Christian-Muslim ratio (Lijphart, 1977: 148; Teuteberg, 2011:45).

The Malaysian constitutional bargain comprised of a trade between the Chinese and Malayan communities. The Chinese gained citizenship, in return for the recognition that the Malays would dominate electoral politics, and the civil service with preferential appointments in terms of a 4:1 Malay-to-Chinese ratio (Milne, 1970:564). Malays would also be the beneficiaries of general economic upliftment, and the Malayan language would replace English as the official language in 1967 (Milne, 1970:565).

Both the Lebanese and Malaysian bargains have been faulted for being too rigid. Social contracts can provide more flexibility. According to Sisk (1995: 54) a social contract in a post-conflict multi-communal society amounts to the institutionalization of a culture of negotiation, that is, a process of mutual compromise, rather than a once-off trade in demands codified in a rigid set of rules. A social contract, in his view, is not identical to a specific set of institutions, or a specific set of procedures for decision-making, although both of the above would comprise of essential components in making a social contract work. Instead, the social contract is vested in the political and corporate culture of the incumbents of such constitutional arrangements.

1.5.2. High-context cultures: Negotiated Outcomes as benchmarks

In high-context cultures, the negotiation process is not seen as a 'specific event with a discrete character and finite, clearly demarcated boundaries' (Du Toit, 2001:102). A negotiation process is more likely viewed as one event in a longer process including other events and interactions (Cohen, 1997:34). An agreement, or 'outcome', achieved by

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negotiation is not seen as a fixed point, or as a set 'codification' of the relationship between those involved. According to Du Toit (2001: 102), '[a]t worst, such an event is merely an episode in the ongoing relationship, at best a benchmark.'

In this type of negotiation culture, negotiated agreements do not represent rigid contracts but are rather seen as flexible arrangements that are entirely subject to renegotiaiton. In such agreements, the relationship is upheld by *goodwill* rather than *good faith*. *Goodwill* derives from 'joint recognition of the justness of the cause of one party over the other, and from their joint, but not identical, contributions to right some large historical wrongs' (Du Toit, 2001:102). Cohen (1997) states that the difference between whether negotiating in good faith or in goodwill depends not on integrity or personal traits, but rather on culture.

In high-context cultures, the negotiated outcome is seen as merely an episode, a *benchmark*, in a larger process, which reflects the nature of the relationship at the specific time of negotiation. This type of outcome has a tendency to become outdated as the relationship changes. In high-context cultures, negotiation becomes a continuous process. This means that any agreement produced as a negotiated outcome is considered to be merely one of many in a long-term, open-ended negotiation relationship (Cohen, 1997:200). The low-context perception of a contract as binding (until modified by mutual consent) is not present (Cohen, 1997:201). Here, agreement signifies the beginning and not the end of an ongoing bargaining relationship: 'the contracting parties will be able to work out future differences in a cooperative, rather than litigious, spirit of goodwill' (Cohen, 1997:201).

1.5.3. South Africa

Both Sisk (1995) and Horowitz (1991) explore the problem of the varying perceptions of the South African outcome. However, both of these studies were published before the final outcome of 1996. Du Toit (2001: 104) notes the limited data available regarding participants' views on the outcome of the South African negotiations. Even from the limited data, Du Toit finds several divergent views present among those involved in the process. He notes that the ANC and PAC focused on the outcome as part of a liberation process, as a mere 'landmark' in a larger process. The NP, however, focused on the establishment of a 'rechtsstaat' – a constitutional contract in itself.

Du Toit asks the question whether South Africa represents a process based on good faith or on goodwill. He concludes that this is a 'crucial, but under researched aspect of the process.'

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(2001:104). He found that while the NP failed to officially discuss their position, the ANC seemed to openly view negotiations as a 'fifth pillar of the struggle' – clearly indicating that their view of the negotiation process was far from delivering the irreversible outcome the NP wished to achieve. The ANC was, however, split on the issue. Highly influential Nelson Mandela appears to have wanted to negotiate in good faith, while Joe Slovo, another seminal figure of the struggle, argued that good faith was immaterial to the process and that negotiations were but a strategy toward the ANC achieving complete victory. The Slovo school of thought cannot be placed within a low-context, good faith negotiation culture.

Du Toit (2001) sets out a preliminary exploration of this case with the limited available data. This study will examine this apparent divergence in greater detail, making use of original data and a detailed analysis of other data already in the public domain.

Current use of the content is very weak. One example can be found in an article titled *The demise of the Social Contract in South Africa* authored by Carolyn Basset (2004). While the article aims to address economic policy-making within the so-called social contract (used interchangeably with the term *social compact*), the author does not provide a definition of either of the terms.

1.6. Limitations and Delimitation

1.6.1. Delimitation

This is not a study of the context and/or process of negotiation that culminated in the 1993/96 constitutions in and of itself. The analysis of the process has been done by several authors, including Waldmeir (1996), Giliomee (2012); Sparks (1994); De Klerk (1994); De Villiers (1994); Welsh (2009); Du Toit (2001); Jeffery (2009); Esterhuyse (2012); Heunis (2007); and Wessels (2010) and is not the focus of this study. The process itself is recognised as a factor that is inherent to negotiations, which in turn is located within a specific context. The process of negotiation may become of relevance to this study only to the extent that negotiators are of the opinion that certain events and/or actions by some negotiators shaped the meaning that they assign to the negotiated outcome.

No assumptions are made by the researcher about whether there was a causal relationship between the context, process and outcome of the negotiations, nor is it examined whether

such a causal relationship existed, that is, whether the nature of the context, and/or of the process affected the nature of the outcome. This would be the focus of an entirely different study.

The focus of this study is on the meaning invested into the outcome itself, as perceived by the negotiators themselves at that time. The outcome of the negotiated transition to democracy in South Africa under consideration is only that which is found in the 1993 and 1996 constitutional texts.

This is not a study in jurisprudence. The aim is to identify, describe and categorize certain dispositions (i.e. values, beliefs and attitudes) held by erstwhile negotiators about the meaning of the Constitution. It is not about interpreting the constitutional texts in order to clarify the substance of the (constitutional) law.

A strict timeframe delimits the study: events up to the conclusion of the constitutional negotiations in December 1996 are considered, but published material relevant to the study up to 2014 is used.

The study does not include the analysis of the establishment and/or functioning of new institutions and policies formed within the new democratic regime subsequent to the implementation of the final constitution in 1996, such as the Truth and Reconciliation Commission and Nedlac. The question of whether these institutions can serve as indicators of a Constitutional Contract, a Social Contract or a Benchmark Agreement is not addressed.

The study is also not about the perceptions and actions of major stakeholders in the politics of the democratic era (that is to say, after 1996), and not about the extent to which they perceive the current (2014) democratic political system to be a Constitutional Contract in action, or a Social Contract, or as a Benchmark Agreement.

The study is not about other aspects of the negotiated outcomes, such as economic, cultural and social agreements, except to the extent that these feature in and bear on the 1993 and 1996 constitutional texts, and on the meaning assigned to these texts by the erstwhile negotiators.

This study does not address whether the outcome was 'miraculous' or 'exemplary' in any way.

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The study is not about the exact substance of the terms of the negotiated outcome to the extent that it reveals who conceded most, who conceded least, or whether it was a win-win outcome, except to the extent that it shaped the meaning the negotiators themselves assigned to the outcome.

Likewise, the study is not about the constitutional framework of the democratic state and regime spelled out by the negotiated constitutional texts, such as the extent to which a power-sharing executive was established or not, or the extent to which the attributes of a constitutional state was written into the texts or not, or how many federal features can be identified in the texts, or the extent to which the executive resembles a presidential rather than a parliamentary type, except to the extent that these elements/aspects of the constitutional settlement are relevant to shaping the perceptions of the negotiators as to the meaning of the constitutional outcome itself.

The 'meaning of the constitutional settlement' is understood to be whether it is perceived as either a Constitutional Contract, Social Contract or Benchmark Agreement.

The study does not address the issue of whether the South African negotiated constitution represents pivotal events of a process of democratisation, that is, the establishment of a democratic regime, or the process of peacemaking, that is, a peace accord, or both, unless it is relevant to the negotiators themselves in assessing the outcome.

The study does not take up the question of which one of the three kinds of outcomes (Constitutional Contracts, Social Contracts and Benchmark Agreements) is superior to the others in any particular way.

The study is not about numbers, it is not about representivity. The aim is to examine whether divergent opinions were present as to the nature of the negotiated outcomes, and if so, whether this diversity of interpretations can be classified according to the categories presented in the conceptual framework. It is not the aim to find out how many of the negotiators supported one interpretation over the others, and it is not about gaining access to a representative sample of these negotiators.

The units of analysis act as a delimitation to the study. Those who voluntarily abstained from the negotiation process will not be included in the study, as the study focuses primarily on participants. Participants in formal negotiations, Codesa I, Codesa II, the MPNP, and the

Constitutional Assembly, will be taken into account in this study. Should some key participants not be able to be interviewed, due to personal or other reasons, other interviewers' data will be used (listed in Data Sources).

The study will not address the policy implications (the 'so what' question). This would constitute an entirely different study.

1.6.2. Limitations

This studied is limited to 85 000 words as prescribed by the University of Stellenbosch. The study aims to stay within this word count in order to keep the study as comprehensible and to the point as possible.

Access to data:

- Memoirs: some key negotiators may not have written/published their memoirs. Some memoirs may not produce data relevant to the research questions.
- Interviews: some individuals may be unreachable, or may refuse interviews. Some key informants may be deceased.
- Some informants may be approachable, but may be reticent to disclose information specific to the research questions, for a variety of reasons. In these cases, other raw data will be used, including full text interviews conducted by Patti Waldmeir, Hermann Giliomee and Padraig O'Malley, among others.

Time and resources also act as a limitation to the study. The Scholarship granted by the Graduate School of the University of Stellenbosch is valid for three years of study.

1.7. Chapter Outline

Chapter 2 presents a literature study of negotiated transitions to democracy. The chapter will highlight key authors on this subject, as well as comments and critique regarding democratic transition. The chapter goes on to discuss in some detail the dynamics of negotiated compromise and constitution-making, focusing on the pre-conditions necessary for negotiations to start, the phaseological approach to the analysis of transitions, and the details involved in substantive negotiations.

Chapter Three identifies the conceptual typology being used here to categorise negotiated compromises in the form of Constitutional Contracts, Social Contracts and Benchmark Agreements. This chapter will then elaborate the research design and methodology taken in this study in specifically operationalizing the concepts mentioned above.

The fourth chapter of this study begins the case study of the South African transition, first outlining the context and then going on to focus on the period between 1987 and 1991 characterised by secret talks and preliminary discussions. The chapter takes a look at the first 'pacts' to be made among the elites taking part in the negotiations, and explores the ANC and NP's original positions regarding the dynamics of the transition, as well as their views on the establishment and details of a new constitution. It goes on to assess the shifts in both parties' attitudes toward a new constitution as well as their proposals regarding the details of the negotiation compromise. The chapter examines the actual constitution-making process, from trust-building until the adoption of the final constitution. The differences between the 1993 and 1996 constitutions are reviewed.

Chapter Five identifies aspects of the 1993 and 1996 Constitutions that are amenable to being interpreted as being indicators of either the Constitutional Contract, Social Contract and Benchmark Agreement framework. Specific sections are analysed as being congruent with each of the concepts in the framework, allowing for an overall assessment and short comparison of the two constitutions.

Chapter Six presents the analysis of published sources as well as the findings of the interviews. These findings will place the interpretations of the 1993/1996 constitutions by certain key participants within the framework presented in Chapter Three, whether as Constitutional Contract, Social Contract and Benchmark Agreement.

In the Seventh Chapter, the nature of the outcome of the South African negotiations will be assessed as being either convergent or divergent. It proceeds to assess whether the theoretical framework has proved successful and valid in assessing this case study, and whether it may be expanded to use in other such cases. The implications for theory will also be discussed.

Chapter 2: Negotiated Democratic Transitions

2.1. Democratic Transitions

The aim of this chapter is to provide a basis for the conceptual framework in Chapter 3 by looking closely at literature regarding democratic transitions and their outcomes. The South African negotiated democratisation falls within a larger global process, identified by Huntington (1991) as the 'third wave of democratisation', and described and analysed by Schmitter, O'Donnell and Whitehead (1986) as part of a larger project concerning transitions from authoritarian view with focus on democratisation as part of these transitions. Huntington identified South Africa as in the process of a 'transplacement', falling within his framework of the Third Wave. Chapters 2 and 3 provide a conceptual framework for this thesis.

2.1.1 Huntington: Third Wave (1974 – 1989)

In 1991, Samuel Huntington sought to explain why, and how, more than 30 countries around the world democratised between 1974 and 1990. Huntington identifies two preceding waves, the first was preceded by the American and French Revolutions and reached its peak during between 1826 and 1926 (Huntington, 1991:16). The Second Wave of Democratisation falls between 1943 and 1962. This wave is preceded by the Allied occupation of several countries during the Second World War which promoted the installation of democratic institutions in countries like West Germany, Italy, Austria, South Korea and Japan. Turkey and Greece followed suit, with several Latin American countries, including Brazil and Costa Rica, in tow (Huntington, 1991:18).

Huntington's Third Wave (1974 to 1990) kicked off with a coup d'état in Portugal on Thursday 25 April 1974 which deposed a dictator of over 35 years, and led to revolutionary upheaval in the country and the eventual democratisation of Portugal by 1975 (1991:5). Approximately 30 countries in Europe, Asia and Latin America followed, while in several other countries with authoritarian regimes, significant liberalisation was taking place (Huntington, 1991:21). Huntington (1991:165) finds that 'compromise, elections and nonviolence were the third wave democratisation syndrome'. He identifies two types of leaders in transitions: *standpatters* and *reformers*. Standpatters are those leaders who are content with the status quo and the current political situation in the country, and wish to keep

it that way. Reformers wish for a transition from the existing state of affairs, for reasons including moral and economic incentives, among others.

According to Huntington, democratisation in the third phase came in three forms: *Transformation*; *Replacement*; and *Transplacement*. *Transformations* happen when 'those in power in the authoritarian regime take the lead and play the decisive role in ending that regime and changing it into a democratic system' (Huntington, 1991:124). In other words, the change takes place from within government itself. At the start of this type of democratisation, the opposition is usually very weak or insignificant (1991:125). Prototypical cases of this include Spain, Brazil and Hungary. Huntington (1991:127 – 128) identifies a five step process towards transformation:

1. A group of leaders within the incumbent authoritarian regime believes in moving toward democracy emerges. They may believe democratisation to be desirable or necessary – the reason is not important, as long as they advocate democracy.
2. In some cases, leaders become aware of the risks of not moving toward democracy, and wish to reduce these risks by advocating democratisation. It may be that the opposition seems to be gaining support, and moving toward democracy may curb this.
3. In some cases leaders believed that they, or their associates, would not lose office (in most cases they were wrong). These leaders sought to renew their legitimacy and gain support by democratising.
4. Some reformers believed that moving toward democracy would hold economic and other benefits for the country – including increasing international legitimacy or reducing sanctions against the country.
5. In some rarer cases, reformers believed that democracy was the 'right' form of government. These reformers believe that their country has evolved towards a democratic system and should keep up with other developed countries.

The second means of democratisation during Huntington's third wave comes in the form of *replacement*. In this type of transition, the government loses strength while the opposition gains strength. The replacement occurs when the opposition has gained enough strength to overthrow the government, or when the government collapses (Huntington, 1991:142). Usually reformers within the government are either very weak or non-existent, while standpatters dominate government thinking and oppose change. This transition involves three phases: firstly, 'the struggle to produce the fall'; secondly, the fall of the government; and

thirdly, 'the struggle after the fall'. The third phase involves groups within the new government who fight among themselves to determine the nature of the new regime (Huntington, 1991: 143). Before the 'fall' (the second phase), opposition groups unite in their desire to overthrow the existing status quo. Once they have achieved this, they become divided on the 'distribution of power' and the 'nature of the new regime' (Huntington, 1991:148).

Replacements are the rarest form of transition during Huntington's Third Wave. Authoritarian regimes exist because the opposition is not politically strong enough to overthrow the government. Replacement occurs only when the government loses enough power to become weaker than the opposition, meaning that the opposition has shifted the balance of power (Huntington, 1991:143).

Another means of transition Huntington identifies is *transplacement*. Transplacement entails joint actions by both the government and the opposition toward democratisation (Huntington, 1991:151). Neither standpatters nor reformers dominate the incumbent regime, but a balance exists which makes the government willing to negotiate a change. Some form of push-pull needs to be exerted on the government for it to enter into negotiations, this may come in the form of a third party, international sanctions, security threats or other incentives. Examples of transplacement include Bolivia, Honduras and Poland (Huntington, 1991:151). According to Huntington (1991:152), South Africa started the process toward transplacement in 1989 and 1990.

For transplacements to be successful, leaders in the opposition and within government should recognise that they are not able to determine the political future of the country without the input of their rival (Huntington, 1991:152). Both sets of leaders often try to 'test' each other's strength before entering into negotiations. At the onset, both parties believe that they could unilaterally either keep the status quo or bring about change, but when both have changed their beliefs, transplacement occurs (Huntington, 1991:152).

Huntington identifies four step to transplacement (1991:152 – 153):

1. Government engages in some forms of liberalisation, but slowly begin to lose power and support.
2. The opposition notes the weakening of government and exploit this by intensifying its attempts to gain support in the hope that they will be able to topple government.

3. The government responds by forcefully suppressing these actions.

4. The opposition and government start to perceive a 'standoff' or a 'mutually hurting stalemate' – a situation wherein no party can convincingly win – and explore the possibility of negotiations. This step is not, however, inevitable.

In transplacements, both parties should be roughly equal in strength, or at least perceive themselves to be relatively equal. Both sides are uncertain as to whether they will eventually 'win' the struggle outright (Huntington, 1991:153). Government and opposition realise that the risks of confrontation are greater than the risks of entering into negotiations and eventually compromising. For transplacements to occur, both sides need to be open to the risks of negotiations (Huntington, 1991:155). Different from transformations and replacements, transplacements require governments to negotiate with opponents whom they have previously deemed criminal (Huntington, 1991:159). According to Huntington (1991:161) '[t]he risks of confrontation and of losing thus impel government and opposition to negotiate with each other; and guarantees that neither will lose everything become the basis for agreement... mutual reduction in risk prompt reformers and moderates to cooperate in establishing democracy.'

Huntington (1991:164) goes on to identify three characteristics present in all three types of democratic transitions in the third wave: compromise; stunning elections; and low violence. One of the key characteristics mentioned is that of compromise among political elites. Implicit or explicit bargaining between key parties brought about the transition to democracy. While the agreement was not satisfying to all involved, the transition became acceptable (Huntington, 1991:165). In all cases, formal or not, implicit or explicit agreement was easier to reach when there was not a great discrepancy in power and resources between the parties involved (Huntington, 1991:167). The third wave witnessed moderation in tactics, and often involved the renunciation of violence and revolutionary actions. Both government and opposition worked through elections and other political procedures in order to reach their goals (Huntington, 1991:170). Huntington also mentions the importance of culture when exploring the willingness and ability of leaders to come to compromise, stating that '[s]ome cultures appear to be more favourable to compromise than others' (Huntington, 1991:171).

Another common characteristic of third wave transitions is elections. Elections act as a means of weakening or ending incumbent authoritarian regimes (Huntington, 1991:174). Huntington assigns a lot of power to election: 'elections are not only the life of democracy; they are also

the death of dictatorships' (1991:174). Elections provide authoritarian rulers with a platform to renew their legitimacy when they come under pressure, and they sponsor these elections with the belief that their legitimacy will be bolstered. However, elections in these cases more often than not come out in favour of the opposition, or in the least show poor results for the government. These elections are referred to by Huntington as 'stunning' as they usually surprised both the government and the opposition (1991:175). Huntington lists several examples of 'stunning elections' (1991:175 – 178), including Chile's General Pinochet who in 1988 sponsored a referendum to his continued rule. He was convinced that he would win by a 'landslide', but lost by 55% to 43%. The opposition had succeeded in mobilising public opinion against General Pinochet.

Political change is almost always concomitant with high levels of violence, but low levels of violence are characteristic of third wave transitions (Huntington, 1991:192). The nature of third wave democratisation being through compromise and elections meant that these transitions were comparatively peaceful (Huntington. 1991:192).

2.1.2 Schmitter, O'Donnell and Whitehead: Negotiated Compromise

The worldwide transition phase of the last quarter of the twentieth century was described by Huntington as the third wave. From this model on democratic transitions, Guillermo O'Donnell, Philippe Schmitter and L. Whitehead developed the 'New Model': The Transition Paradigm. Schmitter, O'Donnell and Whitehead (1986:8) define democratisation as 'the processes whereby the rules and procedures of citizenship are either applied to political institutions previously governed by other principles… or expanded to include persons not previously enjoying such rights and obligations… or extended to cover issues and institutions not previously subject to citizen participation.' The outcome of democratisation should be peace-making and constitution-making. The 'transition' period is the 'interval' between political regimes. They go on to state that political democracy, in all cases included in their study, was preceded by liberalisation, in differing levels of steadiness and significance (1986:10). Liberalisation is defined as the extension of rights. However, it is important to note that liberalisation can occur without democratisation, and elections can take place without democratisation, as seen in Zimbabwe (2002; 2008; 2013) and Russia (2008; 2012).

Schmitter *et al* (1986) identify characteristics, trends and threats present during the 'opening', or what they refer to as *abertura*, of authoritarian regimes. Two groups typically present in

authoritarian regimes are *hard-liners* and *soft-liners*. Hard-liners believe that it is not only possible, but also desirable (for whichever reason, including moral and opportunist) to uphold the incumbent authoritarian regime (Schmitter *et al*, 1986:16). Hard-liners are compatible with Huntington's standpatters. It may not be possible to distinguish soft-liners from hard-liners at the start, but as these leaders become aware that the regime could use some legitimisation, usually by means of elections, they become identifiable as soft-liners.

Schmitter *et al* also find that high economic growth is favourable factor to democratisation. In Latin America, liberalisation was concomitant with the demilitarisation of public life, which can be linked to the revival of civil society. This sharp increase of political activity is usually followed by a sense of 'normalisation' as groups and individuals become depoliticised (Schmitter *et al*, 1986:26). The unbanned opposition tends to de-radicalise during negotiations, realising that their maximum outcome will not likely be achieved (Schmitter *et al*, 1986:26). Schmitter, O'Donnell and Whitehead (1986:23) identify one characteristic present in all cases included in their study: the fear of a coup d'état during the transition, carried out by hard-liners.

2.1.3 Basic Assumptions, Comments and Critique

In 2002, Thomas Carothers challenged this model in claiming that 'reality is no longer conforming to this model' and that it was 'time to recognise that the transition paradigm has outlived its usefulness and to look for a better lens' (2002:6). Guillermo O'Donnell stepped in to argue against some of Carothers' claims, but also to clarify some original points and concede some of the weaknesses of the original theory. Carothers (2002) identifies five core assumptions of the Transition Paradigm and seeks to refute each individually.

The first core assumption made by Schmitter, O'Donnell and Whitehead (1986) is that a country in the process of moving away from dictatorial rule can be considered in transition toward democracy. Carothers (2002:6;9) argues that of the 100 new transitions thrown into the transitional paradigm, only 20 at the most can be considered clearly on route to becoming well-functioning, successful democracies. O'Donnell (2002:7) agrees that moving away from authoritarianism does not necessarily mean moving toward democracy: he explicitly states the title of his, Schmitter and Whitehead's work as 'Transition *from* Authoritarian Rule', as opposed to of 'Transitions to democracy'. He goes on to state that under this title they had insisted the open-endedness and uncertainty of the transitions.

The second assumption made by Schmitter, O'Donnell and Whitehead (1986) and identified by Carothers (2002:7) is that democratisation unfolds in set stages: opening; breakthrough; and consolidation. Carothers (2002:9) holds the argument that transitional countries often fall into what he calls a 'political gray zone'. This means that countries have negative as well as positive aspects, for example having regular elections, but low levels of political participation. Countries are then termed 'semi-democracies'; electoral democracies; pseudo-democracies; or any other term relating to a type of 'qualified democracy'. O'Donnell argues that neither he nor his co-editors held the view of set stages within a transition (2002:7), reiterating his own warning on 'illusions about consolidation' in 1996.

The third assumption, 'the belief in the determinative importance of elections' (Carothers, 2002:7), refers to the value granted elections of giving governments legitimacy and broadening political participation. It is assumed that elections are fundamental in generating democratic reforms. Carothers (2002:10) identifies two broad political 'syndromes' present in political gray zones which undermine the power of elections: 'feckless pluralism' and 'dominant-power politics'.

Feckless pluralism is defined as the political dynamics within countries with significant democratic aspects like political freedom, alternation of power between different groups, and regular elections, but which are marred by weak political participation outside of elections, corrupt political elites, and a state that remains weak (Carothers, 2002:10). Countries where one party dominates the system with little chance of being ousted even by means of elections have fallen into the dominant-power politics syndrome (Carothers, 2002:12). O'Donnell argues that neither he nor his co-editors give elections 'magical powers', but he restates the importance of elections, arguing that 'feckless pluralism' is still democracy, even if it is flawed (2002:8). He does however state that dominant-power systems are not democracies at all, but rather authoritarian regimes that hold elections (O'Donnell, 2002:9). O'Donnell also mentions that in their original work, he, Schmitter and Whitehead identified these 'syndromes' as *democradura* (feckless pluralism) and *dictablandas* (dominant-power politics).

According to Carothers, the fourth assumption made by the transition paradigm is that 'the underlying conditions in transitional countries – their economic level, political history, institutional legacies, ethnic makeup, sociocultural traditions, or other 'structural' features – will not be major factors in either the onset or the outcome of the transition process' (2002:8).

This assumption had arisen from the unlikely number of countries with no existing preconditions for democracy democratising, like Albania and Mongolia, in the early period of the third wave.

Carothers argues that there are a number of factors which influence the outcome of the transitions, including the institutional legacies from previous regimes (2002:16). He goes on to cite several scholars who analyse the role of structural conditions like economic wealth and social class in democratic transitions, but notes the lack of integration by scholars on both subjects (2002:16). O'Donnell cites Przeworksi (2000) when agreeing that socio-economic factors are not pre-requisites for democracy, but when it comes to durability, 'socio-economic factors are significant… the mortality rate of poor democracies is higher than that of rich ones' (2002:10).

The fifth assumption noted by Carothers (2002:8) is that the 'democratic transitions making up the third wave are being built on coherent, functioning states'. Carothers argues that state-building has been much more difficult than envisioned by the transitional paradigm, as the study of transitions away from authoritarianism has left countries in the lurch concerning fundamental state-building (2002:16). In many countries, weak states have severely curbed the growth of democracy – state-building is either a low priority, or it is done in such as way as to gain power and resources as quickly as possible (Carothers, 2002:17). O'Donnell concedes that their original literature may not have addressed the problem of weak or non-existent states, but that weak states in general were more susceptible than strong states to transitions. He also mentions that in the 1990s 'political scientists and sociologists argued that a reasonably effective and viable state is a crucial condition for, among other things, democratisation' (2002:11).

2.2. Transplacement – The Dynamics of Negotiated Compromise and Constitution-making

This next section will embed the literature on democratic trasplacement within the broader field of negotiated conflict resolution. The section presents a standardised conceptual framework for the description of the dynamics of bargaining and negotiation. This framework will be used to provide conceptual clarity to the chronology of events comprising the South African negotiated transition, presented in Chapter 4.

2.2.1 Pre-Conditions

Most literature on peace processes focus on the content of the settlement itself as vital to conflict resolution. However, more and more focus is being placed on the *timing* of the negotiations or efforts toward resolution as equally important as the substance of the proposals (Darby & MacGinty, 2003:19).

Parties to the conflict must feel that they are not being forced to join the peace process, but rather that they are willing participants (Rubin & Brown, 1975:7). Each party should believe that he will gain more by participating in bargaining rather than refusing to join the peace process. One of the most important pre-conditions is the existence of a contract zone, or at least the perception that a contract zone exists.

2.2.1.1. Contract Zone: The Space to Make a New Constitution

The contract zone has many names – the middle ground, the common ground, or the 'bargaining range' - but all describe the social space where the two parties' interests and preferred outcomes overlap and potential agreements exist (Barry & Friedman, 1998:346). As represented in the figures below, this area is where the negotiating parties' interests overlap (Atkinson, 1977:43). For bargaining to occur, a contract zone must exist. Parties' interests are mainly divergent, but without some commonality, bargaining cannot take place (Rubin & Brown, 1975:10). Kelley and Thibaut (1969, in Rubin & Brown, 1975:10) support this observation: '[i]f the interests are totally congruent, there is nothing to bargain for; and if they are totally opposed, there is no basis for bargaining'.

Participating parties must determine a 'reasonable settlement' – this entails a settlement with maximum gain for each party, while still having a good chance of being agreed to by the other side. Rubin & Brown refer to this as the 'minimax solution' – a solution to the conflict representing 'the best he can obtain in the face of the other's opposition' (Rubin & Brown, 1975:11).

As mentioned before, each bargainer must believe that a 'contract zone' or 'middle ground' exists. In other words, each bargainer must believe that 'at least one [solution] with which he will be satisfied' exists (Rubin & Brown, 1975:8). One settlement point in the contract zone is 'Pareto-optimal' – this means that it includes all parties' 'best possible outcomes, given any possible outcome for its opponent' (Lawler & Bacharach: 1981:8). No party will agree to

a settlement that does not give it as much as it would 'win' from not negotiating at all, and 'neither will accept a solution if another solution would give it a higher pay off without requiring the other party to accept a lower one' (Lawler & Bacharach: 1981:8). If reasonable solutions to inequalities are not evident, negotiation may not take place at all (Johnson, 1993:12). Parties must recognise that a solution exists for negotiations to begin (Zartman & Berman, 1982:45).

Ideal Settlement

When entering a bargaining relationship, each party must determine an 'ideal settlement' (IS) which represents the most beneficial settlement that can, within realistic means, be achieved in negotiation. Atkinson (1977:42) calls it 'realism with a touch of optimism' Negotiation is usually opened at this level, with each party presenting its 'best imaginable deal' (Johnson, 1993:22).

Realistic Settlement

The 'realistic settlement' (RS) is the point that each party calculates as being within reach with reasonable skill in negotiation and where unforeseen circumstances don't negatively affect the negotiation (Atkinson, 1977:43). Zartman & Berman (1982:63) refer to this position as the 'expected outcome': 'the maximum he feels he can realistically obtain from the other party'.

Fall-back Position

The 'Fall Back Position' (FBP) is the point 'beyond which confrontation will be preferred' – meaning that this is the least favourable outcome that parties will be satisfied with. Should the outcome go beyond this point, parties would rather step out of negotiations and choose direct (often violent) confrontation, as they feel they would be 'better off' doing so (Atkinson, 1977:43). This position represents the last resort of the parties involved. Johnson (1993:22) refers to this as the 'worst acceptable deal', and Zartman & Berman (1982:63) call it the security position, which is estimated by doing a cost-benefit analysis.

Bargainers' limits, or Fall-Back Positions, are made on instructions from constituents, ethical principles, principles of fairness, and equated with the value of no agreement: bargainers should feel that they are better off in this 'last-resort' agreement than they would be should they fail to agree (Carnevale & Pruitt, 1992:537). This position also indicates which issues

can be settled by negotiation, which can be settled by joint agreement and which 'by power bargaining' (Atkinson, 1977:43). Barry & Friedman (1998:346) refer to this as the 'resistance point' or the 'bottom line'.

Figure 2.1: Range of Possible Outcomes
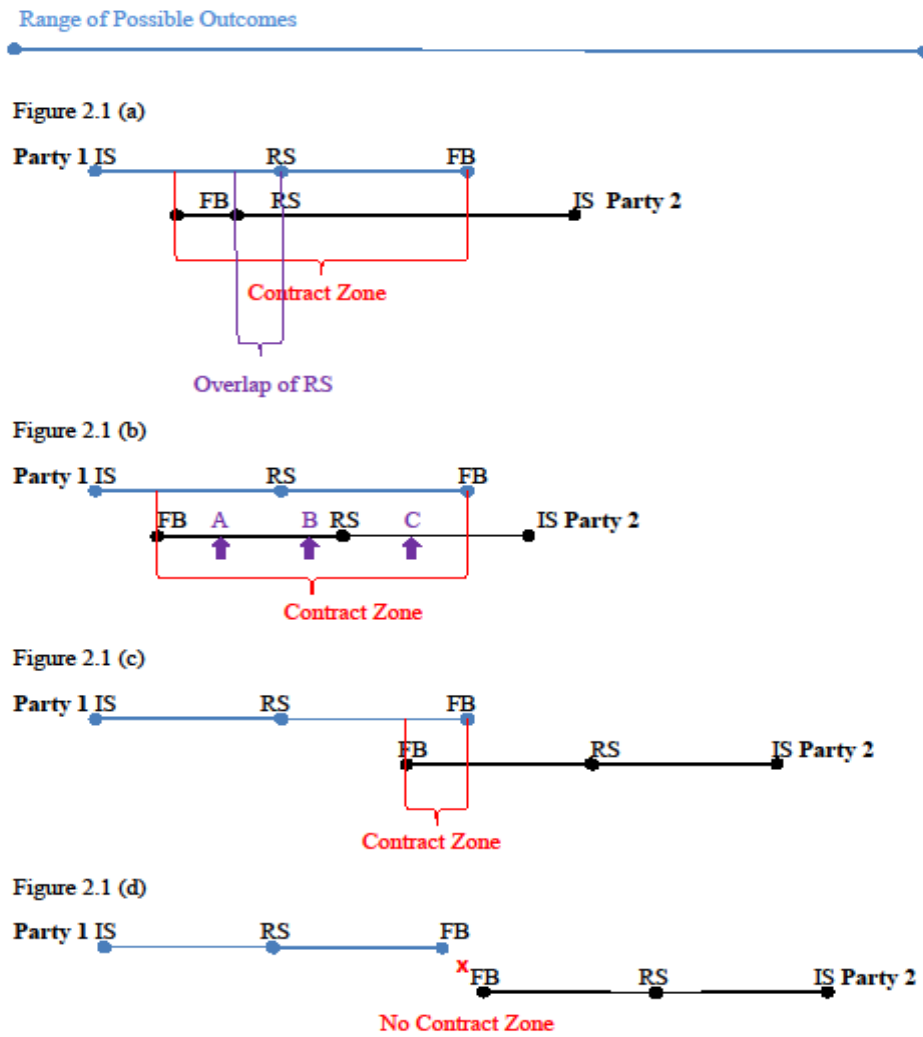
Source: Compiled by the researcher, adapted from Atkinson (1977:45)

Figure 2.1 (a) represents a situation where not only a contract zone presents itself, but there is also an overlap of the parties' respective Realistic Settlement points (RS). In this type of case, settlement can be reached with some ease.

Another type of situation presents itself in *Figure 2.1 (b)*. The contract zone in this case represents a wide range of possibilities. Each party has the possibility of achieving its Realistic Settlement, or even better, but reaching this settlement is not guaranteed and will take some skill on the part of the negotiator. In this case, if one party reaches Realistic Settlement or better, the other party will not. Instead, for the party not reaching its Realistic Settlement, the outcome will fall closer to its Fall-Back Position. Point A represents the outcome in which Party 1 will be better off than Party 2, as the outcome is closer to Party 1's Ideal Settlement, and further from Party 2's Realistic Settlement Point. Point C represents the opposite of this outcome – the outcome is closer to Party 2's Ideal Settlement, but further from Party 1's Realistic Settlement Point, meaning that Party 2 is better off than Party 1. Point B represents the Pareto Optimal point of outcomes – the point at which both parties are equally well-off and both have their best possible outcome.

In *Figure 2.1 (c)* a contract zone has presented itself in the form of an overlap of the Fall-Back Positions (FB). Settlement is within reach here, but can only be achieved with some difficulty and excellent negotiating skills. Both parties will have to be willing to make several concessions in this instance.

Figure 2.1 (d) represents a situation where no contract zone exists, and therefore negotiations would be least likely to lead to a settlement of any kind. In this case the conflict situation often has not reached a point of 'ripeness' (elaborated further in section 3) and parties should re-evaluate their positions before entering into negotiations.

2.2.1.2 Mutually Hurting Stalemate/Ripe for Resolution

Calero (1982:33) stresses the importance of timing when starting negotiations. While it is difficult to determine the 'perfect' timing, prematurely forcing issues may weaken a party's negotiating position (Calero, 1982:34). The most optimal moment to initiate negotiation is when power relations have shifted in such a way that parties become more equal (Zartman & Berman, 1982:54). A Mutually Hurting Stalemate presents itself when neither party is able to solve the conflict on its own, but each party is necessary to create a solution. In this situation, each party holds some of the cards, but no party has the complete upper hand. By making this

fact apparent to all involved, a stalemate may be converted into negotiations (Zartman & Berman, 1982:77). Good tactics in the prenegotiation stage means that parties to the conflict make it clear to their opponents that the situation will only deteriorate for both parties should negotiations not go forth (Zartman & Berman, 1982:82).

A 'ripe moment', or moment optimal to start the peace process, exists when parties perceive a Mutually Hurting Stalemate. The Mutually Hurting Stalemate is ideally coupled with a catastrophe, whether impending or past. Zartman (2003:19) defines the Mutually Hurting Stalemate:

The concept is based on the notion that when the parties find themselves locked in a conflict from which they cannot escalate to victory and this deadlock is painful to both of them (although not necessarily in equal degree or for the same reasons), they seek an alternative policy or way out.

Parties opt for 'cost-benefit analysis'. Public choice notions of rationality show that each party will lean towards its preferred alternative, unless increased pain associated with the current situation induces a decision to change (Zartman, 2003:20).

When parties perceive a 'deadlock', negotiation tends to come about. Only when all parties realise that neither can obtain total victory, and that continuing with violence will be too costly, does negotiation become an option (Harris & Reilly, 1998:61). This does not mean that the parties to the conflict are necessarily militarily evenly matched, which is rarely the case, – the stronger party needs only to perceive that the weaker can prevent it from winning outright (Harris & Reilly, 1998:62). A Mutually Hurting Stalemate often occurs 'because of the absence of change', but negotiation becomes a feasible, even attractive, option because of contextual changes (Harris & Reilly, 1998:63).

The Mutually Hurting Stalemate rests solely on the parties' perception of whether it exists. The 'secret of negotiation' lies in changing the perception of the parties so that the issues, or items, at stake can be used to the advantage of all involved (Zartman & Berman, 1982:13). Parties hoping to entice their opponent into joining negotiations aim to divide the items at stake into 'goods valued more by one party than they cost to the other and goods valued more by the other party than they cost to the first' (Homans, 1961, in Zartman & Berman, 1982:13-14). If the parties perceive the Mutually Hurting Stalemate to be present, then it is, whether perceived as such in someone else's view or not (Zartman, 2003:20). Parties will only choose

to enter into negotiations if they perceive it to be in their interest to do so (Harris & Reilly, 1998:61).

Another element essential to the perception of a ripe moment is the Way Out. While parties need not be able to name a solution, they should 'sense' or perceive that a solution is possible through negotiation, and that the other party (or parties) share this willingness (Zartman, 2003:20). In other words, parties need to perceive a Contract Zone before entering into negotiations. If the parties do not sense a Way Out, parties may feel they have 'nowhere to go' in negotiating with the other (Zartman, 2003:20).

Zartman (2003:21) mentions Stephen J. Stedman's reinforcement of the idea that the perception of a Way Out is equally important as the perception of a stalemate: all parties may see a very favourable outcome should they opt for negotiation. Stedman also mentions the perception may be induced by the supporters of the parties, or by interested third parties, not the parties alone.

Leadership change can lead to a change in the perception of a situation, and the perception of the Mutually Hurting Stalemate may arise where it had not been before. Threats from within a faction toward incumbent leadership may serve as the source of approaching catastrophe, therefore strengthening the Mutually Hurting Stalemate (Zartman. 2003: 21).

The existence of 'ripeness' does not in itself guarantee or in fact lead to the initiation of the peace process. Parties should 'seize' the moment, or a third party should persuade parties to do so (Zartman, 2003:20).

There are some complications associated with the concept of the Mutually Hurting Stalemate. Parties may choose to react negatively toward this type of ripeness – instead of initiating negotiations, parties take the 'don't give up without a fight' attitude and reinforce their stronghold against the opposition (Zartman, 2003:24). Parties may feel like they are being pushed into a corner, or are too wary of their opponents, and react negatively. Another complication arises when pressure on a party leads to a worsening image of the opponent, which then in turn lessens the chances of reconciliation (Zartman, 2003:24).

Also, unfortunately, the Mutually Hurting Stalemate is dependent on conflict. While by definition the Mutually Hurting Stalemate does not require a high level of violence, it does point out the difficulty of accomplishing successful preventative conflict resolution. The

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South African peace negotiations (1990-1994) are a remarkable example of a perception of a Mutually Hurting Stalemate from both major parties, both parties fully aware of an impending catastrophe and not of 'present casualties' (Zartman, 2003:24).

Lijphart (1977) identifies the 'self-negating prediction' as being essential to joint commitment to pursue a settlement (Du Toit & Gagiano, 1988:7). The self-negating prediction is defined as such (Du Toit, 1989:213):

The self-negating prediction involves an awareness of the destructive conflict potential of deeply divided societies, which motivates elites to cooperate with one another in order to avert such conflict. The very real prospect of violent conflict provides the incentive for leaders to act in order to avoid it. It consists of an assessment of perceived future costs and benefits in a conflict relationship that provides the catalyst for preemptive action to forestall these perceived costs of escalating conflict by deescalating it instead.

By making the self-negating prediction, negotiators find that seeking a negotiated settlement is more profitable than induced violence in divided societies (Du Toit, 1989:212). These negotiators, often the political elite, realise that by not cooperating they will be further dividing the already polarised society.

2.2.1.3 Security Dilemma

Peace processes often take place amidst periods of violence and have to deal with fears of ex-militants influencing the negotiations. The South African National Peace Accord of 1991 did not ban arms, but instead dealt with this fear by requiring that firearms be displayed at public meetings (Darby & MacGinty. 2008: 347). A security dilemma is linked with the perception of the Mutually Hurting Stalemate. Parties to the conflict have up until the negotiations used displays of strength, often military, in order to show their dominance. Parties also feel that they should be able to defend themselves during negotiations, but this would also mean entering into negotiations in some degree of bad faith. The banning of arms symbolises good faith, and trust, in opponents. However, in situations that have been violent for years, parties fear letting go of their defence mechanisms.

2.2.1.4 Trust and Good Faith

Bargaining in good faith means that 'once a bargainer makes an offer it cannot be retracted, and an agreement, once reached, is enforceable' (Lawler & Bacharach, 1981:9). The principle of negotiation in good faith is a widespread standard across negotiation processes, and has become a custom or is even protected under law in some cases (Gulliver, 1979:102). Overt offers cannot be withdrawn in favour of higher offers at a later stage.

'Negotiations tend to focus on issues, but their success depends on people' (Harris & Reilly, 1998:63). Successful processes focus not only on the issues at hand, but also on creating an effective working relationship between parties in order for them to negotiate in good faith (Harris & Reilly, 1998:64). The 'psychological dimension' of the conflict should be broken down in order for those engaged in the negotiations to develop trust. Perceptions must be changed for negotiations to be successful (Guelke, 2003:53). In extensive experimentation, Schurr & Ozanne (1985:948) found that when bargainers are perceived as trustworthy, there are higher levels of cooperation and more concessions made.

Each phase of negotiation is precarious and requires a degree of trust between bargainers. Bargainers enter a high-risk environment in order to ascertain whether the other participants are serious about bargaining. Good faith is especially important in the early stages of negotiation as the chances of collapse are high. Distrust, the involvement of third parties and secrecy are rife in the initial phase. Parties often demand 'signals of good faith' in order to build confidence – this may include ceasefires or public statements of intent (Darby & MacGinty, 2003:7).

Rubin & Brown (1975:15) refer to this as the 'dilemma of trust'. Parties should show their integrity to their opponent, while not jeopardising their bargaining position by appearing weak or divulging too much information: 'No party can be completely trusting, since he would be at the mercy of the other's deceptions, and no party can be completely untrustworthy, since he would destroy the possibility of any agreement' (Zartman & Berman, 1982:28).

The possibility does exist that one or more parties make a commitment to a normative element in bad faith, meaning that a party may have made a promise they do not intend to keep. This means that the existence of a settlement does not guarantee its success. The existence of such failures does not mean that normative elements in settlements should be

discounted. In fact, peace processes may not even reach this stage – parties are most often accused of 'bad faith' when ceasefires or the ending of violence is not sustained (Guelke, 2003:56).

Another factor that encourages negotiators to act cooperatively is the tradition of elite accommodation (Lijphart, 1977:100). Lijphart (1977:100) refers to Daalder's argument on the traditions of political accommodation in the Netherlands and Switzerland and how these traditions eventually facilitated the move toward democracy.

2.2.1.5 Valid Spokesperson

Another element that has been periodically linked to 'ripeness' is the availability of a valid spokesperson for each side (Zartman, 2003:22). Strong representation in the form of leadership from parties involved can deliver that party's compliance in productive and successful negotiations. Negotiators in South Africa went so far as to become 'evangelists for peace': Nelson Mandela became the face of peaceful negotiations and provided significant incentive to other parties to become involved (Darby & MacGinty, 2008:339).

2.2.1.6 Spoilers

Weaker parties may feel that a settlement in their favour is unattainable and instead choose to attempt the destruction of the peace process itself. In conflict situations where serious inequalities are present, envy and hatred are rife. This introduces the possibility of spoilers. Parties who feel that reasonable solutions are not within reach may aim to make negotiation difficult if not impossible. Parties who feel marginalised may become spoilers, and parties with military capability represent the greatest threat to negotiations.

2.2.2 Process: The Phaseological Approach

The phaseological approach to the study of negotiation aims to 'fulfil a clarifying role regarding the timing and development of a bargaining relationship' (Kruger, 1998:2). This approach can be easily integrated with other approaches to the study of negotiations.

Several authors propose theories regarding this approach. Ann Douglas (1962) developed the first theoretical framework on negotiations based on the notion that negotiations occur in stages. Douglas's framework did not show the phases as chronological, but rather as functional. She set up a framework based on three stages: (1) Establish the Bargaining Range

– this stage often involves violence as negotiators attempt to defend their positions and try to establish the boundaries within which the negotiations will take place; (2)Surveying the Bargaining Range – in this stage, proposals are made without official commitment; (3) Precipitating the Decision-Making Process – this is the stage where parties to the conflict officially commit to negotiations (Stephenson *et al*, 1977:231).

A few years later, in 1968, Daniel Druckman moved away from identifying specific phases and focused on the preparatory phase of negotiations (Druckman, 1968:368). Ian Morley and Geoffrey Stephenson (1977) built on Douglas's work by identifying the importance of the interpersonal relationship between bargainers during each phase of negotiation. A few years later, Gulliver (1979:121) built a model of successive phases in negotiation. He found that certain phases were given more attention by negotiators and as such built this model. While mentioning that in practice the phases are not necessarily linear or chronological, he found that 'progress in one phase… opens the way to the succeeding phase…' Calero (1982:38) built on previous work by mentioning the 'intuitive awareness' of negotiators that negotiations happen in phases.

By 1982 Zartman & Berman identified 'stages, sequences, behaviours, and tactics' used in order to improve the practicability of negotiation theory, and in turn better the chances of successful negotiations (Zartman & Berman, 1982:1-2). In 1985, Harold Saunders brought the focus back to the pre-negotiation phase (Saunders, 1985:254-258).

In 1989, Pierre du Toit reduced these phases into a comprehensible, overarching three phases, each inclusive of several elements of negotiation. These include (1) *Bargaining about Bargaining*, of which the main function is to encourage parties to accept that negotiation is the only viable option, that 'outright victory' is highly unlikely if not impossible, and that complete defeat isn't necessary. The second phase, *Preliminary Bargaining*, focuses on the establishment of agendas, arenas, tactics, rules of conduct and other preconditions. The third and last phase, *Substantive Bargaining*, is focused on resolving the issues on which the conflict was originally based. In this phase, parties could secure a settlement within the contract zone.

In 1998, Peter Harris and Ben Reilly brought the focus back to the pre-negotiation phase. These researchers stressed the fact that this phase was not to be used for addressing the outcome, but rather was to be used as 'negotiation over process' (1998:67). Harris and Reilly

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once again made clear the importance of this phase in ensuring, or at least aiding, a successful outcome. This phase is equal to Du Toit's definition of Preliminary Bargaining, followed by a similar Substantive Negotiation phase. While Harris and Reilly do not completely bypass the essential first phase mentioned by Du Toit, they place more emphasis on the phase where the framework, structure, roles and agendas are set up (1998:67).

In 2003, Adrian Guelke once again broadened the framework of the phaseological approach. Guelke (2003: 56) identified seven phases in the process: (1) the pre-talks phase; (2) a phase of secret talks; (3) the opening of multilateral talks; (4) negotiating to a settlement; (5) gaining endorsement; (6) implementing its provisions; and (7) the institutionalisation of the new dispensation. While not arguing that these phases were present in all negotiations, Guelke argued that at least these seven phases were present (or should be) during difficult negotiations (2003:56).

I have chosen to use Du Toit's basic approach while incorporating important aspects from different models within this framework. I choose this as it provides a comprehensive, simple, three-phase model on which to ground my analysis. This model has previously been used effectively to analyse the South African negotiations in Kruger (1998). I add an *Aftercare* section (Darby & MacGinty, 2008:352).in order to encompass the later focus on the implementation of settlements, especially in securing their long-term success.

2.2.2.1 Pre-negotiation (Talks about Talks)

Negotiation often takes time, starting with pre-negotiations. Harris & Reilly (1998:66) refer to this phase as 'talks about talks', while Du Toit (1989:215) refers to this phase as 'bargaining about bargaining'. At this time in the process parties are often unwilling to enter into negotiations. It may be very difficult for parties to enter into negotiations – they may not be able to meet, levels of trust could be so low as to completely discourage talks, one or all parties may be too angry or too proud (Carnevale & Pruitt, 1992:533). Some parties may seek violent means when faced with the possibility of having to accept undesirable settlements (Johnson, 1993:12).

Conditions resulting in a willingness to negotiate rarely, if ever, coincide for all parties involved in the conflict (Darby & MacGinty, 2008:352). Rivals in conflict may propose talks in turn, but this very rarely happens simultaneously. 'Windows of opportunity' are rare, but it is only during this window that a settlement can be reached.

Pre-negotiation, or the 'pre-talks phase' (Guelke, 2003:57), often relies on the existence of a Mutually Hurting Stalemate. Though this concept has been criticised as 'too passive', Zartman (in Darby & MacGinty, 2008:353) maintains that 'unripeness should not constitute an excuse for second or third parties' inaction'. The Mutually Hurting Stalemate will be explored further in the next section. Parties seek motives in order to enter into negotiations. One motive may be that seeking negotiation gives them a 'measure of legitimacy', implying that the conflict cannot end without their participation (Guelke, 2003:57).

Parties have divergent reasons for entering into talks, and the desire to negotiate needs to coincide. While certain favourable circumstances do exist, Guelke (2003:57) refers to this as 'coincidence' rather than set in stone. Guelke (2003:57) refers to Zartman's argument that the intent of parties to 'arrive at a joint outcome', a crucial ingredient for talks, is often completely absent. In this phase, parties determine whether they should strive for complete victory or whether a mutually beneficial and acceptable settlement can and should be sought (Du Toit & Gagiano, 1988:7).

This phase provides parties with a platform to 'probe and explore, and to show the other side examples of possibilities' (Zartman & Berman, 1982:71). However, this is not a time to make binding promises. In this phase, parties try to explain their perception of the conflict to their opponent, making clear their meanings and understanding of the conflict in order to better understand each other before entering into binding negotiations (Zartman & Berman, 1982:95).

For the negotiation process to officially begin, parties should make a deliberately calculated conscious change in their perception of the conflict, and this usually occurs during this phase (Zartman & Berman, 1982:43). Such a new perception, which follows from a newly (re)calculated cost-benefit analysis, is often/can be induced by major structural changes to the political environment of antagonists, such as the end of the Cold War which induced some changes in the South African political landscape. This type of 'fortuitous event' often plays a role in helping parties to re-define their perceptions.

An 'era of secret talks' often follows these 'pre-talks' and falls within the pre-negotiation phase. Parties to the conflict fear reaction from their supporters and as such these talks are often conducted in secret. These talks are 'exploratory' rather than substantive and parties have not yet committed themselves to negotiate with the view to clinching a mutually

beneficial settlement (Guelke, 2003:58). Truce or ceasefires usually don't occur during this phase. During this stage, the public may become aware of the existence of talks, although not necessarily the content of the talks. The public reaction to this often plays a vital role in whether the parties continue toward negotiations (Guelke, 2003:58). Should the public react positively, parties may see this as a go-ahead for more substantive talks, but public upheaval may result in abandoning the talks altogether.

Zartman (2003:26) identifies items to be explored during pre-negotiation:

- The Parties involved in the conflict and essential to a settlement should be identified;
- The issues that can be resolved should be separated from those not resolvable in the conflict;
- Alternatives to the current conflict should be identified;
- Opponents should develop contact between each other;
- Risks and costs to negotiation should be made clear;
- A reciprocal relationship should be established;
- Support from each partaking party's followers should be garnered.

2.2.2.2 Preliminary Negotiation

Preliminary negotiation and pre-negotiation are sometimes used synonymously. In this study a distinction is made between the two. Preliminary negotiation is one step further than the pre-negotiation phase described in the section above. Du Toit & Gagiano (1988:7) define preliminary negotiation as the phase where issues like tactics, preconditions and arenas are discussed and determined, in other words, defining the bargaining relationship.

Distrust, negative stereotypes and hostility between conflicted parties become entrenched during years of violence. Parties often view their opponents as 'cohesive, devious and successful', and tend to view themselves as discouraged and divided. This does not create an environment conducive to successful negotiations (Darby & Mac Ginty, 2008:355). Darby & MacGinty (2008:355) address the issue of building confidence during preliminary negotiation and the establishment of rules and procedures in order to move forward with negotiation:

Israel's recognition of the Palestine Liberation Organisation (PLO) as legitimate representatives of the Palestinian people in the Oslo Accord, coupled with acceptance of the Palestinian right to self-determination, had great symbolic significance. There and elsewhere,

the fact that negotiations are taking place at all presumes an acceptance, often implicit, that the representatives of militants have been admitted to negotiations in return for giving up violence. Their inclusion, whatever pressures it imposes on the process, admits militants to the common enterprise and applies a moral pressure on them to preserve the process in the face of violence from dissidents or spoiler groups.

Oftentimes radical differences concerning bargaining preferences are apparent at the onset (Atkinson, 1977:57). It is then up to the parties to structure the bargaining process in such a way as to satisfy both sides. This is where preliminary negotiation comes in. This phase provides a platform for setting up the framework of the negotiation itself – such as the agenda and the procedures the negotiation can take on. Preliminary negotiation is not concerned with the issues themselves, but rather the framework within which these issues will be discussed (Harris & Reilly, 1998:67). Items to be addressed during preliminary negotiation include whether or not to set a time limit to negotiations and symbolic issues including representation, procedures and venue (Guelke, 2003:59). While this may delay the substantive negotiations, these issues are instrumental in determining a positive outcome.

Harris & Reilly (1998:67) stress the importance of these talks. They list some major elements of this phase (Harris & Reilly, 1998:69):

- Agreeing on the basic rules about procedures;
- Agreeing on who should participate in the process, and how they will be represented;
- Dealing with preconditions for negotiation, like ceasefires or disarmament; and barriers to dialogue, where parties refuse to enter into negotiations with a specific party/person or on a specific subject. This may be ratified by the influence of a third party;
- Creating a level playing-field for the parties – no party should be shown to have a marked advantage entering into negotiations. Governments have easier access to resources (like arms and allies) than rebel groups who often have to fight for these resources. The equality need only exist within negotiations;
- Resourcing the negotiations – who will fund the physical aspects of the negotiations? Negotiators may opt to each fund themselves, seek contributions from other actors, domestic or international, or one party may offer to fund all or most of the negotiations;

- The form the negotiations will take on: this is determined by the number of participants as well as the issues on the agenda. The negotiations may take on the form of a conference, a summit, round table discussion, bilateral discussion or any form that the negotiators choose as most suitable to their unique situation;

- Venue and location: the choice of venue has the potential to become a contentious issue;

- Communication and information exchange: parties should choose whether to keep the proceedings transparent in whole, in part, or not at all. There are benefits to each of these choices – transparent talks reduce suspicion and allow for positive use of the media, while closed talks allow for more candour on the part of the negotiators;

- Discussing and agreeing upon some broad principles with regard to outcomes;

- Managing the proceedings: this includes questions as to who will chair the proceedings and who will be responsible for what. For example, in Ireland, a former US Senator was chair of the process, while in South Africa the position of chair was rotated among parties;

- Decision-making procedures: it should be determined in advance how decisions will be reached and how to define the agreements as binding;

- Process tools to facilitate negotiations and break deadlocks;

- The possible assistance of a third party.

2.2.2.3 Substantive Negotiation

Substantive negotiation involves 'the process of resolving the dispute from which the original conflict of interest arose' (Du Toit & Gagiano, 1988:7). This phase of negotiation seeks a settlement within the contract zone acceptable to all parties (Du Toit, 1989:216). Formal talks involving all parties to the conflict are vital to the peace process (Guelke, 2003:59). The commitment of the parties to a negotiated settlement is demonstrated by the formality of the juncture. Inclusion of the divergent parties involved is essential to the legitimacy of the talks (Guelke, 2003:59).

Inclusive negotiations do not guarantee political settlement (Guelke, 2003:59). Each side's minimum requirements have to be reconciled in order for there to be settlement. In other words, the existence of a contract zone needs to be apparent to all parties involved before substantive negotiations are attempted.

Structural components greatly affect the behaviour or bargainers (Rubin & Brown, 1975:42). This section takes a closer look at some structural aspects that influence bargainers. Every one of these structural aspects is the subject of preliminary negotiations.

a) Participants

Because of the militant and violent nature of conflict, it may seem natural to want to exclude certain parties from negotiations. More extreme parties have the ability to undermine the agreement or obstruct the process (Harris & Reilly, 1998:69). However, inclusion is essential to the success of negotiations. Inclusion does not only refer to opposing parties but also to different factions within parties (Harris & Reilly, 1998:70). It is also vital that the negotiators be recognised as such by their followers as well as by the opposition (Harris & Reilly, 1998:71).

More often than not, more than two parties are involved in a bargaining exchange. The more parties are involved, the more time is needed, the more tangible and intangible issues need to be discussed and agreed upon, the more audiences are to be held in account, and the greater the likelihood of the formation of coalitions (Rubin & Brown, 1975:64).

Figure 2.2: The Formation of Coalitions
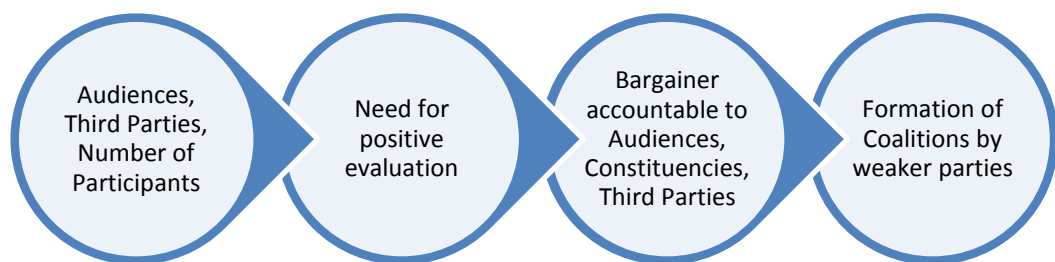
Source: Compiled by the researcher, adapted from Rubin & Brown (1975:64)

Coalitions are defined by Rubin & Brown (1975:64) as 'the unification of the power or resources (or both) of two or more parties so that they stand a better chance of obtaining a desired outcome or of controlling others not included in the coalition'.

Coalitions are most likely to form in bargaining when power is perceived to be unevenly distributed and parties seeking specific outcomes see coalition formation as advantageous to themselves (Rubin & Brown, 1975:67). Rubin & Brown (1975:71-72) mention some inhibitors to the formation of coalitions: the initial distribution of resources or power inhibits the effective and fruitful formation of coalitions; parties choose to opt out of potentially effective coalitions because of external issues, like loyalty to an audience, and differences, like race issues or differences on key policy, which inhibit them from recognising common interests. *Figure 2.2* represents the process of the formation of coalitions.

When these inhibitors are not present, weaker parties form alliances with other weaker parties in order to go up against stronger parties. It is highly unlikely for weaker parties to seek alliances with stronger parties, and opt for weaker parties with less power and resources instead. Stronger parties seek exploitative or manipulative coalitions with weaker parties in order to ensure an advantageous outcome for themselves. Coalitions may be formed in order to increase intangible gains only (Rubin & Brown, 1975:74). Parties have a tendency to form coalitions against historically advantaged parties (Rubin & Brown, 1975:76).

Parties with more power are more attractive coalition partners (Rubin & Brown, 1975:78). Parties who initially have equal power and resources are more likely to have an equal division of outcomes. Differential power within coalitions and resources and status usually results in unequal distribution because stronger parties demand a larger share of the outcomes (Rubin & Brown, 1975:79). However, it is not necessary for parties to be exactly alike or equal in every way in order for them to negotiate with each other (Johnson, 1993:11). Instead, parties should perceive equality in the 'playing field' of the negotiations.

b) Rules

A stable set of rules is vital during negotiations. Rules provide stability to an unstable situation (Atkinson, 1977:47). Atkinson (1977: 38-47) designed a set of basic rules conducive to successful bargaining. Items 1, 2, 4 and 7 are all conducive to good faith bargaining and resonate with Lawler and Bacharach's (1981:9) definition of good faith mentioned in section 2.2.1.4:

1. Only those issues put on the agenda during preliminary negotiations may be bargained on;
2. All standing agreements must be upheld during negotiations, and implemented;

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3. A time limit or time scale should be determined early on and honoured by all;

4. Parties to the negotiations should be willing to move from their original position;

5. Parties should not manipulate or abuse means of achieving movement;

6. Sanctions are allowed, but should not overshadow bargaining. Sanctions are preferred when a party has no faith in the process and views it as the best (or only) method of gaining its outcome. Bargaining expertise may be able to counter sanctions, but often need to be countered by 'equal or greater' power. It should however become clear to negotiators that sanctions are not effective in the long term;

7. 'Bargaining should be fair'

- Once an offer is made it should not be withdrawn without sufficient warning or significant changes in circumstances;

- Parties should refrain from denying previously accepted norms, rules, or issues;

- Only when direct negotiation has failed are parties allowed to appeal to actors outside of the negotiations (e.g. the opponent's followers);

- Bargainers should demonstrate a willingness to bargain on previously identified negotiable issues;

- Informal settlements and confidential information should be treated as such and not exploited in order to achieve formal commitment;

- Even in defeat, bargainers should be able to maintain credibility (or 'save face') to his own side;

- The final settlement should be free of dishonestly and deceit;

- Once the settlement has been formally agreed upon, it must be implemented as is.

c) Venue

The choice of venue during negotiations affects the psychological climate of the negotiations as well as the amount of power each party has over the physical arrangements of the exchange. Should the negotiations be conducted on one party's territory, it has power over the physical arrangements of the site, which in turn affects all parties involved (Rubin & Brown, 1975:82). This gives the host party a distinct advantage, i.e. 'home ground advantage'. Bargaining on one's own territory is a potential source of strength in assuring

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assertiveness in bargaining. Guests to the site may view themselves as inferior and behave accordingly (Rubin & Brown, 1975:83).

Not only the neutrality of the site, but also its appropriateness (size, location, and availability), its distinctiveness (can this venue later be used symbolically as representing the place where great cooperation took place?) and its openness to the public may determine its selection (Rubin & Brown, 1975:86). Openness is often undesirable, but parties sometimes wish to use openness to their advantage by 'marshalling for public opinion' or publicly enhancing its standing (Rubin & Brown, 1975:87). The venue for the South African negotiations in Kempton Park is an excellent example of a neutral venue.

d) Agenda

Preliminary negotiations provide a platform for determining the broad subject matter and negotiable issues of the substantive negotiations. Bargainers should be aware of these issues ahead of time in order to effectively prepare for the negotiations (Harris & Reilly, 1998:86 – 87). The initiation of talks surrounding an issue not agreed upon may destabilise the process. It is thus vital to define the agenda ahead of substantive negotiations (that is, during pre-negotiations) - in other words, listing and defining the issues to the satisfaction of all parties, but not addressing the issues (Harris & Reilly, 1998:86 – 87).

Bargainers assign different 'importance rankings' to issues and as such the agenda has to be set up in order to satisfy all sides' perspective of size of the issues at hand (Rubin & Brown, 1975:136). Intangible issues such as precedent and concerns with national survival often determine, and increase, the scale of value of tangible issues (Rubin & Brown, 1975:136).

By adding certain issues, parties can gain power. The same sort of power can be gained by keeping items off the agenda. Adding issues may also be viewed in a positive light when adding issues leads to enhancing or creating a contract zone. When issues are separated, it may reduce the chance of settlement. Linking issues, however, could make for advantageous agreement (Sebenius, 1983:314).

Carnevale & Pruitt (1992:534-535) mention the necessity of reconceptualising or reframing issues to such an extent that agreement becomes an option. They refer to this as the 'joint utility space' which may be approximated with the contract zone. This 'space', like the contract zone, shows options for settling issues that satisfy all parties involved.

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e) Timeframes

Time is of the utmost importance in most bargaining exchanges (Rubin & Brown, 1975:121). Divergent arguments prevail for and against timeframes and deadlines. One side argues the necessity of deadlines in order to push toward success, another argues that bargainers may use 'delaying tactics' if there is endless time, while yet another argues that without time limits, urgency to concede and come to a settlement is missing (Harris & Reilly, 1998:89).

Time limits can be 'explicit or implicit, self-generated or imposed from without, flexible or rigid, and viewed in similar or dissimilar ways by the parties involved' (Rubin & Brown, 1975:121). Harris & Reilly (1998:90) list some of options for timeframes:

- Parties may opt to set no time limits and remain in negotiation until all the issues have been resolved;
- Parties could choose to 'pre-arrange' a time limit;
- Parties can put a realistic limit on the amount of goals to be achieved in the time that is available;
- Parties may aim to comprehensively settle 'all aspects of the dispute';
- Parties could opt for further negotiation should the original timeframe be insufficient, therefore opting for a flexible timeframe based on certain goals.

f) Decision-making Rules

How decisions are made and agreed upon during the negotiating process is very important to ensure the contentment of all parties involved. By what criteria/rules is agreement reached? All parties must accept decisions as legitimate and binding once these decisions have been reached. These measures must be established in advance (Harris & Reilly, 1998:91).

Parties may choose to abide by a numerical majority, the choice of which will mean having to establish a system of voting. Another option is to accept agreement by the judgement of an outside party as to when an issue has been agreed upon, this can be the form of adjudication, arbitration or go by another name suitable to the situation (Zartman & Berman, 1982:46)

Modern peace processes are rarely bilateral and include many divergent parties and opinions. Should small parties carry the same weight in decision-making as major parties, the process has the potential of being stalled by the veto of smaller, less influential, parties (Darby, 2003: 343). The South African peace negotiations provide a good example of dealing with this

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eventuality. These negotiations were based on innovative approaches, for example, a system of 'sufficient consensus' was used in decision-making in order to ensure that the process not be stalled should the minority disagree with those in the majority (Darby, 2003: 341). This meant that when the two major parties agreed, the decision could not be stalled by smaller parties. Smaller parties' dissent was recorded, and they could remain in the process and decide whether to support the eventual outcome when it had been reached (Darby, 2003:344).

2.2.3 The Process of Bargaining

Bargainers entering into negotiations wish to reach some form of settlement, but on terms most favourable to themselves. This presents the bargaining problem (Lawler & Bacharach, 1981:4). However, if bargainers did not want to cooperate, they would not be at the negotiation table (Lawler & Bacharach, 1981:4). The bargaining process is, basically put, the 'convergence of offers and counteroffers over time' (Lawler & Bacharach, 1981:5).

The activity during the process of negotiations is sequential, as represented by *Figure 2.3*.

Figure 2.3: Negotiation Activity
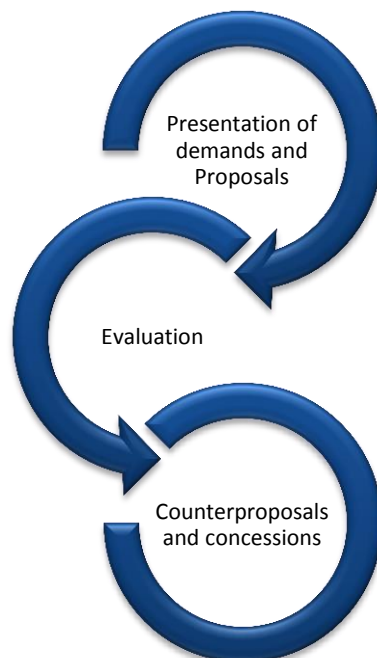
Source: Compiled by the researcher, adapted from Rubin & Brown (1975:14).

It is vital that the negotiation process remains flexible. Overly detailed pre-conditions have a tendency to hamper dialogue (Harris & Reilly, 1998:66). Flexibility allows for the inclusion

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of new groups or ideas which in turn 'generates a vital constitutional politics, in which groups have a stake in the maintenance of certain core elements of the constitutional bargain even as more peripheral elements change' (Elkins *et al*, 2009:82). Parties should also be willing to move from their original position – otherwise bargaining becomes impossible (Atkinson, 1977:42).

2.2.3.1 Intangible issues

While bargaining relationships focus on the division of tangible resources, the resolution of intangible issues (like honour, self-esteem or principle) is essential to bargaining activity (Rubin & Brown, 1975:11). Inherent in the bargaining relationship are two goals: firstly, 'winning' a favourable outcome to oneself; and secondly, to acquire and maintain the appearance of being 'powerful as well as lovable' (Rubin & Brown, 1975:12). In other words, to save face during negotiations.

Parties who wish to appear strong to the opposition or to other audiences generate intangible issues like public image and self-esteem. Parties suppose that in order to receive favourable outcomes, they need to appear strong and protect themselves from injuries. Bargainers who have a high need for power or who hold themselves in low self-esteem are most susceptible to intangible issues as mentioned above (Rubin & Brown, 1975:136).

Parties to a conflict are often, and mostly, very concerned with upholding 'face'. Sometimes parties become so obsessed with protecting themselves from loss of face that it overtakes tangible issues and causes very intense conflict that can hamper movement toward settlement as well as increase the costs of the process (Brown, 1977:275). Insults and unnecessary intimidation, one's outcomes being unfairly reduced, and events causing public humiliation pose threats to face (Brown, 1977:276). Any event that can be construed as casting doubt on a party's 'capability, strength, status, prestige, or reputation in the eyes of salient others' is cause for a party to feel that it might lose face (Brown, 1977:276-277).

Face-saving is defined as 'anticipatory and preventative, and as becoming evident when A attempts to prevent, forestall, or block action by B that A supposes could cause him to look foolish, weak, or incapable' (Brown, 1977:277). Face-saving behaviour is essentially anticipatory and preventative, which means that it is future-orientated and offensive. Face-saving techniques aim to hide, prevent, moderate or defend against the disclosure of information that could potentially cultivate an appearance of weakness. Face-saving

techniques also aim to curb the occurrence of events that could construe the victimised party as vulnerable (Brown, 1977:278).

Face restoration stand in contrast to face-saving as it is defined as 'reparative of damage already done and as reflected in attempts by A to seek redress from B, whom A believes has already caused him to look foolish, weak, of incapable' (Brown, 1977:277). Face restoration actions aims to repair face that has either been damaged or lost. These techniques can be either verbal or physical actions (Brown, 1977:281-282):

(1) Verbal expressions like retractions or modifications of statements that have been either misinformed, inaccurate or inappropriate and have caused one to look weak or vulnerable;

(2) Face restoration actions include the use of threat. Had a party been intimidated by the opposition they may choose to use threat in order to repair damage to their self-esteem and public image.

2.2.3.2 Bargaining Power

Bargaining power has been described as the 'the crucial variable' in conflict situations. The capacity of 'power' in negotiations is the ability to effectively pressurise one's opponent and is often used in the form of threats or the promise of reward (Carnevale & Pruitt, 1992:550). Atkinson (1977:12) refers to Neil Chamberlain's explanation of bargaining power: 'We may define the bargaining power (of A let us say) as being the cost to B of disagreement on A's terms relative to the cost of agreement on A's terms'. Thus, the power of A is based on B's 'dependence on the benefits that can be provided' by A, and vice versa (Lawler & Bacharach, 1986:191).

2.2.3.3 Bargaining Tactics

Bargaining can be portrayed as a game where the players try to manipulate information to their advantage (Lawler & Bacharach, 1981:42). Determining how to use bargaining power is based on tactical action. Tactical action is the link between bargaining power and bargaining outcomes (Lawler & Bacharach, 1981:47). Bargaining power is used by means of tactics, and effective tactics can ensure positive, or favourable, outcomes. Parties may choose to manipulate the impression of their bargaining power by using ambiguities or other tactics. The perception of power can have the same effect as actual power, depending on how effectively tactics and ambiguous speech are used to manipulate perceptions. It is the task of

the negotiator to persuade its opponent that it has control over resources that the opponent is in need of, and that the negotiator is willing to use that power to its advantage (Lawler & Bacharach, 1981:51).

2.2.4 Aftercare: Nurturing the Settlement

What happens after negotiation is essential to a successful peace process, but is often neglected. A settlement should identify general principles and parameters of what was agreed upon during negotiations. The implementation of the settlement prolongs the peace process in establishing functioning institutions and carrying through reforms (Darby & MacGinty, 2008:352).

According to Guelke (2003:62) the last phase of the peace process is when the 'irreversible' entrenchment of the settlement becomes evident. In order for the negotiated settlement to be perceived as institutionalised, it requires international legitimisation, which in turn depends on the internal response to the settlement. Elections play a big role in legitimising new agreements. In 1994 in South Africa, elections served the purpose of 'retrospective endorsement of the settlement and its partial implementation' (Guelke, 2003:60-61). Endorsement may also be gained by referendum (Guelke, 2003:61). Darby and MacGinty (2008:360) use Reilly's statement that these elections or referenda should be viewed as 'the beginning of a long-term process of democratization, not the end-point'. Once again, this indicates that a negotiated settlement in itself does not assure long-lasting peace.

Guelke (2003:61) asserts that the less detailed a settlement, the more difficult it will be to implement. Contrary to the commonly-held belief amongst American constitutional scholars that constitutions that are 'loosely drafted' are superior, a certain amount of clarity and specificity may be useful in facilitating enforcement (Elkins *et al*, 2009:84). The argument is that a document that provides a clearer and more specified framework is more easily and widely understood (Elkins *et al*, 2009:84). A less detailed settlement leaves room for interpretation, which in turn may invoke disputes over the settlement itself. An effective trade-off should be made regarding the flexibility of the settlement versus its specificity.

The balance of forces may shift during implementation which in turn may make it 'apparent that one side has won' (Guelke, 2003:62): The foundation of the situation may be destabilised by the reality of the balance of forces. This could result in the settlement being implemented

disproportionately, bringing into question the legitimacy of the settlement itself, as well as its implementation.

Darby & MacGinty (2008:359) list *post-accord reconstruction and conflict transformation* as the final phase in negotiations. In countries like El Salvador and Guatemala, where peace agreements have been hailed as exemplary and enduring, high crime rates and weak economic growth threaten stability. The lack of economic regeneration and social equality in South Africa led to a 'growing sense of disillusion with peace itself' (Darby & MacGinty, 2008:360). New administrations are left with problems from years of violence and have to deal with these as well as continuing disputes. Many explanations exist as to why peace accords don't survive or lead to positive peace. Explanations include (Darby & MacGinty, 2008:359):

- War leaves states in weakened positions, and many of these states are impoverished and have weak institutions to begin with;
- Peace processes may not have included or sufficiently resolved all the fundamental issues, which may prolong the dispute;
- Leaders fail to gain sufficient acceptance from their followers for the agreement, which results in discontent when benefits do not live up to expectations or are delayed;
- The agreement may not be comprehensive or detailed enough, which often leads to failure to implement the terms of the agreement;
- Economic restructuring may simply not be sufficient for post-war reconstruction;
- Unanticipated developments may impede the peace process, such as the 2004 Tsunami or the USA War on Terror

2.3. Chapter Summary

This chapter sought to identify important literature on the study of negotiated transitions to democracy. Key authors on this subject were highlighted, and comments and critique regarding democratic transition were extensively explored. The chapter went on to discuss in detail the dynamics of negotiated compromise and constitution-making, focusing on the pre-conditions necessary for negotiations to start, including the existence of the contract zone, the

Mutually Hurting Stalemate, security dilemma, trust and good faith, valid spokespersons and spoilers.

The phaseological approach to the analysis of transitions was explained and examined. This chapter sought to set the platform for the next chapter which will look at the outcomes of this type of transition and negotiation.

Chapter 3: Research Methodology

3.1. Introduction

Negotiations about protracted communal conflicts within national states invariably require written constitutional outcomes. These outcomes range from written Constitutional Contracts to more loosely drafted contracts and social contracts. Some may not even be defined as contracts at all. This study focuses on three types of outcomes: the Constitutional Contract; the Social Contract; and the Benchmark Agreement.

This chapter sets out to operationalize these three concepts, which were introduced in Chapter 1. Each concept will be explored, looking at supporting literature, in order to form an operational definition. From this literature, a set of indicators for each concept will be identified. These indicators will assist in the qualitative case study to follow, allowing for focused study of the data sources, listed in section 3.4.1.

3.2. Outcomes: Negotiated Constitutions, a Conceptual Framework

When parties have reached a consensual settlement it means that all parties 'freely consent to make the particular agreement and that [all] parties feel substantial responsibility for the nature of the agreement' (Lawler & Bacharach, 1981:202). The more responsible parties feel, and the higher levels of mutual consent, the more committed they will be to the settlement, and as such, more content with the implementation thereof (Lawler & Bacharach, 1981:203).

Before an accord can be negotiated, the question whether the issues surrounding the conflict can be resolved within the framework of the national state needs to be addressed. The alternative to this is secession and autonomy – Darby & MacGinty (2008:358) refer to Yash Ghai who questions whether this is a viable option by mentioning the 'paradoxes of autonomy':

It (a) seeks to solve the problem of territory, and yet may aggravate it; (b) is intended to solve the problem of identity, yet it may accentuate identity and stimulate the 'manufacture' of new communities; (c) seeks to increase pluralism, yet depends for its own success on pre-existing traditions of pluralism; and (d) aims to resolve conflict, yet aggravates disputes.

These so-called 'paradoxes' or tensions make the option of secession less favourable, and most contemporary peace processes tend to find an outcome between secession and reformation of the status quo. This often involves power-sharing (Darby & MacGinty, 2003:358). Darby & MacGinty (2008:358) rely on Timothy Sisk to highlight the importance of 'guarantees' to major stakeholders in conflict, more specifically, guarantees concerning 'permanent political representation, decision-making power, and often autonomous territory in the post-war peace'. This type of power-sharing is widely encouraged by international mediators.

Constitutional settlements not only focus on political agreement, but also on other elements: 'a central deal on democratic access to power; the establishment of human rights institutions; and some mechanisms to address past human rights violations' (Darby & MacGinty, 2003:358).

Guelke (2003:67) states that if a settlement is not based on some normative foundation separate from 'power political considerations', then it will most likely not survive in the long term. For Ramsbotham *et al* (2005:175) a 'good' settlement 'should not only bridge the opposing interests, but also represent norms that are public goods from the wider community in which the conflict is situated.'

There has been some focus by writers of conflict on refining the positions of parties in order to achieve an outcome that favours the goals of all the parties – in other words, a positive sum outcome (or win-win). This approach aims to do more than simply 'split the difference' between the positions of the parties (Guelke, 2003:63).

Integrative approaches, otherwise known as positive sum approaches, seek ways 'if not to reconcile the conflicting positions, then to meet the underlying interest, values or needs' (Ramsbotham *et al*, 2005:173). This can be achieved by putting the issues into a wider context, or by framing the parties' issues so that they become compatible. Integrative negotiation creates the potential for win-win outcomes – all parties 'win' or gain in some way (Barry & Friedman, 1998:346). These outcomes are non-zero-sum, and also not negative sum (lose-lose), meaning that each side has a possibility to gain from negotiation, even if not equally so (Barry & Friedman, 1998:348). Integrative situations call for more communication and effort so that parties are able to discover joint, mutually beneficial outcomes. Parties in these situations bargain best when needs and interests are openly displayed. This means that

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to bargain effectively in integrative situations, all interests must be taken into account (one's own as well as that of the opponent) (Barry & Friedman, 1998:348).

Distributive outcomes constitute win-lose situations – one party wins while the other party loses. In a distributive bargaining situation, the issues at stake involve 'fixed sums of goods or resources to be allocated among the negotiating parties' (Barry & Friedman, 1998:346). In cases that are purely distributive, parties' interests are negatively correlated – this means that, as one party's gains increases, the other's gains decrease. Most negotiations have integrative and distributive characteristics. Rubin & Brown (1975:137) refer to Gallo's argument that conflicts where tangible issues are involved most often result in non-zero-sum settlements, while those with intangible, symbolic issues are likely to produce zero-sum outcomes.

Ramsbotham *et al* (2005:175-176) identify characteristics of successful settlements, in line with characteristics noted by Elkins *et al* (2009) and Horowitz (1991):

- Settlements and negotiations toward them should be as inclusive as possible of all affected parties;
- Settlements should be precise, detailed and well-crafted about transitional arrangements (such details regarding ceasefires and voting rules);
- Settlements should offer some flexibility in balance with clear commitments;
- Incentives and/or 'rewards' should be offered to parties to be (and stay) involved;
- Settlements should have provisions on mediations and renegotiation;
- Settlements should include and deal with the core issues of the conflict and 'bring about real transformation' by integrating norms and principles to which the parties are required to subscribe, while 'creating political space for further negotiations and political accommodation';
- Settlements should not undermine international standard on justice, human rights, and respect for individuals and groups.

3.2.1. What is a constitution?

The Blackwell Encyclopaedia of Political Science defines a constitution as 'a collection of written and unwritten principles and rules that identify the sources, purposes, uses and

restraints of public power' (Bogdanor, 1991:142). Another notable definition is that of Strong (1972:10): 'A constitution may be said to be a collection of principles according to which the powers of the government, the rights of the governed, and the relations between the two are adjusted.' Duchacek (1973:3) defines the text of a constitution as 'the official blueprint for the uses of public power is accompanied by numerous provisions for controls and restraints of the exercise of power'. Other noteworthy authors in this field include Blaustein & Flanz (1971) and Friedrich (1950).

S.E. Finer's (1997:1502) definition of constitutions as 'codes of rules which aspire to regulate the allocation of functions, powers and duties among the various agencies and offices of government, and define the relationship between these and the public' presents a clear and comprehensive definition for the purpose of this study.

3.2.2. Constitutional Contract

It is clearly difficult, if not impossible, to ensure the unanimous consent of all groups and individuals present during negotiations. A certain amount of 'give and take' occurs during negotiations and stakeholders may be unhappy with certain aspects which have been placed in the constitution at their own cost.

A Constitutional Contract is a written document demarcating a set of institutions. A Constitutional Contract is not necessarily vested in political culture and does not necessitate the nurturing of the contract within a changing society. A feature of Constitutional Contracts is the exchange of concessions, based on *quid pro quo*: 'this-for-that'. The Constitutional Contract is inherently based on these strict terms of the trade. This type of contract is made up of constitutional rules and democratic institutions and is not concerned with ongoing bargaining in the social and political arena. A Constitutional Contract is not necessarily focused on the 'aftercare', but is rather a set of rules on paper, instead of being concerned with becoming entrenched in the hearts and minds of citizens. Constitutional Contracts tend toward including 'group rights', and are attractive because of the 'immediacy' of the gains vested in the contract (Horowitz, 1991:151). Horowitz (1991:151) calls this 'treaty making'.

Contractually based constitutions have the strength of clarity, but they also have weaknesses. According to Horowitz (1991:149), Constitutional Contracts are 'based on reciprocity, and they have all the characteristic problems all contracts have: the preferences of parties change over time; conditions also change; the returns to the parties from the deal are uneven; and the

deadlines laid down inevitably arrive.' One of these weaknesses is what Horowitz (1985: 584-585) calls the *Incommensurables pitfall*. This occurs when the expected terms of trade, the *quid pro quo*, does not materialize, due to the incommensurability of the nature of the goods traded. In the case of Malaysia, the Chinese received citizenship, which was accomplished through executive decision and bureaucratic policy implementation. They received it quickly, and were able to gain the benefits of citizenship immediately. The other side of the bargain, however, was for Malays, a largely impoverished community, to gain economic betterment. At best, lifting an entire community from poverty takes decades, and generations, and is not immediately available as a benefit to all. The fairness and equity of the bargain soon came to be undermined, and was effectively terminated with violent anti-Chinese riots after the 1969 election (Horowitz, 1985: 584-585). The bargain was again re-instituted in 1971 in a revised form.

When contracts are drawn up, there is generally some 'splitting the difference'. Some provisions made at the time of adoption in order to moderate aspiration may later create discontent with the settlement itself (Horowitz, 1991:149). Without sufficient provision for amendment, a contract in itself does not provide grounds for long-lasting accommodation (Horowitz, 1991:149).

Another common feature of Constitutional Contracts in communally divided societies is built-in quotas. This often serves as a 'quick fix' to parties vying for long-term power, and seeing this power entrenched in a contract placates hostilities. However, quotas may also become a weakness within a contract: Horowitz (1985:586-587) identifies this as the *Frozen Quota pitfall*. The Lebanese National Pact is an apt example, with the ethnic quota for civil service appointments set at a 6:5 ratio, based on the 1932 census. While this ratio could still serve as a fair guide in 1943, in subsequent decades it lost its legitimacy, with presumed differential growth rates in the various religious communities. The actual demographic shifts were never measured as the potential destabilizing consequences of a new census were so large that a new census was never conducted. The pact itself lasted from 1943 to 1975, when Lebanon succumbed to civil war, as part of the regional turmoil in the Middle East at the time (Horowitz, 1985:586-587). The Malaysian quota of 4:1 in favour of Malays over Chinese was less deeply frozen, because it did not extend to professional and technical services.

Constitutional Contracts tend to be based on constraints rather than incentives. Constraints are rules that bind 'only because it was agreed to at the outset. It has no continually binding

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force based on present interest' (Horiwitz, 1991:154). Incentives, alternatively, are binding because they are in both the present and anticipated future common interest of all actors involved. Incentives are more likely to be found in Social Contracts, explained below.

Settlements among opposing groups can become self-destructive: to endure, settlements should be flexible, but to be settled on, they should be considered permanent (Horowitz, 1991:149). Overall, the assessment by Horowitz (1985: 588) is that contractual constitutional agreements tend to lose legitimacy as benefits and costs accrue unevenly, both within and between groups. More elastic agreements are required.

Many have asked whether the ideal of a lasting contract is attainable. Lessnoff (1986:151) attempts to answer this question. He argues that while the difficulties, including different values, goals and interests of stakeholders, are daunting, 'the application of even modest contractarianism need not be confined to modern western society; it should be applicable to any society that recognises the need for a just resolution of conflicting individual interests'.

3.2.3. Social Contract

Sisk (1995:54) defines a Social Contract within communally divided societies by the institutionalisation of a culture of negotiation. While a set of institutions or procedures for decision-making comprise essential components in the making of a Social Contract, it is not identical to a Social Contract. The Social Contract is lodged in the political culture of the incumbents of these constitutional arrangements (Sisk, 1995: 252):

…a social contract reflects a breathing, living commitment to the regulation of conflict through ongoing bargaining and reciprocity within the non-violent confines of the new democratic state. It can be measured, however, by the extent to which the centripetal forces of moderation on deeply divisive themes such as race and ethnicity withstand the attempt of outbidders in their communities to arouse extremism and undermine intergroup moderation. Nor would it simply be manifested in a single document like a constitution; rather, it would be multi-faceted agreement in which bargaining institutions in the political arena are reinforced by ongoing bargaining in the economic and social arenas, and vice versa.

Constitutional rules and democratic institutions are, in this view, necessary but in themselves still insufficient devices for nurturing, enabling, enacting and maintaining a Social Contract. For Sisk these institutions could include a bill of rights, institutions that reconcile majority

rule with minority rights, institutions that provide for equality before the law, and for equal economic opportunity, among other examples (1995: 250). Within these institutions citizens, policy makers and opinion-leaders should alike nurture and act upon the political culture of ongoing negotiation, and the politics of moderation and accommodation that is the essence of the Social Contract.

According to Horowitz (1991:150-151), 'bitter experience is more likely to produce public policy making through the Social Contract mode than to produce treaty making through the simple contract mode'. He goes on to define public policy as 'arrangements that do not merely reflect transient group interests but a design for living together premised on incentives for accommodative behaviour transcending group interests at the moment of enactment' (1991:151). These public policies include institutions and arrangements, like those mentioned by Sisk as being present in a Social Contract that reward accommodative behaviour and do not solely reflect the transient nature of group interests. A Social Contract is vested in public policy, and is represented by *processes that emerge from institutions*, instead of the institutions themselves. Interests, in this case, are both present and future, as anticipated, or even unanticipated. Social Contracts may therefore be less attractive as they produce unforeseeable gains and losses.

Getting the institutions right takes time, especially when dealing with a Social Contract as building these institutions is not simply based on trading concessions. Another element of the Social Contract is to convince those in doubt of the legitimacy and efficacy of the process (Horowitz, 1991:280). These aims are more easily (and successfully) achieved when all parties to the conflict are involved, but the more parties are added, the more time-consuming and difficult the consummation of the arrangements become. But, for the product to be credible as a long-lasting constitution, it should not exclude major stakeholders. The process should be open to wide participation, however, some may choose not to take part, and every 'shade of opinion' need not be embraced (Horowitz, 1991:280).

Kotzé and Du Toit (1995:34) believe that the 'values, skills, and decisions' of formerly dis-unified opinion leaders play a big role in determining the success, or failure, of democratization. The ideas, values and motivations revealed by individuals during democratic processes shape that democracy (Garcia-Rivero *et al*, 2002:166). The origins of a Social Contract should therefore be found in the values, beliefs and attitudes of the original negotiators of the peace agreement as well as in the institutions that they constructed.

The actors present in the negotiations are often divided on big issues (Horowitz, 2007:1228). It is widely accepted that the success of such a process of negotiation depends on, amongst others, that all participants make a fundamental re-definition of the nature of their opponents, and the nature of the conflict (Sisk, 1995:54). Dealing with these issues is essential to the effectiveness of negotiated settlements (Du Toit, 2004:195). Former opponents should commit to mutual trust and give in to the uncertainties of an electoral process (Sisk, 1995:54). Opponents should come to be seen as potential co-citizens of a democratic state and society, each and every one the holder of identical rights and obligations. Previously held demonized views of one another have to make way for appreciating the inherent reasonableness of each other. And the nature of the conflict has to be re-defined from one that is perceived in zero-sum terms to one that is seen to hold positive-sum results (also called "win-win" outcomes). According to Sisk (1995:55) a democratic Social Contract leads parties to 'voluntarily reject mutual fear in favour of mutual gain'. The parties need to find a sense of 'shared destiny', which is then consolidated in a set of institutions constituted through negotiation (Sisk, 1995:55). According to Sisk (1995:54), a Social Contract 'in a democratizing multi-ethnic society can evolve when formerly antagonistic and deeply divided political leaders, parties, and organizations of civil society choose to escape self-defeating conflict and bind together to create a democratic polity that institutionalises the principles of intergroup bargaining and cooperation'. This once again shows the preference of process over institutions within the Social Contract, and the importance of the values, beliefs and attitudes with which leading stakeholders enter constitutional negotiations.

While these negotiators experience the formative process of direct, interpersonal contact with one another, with ample opportunity to learn from one another on a first-hand basis, a Social Contract has to be established on the continuation of this learning experience: 'a culture of ongoing negotiation is institutionalized' (Sisk, 1995:54). New subsequent generations of leaders, who did not experience the founding negotiations, have to be successfully inculcated with these values and beliefs. And they have to establish this political culture among fellow citizens.

Agreements made on good faith in low-context cultures, like Constitutional Contracts and Social Contracts, generally hold a more binding status than those made in high-context cultures. Cohen refers to the idea of agreements such as these as a Western one, within a low-context culture (1997:199). Entering into negotiation amounts to a commitment to reach

agreement: '[n]egotiation is viewed as a discrete, finite process that terminates with the conclusion of an accord' (Cohen, 1997:199). The implementation stage that follows agreement is governed by the mutual conviction that contracts will be honoured. In this instance, agreements tend to stay fixed and static until all parties to the agreement agree to revisit the arrangement.

The durability of constitutions is examined in a study by Elkins, Ginsberg and Melton (2009). In a comparative study incorporating every democratic constitution since 1789, except that of Britain, they find that durability is a function of constitutional design, in interaction with the challenges faced by such regimes as they emerge from the particular environments they are embedded into. The key dimensions of design are those of inclusion (of the relevant social and political actors), flexibility (referring to ability of constitutions to adjust to changing conditions, as measured in the ease of constitutional amendment) and specificity (the level of detail written into the formal constitutional document). Their general finding is that constitutions that are more rather than less flexible, more rather than less inclusive, and more rather than less specific tend to be more enduring, and more capable of surviving environmental challenges. There is an obvious tension between specificity and flexibility: to be flexible, a constitution should not be too specific, but in being specific, a constitution becomes less flexible. This finding offers a framework within which Constitutional Contracts and Social Contracts can be compared. Social Contracts, one would predict, tend to be more flexible than contracts, but less specific, while both could be equally inclusive. Which one is more effective for conflict resolution in communally divided societies, and hence, more durable, is not directly taken up by Elkins, Ginsberg and Melton, but both Horowitz and Sisk favour Social Contracts over Constitutional Contracts (Horowitz, 1991 & Sisk, 1995).

3.2.4. Benchmark Agreement

As mentioned in Chapter One, in high-context cultures a negotiation process is more likely to be viewed as one event in a longer process including other events and interactions, as opposed to a single negotiating event in which participants aim to secure a concrete and fixed point in the form of a contract (Cohen, 1997:34). During this study, this type of agreement will be referred to as a 'Benchmark Agreement'. Benchmark Agreements are flexible and subject to renegotiation at any point. While contracts tend to be based on good faith, Benchmark Agreements are based on what Cohen (1997) terms 'goodwill', which Du Toit (2001:102) sums up as the 'joint recognition of the justness of the cause of one party over the

other, and from their joint, but not identical, contributions to right some large historical wrongs'. Cohen attributes these differences to culture, but expresses no clear preference for low context negotiating styles (associated with good faith) over high context negotiating styles (associated with goodwill).

Cohen (1997:37) uses the American and Japanese negotiating styles as an apt illustration of the difference between low- and high-context negotiating styles, referring to the American style as 'can-do', or 'manipulative', as opposed to the Japanese 'adaptive' style. Cohen (1997:37) relies on Kinhide to define this American style of negotiation: it rests on the idea that 'man can freely manipulate his environment for his own purposes'; while the Japanese style 'rejects the idea that man can manipulate the environment and assumes instead that he adjusts himself to it.'

In his book *Negotiating Across Cultures* (1997), Raymond Cohen sets out to explore the 'effect of cultural differences on diplomatic negotiations between the negotiating parties' (1997: 10). He asserts that, for purposeful dialogue to take place, those taking part should share a 'complex and extensive body of shared knowledge, conscious and unconscious, of what is right and fitting in human communication and contact' (1997:14 – 15). When this is not the case, the result may be confusion. For parties to understand each other, they should be drawing from the same 'semantic assumptions'. Cohen (1997:26) notes that '…content encoded by the sender must be consistent with the content decoded by the receiver'. This occurs most easily when parties share a common culture and/or language (Cohen, 1997:26). By examining a series of cases, Cohen identifies several trends among cultures when negotiating (1997:18).

When negotiation takes place across cultures, these shared 'semantic assumptions' are often absent and present persistent problems in understanding. Parties' perceptions and interpretations are formed by cultural experiences and cannot be defined with a simple dictionary definition of concepts (Cohen, 1997:27).

One dimension of the difference between high- and low-context cultures can be seen in the different ways that they use language to communicate. High-context cultures tend toward allusive communication as opposed to direct communication. High-context cultures are concerned with the implicit content of a message, the nonverbal clues and 'hinted-at nuances of meaning' (Cohen, 1997:31). High-context cultures are very concerned with maintaining

face, and therefore, the loss of face is seen as a penalty to be avoided. Cohen (1997:32) identifies this type of cultures as being 'shame oriented rather the guilt oriented'.

Low context cultures do not attribute meaning beyond the transmission of information to the use of language: 'what has to be said is stated explicitly' (Cohen, 1997:33). The focus here is on results, as opposed to the fostering of relationships. The maintenance of face is not as important to those within low-context cultures as to high-context cultures. Low-context cultures assign importance to the 'truth ethic', building trust by remaining truthful and accurate in their negotiations. Lying undermines trust and has negative implications for good faith. Guilt, rather than shame, is the 'psychological price paid for misdemeanour' (Cohen, 1997:33). Low-context cultures are not as concerned with outward appearances, but rather with an 'internalised sense of responsibility'.

Another dimension of difference is found in how the importance of time is understood by negotiators in both high- and low-context cultures. High-context cultures find urgency to be futile, as this would undermine the relationship-building nature of the negotiations. Low-context cultures place more focus on 'getting things done', arguing in favour of time restraints (Cohen, 1997:35). When looking at negotiating styles, high- and low-context cultures differ greatly. Low-context cultures favour results, rather than the building of relationships, while for high-context cultures, negotiation becomes 'simply one episode in an ongoing relationship' (Cohen, 1997:37). However, the terms of renegotiation is a function of the ongoing relationship, especially the *power relationship*, in which the parties are not always seen as equals.

As relationships change, agreements become outdated. A Benchmark Agreement allows for revisiting and changing agreements as relationships change, making negotiation a continuous, ongoing process. Cohen (1997:201) contends that in high-context cultures, unforeseeable difficulties arising in future are renegotiated in a 'spirit of goodwill', which itself is derived from an interpretation of the context within which the dispute arises. High-context negotiators insist that the context reveals historical wrongs committed by one party over the other. 'Goodwill' then, as derived from the above, requires the perpetrator to appease the victim in the negotiating process, and places pressure on the perpetrator to accept terms of settlement that go some way to amending these historical wrongs. Therefore, a culture of ongoing negotiation is cultivated and required.

In high-context cultures, a single agreement, which may come in the form of a contract, is 'certainly not a conclusion', but merely a document of transitory status in which 'nothing is ever definitively closed' (Cohen, 1997:200). High-context cultures tend not to view contracts as binding in the low-context sense. Relationships are open-ended, and as such, so are agreements within those relationships. The agreement is subject to the relationship and the predominant aspect of the relationship is the power relationship. This does not mean that high-context parties enter into contracts in the low-context idea of 'bad faith', or with 'malicious intent', but rather (Cohen, 1997:201):

...they lack the low-context conception of the centrality of contracts, or the connected assumption that a good agreement should guide future relations by covering every conceivable contingency, viewing agreement as the beginning, not the end of an arrangement, it is simply assumed that, if the relationship is healthy, the contracting parties will be able to work out future differences in a cooperative, rather than litigious, spirit of goodwill.

3.2.5. What happens when parties hold opposing contextual perspectives?

Du Toit (2001:103) clearly states the importance of establishing a 'clear and explicit understanding' between negotiators regarding the approach to be taken on negotiations. He goes on to mention four problems (2001:103-104) associated with the absence of an explicit understanding among negotiators regarding their approach to negotiations:

First, it may lead to a disagreement on the importance of procedures, the establishment of procedures and the following of procedures. Second, in low-context cultures, tactics beyond the negotiating table are 'discreet' from official negotiations, while in high-context cultures, these types of tactics form part of and complement official negotiations.

Third, in low context cultures, the outcome is considered contractually binding. However, in high-context cultures, the outcome is 'just another platform for further contestation and for remoulding' the power relations between the parties. Fourth, low-context cultures consider negotiators as equal when coming to the negotiating table. Negotiators from high-context cultures 'insist on recognition of their own high moral superiority' (Du Toit, 2001:104).

Confronted with high-context negotiators, low-context negotiators can accuse their opponents of bad faith, while when high-context negotiators are confronted with opponents from a low-

context culture, they may claim those negotiators to be morally insensitive. Differing definitions of how agreements are made and interpreted in the long run may cause disruptions in conflict settlements.

3.3. Operationalisation

The research problem is concerned with what the constitution stands for, therefor its meaning, what it represents, and the interpretation thereof, and what it embodies. In other words, it is about attributes or dispositions (values, beliefs and attitudes) about properties (content and structure) of the written document. The operationalization will identify certain properties of the content and structure of negotiated constitutions that are open to, amenable to, and susceptible to interpretation by negotiators. These interpretations are dispositions (values, beliefs, attitudes) about these properties: the actual interpretations as found in the writings and words of the original negotiators.

The operational indicators identified here are properties that can readily be interpreted as being consistent with, congruent with, and/or indicative of one or the other concepts: the Constitutional Contract, the Social Contract and the Benchmark Agreement.

3.3.1. Constitutional Contract

3.3.1.1. Nominal Definition

Taken from section 3.2.1, a Constitutional Contract can be described as: a written document describing a set of institutions. It is not necessarily vested in political culture and does not necessitate the nurturing of the contract within a changing society. The Constitutional Contract is made up of constitutional rules embodied in democratic institutions, and is not concerned with ongoing bargaining in the social and political arena. It is a formal written text, with a specified status as being a constitution that is viewed as fundamental law.

3.3.1.2. Trades and Deals/Bargains

Trade-offs, exchanges and deals or bargains all form part of a Constitutional Contract. Making a trade-off is where one item, or issue, is traded directly for another item or issue. In the view of the stakeholders the traded items are usually 'equal' in terms of value, and as such constitute a direct barter or exchange. This creates a situation where one party 'loses' on one issue in order to win on another, and vice versa; or meet one another in the contract zone

through mutual concessions. This can happen when parties attribute different levels of value to issues or items at stake.

Deals and/or bargains are made in order to gain/win on issues that are deemed more important by one party. A party may choose to concede on one issue in exchange for the opposition's concession on another issue. In this way, parties may 'win' on issues more important to them or their constituents but lose on seemingly less important issues.

In Constitutional Contracts, trade-offs and deals made are conclusive and can be seen in terms of immediate gains and losses. Bargainers may refer to 'giving up' a certain item or issue in exchange for another, or to 'giving in' on one issue in order to have their way on another.

Bargainers involved in Constitutional Contracts tend to speak in terms of *quid pro quo*, or give-and-take. This generally means that in order to gain something, a party must give up something else. This is not something that is realised over time, but immediately with the implementation of the agreement. By identifying the details of the bargain that was struck the following can be determined:

- Who received what from whom?
- Who conceded what to whom?

3.3.1.3. Core vs. Non-core issues

Contracts are comprised of what can be termed core and non-core issues. Core issues refer to issues which, in the eyes of the negotiating stakeholders, signify the foundation of the agreement. These core issues form the basis of the agreement and after having been agreed upon, become non-negotiable. Should these issues come into question, the fairness of the trades made in the entire agreement would come into question. Non-core issues are those issues which, in the eyes of the negotiators, may become subject to renegotiation, and the renegotiation of which would not constitute the overall weight of mutual concessions in the entire agreement becoming unbalanced, or unfair.

When parties exchange goods (as per contracts) they generally remain committed to only that which was received. In a Constitutional Contract, the core comprises of the terms of the trade, which stipulate who conceded what and who gained what in return.

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3.3.1.4. Breach of contract

What constitutes breach of contract in the eyes of the negotiators provides insight into the foundation of the agreement. Within Constitutional Contracts, it can be said that a unilaterally determined change to any element of the core of the agreement may be viewed as breach of contract, as the agreement when made was perceived as final and not subject to change.

Determining what elements would constitute breach of contract to the negotiators/stakeholders will also aid in identifying the core and non-core issues in the agreement.

3.3.1.5. Quotas

Quotas, sometimes ethnically or religiously based, often form part of Constitutional Contracts in resolving conflicts in communally divided societies. The use of quotas ensures certain groups' continued participation in decision-making, and is often associated with minority rights. Quotas are often found in Constitutional Contracts as they ensure immediate, tangible gains and show a fixed solution based on numbers.

3.3.1.6. Fixed Targets/ 'Fixed Terms'

Constraints on amendments to the original agreement may be an indication of how 'fixed' the contract is. Constraints on how amendments are made can come in the form of fixed targets or 'fixed terms': whenever an agreement is termed 'fixed', or a time constraint is put in place, stakeholders and implementers are left with rigid constraints within which to implement the agreement.

3.3.1.7. Amendment procedures

How easy or difficult is it to change the terms of the contract? The more difficult it is to change any part of the original agreement, the more 'fixed' the agreement is. Little room for movement or inflexibility is a structural feature that is often found in constitutions usually described as Constitutional Contracts. An example of an inflexible amendment procedure is having special majorities for specific issues, increasing the difficulty of bringing about a change in the details of the agreement. Constitutional Contracts are usually very specific about amendment procedures, setting up precise and rigid rules within which renegotiation is warranted or allowed. In the terms of Elkins' *et al* (2009) framework, Constitutional Contracts tend toward being less flexible, and more specific. It is not the purpose of this study

to build a model measuring amendment procedures; Elkins *et al* (2009) as well as Lutz (1994) provide detailed models for the measurement of the amendment rates.

3.3.1.8. Permanence

The core of a Constitutional Contract is usually seen as a permanent fixture. It is not subject to any form of change, except for those specified in terms of formal amendment procedures; or to a changing power relationship, demographic or leadership. All future leaders will be subject to the rules determined by the original agreement, in the form of a lasting contract.

3.3.2. Social Contract

3.3.2.1. Nominal Definition

As mentioned above, Sisk (1995: 54) defines a Social Contract as 'the institutionalization of a culture of negotiation'. A Social Contract is not identical to a specific set of institutions, or a specific set of procedures for decision-making, it is lodged in the political culture of the officeholders of such constitutional arrangements, and as expressed in public policy and political action by stakeholders. Horowitz (1991) defines a Social Contract in a communally divided society as 'process over institutions'. The Social Contract is usually derived from a formal, written text.

3.3.2.2. National Consensus

On entering into negotiations, a dissensus on the rules of the political game can be seen between contending parties. Upon concluding (successful) negotiations, the aim is that this dissensus dissipates and a new era of consensus is nurtured. Social Contracts are associated with the concept of a 'national consensus'. While this term is not necessarily quantified, it leans on the principle that stakeholders will act according to a shared understanding of what the constitution means and stands for. While consensus in this sense is not equal to unanimity on the nature of the core, it does strive for a continued national agreement on basic fundamental issues, making for a political culture of ongoing negotiation.

Bargaining power comes into play during prenegotiation, preliminary bargaining and substantive bargaining. Parties who choose to use their bargaining power, or who choose to manipulate information in such a way that their resources can be construed as bargaining power, have more control over the outcome of negotiations. In order for a Social Contract to

be constructed, all parties involved should feel that they have contributed equally to the settlement, as well as having equal, or perceptively equal, shares in the implementation of the settlement. Should bargaining power be used in such a way as to convince other parties involved of the shared nature of the successful settlement, right from the prenegotiation stage, then bargaining power is conducive to gaining a Social Contract. However, negotiators have been known to abuse bargaining power. In retrospect, parties involved may feel that they have been manipulated or coerced, which would mean that they are not content with the settlement in the long run, and this hampers the establishment of the Social Contract.

3.3.2.3.   Core vs. Non-core issues

Core and non-core issues also come into play in the Social Contract. The content of those issues perceived as 'core' by the original negotiators provide some indication as to how these negotiators view the entire agreement. Within a Social Contract, a bill of rights may be considered core, while other issues may become subject to renegotiation. However, the basis of the Social Contract is that negotiators/stakeholders become committed to the process which is facilitated by certain key, or core, aspects of the agreement. Institutions conducive to such a process are at the core of the contract. A Social Contract may be found when opposing parties assign value to the same issues, or establish the same issues as 'core' or 'non-core'. Within a Social Contract, what is core would be those institutions which generate an ongoing dynamic negotiation, and are critical to generating a political culture of compromise and negotiation.

3.3.2.4.   What kind of amendments will 'break' the 'spirit of consensus'?

The element of trust, or trustworthiness, is very important to the creation of a Social Contract. The nature of conflict is based on mutual mistrust – during negotiations, this perception of one's opponent should be broken down in order for a settlement to be made in which all parties feel they have cooperated and conceded only as much as their opponents. Trustworthy bargainers induce high levels of cooperation and concessions, which means that in order to create a settlement to which all parties feel responsible and all have a stake in, all parties should cooperate and concede. This means that a high level of trust is necessary in order to produce a Social Contract.

When settlements are made in good faith, which implies trust, parties have the tendency to become committed to the arrangements that they have helped to shape. Parties may go so far

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as to become committed to each other, transcending cleavage lines. Here, parties may establish coalitions of convenience (formed after the election), or, in the sense of a Social Contract, coalitions of commitment (formed before the election). This type of commitment induces the defence of the settlement should outsiders or even unhappy insiders attack the settlement (Horowitz, 1991:280). This type of commitment is only possible if both sides agree that the negotiations have taken place in good faith, and that the settlement that has been produced is an amalgamation, a synthesis, of all sides' points of view and favourable outcomes (Horowitz, 1991:280). In other words, an integrative, not distributive, outcome.

According to Elkins *et al* (2009:99), 'constitutions with lower thresholds for amendment will be more flexible and likely to survive in the face of constitutional crisis.' Lower thresholds for amendment are associated with the Social Contract.

Determining how negotiators and stakeholders interpret 'breaking the spirit of consensus', which should be established within a Social Contract, will allow insight into their understanding of whether the negotiated settlement is taken to be a Constitutional Contract or an incipient Social Contract, as well as revealing the boundaries of the consensus.

3.3.2.5.   Institutions

According to Sisk, institutions that can serve as foundational building blocks for a Social Contract include a bill of rights, institutions that reconcile majority rule with minority rights, institutions that provide for equality before the law, and for equal economic opportunity (1995: 250). It may also include electoral rules, and it has to include every institution that is favourable to the process of securing and consolidating a political culture of compromise.

3.3.2.6.   Changing perceptions

The mutually hurting stalemate presents a good opportunity for the start of mutually cooperative negotiations. Leaders should not only feel that they have no other choice but to enter into negotiations, but also that the power in the relationship has equalised, making for the optimal moment for negotiations. Parties may have to be convinced that the moment is ripe, whether by an opponent, their constituents, or a third party, but the choice of entering into multiparty negotiations should remain that of the party. When parties realise that they cannot solve the problem on their own, they recognise the importance of the participation of all parties to the conflict. The perception of a Mutually Hurting Stalemate is thus essential to the formation of the Social Contract.

This situation is conducive to the creation of a Social Contract. Parties entering into negotiations often have high hopes for resolutions. Though these resolutions need not be quashed, prenegotiation provides an optimal time for perceptions to be changed. It is not necessary for parties to become friends, but cooperative behaviour is essential. The mutually hurting stalemate rests on the fact that parties have no other viable choice but to negotiate. This is the most viable platform to change this perception to 'negotiation is the best option, not the only option'.

3.3.2.7.   Process

When assessing whether an agreement has successfully created a Social Contract, questions can be asked whether the agreement initiates a process with incentives for moderation and accommodative politics, including whether there are rules that initiate certain processes that promote accommodative behaviour. As an example of such a process, Horowitz (1991) uses the Malaysian electoral system. The Malaysian bargain provided for the formation of an interethnic coalition, 'flanked by ethnically based political parties' (1991: 152). This coalition provided a platform for ongoing compromise between rival ethnic parties. A First-past-the-post system based on a single candidate list (or single slate) within a ward system was implemented, which in turn facilitated coalitions of commitment. The coalition arrangements (Horowitz, 1991:154-155):

...forced Malay and Chinese politicians, in heterogeneous constituencies, to rely in part on votes delivered by politicians belonging to the other ethnic group. Those votes would not be forthcoming unless leaders could portray candidates as moderate on issues of concern to the group that was delivering its vote across ethnic lines, in other words, vote pooling. Consequently, compromises at the top of the coalition were supported by electoral incentives at the bottom.

Here, a short look at electoral options for Social Contracts is warranted. Sisk (1996:33) asks '[i]n deeply divided societies, which kinds of institutions and practices create an incentive structure for ethnic groups to mediate their differences through the legitimate institutions of a common democratic state?' Both Lijphart (1977; 1985) and Horowitz (2003) address this question. When dealing with the issue of electoral systems, Lijphart (1977; 1985) favours the party-list proportional representation system in which all parties that receive a certain number of votes (the threshold being as low as possible), receive a percentage of seats in parliament

directly corresponding to their percentage of votes won. This system produces proportional representation. He believes that the consociational model fosters faith in assurances of minority protection. Horowitz (1985) notes some weaknesses within this approach, including the tendency of parties to form 'coalitions of convenience' as opposed to 'coalitions of commitment'.

Horowitz (2003) argues strongly against this model, advocating a process of incentives and rewards to encourage interethnic cooperation. Sisk terms this the 'integrative approach' (1996:34). Horowitz argues that the institutions most likely to produce proportional results are the alternative vote system; the second ballot majoritarian system; the first-past-the-post system (Malaysia); and Single Transferable Vote (STV) (2003: 116). Each system comes with its own set of problems: the simple first-past-the-post system may permanently exclude minorities; and a lack of 'floating' voters who base their votes on 'other-than-ascriptive criteria such as class' (Sisk, 1996:32). However, in these types of systems, parties are 'encouraged to create coalitions before elections', which in turn leads to more broadly representative governments (Sisk, 1996:35). Accordingly, party-list proportional representation is least likely to produce the process essential to a Social Contract.

Horowitz (2003:118) specifically mentions the option of vote-pooling in producing moderate politics and compromises between opposing groups. He mentions a system based on 'ethnically reserved seats, multi-seat constituencies and common-roll elections' formulated in Lebanon, which 'gives politicians very good reasons to cooperate across group lines, for they cannot be elected on the votes of their own group alone. They must pool votes (that is, exchange support) with candidates of other groups running in different reserved seats in the same constituency' (2003:118). Within this type of system, politicians 'vie to appear the most moderate' in order to gain votes from 'voters who would not ordinarily vote for them' (Sisk, 1996:43). Vote pooling is essentially a process of ongoing compromise, facilitated by electoral rules, and is consistent with the concept of a Social Contract as 'process over institutions'.

3.3.3. Benchmark Agreement

3.3.3.1.   Nominal Definition

In high-context cultures a negotiation process is more likely to be viewed as one event in a longer process including other events and interactions (Cohen, 1997:34). This type of

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agreement, referred to as a 'Benchmark Agreement', is flexible and subject to renegotiation at any point, as initiated by the party with the dominant power. The agreement is produced from and a reflection of the bargaining relationship at that time. The agreement does not always come in the form of a formal written text.

3.3.3.2.   Historical Context and Moral High Ground

Historical context plays a formative role in how high-context negotiators react toward each other, and as such has the ability to shape, or at least act as a factor in, negotiations and their outcome. Within high context cultures, a lot of focus is placed on who holds the moral high ground in negotiations. Historical context may favour one party over the other in terms of morality, or one party may view itself as having the moral high ground because of past injustices. Third parties may also assign participating parties moral high ground when entering into negotiations.

Parties who enter into negotiations believing they hold the moral high ground may see themselves as being entitled to the bargain falling in their favour. Those who believe themselves to hold the moral high ground tend to expect more concessions from their opponents.

This perceived 'unequal standing' usually stems from past injustices where one party is considered by the other party to have acted immorally, unfairly or wrongly toward the other. While in low-context cultures, parties who enter into negotiations accept/endorse the principles of equal status., high context thinking changes the way that the bargaining relationship is shaped. Parties tend to think in terms of a perpetrator/victim mentality: this means that one party believes that it has been treated unfairly, or has been the 'victim', while another party has been in the wrong, as the 'perpetrator'. This type of thinking is present in the high context, benchmark culture. To low-context negotiators, like negotiators from the United States, the idea that something that occurred in the past is relevant to problem-solving in the present is 'almost incomprehensible', while the Chinese typically continue to refer to past injustices (Cohen, 1997:35). Cohen (1997:36) mentions Mexican, Egyptian, Japanese and Indian negotiators as being conscious of previous injustices, whether racist or imperialist, during the colonial era. According to Du Toit (2001:102): 'From this perspective, the goodwill necessary for sustaining the process of negotiating for peace has to derive from joint

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recognition of the justness of the cause of one party over the other, and from their joint, but not identical, contributions to right some large historical wrongs.'

The mention of moral high ground, past injustices, unequal standing or victim/perpetrator juxtaposition by negotiators and stakeholders may indicate a high context culture, which in turn may shape the perception of the outcome as a Benchmark Agreement.

3.3.3.3.   Subject to a larger, superior, objective

Present within the benchmark perception of the outcome is the idea that the outcome, or bargain, is subject to a larger, and definitely superior, objective. The settlement, or outcome, reflects only the commitment and relationship at the time of the negotiations, and is not intended to be governing 'law' with any sense of permanence. The settlement is a means to a larger end.

Instead of signifying the end of a relationship between the opposing parties, the negotiations and the outcome thereof signifies the beginning of an ongoing and changing relationship. The settlement is instrumental in reflecting the power relationship at the time of the negotiations, and may further shape the relationship, but will become obsolete as the relationship changes.

Indicators to look for when assessing whether a stakeholder or negotiator holds the benchmark view of the outcome can be found in the following themes: means to a larger end; instrumentality; subordinate (to a larger goal or objective); reflecting a changing power relationship; and a Gramscian 'war of position', which means that each party is constantly vying for the upper hand in order to dominate the power relationship, which is then reflected in the changing agreement. As one party gains power over the other, whether by tangible or intangible means, the agreement changes to reflect the change in the power relationship. Parties constantly try to gain power in order to change the agreement in their favour.

'Means to a larger end' would mean that the end-goal in mind is not the settlement. The settlement is viewed as one element in realizing a larger goal. The settlement, or agreement, is instrumental to attaining the larger goal, instead of signifying an end point. Once made, the settlement does not become the chief determining factor: it remains subordinate to the larger goal. The settlement will not determine the power relationship: it will change to reflect the power relationship, indicating a constant war of position between parties.

3.3.3.4.   Agreement as temporary

The view of the settlement as temporary as opposed to permanent is the basis of the benchmark view. Du Toit (2001:102) terms it as such: 'The agreement does certainly not hold the status of an irrevocable contract, but is always subject to renegotiation, to reinterpretation, and is as fluid as the ongoing relationship is indeterminate.'

3.4. Data Collection Methods

3.4.1. Data Sources

Data relevant to the research questions mentioned in Chapter One and in accordance with the above operationalization will be acquired from the following sources:

Primary Sources

- Official documents: the 1993 and 1996 constitutions, and the Hansard Records for the 1993 and 1996 Debates.
- Published memoirs of major negotiators during the transition,
- Opinions expressed by negotiators in other publications, e.g. journals.
- Qualitative research data bases that are in the public domain and contain full-text interviews, such as the Patti Waldmeir files at the University of Cape Town; The O'Malley Archives (available online) and The Hermann Giliomee files at Stellenbosch University
- Speeches of which the full-text written record could be found[1]
- Interviews by the researcher with original negotiators. Snowball selection will be used, relying on referrals from interviewees to certain actors who may not otherwise be willing to be interviewed for this study.
- Electronic correspondence with original negotiators by the researcher.

This study did not focus on biographies (with the exception of the biographies of Thabo Mbeki and Cyril Ramaphosa). The study focuses on the original negotiators' opinions and views in their own words. This study did not include other scholarly works on the negotiated

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[1] This includes a compilation of selected extracts from speeches made by Thabo Mbeki, compiled by Corrigan (1999)

democratic transition in South Africa, as each author uses his or her own conceptual framework. No author has used this conceptual framework, barring Horowitz (1991) and Sisk (1995), which was prior to the written constitution of 1996. Also, the study focuses solely on information that can be directly attributed to the original negotiators, and not interpretations by others of the views of the original negotiators. Joe Slovo, Benajmin Turok and Ahmed Kathrada, among others, who played the role of negotiators, wrote autobiographies that did not touch on the subject of this study.

3.4.2. Data Retrieval Methods

The data retrieval will consist of an in-depth analysis of published resources as well as interviews with selected negotiators and key informants wherever possible. The interview forms an important part of case study research. The interviews for this study will come in the form of personalised interviews – which each interviewee's individual participation in the process to be taken into account during the interview. The interviews will be open-ended and thematically structured on an individual basis. The theme of each interview is set by the conceptual framework – thus, questions pertaining to each of the concepts. No standard format of questions was used. Each individual interview was shaped by the unique positions which every interviewee held in the negotiations process. Yin (2009:106) refers to these as 'guided conversations rather than structured queries.' This type of interview can change the role of the interviewee to 'informant', as opposed to a mere respondent. Yin (2009:107) states the importance of key informants: 'Key informants are often critical to the success of a case study. Such persons provide the case study investigator with insights into a matter and also can initiate access to corroboratory or contrary sources of evidence.'

3.4.3 Population

The interview frame is made up of all available negotiators during the South African transition 1990 – 1996, including Codesa I, Codesa II, the MPNP and the Constitutional Assembly. Each available negotiator will be contacted for an interview.

3.5. Chapter Summary

Negotiations about accords inevitably require constitutional, written outcomes: this chapter began by looking at how negotiations lead to outcomes, and how these outcomes can be classified into a typology. Some mention was made of what type of outcome is most

successful. Three specific types of outcomes were identified: the Social Contract, the Constitutional Contract and the Benchmark Agreement. The chapter continued operationalise these concepts, which were then clarified within the framework of low- and high-context cultures.

Each concept was operationalised into key indicators which allowed for their empirical observation. A comprehensive list of all the sources which will be used during the study was given, with an overview of the data retrieval methods and sampling frame.

Chapter 4: The South African Transition: Pre-negotiations (1985 – 1991) and Substantive Negotiations (1991 – 1996)

4.1.   Introduction

The chapter provides the context within which the South African transition took place, mapping out several factors leading up to the ultimate decision by opposing parties to enter into talks, and eventually a negotiated settlement. Parties to the conflict went through several channels in order to get to a settlement, some less successful than others, but eventually a settlement was achieved, due in part to excellent negotiating skills on both sides, and to the willingness of both sides to cooperate. A closer look is taken at the evolving positions of the most significant parties, as well as some of the motivating factors.

The purpose of this chapter is to provide the reader with a phaseological framework within which to locate the data reported in Chapter 5, within the parameters outlined in the delimitations (Section 1.6.2.). *Figure 4.1* (on the following page) represents a timeline of the most significant events during the negotiations:

Figure 4.1: Timeline

November 1985 Nelson Mandela & Kobie Coetsee begin Secret Meetings	→ **November 1985- February 1990** Secret Talks	→ **2 February 1990** De Klerk Speech

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February 1991 D.F. Malan Accord	← **August 1990** Pretoria Minute	← **May 1990** Groote Schuur Minute

↓

August 1991 Roelf Meyer and Cyril Ramaphosa meet	→ **September 1991** National Peace Accord	→ **December 1991** Codesa I

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April 1993 MPNP	← **September 1992** Record of Understanding	← **May 1992** Codesa II

↓

November/December 1993 Preliminary Contistitution	→ **April 1994** Elections	→ **December 1996** Consitution

Source: Author's own compilation

4.2.　　Context

During most of the 20th century, South Africa was run by a system of 'apartheid'. This involved a 'racially defined institutional separation between communities, dictated by the white rulers of the country and applied in a discriminatory way' (Du Toit, 2001:35). Black South Africans saw the worst of the apartheid system. Blacks were systemically and systematically subjected to a gross rights violations and socioeconomic deprivation, forcibly removed from their homes and marginalised (Sarkin, 1999:67). This brought about protest and rebellion by the black majority in South Africa in several forms, including petitions, protests, strikes and insurgency. Analysing the conflict in South Africa is no simple matter. Not only has there been conflict, but also conflict about the nature of that conflict. Du Toit (2001), Horowitz (1991) and Lipton (2007), among others, take up the strenuous task of describing the conflict about the nature of the South African conflict.

Steenekamp (2011) provides a summary of the events leading up to and culminating in the apartheid state in South Africa, as well as the later disbanding thereof. Apartheid was officially imposed in South Africa by means of an enforced policy of segregation (Steenekamp, 2011:100). These policies were aimed at advancing white (no more than 20% of the population at the time) economic and political interests while exploiting the black majority population as labour. A series of discriminatory acts systemised 'discrimination and strengthened African resistance, laying the foundation for the apartheid era' (2011:102). The notion of 'separate development' was later developed and enforced by another series of acts confining Blacks to 'ethnic homelands' (Steenekamp, 2011:104). According to Steenekamp, the 'defiance, together with the stagnation of the economy, the collapse of labour control, and urbanisation that took place during the 1970s and 1980s was the beginning of the end of apartheid' (2011:105).

In 1983 the incumbent National Party (NP) won the referendum for a tricameral parliament: separate houses of parliament for whites, Indians and coloureds (Reynolds, 2005:302; and Welsh, 2009:218 - 219). Symbolically, the 1983 parliament ended the supremacy of whites in South Africa, but effectively, little change had been made (Giliomee, 2012:175).

The white-dominated government remained ambiguous about future plans to include blacks, but rejected outright the idea of a one-person, one-vote electoral system, as well as a parliamentary chamber for blacks (Horowitz, 1991:19). Many whites retained conservative

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positions regarding change, advocating either a return to 'pure apartheid', or continued racial partition. This denial of power to blacks spurred the formation of the United Democratic Front (UDF) in August 1983, with the purpose of fighting for power for blacks in government (Seekings, 2000:1-3).

In 1982, the government had made a promise to whites that blacks would not be included in parliament, and this greatly limited the options that government had in calming black tempers. The tricameral parliament had made the message clear: blacks were 'foreigners in their own country' (Giliomee, 2012:178).

President P.W. Botha of the NP was faced with the challenge of getting black leaders to accept that they had once again been excluded from power, while persuading them to take part in a 'negotiating forum on black political rights' (Giliomee, 2012:177). Botha realised the urgency of dealing with this and proceeded to appoint a special cabinet committee to deal with this problem. Botha clearly stated the purpose of the committee as finding an alternative for this problem other than a fourth chamber in parliament for blacks. He advocated regional development and 'the creation of a constellation of states' (Giliomee, 2012:177).

The Special Cabinet Committee (SCC) faced a great challenge: how to address black political demands while keeping promises to whites (De Klerk, 1998:99). The only conclusion that the SCC had made reiterated Botha's demand: there would be no fourth chamber for blacks in parliament (Welsh, 2009:232; and Giliomee, 2012:187).

As the tricameral parliament was being inaugurated in September 1984, political violence increased, and did not subside until 1987 (Welsh, 2009:214). Black anger fuelled the mass resistance in several forms, including consumer and school boycotts, massive rallies and sabotage by the African National Congress (ANC) (Waldmeir, 1997:46). Black residents lashed out at being excluded from any effective decision-making by refusing to pay rent, or for water and electricity. Township police stations and government offices were attacked, and several of those considered to be collaborating with the white regime were murdered. For two years, 1985 and 1986, South Africa saw a surge of extreme violence. Attempts were made to render townships 'ungovernable' (Lawrence, 1994:5; and Wessels, 2010:181). Between 1984 and 1991, factional violence claimed the lives of almost 11 000 black South Africans (Time, 1991).

After ten months of upheaval, on 20 July 1985, Botha declared a partial state of emergency, spanning those areas most affected by the revolts (Esterhuyse, 2012:11). The upheaval caused Botha to sanction the detainment of 12 000 black activists and step up the number of assassinations (Waldmeir, 1997:48). The ANC played a role in unifying the revolt, but by the time the 'call to ungovernability' was officially issued by the ANC leader in exile Oliver Tambo, the townships were already wracked by chaos (Waldmeir, 1997:46). Patti Waldmeir (1997:48) sums up the resistance movement: 'The aim was to raise up a thousand flowerheads of resistance, which could not all be mown down by the apartheid scythe'.

The 1985 partial state of emergency failed to quash the upheaval. After lifting the partial state of emergency in March 1986, Botha declared a national state of emergency on 12 June 1986 (De Klerk, 1998:119; Wessels, 2010:186; and Esterhuyse, 2012:11).The state of emergency destroyed countless lives in its wake, while crushing the rebellion. The use of massive force and tyranny became legal, and the police were freed from 'any remaining psychological impediments to oppression' (Waldmeir, 1997:70; and Giliomee, 2012:263).

The end of 1987 saw activists retreating and a 'tense calm' settling over the townships (Waldmeir, 1997:70). Botha now felt that he could take action from a 'position of strength', clearly, the state was 'losing its grip' (Lawrence, 1994:5). The ANC admitted that it had not come close to achieving all the objectives of the 'call to ungovernability', as the state of emergency and detainments had curbed their efforts (Giliomee, 2012:263). But the ANC had realised that while the government could contain dissent, it could not completely eradicate it. The ANC was acting from a position of strength as well, but that neither was strong enough to defeat the other (Kruger, 1998:74; and Waldmeir, 1997:71). Botha Kruger (1998:70) argues that 'both a mutually hurting stalemate and the danger of an impending catastrophe were evident in South Africa.' He goes on to state that the South African situation had so changed as to impelled parties to explore alternatives to a military conflict (1998:70).

As President, Botha sought to prove that the authority of the state had not been hurt in the least. However, the revolt had demoralized whites. White prosperity had been sufficiently threatened. The revolt had had the wanted effect: weakening white confidence and unity (Waldmeir, 1997:49). The state of emergency ruined the country's international reputation and created a rift in its communities (Waldmeir, 1997:70), but at the same time showed the strength of the government, and that the ANC did have some clout. In effect, the uprisings created favourable circumstances for negotiations. Taylor and Vale (2000:401) mention this

'military stalemate' as one of several explanations to the commencement of negotiations in South Africa. Not only had the South African military failed to modernise technologically, but the 'war' that was to be fought was in the streets of South Africa itself.

The biggest crisis of Botha's presidency came with his 'Rubicon' Speech of August 1985 (Welsh, 2009:231; Heunis, 2007:75). Early in August 1985 Botha announced that he would soon be taking steps away from apartheid, alluding that these steps would be major in comparison to the cop-outs of the past. He would deliver a speech outlining 'South Africa's path across the Rubicon of apartheid to the new South Africa' (Waldmeir, 1997:54). The foreign minister, Pik Botha, was sent to Western capitals in order to break the good news, and the international hype surrounding the hope of dramatic changes in South Africa grew immensely.

Botha failed to make the speech expected by the international community. A few days before the scheduled speech, Botha made a decision to diverge from the original intention of a reformist message. It has been claimed that Pik Botha had falsely heightened international expectations in order to embarrass P.W. Botha (De Klerk, 1998:103). P.W. Botha appeared so clearly irritated, and enraged while making the speech, by the international and local press hype, which would make any attempt at a reformist speech anti-climactic (Giliomee, 2012: 197; and De Klerk, 1998:103).

Botha's speech was broadcast live to millions of international viewers (De Klerk, 1998:104). What they saw was not a reformist 'hero', but rather the epitome of a bullying apartheid leader. According to De Klerk (1998:104) the 'significance of the speech was completely lost': For the first time in forty years, the NP was finally admitting that black people would have to be incorporated into the white system. But by rejecting majority rule, a black chamber in parliament and a 'one man one vote' system, Botha rejected what those watching understood as democracy (Giliomee, 2012:199). Esterhuyse (2012:21) refers to this speech as wiping away any shred of hope for a negotiated settlement in South Africa.

Botha did not deliver on the major leap promised by Pik Botha. Nelson Mandela would not be unconditionally released: he would have to renounce violence in order for this to happen. Publicly, the speech produced great disappointment, and was seen as a 'major public rejection of reform' (Waldmeir, 1997: 54). Diplomatically, economically, morally and financially, South Africa was shunned (Waldmeir, 1997:56). South Africa was clearly in

financial trouble (Kruger, 1998:72 - 73; and Giliomee, 2012:202). These pressures should have spurred Afrikaners to enter into talks with 'the enemy', but Botha made no such move.

By the end of the 1980s, thousands of people were openly challenging the communist regimes in Eastern Europe. By May 1989 East Germany still seemed stable, but the election results of that month were so blatantly fabricated that thousands were incited to protest, despite it being dangerous to do so. On the 9th of November 1989, it was announced that people could now freely cross the border into West Germany, marking the fall of the Berlin Wall (Giliomee, 2012:298). Communism started collapsing, one state after the other (De Klerk, 1994:5).

The ANC no longer had its East European support base, and socialism had been widely discredited (De Klerk, 1994:5). The Soviet Union's policy of supporting liberation movements in the developing world 'as a way of weakening the West' was diminishing (Giliomee, 2012:300; and De Klerk, 1998:161). The South African government was presented with a golden opportunity to lift the ban on the ANC, marking the fall of the Berlin wall as instrumental to the fall of apartheid (Taylor & Vale, 2000:401).

By this time, the South African government had lost international credibility, submitting the country's economy to trade sanctions and other forms of international political pressures (Shapiro, 2012:35). The South African economy could not compete on the international stage any longer, forcing the government to re-examine the way it was dealing with the security concerns within the country (Taylor & Vale, 2000:402). Taylor & Vale (2000:404) state that '[i]n short, apartheid became bad for business and the elites at both the national and international level realised this.' Wessels (2010:148) states the importance not only of the international sanctions in bring the NP to the negotiation table, but also the 'virility' of the Botha government.

Another event closely linked to the fall of the apartheid regime was the peaceful Namibian transition. The war in Angola ended in a peace settlement (Giliomee, 2012:297). The process was backed by the United Nations (UN) and the process of South West Africa (Namibia) becoming an independent state was initiated. In November 1991, South West Africa held their first free elections, with whites and black alike going to the polls. Most South Africans were affected by this peaceful outcome – serving almost as a 'dress rehearsal for the South African transition to come' (Welsh, 2009:348).

4.3.   Prenegotiation: Talks about Talks (from 1985)

In the late 1980s, South Africa was in the midst of a stalemate in which neither side had the power to completely defeat the other (Adam, 1987:287, 302). The NP government was not able to maintain apartheid, and the opposition, though strengthened, was not able to seize power. Both the government and the opposition were rejecting the reality of the stalemate – the government hoped that the situation would correct itself, while the opposition still believed that they would reap the rewards of the armed struggle. Substantive negotiations could not start before both parties perceived the stalemate (Adam, 1987:302). For substantive negotiations to begin, parties need to come to the realisation that negotiation is 'the only viable option' (Ebrahim, 1998:29).

There was an 'absence of basic trust' between these parties, and without trust, neither side could envision any kind of joint solution to the 'seemingly intractable conflict' (Shapiro, 2012:34). Ebrahim (1998:29) notes that 'years of negative perceptions of one another did not make it easier for the parties to negotiate.' For any type of official meeting to occur, a level of trust and confidence would have to be present. As a member of the ANC leadership, Thabo Mbeki was set to play a vital role in building this trust during the second half of the 1980s (Shapiro, 2012:35). Building trust was also linked to establishing whether common ground, or a 'contract zone', existed.

During this time, President Botha had condemned talks with the ANC (Sparks, 1994:80). Any talks taking place would have to be in secret. Kruger (1998:95) mentions the importance of audiences at this stage: the government 'could not risk being seen to talk with the enemy by their supporters.' While talks after De Klerk's seminal speech in 1990 (See section 4.3) have been well documented and analysed, what happened leading up to this speech, specifically in the form of secret talks, remains more vague (Breytenbach, 2010:14).

In the early 1980s, some leaders within the NP had begun to realise that apartheid was failing (Lieberfeld, 2000:21; and Meer, 1990: 345). Leaders of both the ANC and the NP had started to realise that not negotiating would lead to even more 'oppression, violence and war' (Lieberfeld, 2000:31). From 1987 onwards, several non-official networks of 'talks about talks' developed in South Africa. Business people, prominent organisations, professional institutes and academics met with the ANC in Dakar, London and elsewhere (De Klerk, 1994:1; and Breytenbach, 2010).

In June 1987, the press caught wind of a meeting in Dakar, Senegal, that would take place in August between eleven senior members of the ANC led by Thabo Mbeki and about sixty people invited by instigator and transformation activist Van Zyl Slabbert (Spaarwater, 2012:173-174; Giliomee, 2012:273; Waldmeir, 1997:75). This group of dissidents included Afrikaans-speaking academics, journalists and professionals, several Afrikaans-speaking coloured people, and a few English-speaking businessmen. The violence wracking South Africa was the main topic of discussion (Giliomee, 2012:230). While evoking a lot of negative press in South Africa, the Dakar conference was an important 'demonstration of the necessity of a negotiated settlement' (Esterhuyse, 2012:25). At this conference, Mbeki's negotiating style became clear: he 'understood … charm as a game of strategy' (Gevisser, 2009:190). Mbeki realised that negotiation would not happen spontaneously, but that it is something that had to be worked at and nurtured.

4.3.1. Secret Meetings

Breytenbach (2010:14) mentions the first contact with the ANC abroad as being in 1984, when a meeting between the ANC in Lusaka and Dr Piet Muller (then editor of the Beeld newspaper) was organised, sparking other interest. By 1987, Dr Frederik van Zyl Slabbert and Colin Eglin had met with the ANC in Lusaka; Tony Bloom had met with Oliver Tambo, Thabo Mbeki and Chris Hani, amongst others; and Patrick Laurance (editor of the Rand Daily Mail) and Willie Breytenbach had met with Mbeki in New York (Breytenbach, 2010:14). 1987 saw the Dakar meetings, mentioned above.

The government needed information on the ANC, and so The National Intelligence Service (NIS) set out to 'get to know' their 'enemy'. They proceeded to approach delegates of the Dakar meetings for information (Waldmeir, 1997:75). Top officials in the NIS had realised that ANC members other than Mandela would also have to be approached, as a settlement would not depend on Mandela alone. The NIS proceeded to seek a way to meet with the ANC in exile. They chose reformist academic Willie Esterhuyse to act as their go-between, as he had become involved in other meetings addressing the possibility of negotiations (Gevisser, 2009:2001). Two NIS officials went to Esterhuyse's home and made him a proposal: 'they asked him to spy for his country' (Waldmeir, 1997:75). Esterhuyse was asked to report back to the NIS under the leadership of Neil Barnard on the inner workings of the ANC, an outrageous request at the time. In 2012, Esterhuyse wrote a tell-all book on the inner workings of these meetings, and more specifically his relationship with Thabo Mbeki (2012).

One of the first to publish an insider account of the matter, Esterhuyse elaborates on how a culture of negotiation and trust was built up in these secret meetings.

Esterhuyse arranged discussions in Britain between ANC members and NP-aligned academics, journalists and business leaders through the course of November 1987 and May 1990. Esterhuyse also elaborates on the involvement of Consgold in arranging these meetings, recalling a conversation between himself and Humphrey Woods of Consgold where they both stated their belief that informal and confidential talks between the government and ANC leaders abroad could be of help (2012:22). By this time, Esterhuyse felt that (2012:26): '*Die "ding" het alreeds gekom. Hóé geskik gaan word, wát geskik gaan word en wié gaan skik, is die eintlike "ding"*' (Translation: "It" had already arrived. How to negotiate, what to negotiate and who would negotiate, that was the real question.)

Twelve of these discussions between at times twenty delegates from both the Afrikaner political elite and the ANC were held at a stately home near Bath in England, and later became known as the Mells Park House discussions (Gevisser, 2009:201; and Giliomee, 2012:277). These talks did not mean any concessions on either side: as Patti Waldmeir (1997:77) puts it, they were 'talks… about whether to talk… about talks'.

The academics proceeded to offer valuable information on the willingness of the ANC to enter into more substantive negotiations to the government (Sparks, 1994: 68-90). At the Mells Park House meetings, dissidents were not only to talk formally about the future of South Africa, but also form personal relationships with each other. The release of political prisoners, the role of violence and preconditions for more substantive negotiations were some of the subjects on the table (Du Toit, 2001:56). The two sides' positions on a new constitution were also explored. Other secret meetings were also taking part during this time (see Sparks, 1994).

At the Mells Park meetings, Esterhuyse and Mbeki held private talks away from their respective delegations. Esterhuyse felt compelled to tell Mbeki that he was reporting back to the NIS, and was relieved when Mbeki admitted that that was just what he had hoped for, knowing that his message, that of the ANC, was now being fed to the government (Waldmeir, 1997:77). The involvement of the government in the talks was held secret. P.W. Botha did not divulge the information to the cabinet, and only he and a few NIS officials were privy to

the existence and content of the meetings (Waldmeir, 1997:79). The same went for the ANC – only senior leaders in the ANC were in the know, fearing their denouncement as sell-outs.

The meetings first discussed the issue of starting negotiations, which then turned to a discussion on principles and positions (Kruger, 1998:95 – 102). Esterhuyse continued to report to Niel Barnard. These talks served as an exploration of each other's range of possible outcomes, from their ideal settlement to fall back positions. This exploration served as a means to discover a middle ground, from which plans for formal negotiations could be made.

4.3.2.   Kobie Coetsee and Nelson Mandela Meetings

In October 1980, Kobie Coetsee became minister of Justice, Police and Prisons (Sparks, 1994:19). A close friend of his, Piet de Waal, had been spending some time with Winnie Mandela, wife of the renowned political prisoner Nelson Mandela. De Waal started to subtly petition Coetsee to release Mandela from prison. This caused Coetsee to consider meeting with Mandela, but in those precarious times he was unsure of how to go about the meeting.

In November 1985, Mandela was admitted to the Volks Hospital in Cape Town as he had developed an enlarged prostate gland. Coetsee saw this as an opportunity and proceeded to arrange a meeting (Sparks, 1994:21-24). Meeting at the hospital for the first time presented a unique opportunity: here, Mandela would not be seen as the 'prisoner', but as a patient, and Kobie Coetsee could shed his role as Minister responsible for prisons and assume the role of a visitor (Du Toit, 2001:54). Though the conversation lacked substance, a connection had been made. After the meeting, Coetsee began to prepare for Mandela's release (Waldmeir, 1997:92).

The government realised that meeting with Mandela would be easier if he were moved from the Robben Island Prison to Pollsmoor prison – further from other political prisoners and less conspicuous (Waldmeir, 1997:93). Botha continued to reiterate his previous condition: Mandela would be released if he chose to renounce violence.

By May of 1988, Botha had found that he should open a channel to Nelson Mandela in prison in order to pick Mandela's brain on changing the violent conflict to political conflict (Giliomee, 2012:273). He appointed four officials to meet with Mandela – Niel Barnard and Mike Louw from the NIS, General Willie Willemse and Fanie van der Merwe, a senior official in the Department of Constitutional Development and Planning (Giliomee,

2012:273). These officials were to 'assess Mandela as a potential negotiator', in other words, to seek the existence of a contract zone (Du Toit, 2001:55). Barnard was tasked with reporting back to Botha. By the time Mandela was released in February 1990, they had met some 48 times. Mandela relayed Coetsee's message of tentatively seeking negotiation to his ANC comrades.

Mandela insisted on a meeting with Botha himself, but Botha refused. He would not meet with a prisoner who rejected his demands for the renouncement of violence (Giliomee, 2012:275). Mandela in turn refused to renounce violence unless he was released unconditionally. In March 1989, Mandela sent Botha a memorandum seeking the negotiation of a peaceful settlement, majority rule and 'structural guarantees to prevent black domination of the white minority' (Spitz & Chaskalson, 2000:12). A week later, on the 5th of July 1989, Botha conceded to meet Mandela for the first time (Sparks, 1994:53). Willemse and Barnard also attended the meeting.

Though there was no substantive discussion, Mandela made his demands clear: he would not be freed unless Walter Sisulu and others who he had been imprisoned with would also be released (Giliomee, 2012:276). The meeting turned out to be inconclusive, but a step had been taken in the direction of talks between the ANC and the NP.

Waldmeir (1997:99) puts the scope of networks into perspective: '[n]obody, with the possible exception of P.W. Botha, had a full picture of the wide range of contacts already established between African and Afrikaner. Chris Heunis was allowed to meet the internal anti-apartheid movement, but never Mandela; Coetsee ran with what he called 'the Mandela initiative' in almost total secrecy; and the NIS was pursuing its own clandestine agenda throughout.'

4.4.   PW Botha replaced by FW de Klerk (1989): The Speech 2 Feb 1990

In February 1989, P.W. Botha suffered a stroke. This caused him to retire as leader of the NP. He was replaced as leader of the NP by F.W. de Klerk, elected on 2 February 1989 (De Klerk, 1998:88). On August 14, 1989, F.W. de Klerk and fifteen other senior politicians sought to confront President Botha as they realised that he would not further peaceful talks with the opposition. They asked him to resign as President (Giliomee, 2012:277). He was replaced as President of South Africa by F.W. de Klerk (Spitz & Chaskalson, 2000:13). At this point in time, the main pillars of the Afrikaner establishment, including the press, the

church, the Broederbond and the universities had stopped supporting apartheid (Waldmeir, 1997:132).

The day after being sworn in as acting president, F.W. de Klerk attended a meeting of the State Security Council (SSC). The Council adopted a resolution allowing the NIS to enter 'into direct discussion with the still-banned ANC', specifically aimed at acquiring more information regarding the aims and alliances of the ANC (Spaarwater, 2012:175).

Maritz Spaarwater, an NIS official, proceeded to select a team to meet with the ANC leaders in exile (Spaarwater, 2012:175). Spaarwater and Mike Louw met Thabo Mbeki and Jacob Zuma in Lucerne, Switzerland on 10 September 1989 (Spaarwater, 2012:177; and Esterhuyse, 2012:13). Here, both parties were wary of the other, but also eager to develop some kind of relationship. Mbeki set out to change the view that the NP, or the government, had of the ANC. He proceeded to cultivate a non-threatening persona, based on his education and charm (Shapiro, 2012:37). By showing that he was to be trusted, he was showing that the ANC could be trusted.

At this point, it had become clear that the ANC would not achieve a military victory. However, radical ANC leaders rejected the idea of talks because they believed that the 'movement's revolutionary underground had to be much stronger before talks could begin' (Giliomee, 2012:294). The ANC's 'people's war' had failed to reach its goals of challenging the stability of the NP government, and this helped Mbeki's argument that the ANC should enter into talks (Giliomee, 2012:277). It seemed a mutually hurting stalemate was in place (Kruger, 1998:70).

When Louw and Spaarwater reported back to De Klerk, he was at first incensed. When they mentioned the sanctioning of their actions by the SSC, he proceeded to listen to what they had discovered during their meeting (Giliomee, 2012:277). While de Klerk only realised in 1988 that secret meetings were going on between the government, in the form of Kobie Coetsee and other officials with Nelson Mandela, he quickly realised that he would have to steer the NP in the direction of negotiations.

At this point, these 'second channel' negotiations, held informally and in secret, would have to begin to hand over the reins to first channel, official negotiations (Esterhuyse, 2012:327). De Klerk ordered the softening of strict security measures, including the allowing of mass protests in public (Nelan, 1989:2). De Klerk went so far as lifting the 1986 state of

emergency and unbanning restricted organisations on certain conditions. De Klerk was setting the stage for more substantive steps (Nelan, 1989:2). Eventually the widespread violence in the townships, international sanctions, pressure from the white electorate and other impending dilemmas, forced the NP to 'abandon the sinking ship of apartheid' and seek substantive negotiations (Meer, 1990:346). F.W. de Klerk had realised that denying at least power-sharing to the majority would only end in extreme violence (Meer, 1990: 345).

When the cabinet decided to rescind the ban on the ANC and other banned organisations early in 1990, Louw, together with other officials from the NIS, met with a team from the ANC in Europe. In this meeting, agreement was reached regarding the return of exiled members of the ANC and other organisations and the suspension of an armed struggle. The ANC and the government each had a set period of time in which to prepare their constituents for coming negotiations (Giliomee, 2012:277).

In his seminal speech on the second of February 1990, President de Klerk ordered the release of Nelson Mandela and other political prisoners, and lifted the ban on other liberation movements, including the ANC, the South African Communist Party (SACP) and the Pan-Africanist Congress (PAC) (Gevisser, 2009:211; Lawrence, 1994:8; and Giliomee, 2012:309). Emergency restrictions on the radical extra-parliamentary organisations and the media were also lifted. During this speech, de Klerk insisted that he would not bow to majority rule, but rather usher in a system of power-sharing (Sparks, 1994:107). De Klerk also announced the dissolution of apartheid legislation (De Klerk, 1994:6). The content of the speech came as a shock to most. De Klerk (1994:6) refers to the speech as 'the springboard, the framework, and the dynamo'. The ANC leadership was shocked at the announcement (Gevisser, 2009:211).

De Klerk hoped to set up a basis of good faith on which to build future negotiations. He proposed that peace be achieved by means of a 'negotiated understanding between leaders representative of the entire population' (Viljoen & Venter, 1995:15). This speech indicated that the government had accepted the idea of sharing power with the black majority, and brought about a shift in the white community away from apartheid (Viljoen & Venter, 1995:15). The speech denoted three processes (De Klerk, 1994:6): (1) the democratisation of the state (in the form of equality before the law, a free economy, a bill of human rights, protection of minority and individual rights and general franchise); (2) the 'normalisation of

political processes' (including the lifting of the ban on political groups and free political activity); and (3) negotiations toward a new constitution.

4.5.   Elite Pacting and the Beginning of Official Negotiations

4.5.1. Groote Schuur Minute (May 1990)

The first series of official, preliminary meetings between the leaders of the ANC and the South African government took place at Groote Schuur, the official residence of South African prime ministers, at the foot of Table Mountain in Cape Town (Sparks, 1994:121). This was the first time that leaders from both the Afrikaner and African nationalist movement met formally.

Fourteen people from the government, led by President F.W. de Klerk, met with 15 members of the ANC, led by Nelson Mandela, from 2 to 4 May 1990. The NP delegation was made up solely of white men, while the ANC delegation was made up of men and women from all different races: white, black, Indian and coloured, including Nelson Mandela, Walter Sisulu, Joe Slovo, Thabo Mbeki and Alfred Nzo (De Klerk, 1998:181; and Giliomee, 2012:323).

Resolving issues such as the balance of power was not on the agenda at Groote Schuur. Delegates at this meeting set out to 'clear obstacles to constitutional negotiation' (Waldmeir, 1997:161). However, vastly divergent views on how to deal with the violence in the country emerged. The ANC called for the lifting of the state of emergency, while De Klerk called attention to the fact that the emergency measures had seen a significant decrease in violence. He noted that, should the emergency measures be relaxed or dropped, violence would surely shoot up again (Giliomee, 2012:324). De Klerk and Mandela also disagreed over the lifting of sanctions, and the contentious issue of minority rights (Waldmeir, 1997:161).

The Groote Schuur Minute facilitated the 'release of political prisoners, the return of exiles and the amending of security legislation' (Sparks, 1994:125). Both parties were to agree on a definition of 'political crimes' before this could happen, and a 'Working Group on Political Offences' was set up in order to facilitate this (Spaarwater, 2012:194; and Du Toit, 2001:58). While the Groote Schuur Minute imposed certain obligations on the ANC, it did not do so for the government. The government committed to lifting the state of emergency, but the army and the police could still freely act against opponents, and the government retained resources to monitor violations by the ANC (Maphai, 1993:235; and Waldmeir, 1997:161). The ANC

pledged to reassess the armed struggle. Only once these things had occurred could negotiations begin in earnest. De Klerk (1998:182) left feeling that '[i]t was the clearest commitment to the ending of the armed struggle that we could get from the ANC at that stage. They were extremely sensitive about not being seen by their more radical supporters to be making too many concessions too soon – particularly with regard to the armed struggle.'

The meeting at Groote Schuur was less about making decisions, and more about building trust and establishing connections between the ANC and the NP. The nation and the world were watching. While nothing of real substance came from these meetings, both parties did agree on continuing talks. De Klerk and Mandela left the meeting believing that a deal was to be made, a deal in which 'there would be no losers' (Waldmeir, 1997:162). Both leaders had found that a middle ground, a contract zone, existed. What is significant about this meeting is its 'conviviality', but this would also be the last occasion on which the two parties talked calmly, and without assigning blame (Giliomee, 2012:326).

4.5.2. Pretoria Minute (August 1990)

Violence escalated from May 1990, prompting the two parties to meet again amidst the crisis. The two sides met on the 6th and 7th of August, this time in Pretoria at the Union Buildings (Spaarwater, 2012:194). Mandela announced that the ANC's armed struggle would be suspended, with immediate effect (Sparks, 1994:124). However, this did not mean that the ANC was renouncing the armed struggle (Du Toit, 2001:58). This was still a major concession by Mandela and ANC radicals grew concerned that Mandela would give away too much while de Klerk remained in a position of strength (Sparks, 1994:124). De Klerk believed that the ANC was vying for the 'moral high ground' (De Klerk, 1998:186).

The Pretoria Minute sought to regulate the ceasefire between the two sides (Maphai, 1993:235). The government committed to releasing all remaining political prisoners and to allow those in exile to return to South Africa (De Klerk, 1998:186). The government saw the suspension of the armed struggle as the last obstacle to substantive negotiations, and now the way had been cleared (Waldmeir, 1997:165). However, took sixteen months before official multiparty negotiations began in the form of Codesa (the Convention for a Democratic South Africa). Frustration grew among ANC members, specifically with the government's lack of action regarding its security forces, contrary to agreement (Shapiro, 2012:44). At the ANC Consultative Conference in December 1990, both Thabo Mbeki and Jacob Zuma were

earmarked as being 'over-enthusiastic for negotiations', with frustration aimed specifically at Mbeki's reluctance to step up the confrontation (Shapiro, 2012:44).

4.5.3. D.F. Malan Accord (February 1991)

Violence continued to escalate unabatedly. The two sides met once again, this time at the D.F. Malan Airport in Cape Town, with the sole purpose of bringing about stability (Giliomee, 2012:326). The ANC entered into a secret agreement with the government, the D.F. Malan Accord, on 12 February 1991. The Accord allowed for the existence of Umkhonto we Sizwe (the ANC's military wing, also known MK) as the government would not regard it as a 'private army' during the negotiation period (Sparks, 1994:131). There were however some limitations set on MK, including not engaging in threats of armed actions of training inside South Africa (Du Toit, 2001:59). The ANC was obliged to give the government details of the arms that it had within its arsenal, and these arms would be 'under the joint control of a transitional authority once an interim government was formed' (Sparks, 1994: 131). Both parties committed to ending all forms of hostilities, including armed attacks, and to participating in a peaceful democratic process (Giliomee, 2012:326).

The D.F. Malan Accord failed to bring about stability and curb violence. De Klerk had been under fire from Mandela since the meeting in Pretoria – Mandela accused de Klerk of 'being unable or unwilling to curb a mysterious 'Third Force' that unleashed violence on ANC members and tried to disrupt the movement' (Giliomee, 2012:326).

In July 1991 it came to light that the government had been secretly funding the Inkatha Freedom Party (IFP) (Du Toit, 2001:60). While De Klerk denied knowing anything about this outright, the ANC accused the government of acting in bad faith (Du Toit, 2001:60). In an effort to re-establish good faith, De Klerk proceeded to 'remove the Ministers of Police and Defence from their positions in a major cabinet reshuffle, and to institute administrative control procedures to close down these and any other such operations' (Du Toit, 2001:60).

4.5.4. National Peace Accord (September 1991)

Slowly, the two parties came closer to the drafting of a new constitution. The government made it clear that they would not oppose some sort of 'transitional government', given that it did not break 'constitutional continuity'. On the 14th of September 1991, 32 representatives from political parties (including the ANC and the IFP), government and religious and business organisations signed the National Peace Accord (Viljoen & Venter, 1995:15).

Almost all significant parties were involved, and all, except the Conservative Party (CP) and the Pan Africanist Congress (PAC), signed a 'Declaration of Intent' for substantive negotiations in the form of The Convention for a Democratic South African (Codesa) (Giliomee, 2012:336). The Accord provided a 'code of conduct' for the negotiations to come, provided mechanisms for resolving disputes and was designed to moderate tensions (Lee, 1996:43).

In October 1991 the ANC made its position clear: it demanded that a government of national unity 'should govern South Africa for no more than eighteen months, after which the election for a constituent assembly should take place' (Giliomee, 2012:336). The ANC agreed to Codesa, but not without the caveat that it should not become a constitution-making body. Codesa was set for 20 and 21 December in Kempton Park. Common ground had been established, but at Codesa, the 'real haggling would begin' (Lawrence, 1994:9).

4.6. Pre-negotiations positioning

4.6.1. The NP's earlier proposals

Prior to the September 1989 election, the NP's campaign remained much the same as it had been before (Welsh, 2009:345). The NP was still talking of the need for reform, but attacked the ANC as a terrorist organisation. De Klerk denied that the NP was considering talks with the ANC (Welsh, 2009:345).

The NP appeared to be upholding its 'group rights' position; on the basis that 'only when people feel secure in a group context would they be prepared to run the risk of sharing power' (Welsh, 2009:345). De Klerk maintained that each group would have control of its own interests, attacking the Democratic Party's (DP) proposal of federalism as leaving whites a powerless minority in every region (Welsh, 2009:345). The NP was strongly against majority rule. De Klerk went so far as to equate 'domination by a majority' to Nazi Germany, assuring NP constituents that whatever constitution was negotiated would not allow any group to dominate another (Welsh, 2009:345).

The NP position had clearly remained much the same as earlier in the late 1980s: power-sharing; group rights; firmly against majority rule; a minority veto; and minorities to be represented in a senate (Welsh, 2009:345; and Giliomee, 2012:347-348). After February

1990, the NP government slowly and painfully moved from its steadfast position on group rights to power-sharing (Shapiro, 2012:41).

4.6.2. ANC Proposals 1988/1989

In 1988, the ANC proposals reflected a unitary position, but very few details (Welsh, 2009):

i. unitary, democratic and non-racial state; with
ii. powers (of the government) that might be delegated to subordinate administrative units; and
iii. A Bill of Rights based on the Freedom Charter of 1955.

The ANC continued to cling to the idea of the National Democratic Revolution (NDR). In 1962, the South African Communist Party (SACP) had adopted a theoretical document: The Road to South African Freedom (Giliomee, 2012:294). The NDR was the foundation of this document. The NDR wished to 'overthrow the colonial sate' (the white government), and 'to introduce popular control over all the institutions, to nationalise the main industries and to introduce radical land reform' (Giliomee, 2012:294). At the SACP congress in 1989, Mbeki restated his commitment to the NDR.

4.7.   Positioning 1991

4.7.1. NP Constitutional Proposals September 1991

The NP's constitutional proposals by September 1991 looked as such (Giliomee, 2012:333-334):

- The constitution would have authority above all other laws. It would be guarded by an independent judiciary;
- The state would have a Bill of Rights;
- Democracy would be participatory;
- Power would be decentralised and trasferred to regional authorities;
- The National Legislature was to consist of two houses forming a bicameral system. The first house would be elected by means of proportional representation, and the second house would get the same number of seats to be filled by regional elections. A minimum number of votes for parties would equate to an equal number of seats in this chamber;

- The presidency would rotate between the leaders of the three biggest parties;
- All decisions would be made by consensus;
- Minority political parties would be protected by minority rights.

4.7.2. The ANC proposals of 1991

The ANC proposals of 1991 showed a shift away from their 1988 proposals (Welsh, 2009):

- They proposed a unitary state with an entrenched Bill of Rights
- The homelands should be re-incorporated into South Africa
- Government would be made up of three tiers: central, regional and local
- The government would be made up of a National Assembly based on proportional representation, and a Senate made up of representatives from the different regions. The Senate would be the 'custodian of the constitution'
- The judiciary will be independent and have a constitutional court
- The proposed rights for the Bill of Rights include:
    - Assembly
    - Association
    - Culture
    - Information
    - Movement
    - Religion
    - Equal rights for men and women
    - Affirmative action
    - Abolition of capital punishment
- Ten official languages were proposed
- A human rights commission was proposed

However, Nelson Mandela did try to reassure whites in a speech in Stellenbosch in 1991: 'We have to address the fears of whites and we should go beyond the mere rhetorical assurance in order to address structural guarantees which would ensure that this principle will not lead to the domination of whites by blacks ... It may not be enough to work purely on one-person, one-vote, because every national group would like to see that the people of their flesh and blood are in the government' (Uys, 1994:53). From the beginning, the ANC had been intent on reassuring whites of their economic interests, stating their commitment to

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global neo-liberalism (Shapiro, 2012:41). On the issue of nationalisation, the ANC realised that it would have to make a change in order to keep on attracting international investment to the country. Mandela realised this, and while he could not get the notion of nationalisation removed from the ANC's platform, privatisation as well as nationalisation was accepted (Giliomee, 2012:349).

4.8.   Negotiations for Constitution Making

4.8.1. Codesa I (December 1991)

On the 13th of November 1991, parties met to discuss and decide the rules for the multiparty negotiation process, otherwise known as Codesa. On 21 and 22 December 1991, 228 black, white, Indian and coloured delegates from 19 political groups and governments met at the World Trade Centre near Johannesburg (Laurence, 1992:48; and Sparks, 1994:130). The *Afrikaner Weerstandsbeweging* (AWB), the Conservative Party (CP), the Azanian People's Organisation (AZAPO) and the PAC were the notably missing parties (De Klerk, 1994:7). According to Du Toit (2001:61), the venue was about the only successful aspect of Codesa: the building was easily accessible to all, and presented no historical or emotional significance to any of the participating parties.

During the pre-talks of Codesa I, the vague notion of 'sufficient consensus' was developed (Spaarwater, 2012:201). Parties decided that during substantive negotiations, when consensus proved impossible, the negotiations would proceed on the basis of 'sufficient consensus'. Though the notion has never been defined in detail, it did rest on the hope of more than solely a majority vote (Laurence, 1992:50). Basically, 'sufficient consensus' meant that if 'the ANC and the NP agreed the process could go forward' (Welsh, 2009:481). While this process was hailed internationally, some parties accused the concept as justifying bilateralism in a multi-party decision-making process.

Codesa relied on the trust and goodwill of the participants, and did not have any policing mechanism ensuring compliance to any decision made. The balance of power between the ANC and the NP provided a basis for trust (Maphai, 1993:235). By this time Thabo Mbeki, who had been in charge of the ANC negotiating team, had been replaced by Cyril Ramaphosa. Mbeki had been labelled 'moderate', and the militants within the ANC set about to replace him, finding a worthy candidate in trade unionist and lawyer in training Ramaphosa (Gevisser, 2009:228). During Codesa I, Mbeki took the lead in the working

group for designing the interim government, while Ramaphosa led the working group on designing a new constitution (Gevisser, 2009:231). Here, their difference in negotiation styles became clear: Mbeki proceeded to achieve compromise with minimal conflict, and with minimal concession by the NP, while Ramaphosa's group failed to compromise on several key issues, which eventually led to the collapse of the talks (Gevisser, 2009:231).

Barry Shapiro (2012:33) notes this change in the leadership of the ANC's negotiating team as a 'pivotal turning point in the ANC's drive to secure agreement on a majoritarian constitutional settlement'. Mbeki had spent years building trust by building relationships with the opposition, seeking to change their perception of the ANC as a terrorist organisation to be feared to that of negotiating partner. Shapiro argues that Mbeki's negotiating style had created a steady platform of trust when Ramaphosa took the reins, who proceeded to take a notably more adversarial approach and rely on brinkmanship (Shapiro, 2012:33). By the time Ramaphosa took over, Mbeki had succeeded in making the government believe they shared an 'ultimately 'irreversible' understanding of their mutual interest in making peace' (Shapiro, 2012:33). However, once Mbeki had brought about the establishment of this 'irreversibility', his style of negotiating now longer served the ANC, which led to his replacement by the more adversarial Ramaphosa (Shapiro, 2012:36).

Codesa began with a 'Declaration of Intent': a declaration by all the parties (except two) vowing to achieve democracy and committing themselves to a peaceful transition and a Bill of Rights (Nelan & Hawthorne, 1991:2; and Gross, 2004:58). Codesa's main objective was not to write a new constitution, but rather to reach agreement on how the negotiations and the transformation would go forward (Giliomee, 2012:340).

Five political working groups were set up with specific tasks. Groups were given a timeline – discussion in the next two months, and reporting back at the convention in mid-March (Nelan & Hawthorn, 1991:2). Each party was to send two delegates and two advisers to each of the groups (Giliomee, 2012:337). The five working groups looked at the following issues (De Klerk, 1994:7): (1) creating a political climate of free participation and assessing the role of the international community in the transition; (2) general constitutional principles and the mechanism for writing a new constitution (Cyril Ramaphosa was the chief negotiator for the ANC here); (3) how the interim government and the provinces would be arranged (Thabo Mbeki was the ANC's chief negotiator here); (4) how the TBVC (Transkei, Botphutatswana,

Venda, Ciskei) states will be dealt with; (5) how decisions made at Codesa would be implemented and timetables.

At Codesa, black and white leaders came together to design a democracy specifically for South African needs. While leaders agreed that a new constitution should be set up, they disagreed on almost every other aspect. F.W. de Klerk focused on sharing power, while the ANC preferred the handing over of power from the NP to an interim government (Nelan & Hawthorn, 1991:3). The ANC was in favour of a strong, centralised government, while the NP sought a decentralised, federal system and a minority-veto on major legislation. Buthelezi of the Inkatha Freedom Party (IFP) fought for a strong federalist state, before withdrawing from Codesa. The issue of the ongoing violence continued to be a sore point during Codesa I (Giliomee, 2012:340).

The NP's pressing for minority rights and a white veto on the constitution was threatening to collapse Codesa, or to split the ANC leadership (Giliomee, 2012:345). But the misunderstanding between South African political groups went much deeper than one issue. Codesa I made one thing clear: there was a fundamental disagreement over who would have power in the new South Africa (Waldmeir, 1997:193). The NP held out on its demand of a minority/white veto, hoping that it would entrench at least some political power for the white minority (making up only 12% of the population at that time) (Waldmeir, 1997:193).

After September 1991, De Klerk reiterated the NPs proposal of a Bill of Rights to protect individual rights, civil and property rights; an independent judiciary; separation of powers between the executive and the legislature, and between the provinces and a central government (Waldmeir, 2012:193). Initially, the party line had not changed: the NP was set against majority rule, knowing that simple majoritarianism would take all political power away from whites (Waldmeir, 1997:193). But ultimately, the NP conceded majority rule in a constitutional state.

De Klerk 'sought to artificially balance power between vastly unequal ethnic groups, with a constitution that enforced multi-party coalition government' (Waldmeir, 1997:193). This would mean (Waldmeir, 1997:193):

> *...cabinet posts shared out according to each party's proportion of the vote; extra*
> *representation for minorities; an upper house of Parliament, coupled with special*
> *high majorities for passage of some legislation in the lower house; a presidency*

that would revolve between the leaders of rival parties, rather than residing in one man; the requirement that cabinet decisions be taken by consensus, a system that would give each party an effective veto over the others. In short, a system in which each group had more or less equal power.

Mandela was dead-set against this proposal, referring to it as 'loser-takes-all'. Allowing minorities to veto the will of the majority was not what the ANC had been fighting for. Mandela continued to call for majority rule. De Klerk in turn called this proposal 'winner-takes-all' – exactly what the government was afraid of. The existence of a contract zone seemed less and less likely, threatening a deadlock of the talks.

Ahead of Codesa, the government had made clear its position that it would not accept an elected constitution-making body or an interim government. However, a week later De Klerk finally conceded to a compromise: Codesa would write an interim constitution, and an elected assembly would write a final constitution (Waldmeir, 1997:195). The Codesa negotiators reached an agreement on going forward with a two-stage transition. Firstly, an interim government would be put into place, and secondly, a parliamentary body would be created that would draft a new constitution (Arnold, 1992:3). The procedures for further talks were developed.

While the convention was open to all who wanted to attend, some extremist groups had insisted on boycotting the process, including the Afrikaner Resistance Movement led by Eugene Terreblanch and the Azanian People's Organisation (Laurence, 1992:49). These groups were in danger of 'irreversibly marginalising themselves' (Laurence, 1992:49).

4.8.1.1.   *Ramaphosa and Meyer*

The meeting of Roelf Meyer, who had replaced Gerrit Viljoen as the lead negotiator on the government's side in May 1992, and Cyril Ramaphosa, the ANC's secretary general, was pivotal in the South African negotiations (Strauss, 1993:357). As leader of the Mass Democratic Movement during the 1980s, Ramaphosa had openly expressed his doubts regarding the Nationalist government. While he believed that the government was ready to build a New South Africa, he was wary of phrases like 'group rights' which were reminiscent of apartheid (Nelan, 1989:3). However, he also voiced concerns regarding a one-party-dominant democracy, knowing that the consequences of allowing one black party to dominate the future of South Africa would not be conducive to democracy (Nelan, 1989:3).

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At a meeting organised by a mutual friend in August 1991, Meyer and Ramaphosa met socially for the first time. They were 'forced' into a situation that required mutual trust, where after a bond was formed between the two men who would become central figures in the negotiations (Sparks, 1994:3-4).

4.8.2. Codesa II (May 1992)

On the 17th of March, a whites-only referendum voted in favour of change. The question on the referendum read: 'Do you support continuation of the reform process which the State President began on February 2, 1990 and which is aimed at a new constitution through negotiation? (Strauss,1993:339). Reportedly, 86% of white voters turned up, with 68.7% voting 'Yes' (Strauss, 1993:350). A record turnout of voters at de Klerk's referendum gave de Klerk a mandate to continue with negotiations, and gave him control of white political power (Arnold, 1992:2). Though the ANC and the PAC were initially against the whites-only referendum, the referendum changed the course of the negotiations positively. The large vote in favour of change strengthened the resolve of parties involved toward a peaceful transition.

After the referendum, the NP felt confident (De Klerk, 1998:234). It felt secure in at least a third of the votes in a national election and as such could manoeuvre their proposals in such a way to take this into account (Giliomee, 2012:345). At this point the working groups were meeting almost constantly. Nearly every waking hour was spent at the World Trade Centre near Johannesburg, struggling to negotiate agreements to be presented a Codesa II on 15 and 16 May. At this next big meeting, leaders would be called on to approve what the working groups had agreed on.

During this time, the NP's main constitutional and political adviser, Gerrit Viljoen, started to feel the brunt of the long hours of intense negotiation (Giliomee, 2012:346). He resigned as Minister of Constitutional Development and decided not to take part in talks any longer. Other negotiators, Hernus Kriel and Rina Venter, also decided to pull out of the negotiations. De Klerk had to reshuffle his team: deputy minister Tertius Delport was moved to head of Working Group 2 in Viljoen's place, while Roelf Meyer was assigned as Minister of Constitutional Affairs, chairman of the cabinet sub-committee on negotiations, and chief negotiator (Giliomee, 2012:370). Leon Wessels and Dawie de Villiers were also pulled into more senior negotiating positions, assisting Meyer in talks with the ANC (Waldmeir,

1997:200). Cyril Ramaphosa and Tertius Delport came head-to-head in Working Group 2, with Ramaphosa setting out to break Delport (Waldmeir, 1997:201).

Heading toward Codesa II, the 19 parties taking part had agreed that (Waldmeir, 1997:201):

- The parties present at Codesa would draft an interim constitution;
- Constitutional principles to bind the elected constituent assembly would also be written;
- The constituent assembly would be tasked with rewriting the interim constitution into a final constitution.

Before the start of Codesa II, tensions had been considerably built up, and parties had hardened their negotiation positions (De Klerk, 1994:7). Codesa II assembled on the 15th of May, 1992. Codesa was originally intended to deal only with broad principles regarding the transition, but later evolved into negotiations concerning constitutional issues (Maphai, 1993:225). Continued conflict at the meeting showed that that process may collapse at any moment (De Klerk, 1994:7).

The balance of power at Codesa seemed relatively equal between the NP and the ANC, with each party having an equal amount of allies in the group of assembled parties and delegates. The NP had the support of some of the homeland leaders (Giliomee, 2012:345). This essentially meant that the NP and the ANC would have equal power in the drafting of the interim constitution. A large majority – probably larger than the ANC would have in the constituent assembly – would be required to make amendments to the constitution. The NP would have power to block ANC decisions (Waldmeir, 1997:201).

Codesa placed definite constraints on any constitution-making body, with great influence by the NP, who would otherwise have been in the minority (Maphai, 1993:225). What had not yet been settled, however, was how the constituent assembly would decide on making changes: while Working Group 2 had already agreed that more than a simple majority would be needed, offers of two-thirds and 70% were still on the table (Waldmeir, 1997:201).

The NP was adamant that the abuse of power, and more specifically, the domination of one party over the other, must not be permitted: there should be a 'maximum devolution of power' (De Klerk, 1994:7). The NP now advocated a phased approach to the transition, and stated that the interim constitution 'must already entrench the principles of a final

constitution' – another attempt at keeping power (De Klerk, 1994:7). The ANC would not fall for the NP's proposals and accused the NP of having a hidden agenda and attempting to stall negotiations to achieve this. From the outside, it seemed that the NP had lost control of the process and that the ANC only wanted to win power (De Klerk, 1994:8).

The NP suggested a two-thirds vote for entrenching general constitutional clauses, but a 75% majority for the Bill of Rights, multi-party democracy, the devolution of power and minority rights (Waldmeir, 1997: 202). The ANC smelled a rat: such high percentages could stall changes to the interim Constitution indefinitely. Ramaphosa agreed to the NP's proposal, with the caveat that if the assembly 'could not agree within six months, a referendum would be held…' At that point, only 50% of the population would be needed to pass a new constitution (Waldmeir, 1997:202-203). With this, Codesa II would become deadlocked.

The proceedings had stalled as no common ground could be found regarding some crucial matters (Viljoen & Venter, 1995:16). The government was in favour of a bicameral parliament, one chamber elected proportionally and the other on a disproportionate basis, providing 'special representation' for minorities (Arnold, 1992:2). The ANC was against this, arguing against the institutionalisation of minorities and majorities. Codesa had failed to bridge the differences between the two main parties' interests. No middle ground, no contract zone, had been identified.

4.8.2.1.   *Failure of Codesa (June 1992)*

Several reasons contributed to the failure of Codesa. No one political group can be blamed for its collapse: all made errors in judgement, and there was brinkmanship on all sides (Eloff, 1994:12). Cyril Ramaphosa is specifically noted as to the use of brinkmanship, and forcing the balance of power in the ANC's direction (Gevisser, 2009:231). Giliomee (2012:367) refers to the structure of Codesa as 'clumsy'. Eloff (1994:12-13) identifies several serious flaws in the structure of the negotiations. Firstly, the system of five working groups was 'unworkable': each group had some 80 delegates, making negotiating, and in essence compromise, near impossible.

The way in which there groups were run also facilitated a deadlock: each participating group was given the opportunity to not only present its position on each issue on paper, but also orally. This meant that large amounts of paper was pushed around, entrenching parties'

positions by putting proposals in writing, making movement very problematic. There were no mechanisms for compromise and deadlock-breaking in these structures.

The impasse in negotiations had started with a lack of agreement on interim arrangements (Cohen, 1992). The ANC strongly objected to the NP's suggestion of white minority veto power and an open-ended transition, while the NP continued to demand that have minorities some role in South Africa's future. The ANC 'reverted to its earlier demand for an elected constitution-making body empowered to pass a constitution by a two-thirds majority' (Giliomee, 2012:360).

A surge of extreme violence in the township of Boipatong in June 1992 (46 people had been killed in a 'four hour orgy of slaughter' by Zulu nationalists) set off a dispute among political parties (Time, 1992; and Waldmeir, 1997:206). Nelson Mandela claimed that this was the 'last straw' in a spiralling surge of violence. This reportedly happened under the 'watchful eye of the security police' (Gevisser, 2009:231). Codesa II had been threatening to collapse for several months, but the Boipatong massacre pressed the ANC to withdraw from talks. On the 21st of June 1992, the ANC officially pulled out of negotiations.

Violence continued to wrack the country and the ANC refused to take part in the negotiations until the government actively sought to end the violence (Anonymous, 1992:5). The ANC blamed the NP for being complicit in the ongoing violence and accused the government of harbouring and encouraging violence. This was met by complete denial by NP-leader F.W. de Klerk.

The ANC had a list of demands, including the suspension of state security personnel believed to have been involved in the recent violence at Bisho in the Republic of Ciskei, where 28 people had been killed (Spaarwater, 2012:210). The ANC went so far as to accuse de Klerk of bypassing 'real issues', such as how state security forces were running rampant throughout the country (Anonymous, 1992:5). From June to September 1992, South Africa was marred by further strikes and protests.

Former labour unionist Cyril Ramaphosa reportedly initiated, or had been involved in, the so-called 'rolling mass action' of 1992 (Spaarwater, 2012:210; and Kasrils, 2004:267). Ramaphosa had succeeded in engineering a crisis to tip the scales in the direction of the ANC, playing on the balance of power within the working relationship (Shapiro, 2012:47).

Ramaphosa had sought to show that they 'were dealing with an enemy that would not give in easily', and succeeded (De Klerk, 1998:238).

By refusing to re-enter negotiations before certain demands were met, the ANC forced the NP to make certain concessions, taking some action against the ongoing violence. Security units were disbanded, and the bearing of weapons was limited, while promises were made regarding international intervention in the regulation of the violence (Cohen, 1992). De Klerk dismissed 19 police generals thought to be involved in violent actions in order to aid negotiations (Lee, 1996: 43). It was essential to the resumption of negotiations that the violence be controlled. Parties remained committed to negotiations, and the government had accepted that it is impossible to return to the previous regime. The only viable option for all parties was to return to the negotiating table.

The ANC held that it was ready to join renewed talks, under certain demands made to de Klerk, remaining convinced that de Klerk should hand over power to a government of national unity (Time, 1992). During this time, the first mention of the 'Sunset Clauses' was made. These clauses came forth as a means to protect the jobs of white civil servants and security force members (Waldmeir, 1997:213). These included 'pension protection; amnesty for apartheid crimes; and most of all, compulsory power-sharing for a fixed number of years after the adoption of the interim constitution, including a coalition cabinet enforced by law', which would eventually result in the formation of the Government of National Unity.

4.8.3. Record of Understanding (September 1992)

By the middle of 1992, there was no clarity on the way forward, or how an elected assembly would work (Giliomee, 2012:361). The NP and the ANC had divergent views: the NP saw a mutually beneficial settlement, one that could only be changed if the main parties agreed; the ANC were fighting a 'war of position', using each concession from the NP as a step toward the next battle, true to the form of the National Democratic Revolution (Gevisser, 2009:231; and Giliomee, 2012:361).

When the balance of power shifted in favour of the ANC, it changed its position. Later, Thabo Mbeki would admit that 'the negotiations for an interim constitution were "contrived elements of a transition" necessary to end white domination. At no time did the ANC consider them "as elements of permanence" '(Giliomee, 2012:361).

The deadlock at Codesa had caused parties to rethink their positions. De Klerk announced that the NP was walking away from a Second House of parliament which would be over-representative of minority parties. De Klerk also made concessions regarding the majority needed to change the interim constitution, lowering the percentage form 75 to 70 (Giliomee, 2012:361). The ANC continually rejected all forms of power sharing, calling for non-racial majority rule.

In June/July 1992, Mandela and De Klerk communicated by means of written memoranda. They 'exchanged formal memoranda that were, at least in part, substantial papers on constitutional matter', exchanging views on the current situation and what would happen in the near future (Viljoen en Venter, 1995:15-16; and Giliomee, 2012:373). Cyril Ramaphosa and Roelf Meyer were meeting in secret, attempting to find a deal among the remnants of the failed negotiations. They met more than forty times, creating a network which was later dubbed 'the channel' (Strauss, 1993:357). This formalised the 'sufficient consensus' rule. Fanie van der Merwe and Niel Barnard from the NIS supported Meyer at these meetings, while Ramaphosa had Joe Slovo and Mac Maharaj at his side (Giliomee, 2012: 372-373). Meyer and Ramaphosa had both come to the realisation that the country would be economically ruined should talks continue to fall apart. Both Ramaphosa and Meyer realised that the only future lay in both parties' cooperation (Waldmeir, 1997:208 – 209).

Each party retreated to give compromise another look: the ANC to find a way to 'soften' majority rule; the NP to realise that majority rule may not be so bad in a constitutional state, provided that property rights and press freedom prevailed (Waldmeir, 1997:212). Both shifted focus to a system, at least an interim system, of power sharing. These meetings led to the production of the 'Record of Understanding' on September 26, a paper focused on curbing violence and building democracy, which opened the way for negotiations to resume (Strauss, 1993:357). The following figure shows the clear build-up of political violence during the negotiations:

Figure 4.2: Political Fatalities in South Africa 1985 – 1996

Source: South African Institute for Race Relations South Africa Survey 1996/1997: 600

The ANC set three conditions to be met before they would return to talks: the release of the remainder of political prisoners, the fencing in of Inkatha hostels, and the banning of Zulu traditional weapons (De Klerk, 1998:248). The Record of Understanding marked a turning point in the on-again-off-again negotiations and would 'turn everything upside down' (Giliomee, 2012:360). The three major parties involved all reacted differently: the ANC was happy, the government was embarrassed, and Inkatha was enraged and withdrew from ormal negotiations[2] (Waldmeir, 1997:216).

At this point in time it became clear that the NP would most probably not get more than 25% of the vote in a national election and lose its dominant position, essentially handing over power to the ANC (Giliomee, 2012:360). The ANC would agree to some constitutional principles before the election, but would not accept any procedures or rules that would bind them too tightly. Winning the first election convincingly would allow them some freedom in changing the interim Constitution (Giliomee, 2012:360-361).

The Record of Understanding set up measures to fence off Inkatha hostels and ban the carrying of traditional Zulu weapons, infuriating Buthelezi of Inkatha. The NP had ostensibly

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[2] This withdrawal had implications for the study, as the IFP did not take part in formal negotiations of 1993. No significant memoirs relevant to the study emerged referring to later formal involvement.

gained nothing: no concessions to the government were made. While it made no mention of constitutional matters, the Record of Understanding facilitated the resumption of talks, which was what the NP had been hoping for (Heunis, 2007:190-191; Waldmeir, 1997:216). Waldmeir (1997:218) calls the Record of understanding 'not just a triumph for the ANC; it was a triumph of negotiation over conflict'.

In the Record of Understanding, the ANC abandoned its original position put forth in the Harare Declaration of 1989, where it had demanded an '"unstructured and immediate" transfer of power before a constitution was even negotiated' (Giliomee, 2012:375). Such a total takeover usually only occurs after a revolution, or if the regime had suffered a military defeat. The Record of Understanding set forth the idea of a 'government of national unity', which to F.W. de Klerk meant an interim government built on the premise of power sharing, at least in part what the NP had been fighting for. However, the Record did not mention the interim constitution nor the majority needed to change these decisions, only that the 'elected body would "draft and adopt the new constitution" and "arrive at its decisions democratically with certain agreed majorities"' (Giliomee, 2012:375).

The ANC won several major battles with the signing of the Record of Understanding (Welsh, 2009:466-467): the fencing off of the Inkatha hostels; the ban on the carrying of traditional weapons; the release of political prisoners; and the 'use of mass action as an instrument of political pressures' (De Klerk had proposed a ban in this).

Kobie Coetsee described the Record of Understanding as 'short of disastrous': the NP had been reduced to a junior partner in the transition and had lost its alliance with Inkatha (Giliomee, 2012:379). Similarly, Meyer made his discontent with the agreement clear, claiming that all concessions had come from the NP side (Welsh, 2009:466). The NP and the ANC finally agreed to a five-year government of national unity after two 'bosberade' (bush summits), while De Klerk insisted on a 'revolving presidency' (Waldmeir, 1997:222 – 223).

At the end of November 1992, De Klerk proposed a time scale for the transition (De Klerk, 1998:257):

We would try to launch a new, inclusive, multilateral negotiating forum before the
end of March 1993. We hoped that agreement could be reached on a transitional
constitution before the end of May, with a view to it being enacted before the end of

September. The first elections under the transitional constitution would then be held
no later than March/April 1994.

4.8.4. MPNP (May 1993)

In February 1993, a conference was held in order to prepare for the resumption of multi-party talks in April (Laurence, 1993: 26). It was decided that the talks would resume under a new name, but start were Codesa had left off (Viljoen & Venter, 1995:16). The new talks, known as the Multi-Party Negotiating Process (MPNP) were by far the most inclusive of talks so far – the Conservative Party, the Afrikaner Volksunie and the PAC had decided to join negotiations after loudly protesting the first set of negotiations (Laurence, 1993:26). The previously vague notion of 'sufficient consensus' was clarified by Ramaphosa and agreed to by the NP (Atkinson, 1994:22): 'consensus was sufficient if the process could move on with the backing of only those who supported a proposal. Disagreement would be recorded; dissenters could remain in the process, await its outcome, and the decide whether to support it.'

These talks were also held in Kempton Park, and are sometimes referred to the 'Kempton Park Negotiations' (Gross, 2004:58). Traditional leaders like the Zulu monarch King Goodwill Zwelethini had also found their way into the negotiations. The only notable groups not in attendance were the extremist AWB and AZAPO (Laurence, 1993:26). All in all, 26 parties and organisations took part in the MPNP (Strauss, 1993:360). From the 1st of April, formal negotiations resumed.

During these negotiations, the ANC continued to call for a 'government of national unity' to govern for a five-year period after the first one-person one-vote elections. They believed that this was the best way to curb violence as well as ease the transition. Ronnie Kasrils (2004:260) refers to this 'concession' by the ANC as a move displaying 'magnanimity and statesmanship'.

 The MPNP lasted for seven months, and included several non-political committees in order to draft a new constitution and build structures and procedures. Meyer's team included Leon Wessels, Fanie van der Merwe, Dawie de Villiers, Francois Venter, Johan Kruger, Niel Barnard, Jan Heunis, Theuns Eloff and Maritz Spaartwater. Ramaphosa's team consisted of Mac Maharaj, Joe Slovo, Mohammed Valli Moosa, Thabo Mbeki, Mathews Phosa, Arthur Chaskalson and Dullah Omar (Spaarwater, 2012:223).

On 10 April 1993, the leader of the SACP, Chris Hani, was assassinated by a white man (Kasrils, 2004:261; and Atkinson, 1994:26). This put pressure on the negotiations to proceed as quickly as possible. Niel Barnard and Fanie van der Merwe, assisted by Jan Heunis, set up a timetable marking an election date. Both ANC and the NP agreed to the setting of the election date of 27 April 1994, which put a time constraint on the proceedings. Given the amount of preparation time needed for elections, the MPNP would only have several weeks to produce agreement on a new, interim constitution (Waldmeir, 1997:226).

4.8.4.1.   *Structure*

The MPNP talks consisted of several committees: technical committees to look at specific issues; a management committee, and a negotiating council (Waldmeir, 1997:226). The plenary session of the MPNP was granted the power of confirming agreements reached by the sub-committees (Eloff, 1994:14). The Negotiating Council was made up of two delegates and two advisers per participating party/group, and was set to finalise all agreements. The Negotiating Council was open to the media, as opposed to Codesa which had been closed off to the media (Eloff, 1994:14; and Atkinson, 1994:24). It received reports from the other committees, debated on these issues, and reached agreement. These agreements were then turned into the Constitution and the Bill of Rights. On urgent matters, the Council sometimes took ad hoc decisions (Eloff, 1994:14).

The 'Planning Committee', made up of individual negotiators across the political field, directly reported to the Negotiating Council (Atkinson, 1994:24). Those serving on this committee accepted the important role as 'guardians' of the process (Eloff, 1994:14). Seven different 'Technical Committees' also reported to the Negotiating Council. These committees were made up of 'experts' not affiliated with specific political groupings but acceptable to all the participants (Eloff, 1994:14). Most of these 'experts' came from a legal background, making them the most suitable drafters of agreements made by the participating parties. Parties' proposals were presented to the Technical Committees, avoiding 'grandstanding' and emotive language. These committees were effective as a 'compromise-seeking and deadlock-breaking mechanism' within the MPNP (Eloff, 1994:15). Eloff (1994) further describes the detail of the MPNP structure.

The MPNP had been structured in such a way as to promote constant movement within the process itself, and allowed for a flexibility and informality which enhanced the effectiveness

of the talks (Eloff, 1994:17). The chairmanship was alternated between a panel of eight, ensuring trust in the chair's neutrality (Eloff, 1994:17).

This seemingly complicated structure proved crucial to the success of the negotiations. The technical committees allowed for the most fundamental arguments to be treated as technical problems with technical solutions designed by experts not clouded by emotion (Waldmeir, 1997:226). Using technical expertise had allowed the transfer of power to be dealt with as a 'mutually agreeable trade-off' instead of the emotive conflict it had become (Waldmeir, 1997:226). At the same time, delegates at the MPNP were subject to pressure from their constituencies: some constituencies had very high expectations of the talks, while others openly criticised their leaders as 'selling out' whenever a compromise was reached (Eloff, 1994:19).

4.8.4.2. Trust

Eloff (1994:18) attributes the success of the MPNP, at least in part, to the 'building of personal relationships and trust between various negotiators'. Roelf Meyer and Cyril Ramaphosa continued to run the talks, showing great compromise and expert negotiating. However, they did not always agree, and when this happened they had Fanie van der Merwe and Mac Maharaj to turn to (Waldmeir, 1997:226). Not only had these personalities played a formative role in the compromise-seeking atmosphere, but also the process itself. Waldmeir (1997:227) shows the effectiveness of the process:

All the parties to the talks accepted that reason was their best weapon. Each learned to present an argument for sectional interests in the language of universal, and overwhelmingly liberal, values. They learned that they must appeal to the overall public good, if they wished to win concessions for their own party.

4.8.4.3. Agreement

By November 1993, most of the contentious issues remained unanswered. On the night of 17 – 18 November, the resolving of these issues was undertaken. The ANC conceded the protection of civil servants in order to mollify the NP. However, it would later become clear that this did not mean they could hold their posts (Giliomee, 2012:404). De Klerk made another big concession at this time: the NP would not have veto power in government (Waldmeir, 1997:227). At Codesa II it had been agreed that an interim government (or Transitional Executive Council) would need an 80% majority to make decisions, which

would have resulted in an effective veto for the NP/government. De Klerk ended up compromising on a lower majority, obliterating the chance of a NP veto (Waldmeir, 1997:227-228). Should the constituent assembly be unable to reach agreement, a 60% majority in a referendum would be sufficient for the adoption of a new constitution (Giliomee, 2012:404).

During this period, the idea of third party mediation was mooted. The internal agreement was finalised in late 1993. One issue did remain unresolved – the issue of power-sharing in the executive. No definitive decisions had been made on De Klerk's position in the interim cabinet, nor how the cabinet would make decisions (Waldmeir, 1997:228). De Klerk demanded a two-thirds majority on 'crucial issues' (Giliomee, 2012:405). Mandela held ground at a 50% majority. Eventually, it was agreed that the cabinet would 'seek consensus' when making decisions, effectively ushering in majority rule (Waldmeir, 1997:231 – 232).

Near the end of 1993, an agreement had been reached: De Klerk finally agreed to a multi-party interim government until the elections. On the 18th of November 1993, a peace deal was signed (Waldmeir, 1997:237). 'They had compromised on a new South Africa which none of them really likes – and then decided they were stuck with it' (Waldmeir, 1997:250).

The agreement called for the formation of a 'Government of National Unity' which would be formed by all parties receiving more than 5% of the vote in one-person, one-vote elections to be held in April 1994 (Sparks, 1994:14). Parties would then be awarded seats in cabinet in proportion to the number of votes it had received (Gross, 2004:59). The majority party's leader would become president, and two deputy presidents would be chosen from 'the party coming second and the other from any other party gaining more than 20% of the vote, or, if no party achieved this … from the majority party' (Sparks, 1994:14). De Klerk had been fighting for power sharing and a strong form of federalism, until this, final, round of talks (Giliomee, 2012:398). The ANC had argued that permanent power sharing would not be supported by their supporters. They agreed that the Government of National Unity would rule for five years.

Four draft Bills had also been agreed upon to build the structure for the coming months: the Transitional Executive Council (TEC); the Independent Electoral Commission (IEC); the Independent Media Commission; and the Independent Broadcasting Authority (Eloff, 1994:12).

The MPNP drafted an interim constitution, which emerged as a classic liberal constitution. Power would be separated between the three branches of government (judiciary, executive and legislative) in an attempt to inhibit the abuse of power (Waldmeir, 1997: 228). A Bill of Rights was included, protecting human rights and individual property. The provinces were granted some power, and a constitutional court would 'resolve disputes and ensure that the constitution reigned supreme in the new state' (Waldmeir, 1997:228). However, the strong federalism and entrenched power sharing that the NP had been spouting was nowhere to be found (Giliomee, 2012:399).

The ANC had compromised on property rights: the ANC had realised that it would have to attract investors, preserve the efficacy of the private sector and keep business happy, even though this upset ANC supporters on the left (Giliomee, 2012:400). It was also accepted that the guardian of the constitution would be the judiciary, which in reality meant the constitutional court. On the issue of appointing judges however, it was agreed that the president would have the power to appoint six judges from a list nominated by the Judicial Service Commission, effectively placing the appointment of judges in the hands of the ANC (Giliomee, 2012:401).

Amnesty was another issue that had remained unresolved until this last round of talks. Eventually, the ANC had granted the NP a line of defence: 'there shall be amnesty', but no official ground was taken. This would later lead to the formation of the Truth and Reconciliation Commission, which was heavily partial to the ANC's favour (Giliomee, 2012:406).

While some (De Klerk, 1994:10) believed that there were no winners or losers in the deal, and that a good compromise had been reached, others believed that they had lost a great deal. Tertius Delport of the NP was devastated. To him, the NP had given in on all the issues it had fought for (Giliomee, 2012:406). From an NP point of view, the 'deal' that had been made had major weaknesses (Giliomee, 2012:407-408):

Language rights and the right to instruction in Afrikaans in schools and universities could have been more tightly formulated. The majority in parliament was allowed to make appointments to institutions guarding rights and combating corruption, thus weakening these institutions. Affirmative action was not limited in time and scope. In the eyes of the security forces there was no proper vision for amnesty. With a majority on the Judicial Service

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Commission, the ruling party could pack the bench in the name of representivity and transformation. The issue of land redistribution was left hanging.

4.8.4.4.   *Constitutional Principles*

During this time the MPNP also agreed on a set of principles which would govern the drafting of a more permanent constitution by the constituent assembly elected in April 1994. These principles would be incorporated and entrenched into the new constitution (Giliomee, 2012:393). In July the Negotiating Council accepted 27 Constitutional Principles, which was later expanded to 34 principles (De Villiers, 1994:37). The Constitutional Court would have to verify that these principles were incorporated into the new constitution or any amendments thereof (De Villiers, 1994:37).

The first set of principles was made up of ten principles safeguarding classic democratic rights, including the holding of regular elections and the freedom of speech and information. The independence of institutions like the Reserve Bank and the judiciary was protected by these principles (Giliomee, 2012:393).

The second set of principles attempted to incorporate the protection of minorities that the NP had been insisting on. However, the vague wording of 'collective rights of self-determination' did not live up to what the NP had hoped for (Giliomee, 2012:394). Minorities were guaranteed participation in the legislative process. A 'quasi-federal' system was set out by a third set of principles, including the allocation of powers, specifically the power of the national government over the provincial governments (Giliomee, 2012:394).

De Villiers (1994:37-38) sums up the compromise of the Constitutional Principles:

> *The Constitutional Principles… on the one hand, offered security concerning the nature of future constitutions and, on the other, recognised the inherent competence of the Constitutional Assembly to write a Constitution within the framework of the principles.*

The ANC had advocated a looser, more general set of principles, while the NP had called for the principles to be as detailed as possible, so that the assembly would eventually be bound by rules that the NP had backed (De Villiers, 1994:38). De Villiers (1994: 48-49) argues that the Constitutional Principles have the inherent problem of becoming obsolete: the problems faced during the drafting of the principles may be vastly different to future difficulties; and

matters that had been relevant may become outdated or impractical with time. He argues that the constitutional principles could have been less detailed and more flexible to allow for development.

Herewith a timeline on the decisions reached at the MPNP:

Table 4.1: MPNP Timeline

April/May 1993	-	Establish Technical Committees
1 June	- -	27 April set as Election Date Technical Committee on Constitutional Development tasked with drafting Interim Constitution
15 June	-	IFP calls for proposals for a federal Constitution, which is then rejected in a vote
22 June	-	Calls for establishment of Independent Electoral Commission and Independent Media Commission
2 July		Agreement on: - The adoption of constitutional principles aimed at establishing strong regional and national government; - That the constitutional principles are binding on the constituent assembly, and 'justiciable by a Constitutional Court'; - 'A Commission will make recommendations on regional boundaries'; - Legislation to level the playing field and promote free and fair elections; and - To agree on a transitional (or interim) constitution
31 July	-	Agreement on establishment of nine regions
25 – 28 October	- - -	Agreement on Interim Constitution Agreement on Government of National Unity NP abandons minority veto demands
16 November	-	Mandela and De Klerk reach final agreement
18 November	-	MPNP approves interim Constitution

Source: Compilation by the author, adapted from Welsh (2009:487)

4.8.5. Parliament Adopts Interim Constitution (November/December 1993)

On the 28th of November 1993, the interim Constitution was accepted by sufficient consensus (De Klerk, 1994:9).The Freedom Alliance continued to reject the legitimacy of the interim Constitution. Joe Slovo of the ANC notes the negotiations as a triumph for the ANC: 'Looking at the result as a whole, I can say without hesitation that we got pretty much what we wanted' (Uys, 1994:54). On the 22nd of December 1993, the still NP-led parliament formally adopted the new, preliminary constitution, adopting the fourth constitution of the 20th Century for South Africa (Olivier, 1993:50). Maritz Spaarwater was 'thrilled' when the interim constitution was adopted, being witness to hard work and dedication from all sides (Spaarwater, 2012:225).

The Constitution included eleven official languages and strong safeguards for culture and religion by means of fundamental rights entrenched in the Constitution (Viljoen & Venter, 1995:17). Constitutional provisions also included a prescription 'that executive government at national and provincial levels should be characterized by "the consensus-seeking spirit underlying the concept of a government of national unity," and the recognition - albeit rather vague - of the principle of self-determination for all groups within South Africa (Section 235) are also included in the constitutional provisions' (Viljoen & Venter, 1995:17).

The processes which produced the 1993 interim Constitution were not completely democratic (Olivier, 1994:51). Many of the parties and groups present at the MPNP talks did not have any proven support from the public yet still provided insight and eventually consent to the new, albeit interim, Constitution, as well as the constitutional principles. On contentious issues, the rule of sufficient consensus rather than inclusivity prevailed. The Constitution was passed into law by a tricameral parliament made up of mostly minorities and completely unrepresentative of the black majority (Olivier, 1994:51). Neither the 'collective will of the people', nor a referendum, were ever canvassed (Olivier, 1994:51).

Accordingly, the final constitution would have to be drafted and eventually accepted in such a way as to legitimate its existence (Olivier, 1994:51). Although the final constitution was set to be drafted by the democratically elected Constitutional Assembly (CA), it was strongly bound by 34 principles set out in the interim Constitution (Gross, 2004:59). These principles form the foundation of the new constitution and are to remained unchanged (Olivier,

1994:51). The Constitutional Assembly, to be elected in April 1994, would vote on the passing of a new constitution, needing at least a two-thirds majority to take decisions. The provisions of the constitution relating to the 'boundaries, powers, and functions of the provinces also require the approval of a majority of two-thirds of all the members of the Senate' (Olivier, 1994: 51). The constitution would require 60% for other amendments. In the interim Constitution it is stated that the National Assembly and the Senate will jointly draft the final constitution within a timeframe of two years (De Villiers, 1994:41).

4.9. Implementation and Settlement

4.9.1. Transitional Executive Council (TEC) 1993

In 1992, Working Group 3 at Codesa II had proposed the setting up of the TEC, supported by a number of sub-councils (Heunis, 1994:20). The MPNP had taken up the matter in April 1993, unanimously accepting its implementation. On the 7th of December 1993, the Transitional Executive Council (TEC) met for the first time (Heunis, 1994:20). Heunis (1994) provides technical detail on the inner workings of the TEC.

4.9.2. Election 1994

In November 1992 de Klerk proposed a firm schedule toward universal elections (Maphai, 1993:223). An executive committee was set up in order to help de Klerk toward South Africa's first democratic elections, and depending on the level of violence, the election could be held in the first few months of 1994 (Maphai, 1993:223). The adoption of the 1993 interim constitution included the implementation of electoral arrangements, set for April 1994 (Faure, 1997:70). This represented a turning point in the transition process.

At different stages during the MPNP, various parties withdrew, but the main actors continued to canvas their opinions during the negotiations. In February 1994, the ANC and the NP 'agreed to last minute changes to the interim constitution and the Electoral Act in hopes of getting members of the right wing Freedom Alliance in the election process' (Lee,1996:47). These amendments were made in order to attract all parties to take part in the upcoming elections (Viljoen & Venter, 1995:17). Three days before the election almost all significant political parties had agreed to take part, including the ANC, the NP, the Freedom Front, the PAC and Inkatha. Only the AWB and the Conservative Party, on the ultra-radical right, did not take part (Waldmeir, 1997:250).

27 April 1994 went by peacefully as thousands of South Africans voted for the first time. The ANC won the elections on 27 April 1994 with 62.65% of the vote, just missing the two-thirds majority it needed dominate all decisions. The NP came in second with just over 20% while the IFP garnered 10.54% (Waldmeir, 1997:261). As a whole, the elections were deemed a success. The interim Constitution came into operation. With the election in 1994, a new parliament and nine new provincial legislatures were elected, set to be in office for the next five years (Faure, 1997:70).

The NP was greatly disappointed in the results: it had hoped for at least 35% of the vote (Waldmeir, 1997:261). The outcome made De Klerk dispensable to Mandela – he did not have enough support to make him so. The deal that De Klerk had made was made on the basis of a much different outcome, and after the election, the deal looked 'even worse' (Waldmeir, 1997:261). 20% was just barely enough to avoid humiliation. The NP had garnered just over 60% of the white, Indian and coloured vote (Giliomee, 2012:409). The IFP was reasonably satisfied with the outcome as it had won the KwaZulu Natal Province: its home base.

The ANC was relatively satisfied as it could now exercise real power, with a mandate from the people. The ANC was dependent on the black vote, gaining 94% of the black vote (Giliomee, 2012:409). The Freedom Front won at least a third of the white vote in the provincial election (680000 votes out of 1.8 million voters), which advanced its mandate for self-determination (Waldmeir, 1997:261). The radicalised PAC won an insignificant 1.25%.

4.9.3. Government of National Unity 1994-1996

The Government of National Unity (GNU) was set to rule for five years after the 1994 election. The cabinet was made up of 30 members, including De Klerk as second deputy president, and six other NP ministers, IFP leader Buthelezi as minister of home affairs, and two other Inkatha ministers (Waldmeir, 1997:273). While Mandela genuinely tried to make decisions in a 'consensus-seeking spirit', this proved more difficult than anticipated. While De Klerk held some influence in the cabinet, he certainly did not have the degree of power he had hoped for. Within weeks it was clear that power sharing between Mandela and De Klerk was not a reality (Waldmeir, 1997:272).

The following table shows party representation in the Constitutional Assembly:

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Table 4.2: Party Representation in the Constitutional Assembly (1994)

Party	Seats	%
African National Congress	312	63.7
National Party	99	20.2
Inkatha Freedom Party	48	9.8
Freedom Front	14	2.8
Democratic Party	10	2.0
Pan Africanist Congress	5	1.0
African Christian Democratic Party	2	0.4

Source: Strand, 2001:48

De Klerk pulled the NP out of the GNU in June 1996, realising his powerlessness in the cabinet. De Klerk was aware that his withdrawal would make little difference in the cabinet's decision-making, and that 'President Mandela clearly had no intention of allowing me and the National Party to play a constructive role' (De Klerk, 1998:356).

4.10.   Final Constitution of 1996

4.10.1. Elected Parliament and Constituent Assembly

Literature on the constitutional negotiations tends to focus on the negotiations between 1990 and 1994, placing little importance on the negotiations of the Constitutional Assembly (Strand, 2001:47). Once the interim Constitution was in place, the elected constitutional assembly served as drafters of the final constitution (Gross, 2004:61). The drafting process was to be based on inclusivity, accessibility, transparency, and consensus (Gross, 2004: 60-61).

The drafters of the interim constitution had significant influence on the drafting of the 1996 constitution (Sarkin, 1999:69). The interim constitution set several constraints on the process of drafting a final constitution, and imposed a set of 34 constitutional principles as

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substantive requirements (Sarkin, 1999:69). Strand (2001:48) sets out the process of drafting and adopting the final constitution as delimited by the interim constitution:

> *There would be a two-year constitution-making process with a deadline on 8 May 1996, at which time a two-thirds majority could adopt the constitution. If no such majority existed, a 'Panel of Constitutional Experts' would propose a compromise. If this failed too, the proposal favoured by a simple majority in the CA would be adopted if it won 60 per cent popular support in a referendum and was certified by the Constitutional Court. If this also failed, subsequent deadlock-breaking mechanisms placed even more power in even smaller majorities.*

At first, the Constitutional Court dismissed the constitution as not adhering to the principles set by the 1993 constitution. After amendments were introduced, the final constitution was certified by the Court. The drafting of the final constitution by the elected, broadly representative constitutional assembly proved significant in fostering feelings of participation (Gross, 2004:62). Before pulling out of the GNU, De Klerk had given the constitution his endorsement (Waldmeir, 1997:276).

The final constitution was drafted in three time periods (Sarkin, 1999:69 - 70):

> *a) negotiations from May 1994 leading up to the May 1996 deadline for finalizing the constitution, culminating in the adoption ceremony on May 8, 1996; b) the first Constitutional Court certification process, starting in May 1996 with public submissions, and ending on September 6, 1996, when the court delivered judgment refusing to certify the text; and c) the second round of negotiations in late September 1996 and early October 1996, leading to certification of the text by the Constitutional Court on December 4, 1996.*

a) May 1994 to May 1996: Constitutional Assembly Negotiations

Two particular issues were not addressed by the interim Constitution: (1) the structure of executive power; and (2) the content of the Bill of Fundamental Rights (Strand, 2001:49-50). For the structure of the National Assembly, parties more or less wanted the same thing. Parties were also in agreement regarding a senate with an equal number of representatives from each of the nine regions, or provinces (Strand, 2001:50). The ANC fashioned its

proposal on the German federation, opting for a system of 'co-operative governance' where the senate would be involved (Strand, 2001:50).

For the most part parties agreed on what the executive branch of the government should look like, with notable exception of the NP. Other parties agreed that parliament should elect a president, who would then appoint the cabinet. The NP sought a continuation of a grand coalition government, with a deputy president chosen by the minority parties. They chose this model on the basis that it would 'put checks on undue majority dominance and help stabilise and foster reconciliation in the South African plural society' (Strand, 2001:50). The ANC rejected this proposal, indicating that it would like to have the functions of the president without consulting to be expanded, citing the smooth running of the government as reasoning. The NP later withdrew from the GNU, mentioning this attitude of the ANC as its reason (Strand, 2001:50).

On the fundamental issue of the Bill of Rights, parties' proposals were widely divergent. The IFP called for extensive socio-economic rights entrenched in the Bill of Rights. The ANC reiterated this even more strongly, claiming that strong socio-economic rights were a necessity should past injustices be sufficiently addressed (Strand, 2001:51). The ANC aimed for a Bill of Rights that would make all rights equally fundamental, making them applicable not only between citizens and the state, but also between people (Strand, 2001:51). In certain aspects, the final Constitution improved on the interim Bill of rights, especially by setting a high bar for socio-economic rights (Sarkin, 1999:77). However, the language used to circumscribe these rights makes them subject to the ability and willingness of the state (Sarkin, 1999:80).

All parties, with the notable exception of the ANC, cited the limiting nature of the interim constitution and the constitutional principles in their proposals. While claiming loyalty to decisions made in previous negotiations, the ANC argued that the provisions in the interim Constitution 'were too detailed, and purported to deal with issues which should be left to Parliament to legislate on' (Strand, 2001:53).

By the second year of negotiations, time constraints started to hurry along a process that had struggled to gain momentum. The Constitutional Assembly sought an open, inclusive and democratic process, and as such advocated public participation (Sarkin, 1999:70).

By November 1995, at least 32 contentious issues remained unresolved. Negotiations continued with specific focus on these issues. Unlike deliberations in the Constitutional Assembly before, these negotiations were closed to the media and the public, allowing parties to 'reach compromises without losing credibility' (Sarkin, 1999:71).

By March 1996, the parties were deadlocked on several issues. The time constraints made by the interim constitution were amended in order to maximise the time left (Strand, 2001:53). On 15 April, the fifth working draft of the constitution was published. By this time, the structures of government had been altered in such a way as to resemble the ANC proposal closely: a 'Council of Provinces' to complement the National Assembly, a president elected by that Assembly, and a cabinet appointed by that president (Strand, 2001:53). This put executive power in the hands of the majority. At this point (April 1996), three major issues remained unresolved: 'provisions of a lockout clause, property rights, and the conditions for single-medium education in the proposed Bill of Rights' (Strand, 2001:54).

On the 3rd of May, the ANC made clear its position on accommodating minority parties: it had reached its limit. Several multi- and bilateral meetings followed this announcement, but no progress was made. The issue of single-medium schooling was resolved to the point of the ANC's recognition thereof as legitimate, and adding the caveat (on demand from the DP) that the provision 'did not preclude state subsidies for independent educational institutions' (Strand, 2001:57).

The contentious issues of entrenching rights relating to labour relations remained so: the ANC's 'proposal on the lockout clause had demoted employers' right to such action in industrial disputes to ordinary legislation in the Labour Relations Act (LRA)' (Strand, 2001:57). Both the NP and the DP recorded their opposition to this clause.

The property clause was next on the agenda. The ANC proposed that a condition be set on the state's acquisition of property: that it be done by 'reasonable and justifiable' measures, among several other rigid conditions (Strand, 2001:57). The ANC conceded to put the property holder in a stronger position concerning rights in the Bill of Rights. The DP and the NP accepted this clause.

On the sixth of May 1996, NP advisor Rassie Malherbe was tasked, on the instructions of Roelf Meyer, with setting up a 'balance sheet' regarding the constitution as it stood, listing the NP's gains and losses at that point. This document lists numerous gains, among others:

'one sovereign state with one citizenship'; the 'separation of powers as principle'; and a 'Bill of fundamental Rights.' The document lists the death penalty, a multi-party executive and two national anthems as losses, among several others. This document was to serve as the decisive impetus for NP members to vote in favour of the constitution, noting very clearly that failure to do so would result in the NP effectively losing its influence on the text (See Appendix A). The document warned that should the NP choose to publicly go against the constitution, the ANC would effectively be able to unilaterally write the constitution and would not be bound by any decisions made thus far (Wessels, 2010:281).

The May 1996 deadline was looming, putting pressure on the Constitutional Assembly to reach an agreement. The ANC made clear their fall-back position by refusing to further concede to minority parties, which left few options for minority parties but to vote for or against the constitution on the 8th of May. The constitution was adopted by a majority (Strand, 2001:58). On the 8th of May 1996, 85 per cent of the Constitutional Assembly voted in favour of the Constitution (Ebrahim, 1998:3). The ANC, the PAC, the NP and the DP voted in favour of this text, while the African Christian Democratic Party (ACDP) was the only party to vote against it. The Freedom Front chose to abstain from the vote, and the IFP failed to attend the voting (Sarkin, 1999:72; and Ebrahim, 1998:232). The Constitution was referred to the Constitutional Court which would now start the task of assessing the new Constitution in terms of the 34 constitutional principles noted in the interim Constitution.

b) Constitutional Court Assessment September to October 1996

The Constitution was submitted to the Constitutional Court, which encouraged parties and organisations to 'submit any objections arguing the non-compliance of the constitutional proposal with the Constitutional Principles' (Strand, 2001:58). The NP, the DP, the IFP and the ACDP and 84 other organisations and individuals made submissions to the Court. On the 6th of September 1996, the Court announced that the draft constitution complied with a majority of the Constitutional Principles, with the exception of nine aspects (Strand, 2001:58; and Sarkin, 1999:73).

c) Second Round of Negotiations and Constitutional Court Assessment October to December 1996

In October the Constitutional Assembly met once more, agreeing on 15 amendments to the text in line with the Constitutional Court's ruling (Strand, 2001:60). The Constitutional

Assembly limited itself to only discussing the issues identified by the Constitutional Court, and these issues would be agreed on by 11 October 1996 (Sarkin, 1999:74). Sarkin (1999:75) sets out some of the final changes:

The clause entrenching the right to bargain collectively was extended to grant this right to employers as well as employees. More rights were included in the list of non-derogable rights under a state of emergency, including the right of children under the age of 15 to be protected from armed conflict, some fair-trial rights and more extensive protection of the right to equality. Procedures for amending the Constitution were made more stringent… The clauses immunizing the Truth Commission and Labour Relations Acts from constitutional scrutiny were removed.

The vote on the 11th of October had the same outcome as the previous vote at 85% approval: only the ACDP voted against the text while the Freedom Front continued to refuse the vote (Sarkin, 1999:76). The DP, the IFP, the government of KwaZulu Natal, along with 18 other organisations and individuals called on the Constitutional Court to reject the text again (Sarkin. 1999:76). The Court unanimously certified the adoption of the final Constitution on the 4th of December 1996, and Nelson Mandela signed it on the 10th. The constitutional assembly adopted the new constitution. The constitution abolishes all 'lingering vestiges of enforced power sharing', and is based on majority rule and liberal democracy (Waldmeir, 1997:276). Ebrahim (1998:251) refers to the final Constitution:

> *The negotiations also went on to produce a constitutional framework within which previously warring parties could co-exist to form a vibrant democracy. From the smouldering ashes of a divided society, the basis for a new nation and a new South Africa was produced, which is why this Constitution is referred to as the birth certificate of a nation. The success of the negotiations lay in both the agreed constitutional provisions as well as the process adopted. It was an experience that offers many lessons for other negotiations.*

4.10.2. The Outcome: A puzzle?

De Klerk, ostensibly the stronger opponent entering into negotiations, held the backing of the powerful South Africa military, which had proved loyal to the civilian leadership (Giliomee, 2012:314). De Klerk fought for power sharing throughout the entire process, yet did not secure any effective form thereof. The ANC had entered into the negotiations with

considerably less coercive power than the government, strongly advocating majority rule. It seemed that Mandela would accept nothing less than this (Giliomee, 2012:314).

Giliomee (2012:314) presents two explanations for this puzzling outcome: the first explanation is that the NP failed to meet its objectives because it lacked negotiation expertise; the second is that the NP entered into negotiations much weaker than it appeared to onlookers, while the ANC with Mandela as its spearhead, in reality, held a much stronger negotiating position.

By 1990, the white population was very low, and by 1996 had reached a low of 4 million whites in comparison to 31 million blacks, reinforcing whites as a minority, and adding to the ANC's negotiating power (Giliomee, 2012:314). The NP gained almost no significant black allies or supporters. Buthelezi of the IFP proved an unstable alliance partner (Giliomee, 2012:315). While the fall of the Berlin wall and effectively the fall of communism would have adversely affected the strength of the ANC in exile, the ANC started to gain support from the United States and Europe. Nelson Mandela became an international symbol of peace-making. The ANC lacked formal power, but 'held several strong cards': 'It soon became clear that the lifting of international sanctions depended on its consent' (Giliomee, 2012:316).

4.11.   Chapter Summary

This chapter set out to describe the process of the South African transition chronologically. A brief look was taken at the context in which the two main parties involved found themselves in the 1980s, which lead to the realisation on both parts that negotiations may be better than continued violent confrontation. Several factors contributed to the formation of a mutually hurting stalemate, including international pressures and internal violence.

The prenegotiation phase started in the late 1980s, including several concerned parties. The NP government was late to the game, but started taking part via spies and secret meetings. This enabled both the ANC and the NP to explore the existence of a contract zone, which would allow them to enter into more substantive negotiations. While the NP government was not set against negotiations, no definitive movements were made until P.W. Botha was replaced by F.W. de Klerk as president. F.W. de Klerk realised that the timing for negotiations was perfect and set about organising, with help from several key participants, the first negotiations.

Preliminary negotiations revealed deep cleavages between the parties involved. After several failed attempts at curbing the still escalating violence, including several signed Accords and concessions, parties grew wary of entering into more substantive negotiations. The signing of the National Peace Accord in September 1991 allowed parties to go forward with talks.

Entering into substantive negotiations, the two main participating parties continued to have divergent proposals concerning the way forward. Exhaustive negotiations reached agreement on only some issues, leaving some of the most contentious issues on the table. The failure of the first and second attempts (Codesa I and II) at negotiations took its toll on the parties. The ANC pulled out of Codesa II citing the ongoing violence and the NP's perceived complacency as reason. Several demands had to be met before the ANC would sit at the negotiating table again. The government sought to meet these demands in hopes that negotiations would resume.

In May 1993, talks resumed in the form of the MPNP. The structure of these talks were more conducive to agreement and compromise-seeking, allowing parties to have their say, but allowing room for movement should they seek compromise. The talks were based on an atmosphere of trust and good faith, spearheaded by chief negotiators Cyril Ramaphosa and Roelf Meyer of the ANC and NP respectively. Several issues were resolved at these talks, but more specifically a way forward for the transition was calculated.

The transition took place in phases. First, the MPNP would draft an interim constitution which would govern the government and country for two years after an election in 1994. The elected parliament would also serve as the constitutional assembly. In conjunction with the senate, the constitutional assembly would draft a final Constitution. The interim Constitution did place some limitations on the drafters of the final Constitution, in the form of 34 constitutional principles which would have to be adhered to in the final constitution. The Constitutional Court was tasked with certifying whether the new Constitution complied with the constitutional principles.

A relatively peaceful election on 27 April 1994 produced an unsurprising outcome: the ANC won with over 60%, while the NP lagged behind with only slightly over 20%. A few other parties gained seats in the constituent assembly, which set forth to draft the new constitution. This process sought to be open and democratic, accepting proposals from the public as well as from the Assembly. After two years of negotiations, it seemed the ANC's proposals were

at the forefront. The constitutional assembly voted to adopt a new constitution, subject to certification by the Constitutional Court. The Constitutional Court found only nine issues that were not in accordance with the constitutional principles. The Assembly renegotiated these issues and by December 1996 the final Constitution was adopted.

Chapter 5: Negotiated Outcomes – The Written Constitutions

5.1. Introduction

This chapter seeks first to identify the elements identified in Chapter 3 as indicators within the 1993 and 1996 South African Constitutions. Not all elements typical of a Constitutional Contract, Social Contract or a Benchmark Agreement can be found in the written text of the negotiated settlement. Some elements are identifiable only in the opinions of the negotiators of that agreement, who will be analysed in the next Chapter.

The conceptual framework seeks to identify a frame of thought. The written aspects of the 1993 and 1996 Constitutions which will be identified in this chapter are open to interpretation by the individual negotiators. This chapter focuses on the original 1993 and 1996 Constitutional Texts, and not on the interpretation of these texts.

5.2. The Constitutional Outcomes (1993 Constitution; 34 Constitutional Principles; 1996 Constitution)

5.2.1. Elements typical of a Constitutional Contract

Only certain elements typical of a Constitutional Contract are identifiable within the written text of the negotiated settlement. Quota's, fixed targets, amendment procedures and the element of permanence can be identified in the written text, while the perceptions of trades and bargains, core and non-core issues and what constitutes breach of contract can mainly be found in the opinions of the original negotiators. Also, the extensive information gathered in Chapter 4 allows for an informed examination of these constitutions.

5.2.1.1. Quotas

Quotas are often used in Constitutional Contracts as they are specific numerical criteria for the allocation of goods, and may show immediate gains for some stakeholders, and ensure an ongoing representation of stakeholders in certain decision-making procedures. Examples of quotas can be found in both the 1993 and 1996 constitutions. While these quotas are not numerically defined, they do represent an approach congruent with the Constitutional Contract.

1993 Constitution and Constitutional Principles [emphasis added]

- **Section 115 Establishment and appointments [of the Human Rights Commission]**

(1) There shall be a Human Rights Commission, which shall consist of a chairperson and 10 members who are fit and proper persons, South African citizens and *broadly representative of the South African community*.

- **Section 119 Establishment [of the Commission on Gender Equality]**

(2) The Commission shall consist of persons who are fit and proper for appointment, South African citizens and *broadly representative of the South African community*.

- **Section 212 The Public Service**

(b) …promote an efficient public administration broadly representative of the South African community.

- **Constitutional Principle XXX**

1. There shall be an efficient, non-partisan, career-orientated public service *broadly representative of the South African community…*

1996 Constitution [emphasis added]

- **Section 174: Appointment of judicial officers**

(2) The need for the judiciary *to reflect broadly the racial and gender composition of South Africa* must be considered when judicial officers are appointed.

- **Section 186: Composition of Commission [for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities]**

(2) The composition of the Commission must-

(a) *be broadly representative of the main cultural, religious and linguistic communities in*

South Africa;

- **Section 193: Appointments** [to every commission established in terms of Chapter 9]

(2) The need for a Commission established by this Chapter to *reflect broadly the race and gender composition of South Africa* must be considered when members are appointed.

- **Section 195: Basic values and principles governing public administration**

(1) (i) Public administration must be *broadly representative of the South African people*, with employment…

5.2.1.2.   Fixed Targets

Elements typical of a Constitutional Contract include 'fixed targets', which leave stakeholders and implementers with rigid time frames, as set out in calendar dates or number of years, within which to implement the agreement. Examples of this can be found in both the 1993 and 1996 Constitutions.

1993 Constitution and 34 Constitutional Principles [emphasis added]

The 1993 Constitution is in its entirety a fixed target – the intention of the original negotiators was for the Constitution to serve a temporary – interim – goal. Within the constraint of the 1993 Constitution and the 34 Constitutional Principles, and within a strict timeframe, the final Constitution was to be agreed upon, after which the 1993 Constitution would lapse. Certain extracts from the 1993 Constitution show its temporary nature:

- **Section 38: Duration of Parliament**

(1) Parliament as constituted in terms of the first election under this Constitution shall, subject to subsection (2), continue for *five years* as from the date of the first sitting of the National Assembly under this Constitution.

- **Section 73: Adoption of new constitutional text**

(1) The Constitutional Assembly shall pass the new constitutional text *within two years* as from the date of the first sitting of the National Assembly under this Constitution.

- **Section 121: Claims** (In Restitution of Land Rights)

(This section comes in the form of a reverse target)

(3) The date fixed by virtue of subsection (2) (a) *shall not be a date earlier than 19 June 1913*.

- **Constitutional Principle XXXII**

The Constitution shall provide that until *30 April 1999* the national executive shall be composed and shall function substantially in the manner provided for in Chapter 6 of this Constitution.

- **Constitutional Principle XXXIII**

The Constitution shall provide that, unless Parliament is dissolved on account of its passing a vote of no-confidence in the Cabinet, *no national election shall be held before 30 April 1999*.

1996 Constitution [emphasis added]

The 1996 Constitution shows one definitive example of a fixed target in the form of a reverse target:

- **Section 25: Property**

(7) A person or community dispossessed of property after *19 June 1913* as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

Another instance of a fixed target is found in **Annexure B**:

- **Section 4**

(6) An Executive Deputy President holds office:

(a) Until *30 April 1999* unless replaced or recalled by the party entitled to make the designation in terms of subsections (2) and (3); or

(b) Until the person elected President after any election of the National Assembly held before *30 April 1999*, assumes office.

5.2.1.3. *Constraints on Amendments*

Inflexibility and complicated or difficult amendment procedures can be interpreted as being indicative of a Constitutional Contract, and evidence of this is found in both the 1993 and the 1996 Constitutions. Special majorities are an example of strict amendment procedures, and give a good indication as to which issues the original drafters viewed as core to the agreement. Elkins *et al* (2009: 141) list the South African Constitution as 'at one extreme of detail'.

1993 Constitution and 34 Principles [emphasis added]

- **Section 62 Bills amending Constitution**

(1) Subject to subsection (2) and section 74, a Bill amending this Constitution shall… be required to be adopted at a joint sitting of the National Assembly and the Senate by a *majority of at least two-thirds* of the total number of members of both Houses.

(2) No amendment of sections 126 and 144 shall be of any force and effect unless passed separately by both Houses by a *majority of at least two-thirds* of all the members in each House: Provided that the boundaries and legislative and executive competences of a province shall not be amended without the consent of a relevant provincial legislature.

- **Section 73 Adoption of new constitutional text**

(1) The Constitutional Assembly shall pass the new constitutional text within two years as from the date of the first sitting of the National Assembly under this Constitution.

(2) For the passing of the new constitutional text by the Constitutional Assembly, a *majority of at least two-thirds* of all the members of the Constitutional Assembly shall be required: Provided that provisions of such text relating to the boundaries, powers and functions of provinces shall not be considered passed by the Constitutional Assembly unless approved also by a *majority of two-thirds* of all the members of the Senate.

(3) If the Constitutional Assembly fails to pass a proposed draft of the new constitutional text in accordance with subsection (2), but such draft is supported by a *majority* of all its members, such proposed draft shall be referred by the Chairperson to the panel of constitutional experts referred to in section 72 (2) for its advice, to be given within 30 days of

such referral, on amendments to the proposed draft, within the framework of the Constitutional Principles, which might secure the support required in terms of subsection (2).

(4) An amended draft text *unanimously recommended* by the panel of constitutional experts and submitted to the Constitutional Assembly within the said period of 30 days… it shall become the Constitution of the Republic of South Africa.

(5) Should the panel of constitutional experts fail to submit within the said period of 30 days to the Constitutional Assembly an amended draft text which *is unanimously recommended* by the panel, or should such an amended draft text not be passed by the Constitutional Assembly in accordance with subsection (2), any proposed draft text before the Constitutional Assembly may be approved by it by resolution of a *majority* of its members for the purposes of subsection (6).

(6) A text approved under subsection (5) shall, after it has been certified by the Constitutional Court in terms of section 71 (2), be referred by the President for a decision by the electorate by way of a *national referendum*.

(7) The question put before the electorate in the *referendum* shall be the acceptance or rejection of the text approved under subsection (5).

(8) The text presented to the electorate in the *referendum* shall, if approved by a majority of at least 60 per cent of the votes cast in the referendum and subject to subsection (13), become the Constitution of the Republic of South Africa.

(9) If the relevant text is *not approved in the referendum* in accordance with subsection (8), or if a new constitutional text is not passed in terms of this Chapter within the period of two years referred to in subsection (1), the President shall dissolve Parliament by proclamation in the Gazette within 14 days after the *referendum* or the expiry of the said period, whereupon an election contemplated in section 39 (1) (a) shall be held.

(10) The Constitutional Assembly as constituted after such an election, shall pass the new constitutional text within a period of one year as from the date of its first sitting after such election.

(11) For the passing of the new constitutional text referred to in subsection (10) by the Constitutional Assembly, a *majority of at least 60 per cent* of all the members of the

Constitutional Assembly shall be required: Provided that provisions of such text relating to the boundaries, powers and functions of provinces shall not be considered passed by the Constitutional Assembly unless approved also by a *majority of at least 60 per cent* of all the members of the Senate.

- **Section 74 Amendments relating to this Chapter and Schedule 4**

(1) No amendment or repeal of-

(a) this section or the Constitutional Principles set out in Schedule 4; or

(b) any other provision of this Chapter in so far as it relates to-

(i) the Constitutional Principles; or

(ii) the requirement that the new constitutional text shall comply with the Constitutional Principles, or that such text shall be certified by the Constitutional Court as being in compliance therewith, shall be permissible.

(2) The other provisions of this Chapter may be amended by the Constitutional Assembly by resolution of a *majority of at least two-thirds* of all its members.

- **Section 115 Establishment and appointments** [Human Rights Commission]

(3) (b) …approved by the National Assembly and the Senate by a resolution adopted by a *majority of at least 75 per cent* of the members present and voting at a joint meeting

- **Section 124**

(i) paragraphs (a) and (b) of this subsection, a majority of votes cast shall be required to sanction the inclusion of the areas in question in the provincial territories of KwaZulu/Natal or the Eastern Transvaal, as the case may be; *[Sub-para. (i) amended by s. 1 of Act 2 of 1994.]*

(ii) paragraph (c) of this subsection, a *majority of at least 60 per cent* of the votes cast in either of the two blocks mentioned in paragraph (g) of Part 2 of Schedule 1 shall be required to sanction the division of the said area into two separate provinces; and

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(iii) paragraph (d) of this subsection, *a majority of at least 60 per cent* of the votes cast shall be required to sanction the discontinuance of the Northern Cape as a separate province.

- **Section 250**

(c) *no amendment* by a Parliament established on the basis of a declaration in terms of subsection (1) (a), of this Constitution… shall be permissible until the election contemplated in paragraph (a) has been certified as substantially free and fair in terms of the Independent Electoral Commission Act, 1993;

- **Constitutional Principle XV**

Amendments to the Constitution shall require *special procedures involving special majorities*.

- **Constitutional Principle XVIII**

The powers, boundaries and functions of the national government and provincial governments shall be defined in the Constitution. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of provinces shall in addition to any other procedures specified in the Constitution for constitutional amendments, require the approval of a *special majority* of the legislatures of the provinces, alternatively, if there is such a chamber, a *two-thirds majority* of a chamber of Parliament composed of provincial representatives, and if the amendment concerns specific provinces only, the approval of the legislatures of such provinces will also be needed. Provision shall be made for obtaining the views of a provincial legislature concerning all constitutional amendments regarding its powers, boundaries and functions.

1996 Constitution [emphasis added]

- **Section 74 Bills Amending the Constitution**

(1) Section 1 and this subsection may be amended by a Bill passed by -

(a) the National Assembly, with a supporting vote of *at least 75 per cent* of its members; and

(b) the National Council of Provinces, with a supporting vote *of at least six provinces*.

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(2) Chapter 2 may be amended by a Bill passed by -

(a) the National Assembly, with a supporting vote of *at least two thirds* of its members; and

(b) the National Council of Provinces, with a supporting vote of *at least six provinces*.

(3) Any other provision of the Constitution may be amended by a Bill passed -

(a) by the National Assembly, with a supporting vote of *at least two thirds* of its members; and

(b) also by the National Council of Provinces, with a supporting vote *of at least six provinces*, if the amendment -

(i) relates to a matter that affects the Council;

(ii) alters provincial boundaries, powers, functions or institutions; or

(iii) amends a provision that deals specifically with a provincial matter.

(4) A Bill amending the Constitution may not include provisions other than constitutional amendments and matters connected with the amendments.

(5) At least 30 days before a Bill amending the Constitution is introduced in terms of section 73(2), the person or committee intending to introduce the Bill must -

(a) publish in the national Government Gazette, and in accordance with the rules and orders of the National Assembly, particulars of the proposed amendment for *public comment*;

(b) submit, in accordance with the rules and orders of the Assembly, those particulars to the *provincial legislatures for their views*; and

(c) submit, in accordance with the rules and orders of the *National Council of Provinces*, those particulars to the Council for a public debate, if the proposed amendment is not an amendment that is required to be passed by the Council.

(6) When a Bill amending the Constitution is introduced, the person or committee introducing the Bill must submit any *written comments received from the public and the provincial legislatures* -

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(a) to the Speaker for tabling in the National Assembly; and

(b) in respect of amendments referred to in subsection (1), (2) or (3)(b), to the Chairperson of the National Council of Provinces for tabling in the Council.

(7) A Bill amending the Constitution may not be put to the vote in the National Assembly within 30 days of -

(a) its introduction, if the Assembly is sitting when the Bill is introduced; or

(b) its tabling in the Assembly, if the Assembly is in recess when the Bill is introduced.

(8) If a Bill referred to in subsection (3)(b), or any part of the Bill, concerns only a specific province or provinces, the National Council of Provinces may not pass the Bill or the relevant part *unless it has been approved by the legislature or legislatures of the province or provinces concerned*.

(9) A Bill amending the Constitution that has been passed by the National Assembly and, where applicable, by the National Council of Provinces, must be referred to the President for assent.

5.2.1.4.   *Permanence and Status*

Constitutional Contracts do not have 'expiration dates' and as such tend to have stipulations entrenched in the written texts pertaining to an element of permanence. Evidence of this can be found within the South African constitutional texts, regarding the overarching nature of the constitution as the 'supreme law of the Republic', with no end-date of expiry in mind. While in itself the 1993 Constitution was not permanent, it did provide stipulations for the final Constitution.

1993 Constitution and Constitutional Principles

- **Chapter 1 Section 4**

(1) This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.

1996 Constitution

- **Preamble**

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic…

- **Section 2: Supremacy of Constitution**

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid… the obligations imposed by it must be fulfilled.

5.2.2. Elements typical of a Social Contract

5.2.2.1. National Consensus

As mentioned in Chapter 3, the term 'national consensus' forms an essential part of the formation of a Social Contract. The idea of a national consensus is based on the principle that stakeholders act according to a shared understanding of the fundamental nature of the negotiated text. The multiple references (listed below) to a 'consensus-seeking spirit' within the South African Constitution of 1993 reflect an attempt at a national consensus to govern all decision-making. However, there is a striking difference between the two Constitutions. In the 1993 Constitution, the 'spirit' is mentioned explicitly three times. Only two references are made to this 'consensus-seeking spirit' in the 1996 constitution – the sole direct reference is made in the Annexure, while in Section 39 the reference to 'spirit' is vague and undefined.

1993 Constitution and Constitutional Principles [emphasis added]

- **Section 88 Cabinet**

(5) Subsection (4) shall be implemented in the *spirit underlying the concept of a government of national unity*, and the President and the other functionaries concerned shall in the implementation of that subsection endeavour to achieve consensus at all times

- **Section 89 Cabinet Procedure**

(1) Meetings of the Cabinet shall be presided over by the President, or, if the President so instructs, by an Executive Deputy President: Provided that the Executive Deputy Presidents shall preside over meetings of the Cabinet in turn unless the exigencies of government and *the spirit underlying the concept of a government of national unity* otherwise dictate.

(2) The Cabinet shall function in a manner which gives consideration to the *consensus-seeking spirit* underlying the concept of a government of national unity as well as the need for effective government.

- **Section 150 Executive Council Procedure**

(2) The Executive Council shall function in a manner which gives consideration to the *consensus-seeking spirit* underlying the concept of a government of national unity as well as the need for effective government.

1996 Constitution [emphasis added]

- **Section 39**

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the *spirit*, purport and objects of the Bill of Rights. (Emphasis added)

- **Annex B Section 4** [as pertains to section 91 of the new Constitution]

(15) The Cabinet must function in a manner which gives consideration to the *consensus-seeking spirit embodied in the concept of a government of national unity* as well as the need for effective government. (Emphasis added)

5.2.2.2.   *Core/Non-core*

The phrasing of certain key issues gives some insight into which parts of the constitution may form part of the core of the agreement. The following extracts represent what may be considered as core to the agreement, and could be corroborated, modified, adapted or discarded by the evidence collected in the memoirs and biographies of the original negotiators.

1996 Constitution [determined by special amendment procedures]

- **Section 1: Republic of South Africa**

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and

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freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the constitution and the rule of law.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

- **Sections 7 -39: Bill of Rights**
- **Section 74: Bills amending the constitution**

5.2.2.3.   Institutions

Sisk (1995:250) lists a Bill of Rigts, institutions that reconcile majority rule with minority rights, institutions that provide for equality before the law, and for equal economic opportunity as potential 'building blocks' for a Social Contract (Other institutions that are favourable to the process that rewards accommodative politics also promote the establishment of a Social Contract).

1996 Constitution

The 1996 Constitution allows for the creation of several institutions:

- **Section 181 Establishment and governing principles** [Chapter 9 Institutions]

(1) The following state institutions strengthen constitutional democracy in the Republic:

a. The Public Protector.

b. The Human Rights Commission.

c. The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

d. The Commission for Gender Equality.

e. The Auditor-General.

f. The Electoral Commission.

The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities listed in this subsection relates directly to Sisk's building block. The 1996 Constitution also includes a comprehensive Bill of Rights (Chapter 2: Sections 7 to 39), which is congruent with the kinds of institutions conducive to nurturing a Social Contract.

5.2.2.4.   Process

In determining whether the 1996 constitution contains elements favourable to initiating a process that rewards accommodative politics and relies on a system of incentives rather than restraints, or 'process over institutions', a closer look at the electoral system is warranted.

While Lijphart (1977; 1985) argues in favour of the proportional list system for divided societies which tend to have ethnic voting blocks, Horowitz (2003) argues strongly against this system (2003:118) and argues in favour of an electoral system that is conducive to the process of vote pooling and produces compromises between opposing groups. As noted in Chapter 3, Horowitz (1991) uses the Malaysian electoral system as an effective example. The South African National Electoral System is based on a proportional list system, which, according to Horowitz (2003) is the least likely of electoral systems to produce a process conducive to moderate politics and compromises between groups. This means that the South African electoral system does not encourage the kind of political process definitive of a Social Contract. As discussed in Chapter 3, there is a potential for vote pooling in a mixed system (proportional list and ward-based electoral districts), which is used for local government elections.

The South African electoral system is however not entrenched in the Constitution – the Constitution provides merely for a system that 'results, in general, in proportional representation' (see below). This means that this system may become subject to renegotiation: in other words, that it is possible for the proportional list system to be changed in order to include constituencies and become a mixed system more conducive to continuing compromise, should those in power wish to do so.

1996 Constitution [emphasis added]

- **Section 46: National Electoral System – Composition and Election**

 (1) The National Assembly consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that -

(a) is prescribed by national legislation;

(b) is based on the national common voters roll;

(c) provides for a minimum voting age of 18 years; and

(d) *results, in general, in proportional representation.*

(2) An Act of Parliament must provide a formula for determining the number of members of the National Assembly.

- **Section 157: Composition and election of Municipal Councils**

(1) A Municipal Council consists of -

(a) members elected in accordance with subsections (2), (3), (4) and (5); or

(b) if provided for by national legislation -

(i) members appointed by other Municipal Councils to represent those other Councils; or

(ii) both members elected in accordance with paragraph (a) and members appointed in accordance with subparagraph (i) of this paragraph.

(2) The election of members to a Municipal Council as anticipated in subsection (1)(a) must be in accordance with national legislation, which must prescribe a system -

(a) of proportional representation based on that municipality's segment of the national common voters roll, and which provides for the election of members from lists of party candidates drawn up in a party's order of preference; or

(b) of proportional representation as described in paragraph (a) combined with a system of ward representation based on that municipality's segment of the national common voters roll.

(3) An electoral system in terms of subsection (2) must ensure that the *total number of members elected from each party reflects the total proportion of the votes* recorded for those parties.

(4) If the electoral system includes ward representation, the delimitation of wards must be done by an independent authority appointed in terms of, and operating according to, procedures and criteria prescribed by national legislation.

(5) A person may vote in a municipality only if that person is registered on that municipality's segment of the national common voters roll.

(6) The national legislation referred to in subsection (1)(b) must establish a system that allows for parties and interests reflected within the Municipal Council making the

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appointment, to be fairly represented in the Municipal Council to which the appointment is made.

5.2.3. Elements/Components typical of a Benchmark Agreement

While in itself a Benchmark Agreement does not necessarily take the form of written agreement, certain elements contained within a written agreement may allude to the existence of such an agreement. Phrasing used within the written constitution may indicate the intention to address past injustices, the superiority of a larger goal in the minds of some authors, as well as the overall status of the document, being of a permanent or transitory nature.

5.2.3.1.   Historical Context: Past Injustices

The need to address past injustices is characteristic of the high-context culture of negotiation. High-context negotiators are focused on historical context and do not view the negotiating forum as an equaliser for the parties involved, as past injustices imply past victims and past perpetrators. Instead, these type of negotiators set out to right historical wrongs by means of the negotiations. There is clear evidence in both the 1993 and 1996 constitutions that righting past injustices was high on the agenda, as well as ensuring that these types of injustices do not happen again.

1993 Constitution and Constitutional Principles [emphasis added]

(After Section 251) National Unity and Reconciliation

This Constitution provides a *historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice*, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

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These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, *which shall be a date after 8 October 1990 and before 6 December 1993,* and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

- **Constitutional Principle V**

The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the *amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender*.

- **Section 121: Claims** (Restitution of Land Rights)

 (2) A person or a community shall be entitled to *claim restitution of a right in land* from the state if-

(a) such person or community was dispossessed of such right at any time after a date to be fixed by the Act referred to in subsection (1); and

(b) such dispossession was effected under or for the purpose of furthering the object of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2), had that section been in operation at the time of such dispossession.

(3) The date fixed by virtue of subsection (2) (a) shall not be a date earlier than 19 June 1913.

1996 Constitution [emphasis added]

- **Preamble**

We, the people of South Africa,

Recognise the injustices of our past…

… Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights…'

- **Section 25: Property**

(7) A person or community *dispossessed of property after 19 June 1913* as a result of past racially discriminatory laws or practices is *entitled*, to the extent provided by an Act of Parliament, *either to restitution of that property or to equitable redress*.

- **Section 195: Basic values and principles governing public administration**

(1) (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the *need to redress the imbalances of the past* to achieve broad representation.

5.2.3.2.   *Larger/superior objective*

In a joint statement made by F.W. de Klerk, Nelson Mandela and Chief M. Buthelezi on 19 April 1994, a caveat was added to the 1993 Constitution, amending section 160 of the 1993 Constitution [emphasis added]:

The parties expressed their satisfaction that the Agreement will substantially contribute to *their common goal* of creating circumstances which will be conducive to the holding of a free, fair and peaceful election.

5.2.3.3.   *Agreement as Temporary*

The nature of the 1993 Constitution is *interim*, and as such, temporary. It was intended to be operative for two years until it would be replaced by a new constitution drafted by a constitutional assembly.

1993 Constitution and Constitutional Principles

- **Section 73 Adoption of new constitutional text**
  - (1) The Constitutional Assembly shall pass the new constitutional text within two years as from the date of the first sitting of the National Assembly under this Constitution.

5.2.4 Chapter Summary

In terms of the Constitutional Contract, some differences exist between the 1993 and the 1996 Constitutions. While both Constitutions are equally reliant on quotas in the form of the terms 'broadly representative', only the 1993 Constitution has very rigid fixed target, which is the nature of the 1993 Constitution. The 1996 Constitution has one definitive instance of a fixed target in the form of a reverse target, more specifically, the Property Clause. The 1996 Constitution's constraints on amendments are basically a reflection of what was proposed in the 1993 Constitution, with the added exception of special procedures for amendments regarding provinces.

There is a striking difference between the two Constitutions regarding the issue of National Consensus within a Social Contract. The 1993 Constitution places a lot of focus on the continuation of the 'spirit underlying the concept of a government of national unity', while the 1996 Constitution mentions this 'spirit' only twice.

Both Constitutions address the issue of historical context by addressing past injustices, with specific focus on the restitution of land rights. In its nature, the 1993 Constitution is a temporary agreement, while the 1996 Constitution does not have a fixed end-date or expiration date.

This Chapter set out to place elements within the 1993 and the 1996 Constitution within the conceptual framework set out on Chapter 3. It was found that both Constitutions have indicators open to interpretation as being either those of a Constitutional Contract, a Social Contract and a Benchmark Agreement.

Both of the Constitutions place significant emphasis on the Property Clause with regard to 'addressing past injustices', which is congruent with the Benchmark Agreement. However, placing the addressing of past injustices in such strict terms is also reconcilable with a rigid Constitutional Contract.

Chapter 6: Analysis of Data

6.1. Introduction

This chapter seeks to establish whether negotiators interpreted certain sections of the both the 1993 and 1996 Constitutions to be indicators of either Constitutional Contracts, Social Contracts and/or Benchmark Agreements. These views will be found in published material as well as interviews available in the public domain, and personal interviews. Each negotiator will be analysed as an individual in order to determine whether their views are congruent with the Constitutional Contract, the Social Contract or the Benchmark Agreement, or as reconcilable with one or more of these concepts. The negotiators have been placed in alphabetical order by surname.

6.2. Findings

6.2.1. Kader Asmal

Kader Asmal represented the ANC during Codesa I and Codesa II, where he served on Working Group 5 which dealt with creating procedures for dealing with possible problems during the transition (Asmal, 2011:119). Asmal also formed part of the ANC's negotiating team at the MPNP. After 1994, he was a minister in Nelson Mandela's cabinet.

In his memoirs, *Politics in my Blood,* co-written with Adrian Hadland with input from Moira Levy, Asmal writes about the importance of the ANC getting involved in the debate in South Africa in the 1980s regarding what a future constitution would look like. By getting involved in this debate, the ANC would 'rebut the enemy's claims that the ANC … was nothing more than an organisation of communists and terrorists' (Asmal, 2011:104). By attempting to change others' perception of them, the ANC was laying the groundwork for their opponent to fundamentally redefine the ANC as a viable negotiating partner, which is conducive to creating a political culture favourable to the formation of a Social Contract.

In 1986, the ANC's most basic aims for a constitution included majority rule and 'national unity in the sense of one people corresponding to one country' (Asmal, 2011:105). However, Asmal knew that the constitution would have to make room for diversity and multiculturalism. The ANC would continue to advocate an accommodative unitary state (Asmal, 2011:105). Asmal was strongly against a federal state, as he believed it would 'open the door to white minority rule and would preserve whites' economic power base'

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(2011:107). He, along with the ANC, advocated a strong central government (2011:107). A point of contention that came up during the argument on whether or not to have a strong federal system, was what to name the provinces: the ANC was in favour of the loose term 'regions', while the NP called for the use of 'states' (Asmal, 2011:124). Eventually, the parties compromised on the term 'provinces' (Asmal, 2011:124).

Asmal dismisses the NP's proposal of minority rights. While Asmal recognises the success of minority rights in other societies, he finds that minority rights in South Africa would be 'an inversion and perversion of this legal-philosophical tradition' (2011:101).

Asmal was against the 'conventional liberal democratic constitutional model' as it would limit the state's power, which it would need to eradicate the racial and social inequalities caused by apartheid (2011:113). Asmal stressed the importance of a Bill of Rights and its role in eradicating social and economic inequalities (2011:112). Asmal describes the functions of the Bill of Rights as reflecting 'the need of the majority', while providing 'protection … to the anxieties of different groups of people' (Hansard, 1996:123). This type of process is strongly in line with the formation of a Social Contract.

Asmal refers to the ANC's suspension of the armed struggle in 1990 as a 'major concession for which we did not receive much in return' (2011:119). This type of argument in terms of *quid pro quo* is congruent with Constitutional Contractarian thinking.

Asmal spends some time debating the electoral system that would be best suited to South Africa, a country where most of the population was illiterate and had never voted before. According to the KwaZulu Training Trust, at that time, 78% of blacks, 55% of coloured people, 23% of Indians and 2% of whites were illiterate (Race Relations Survey, 1991/2:213). Asmal notes how this issue was constantly debated within the ANC (2011:121). Asmal was in favour of the proportional list system and expressed his concerns over a constituency-based system (2011:122). He believed that the possibility existed that the ANC would win most if not all the constituencies, removing the chance of all parties being represented in parliament (2011:122). He believed that the National Assembly should be as representative as possible, and that by not setting a threshold within the party list proportional representation system, any party could secure seats in the Assembly.

Asmal also expresses the importance of setting up a 'relatively simple' system, not only because of the administration it would require, but also because fighting over constituency

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delimitation would take up too much time during the negotiations, as it would surely bring about disagreements. He found that a constituency based system would cause administrative problems and that it would 'be much too large in South Africa' (2011:123). Asmal 'could see no other way for the duration of the first few elections than proportional representation' (2011:123). As mentioned in Chapter 3, this type of system is recommended by Lijphart (1977; 1985). However, both Sisk (1996) and Horowitz (2003) argue against this model as more favourable to the emergence of a Social Contract, instead advocating systems of incentives and rewards.

Asmal also very specifically notes that this system should not necessarily 'stay as it is forever' (2011:123). His personal preference would be that in time, the system be changed to one resembling the German system, in which Parliament is made up of sixty per cent constituency-based voting, and forty per cent by proportional representation. He acknowledges that in a constituency-based system, 'members have a more direct connection to their representatives' (2011:123). This type of system would be more conducive to the formation of a Social Contract, as elaborated in Chapter 3, section 3.3.2.7.

Asmal was greatly in favour of a constitution that would hold the interest of the people 'in the highest regard', and for this to happen, the constitution would have to be drafted by 'the people's democratically elected representatives' (2011:130). After much debate, the ANC decided that a multi-party conference, which came in the form of the MPNP, would draft an interim constitution (Asmal, 2011:129). Asmal states that the ANC 'conceded that the regime would not give way to an interim government, as De Klerk would not waver from his attachment to the legitimacy of his government' (2011:129).

In 1994, Asmal admitted that certain provisions in the Interim Constitution were very 'cumbersome' (Asmal, 1994). He continued by saying that the Bill of Rights had 'serious flaws', and that the section on national territory was overly detailed. Asmal did however say that the provision regarding amnesty was very well-formulated and allowed for amnesty to be dealt with 'without threatening anyone, without scapegoating anyone' (Asmal, 1994).

Asmal feels particularly proud of his part in the drafting of the constitution, specifically his hand in the creation of a Constitutional Court and his preference for an electoral system based on proportional representation (2011:131). Asmal specifically mentions the 1993 Preamble and Chapter 16 as standing out to him (2011:130 – 131). When referring to the 'constitutional

settlement' made in South Africa, Asmal states that the idea of dignity 'resides at the very heart' of the settlement (2011:3).

Asmal notes the constant compromise during the negotiations: 'The balancing of the needs of the oppressed with the fears of the oppressors permeated the negotiating process from beginning to end' (Asmal, 2011:132). However, while noting the ANC's concession of the Sunset Clauses, Asmal states that 'in the end it was the regime that capitulated' (2011:132). According to Asmal (2011:126), the ANC used the Sunset Clauses, in part, to secure 'whites' commitment to the process and their loyalty to a peaceful post-apartheid state'. Speaking in terms of wins and losses is congruent with one of the characteristics of the concept of a Constitutional Contract. Asmal finds, in his view, a more fitting description for the negotiated settlement as a 'peace treaty between warring parties' (2011: 132 – 133). Asmal, on negotiations (2011:133):

> *…it is axiomatic of negotiations that they involve give-and-take and compromise; that is the substance of bargaining. However, to find a middle road, to negotiate through seemingly irreconcilable differences, you have to know your objectives. You have to be acutely sensitive to the reasoning behind your particular position on an issue so that you can modify it as need be without compromising your vision or end goal. The sunset clauses are a good example of this. We learnt that trust is the outcome of, not a precondition for, negotiations.*

In a vague statement, Asmal mentions the election of the GNU in April 1994 and says that 'at last we were moving towards our goal' (2011:131). He however fails to note what the 'goal' that he is referring to entails. It may be inferred that he was referring to the ANC's goal of working toward 'national, non-racial, democratic elections for a constituent assembly that would draft the final constitution' in order to establish their goal of a 'non-racial, multi-party democracy' (2011:133).

Asmal praises the importance of the bilateral trust between the ANC and the NP during the negotiations. While noting that this was 'downplayed' during Codesa in order to uphold the inclusive nature of the discussions, direct talks between the two parties by means of Ramaphosa and Meyer were invaluable in finding the middle ground (2011:134). Asmal again speaks to this aspect of inclusion when mentioning the accommodation of the IFP a few days before the 1994 election, stating that this was done in the 'pursuit of full inclusivity'

(2011:131). Inclusion serves as an indicator of a Social Contract, but does not necessarily mean that a Social Contract will form.

In an interview with Padraig O'Malley in 1994, Asmal stated the importance of the ANC getting a large majority in the national elections set for April of that year as it would 'establish clarity in terms of support, clarity in terms of the kind of reconstruction policy that we have' (Asmal, 1994). He continued by mentioning the importance of consensus in the adoption of the final constitution.

In the first sitting of the new parliament in 1994, Asmal 'felt the exhilaration of a victor and the vindication of the just' (2011:1). He states that during the negotiations he 'was courteous towards our opponents… for political power because it was correct and productive to do so. But I never forgot with whom I was dealing' (2011:1). This shows that negotiations did not cause Asmal to change his opinion of his opponents, which in turn would have allowed the formation of a Social Contract. Also, the win/lose argument is one of the indicators associated with the Constitutional Contract.

Asmal refers to the 1996 Constitution as a 'social compact … it's not different from the 1993 Constitution. The fundamental assumptions are not different' (Asmal, 1996). He is clear that the 1996 Constitution was written by consensus, which is a characteristic associated with Social Contractarian thinking. In parliament at the adoption of the final constitution, Asmal said that no party should 'claim victory' in the drafting of the constitution, that '[t]he victory is our country's' (Hansard, 1996:401).

According to Asmal, a system of checks and balances was established in order to 'ensure that the principle of social transformation is sustained and that the rights and duties are accordingly enshrined in such distinctive detail in our Constitution are respected by all' (Asmal, 2011:134). Asmal is very optimistic on the Bill of Rights, referring specifically to the inclusion of affirmative action providing 'redress for the past' and economic and social rights (Asmal, 1996). This referral to past injustices is congruent with the Benchmark Agreement.

After the adoption of the final Constitution in 1996, Asmal said that 'a constitution has to have a high degree of flexibility… What has happened here is that the parties have seen this as a contract with all the details to be included in it and there is extraordinary detail in it and it's possible but we might regret the details because details give rise to litigation' (Asmal,

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1996). A detailed, unchangeable contract is a sign of a Constitutional Contract. However, Asmal mentions the flexible nature of the constitution as an 'in-built flexibility' (Hansard, 1996:402).

Asmal describes the final Constitution as 'a dynamic, creative document, particularly on notions such as cooperative governance, with the capacity to move with changing times and encompass new realities, while holding firm to fundamentals' (Hansard, 1996: 400). This type of assessment is congruent with the political culture of a Social Contract.

In his memoirs, several indicators of both the Social Contract and the Constitutional Contract can be found. However, it becomes evident in Asmal's win/lose assessment as well as his insistence on a party-list proportional representation system that, at the time, his thinking was more in line with the Constitutional Contractarian perspective.

6.2.2. F.W. de Klerk

In 1989 F.W. de Klerk became leader of the then incumbent ruling party, the National Party, and later the same year he became president of South Africa. He remained president and leader of the NP during Codesa I and II and the MPNP, until April 1994. He played a crucial role during the constitutional negotiations, and remained the leader of the NP as well as deputy president in the GNU from 1994 to June 1996, when he withdrew from government (De Klerk, 1998A:362). In his autobiography *The Last Trek – A New Beginning: The Autobiography* (1998A), certain indicators consistent with the conceptual framework used in this study can be identified.

At their December 1989 'Bosberaad', the NP started to devise ways to promote negotiations as the only course of action, to which De Klerk notes that they sought to occupy the 'moral high ground' (1998A:161). This reference to the moral high ground leans toward the Benchmark view, which is generally concerned with outward appearances and using this outward appearance of strength or magnanimity as bargaining power. However, upon closer inspection of De Klerk's intentions, his intentions lean more towards the formation of a Social Contract in which his party's interests are considered as opposed to an ongoing and changeable agreement.

At this strategy session, the NP considered the risks involved in entering into negotiations and devised possible fall-back positions. They sought to 'ensure justice for all South Africans

within the framework of universally accepted democratic values' (De Klerk, 1998A:161). De Klerk lists the NP's core visions for South Africa: 'everybody would have equal rights and opportunities and… minorities would not be threatened or suppressed' (1998A:161). The matter of 'reasonable protection for minority rights' formed an essential part of the acceptance of this major step toward negotiations with the ANC by the cabinet (De Klerk, 1998A:162). In a meeting between De Klerk and Nelson Mandela in December 1989, Mandela voiced his concern over the NP's commitment to group rights, to which De Klerk replied that group rights would merely provide a structural guarantee that majority rule would not mean domination of the white minority by blacks (De Klerk, 1998A:157, 158).

De Klerk divides the negotiation process into three phases, firstly, the 'tentative negotiations' that had taken place between Nelson Mandela, the ANC and certain members of the government, described as *Secret Meetings* in Chapter 4. De Klerk notes these meetings, specifically those held in the United Kingdom, as being instrumental to his understanding of the ANC and its intentions (1998A:173). The second phase, according to De Klerk, involved the preparations for the substantive negotiations, listed as preliminary negotiations. De Klerk notes this phase as integral to establishing a level political playing field (1998A:175). The first and second phases were instrumental in helping both parties redefine their assessment of each other fundamentally, which is essential to the process of constructing the political culture of a Social Contract.

In March 1990, De Klerk made clear his commitment to 'making the political playing fields even' (De Klerk, 1998A:153). This is reconcilable with both the Constitutional Contract view and the Social Contract View, as low-context negotiators tend towards a perception of equal standing when entering into negotiations.

The third phase, substantive negotiations, came in the form of Codesa. De Klerk writes of his continued determination that the negotiations should be inclusive (1998A:176). In an interview with Patti Waldmeir in 1994, De Klerk makes clear his belief that the 'final agreement' should be reached at a multi-party conference where all the parties in the country would be represented (De Klerk, 1993A:2). For a Social Contract to be successfully established, the main parties to the conflict should be included in the process. De Klerk's commitment to inclusion is compatible with the shaping of a new political culture conducive to a Social Contract.

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Just before the Pretoria Minute of August 1990, the ANC announced that it would suspend its armed struggle, something which the NP had been pushing for. Even though De Klerk expressed his delight at this revelation, the unilateral nature of the decision made De Klerk realise that it was 'aimed at seizing the moral high ground' (1998A:186). The Pretoria Minute was portrayed as the 'selling out of the white man', making the NP seem less powerful and strengthening the ANC's bargaining position (De Klerk, 1998A:187). This referral to moral high ground by De Klerk may be reconcilable with the Benchmark Agreement, as he was concerned with losing the NP/government's position. The use of a morally stronger bargaining position is a key indicator of this view.

The divergent views of the ANC and of the NP government were clear from the outset: the ANC called for the handing over of power to a non-elected interim multiparty government, while the NP called for a multiparty constitutional convention to draft a new constitution which would govern the first democratic elections (De Klerk, 1998A:218). According to De Klerk, he proposed two phases to the drafting of the constitution: Codesa would produce an interim constitution which would allow for the election of a representative Parliament, which would then draft a final constitution (De Klerk, 1998A:222).

De Klerk found that the 'real challenge' that lay ahead for Codesa was determining a 'win-win outcome' (1998A:223). Seeking a positive sum (win-win) outcome instead of a zero-sum outcome is consistent with Social Contractarian values. For De Klerk, Codesa was a success. The NP had positioned themselves to be able to achieve their basic goals (De Klerk, 1998A:225). Upon noting that the ANC's 'rolling mass action' had not been as successful as they had hoped, De Klerk continued to work toward what he perceived as a win-win outcome (1998A:248).

The continuing violence in South Africa hampered the negotiating process, and caused 'distrust and recriminations' between the two main parties (De Klerk, 1998A:192). De Klerk specifically notes how difference in culture affected negotiations when talking about his experience with Chief Mangosuthu Buthelezi of the IFP, stating that in Zulu tradition one always concedes to a president or a king, never openly challenging him face-to-face. This acute difference in culture changed the way that De Klerk dealt with Buthelezi, and shows the direct effect of culture on negotiations (1998A:196). De Klerk was searching for equal standing for the participants in the negotiations, once again congruent with the political culture from which a Social Contract can evolve.

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At Codesa II, certain issues continued to provide a great source of contention. One of these was how the final constitution would be adopted: the NP called for a 75% majority, and the ANC called for a two-thirds majority (De Klerk, 1998A:236). The NP sought power-sharing by means of the devolution of power; increased majorities for important decisions and the 'limitation of powers of the president' (De Klerk, 1998A:236). Strict amendment procedures are associated with the Constitutional Contractarian view, but the NP sought to produce a system in which all the major parties would form an ongoing part of the new government, and as such, an approach closer to the values associated with the Social Contractarian perspective (De Klerk, 1998A:237). De Klerk continued to defend this position, noting that power-sharing had become the norm in divided societies seeking stability, while the ANC framed this proposal as an attempt to hold power indefinitely (1998A:237). In February 1993, De Klerk said that 'great progress' had been made in 'an emerging broad consensus with regard to the framework of a new constitution' (De Klerk, 1993A:2). He also made it clear that the bilateral talks taking place at that time between the NP and the ANC had not produced 'fixed agreements'. In Parliament in 1993, De Klerk said (Hansard, 1993:14360):

> *As a lawyer, I know that a healthy contract does not necessarily guarantee a successful transaction. Other factors to consider are the intentions of the parties, their reputations and their ability to comply with their contractual obligations… We are confident that the ANC in general genuinely want to make a success of our joint constitutional effort, and that they are committed to the honourable implementation of our agreements.*

In his assessment of the 1993 Constitutional Principles, De Klerk lifts out one principle in particular which he finds to be the most important: 'the final constitution would have to be adopted by a special majority and it would be bound by agreed constitutional principles' (De Klerk, 1998A:254). Upon mentioning the idea of a sunset clause, Joe Slovo tried to address the government's core interests, which he identified as a period of five years for a Government of National Unity and 'guarantees for civil service pensions and jobs', among others (De Klerk, 1998A:257). This indicates that Slovo and De Klerk had divergent ideas on what constituted the core of the NP government's interests.

By September 1993 the issue of the level of federalism was still on the table. The NP, the ANC and the IFP held a 'fundamental difference of philosophy… on the basic relationship between SPRs [states/provinces/regions] and the federal government' (De Klerk,

1998A:283). The ANC called for a strong central government and weak states, the IFP for strong states and a weak government, while the NP advocated a strong central government, and 'strong states in matters which fell within their jurisdiction' (De Klerk, 1998A:283). De Klerk wanted the devolution of power to be one of the agreed upon constitutional principles, calling for 'entrenched powers for regional governments' as a 'basis for the future constitutional dispensation' (De Klerk, 1993A:3).

The continuing negotiations in October 1993 were marked by 'sufficient give and take and reasonable compromises to encompass the bottom lines of all the main parties on all but a few outstanding issues' (De Klerk, 1998A:287). De Klerk refers specifically to the protection of property rights as a 'titanic struggle', which, according to him, the NP won (1998A:287). The inclusion of market value in law expropriation was something that they had insisted on, and eventually won. Arguing in terms of wins and losses is congruent with Constitutional Contractarian thinking, and shows De Klerk diverging from his previous approach. The property clause emerged as a core issue for De Klerk.

A key, long unresolved, issue was the question of amnesty. At the Groote Schuur Minute of 1990, a working group was set up to deal with some pressing issues. Within this working group the first concerns regarding the matter of amnesty came up – the group could not find agreement on this matter (De Klerk, 1998A:182). The issue of amnesty would continue to be a sore point for De Klerk. The government continually advocated a 'comprehensive process of amnesty for all those, on all sides, who had been involved in the conflict of the past' (De Klerk, 1998A:288). Eventually, De Klerk found that (1998A:288):

...the best that our negotiating team could do was to reach agreement on the inclusion of a paragraph at the end of the interim constitution that stipulated that 'amnesty shall be granted in respect of all acts and omissions associated with political objectives and committed in the course of the conflicts of the past.' Amnesty was to be dealt with 'in a spirit of reconciliation, on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu (traditional African humanism) but not for victimisation.

Despite stating that he found that the ANC was 'not in a position to dictate terms to [the South African government]' (1998A:288), De Klerk was resoundingly unhappy with this wording on amnesty. It provided no indication of the practicability of the process, and thus no

guarantees as to how the ANC would handle the issue. While he states that the NP had brokered the 'best deal that was then possible', he concedes that '[t]he manner in which we dealt with the question of amnesty was probably our greatest failure during the negotiating process.' (1998A:289). This retrospective view of wins and losses is consistent with the Constitutional Contractarian thinking.

De Klerk (1998A:291) terms the Interim Constitution as 'one of the major milestones on the road to the new South Africa'. While De Klerk was not completely satisfied with the agreement, he found that it was concurrent with their 'bottom line' spelled out in the 1992 referendum (De Klerk, 1998A:291). He identified concessions from both sides, but in an interview in 1993, he said that he would 'not describe it as victories', but rather as 'common sense' (1993B). De Klerk mentions that both the ANC and the NP made major concessions on a 'give-and-take basis' (1994B:5). He (1995) refers to the writing of an interim constitution with fixed principles for the final constitution as a 'good compromise', which in its nature did not satisfy any of the parties completely, but rather, sufficiently. De Klerk finds that by addressing each of the party's concerns 'sufficiently', the agreement 'provided the basis for a new national consensus', which is an indication of the political culture associated with the Social Contract (1998A:291).

In November 1993, certain issues remained unresolved. De Klerk (1998A:289) notes the most important of these as the issue of the 'functioning of the GNU and the process by which the multiparty cabinet would take its decisions – would it be by consensus or by a two-thirds majority? The latter option would conceivably give the minority parties a veto.' The minority veto was what the NP had been seeking all along. De Klerk denies that they were seeking a veto, arguing instead that the country 'be governed on the basis of consensus between the main role players' (1993B:3). Eventually, Mandela and De Klerk agreed that the cabinet in the GNU would make decisions based on the 'spirit of consensus underlying the concept of a government of national unity' (De Klerk, 1998A:290). This type of continual bargaining was what De Klerk had been advocating and is consistent with Social Contractarian thinking.

On the working of the Government of National Unity, De Klerk was confident (1994A:1). He defined the ANC within the confines of the GNU: 'we should call ourselves co-operators but also competitors' (De Klerk, 1995). He said that 'the GNU will not implement ANC policy, will not implement NP policy, will not implement IFP policy, but will, with regard to those matters where there are fundamental differences, negotiate compromises' (1994A:1). De

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Klerk was confident that a 'very good team spirit' was developing among those taking part in the GNU, reiterating his commitment to the GNU in an interview with Patti Waldmeir in June 1994 (1994A). This type of continuing compromise is reconcilable with the political culture associated with the emerging of a Social Contract. De Klerk conceded that five years may not be enough time for the GNU, and that the concept of power sharing will not disappear in the final constitution, though it might take a different form (De Klerk, 1994A).

De Klerk begun to feel that the ANC was deviating from the 'spirit of reconciliation' when the ANC sought to press murder charges against the former minister of defence and two former chiefs of the South African Defence Force (SADF) (1998A:348). After a clash with Mandela in a cabinet meeting, De Klerk and Mandela reiterated their mutual good faith in a joint statement (De Klerk, 1998A:351). This gives some insight into which issues were considered core by De Klerk, and specifically the issue of amnesty comes to the fore. This particular action by the ANC seemed to De Klerk to break the spirit of consensus.

De Klerk is optimistic about some compromises made during the negotiations for the final constitution, but certain issues that remained unresolved toward the end produced significant deadlocks. The NP had continually pushed for some form of power-sharing at the executive level, but the ANC refused (De Klerk, 1998A:358). De Klerk argued that 'we need to continue to have a bond of trust and a spirit of co-operation, between that which I represent in public life and that which President Mandela represents in public life (1994B: 12). In an interview with Patti Waldmeir in November 1994, De Klerk said that should the current 'partnership situation' (the GNU) not continue, 'we will have to look at strengthening the checks and balances against the misuse of power, at strengthening the constitutional protection for cultural minorities, not based on race or colour, religious minorities, language minorities' (1994B:12). The NP eventually compromised on almost all important issues: which to De Klerk was 'not entirely satisfactory' (1998A:359).

Three days before the adoption of the new constitution the NP was still unsure of its support thereof (1998A:359). Before voting for the 1996 Constitution, De Klerk notes that the NP did a thorough evaluation of what they had achieved: 'in some instances we got 100% of what we wanted, in some even 110%, in some only 75%, we had to make fairly far reaching compromises but we believed, and I am convinced as I sit here, that we substantially delivered on what we envisaged there and we never advocated that it will be a minority veto or that type of thing' (De Klerk, 1997). In an interview with Padraig O'Malley in 1999, De

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Klerk mentions a 'balance sheet' on 'what was achieved and what wasn't achieved' that was drawn up by Rassie Malherbe. This allowed the NP to conclude that they had achieved most of their goals (De Klerk, 1999). This type of 'balance sheet' is reconcilable with a Constitutional Contract.

In 1996, De Klerk mentioned that the constitution 'contains the most fundamental things that I would like to see there', but continued to argue that the Constitution lacks a 'consensus-seeking model at the executive level' (1996B). The NP did eventually vote in favour of the new constitution, but De Klerk expressed his concerns in a speech after its adoption: he was particularly concerned with the lack of a long-lasting power-sharing agreement as well as the absence of consensus-seeking within the executive (1998A:360). De Klerk's hopes of what the constitution should embody are recognisably those of a Social Contract, though it is clear here that he did not believe that the outcome guarantees this type of ongoing bargaining.

After leaving the GNU in 1996, De Klerk reasoned that the Constitution did not include 'a whiff, even the faintest basis for the concept of multi-party consensus seeking in a structured manner on issues of national importance' (De Klerk, 1996A). He argued for a system where the main political role-players are continually included in decision-making on issues of national importance 'in an effort to find consensus'. Regarding voting yes on the new constitution and leaving the GNU in retrospect, De Klerk says that he would 'have done [it] again' (1998B). He does not believe that putting more pressure on the ANC regarding a consensus-seeking mechanism would have made a difference to the final outcome (De Klerk, 1998B).

De Klerk shows his ongoing commitment to the agreement in this statement (1998A:364):

> *I would like to think that, in our retirement, in some way or other we [he and*
> *Mandela] will be able to work together as elder statesmen to nurture and protect*
> *the young democracy which both of us had the privilege of helping to create.*

At the Truth and Reconciliation Commission, De Klerk made the statement that the new South Africa was 'just as much our creation as it was the creation of any other party' (De Klerk, 1998A:379). He continued to say that he and his party were neither morally inferior nor superior to any other party to the conflict, and that the solution to the historic divisions in the country had been a joint one. This reveals once again a cognitive mindset that can be located within the framework of Social Contractarian values, as fundamental redefinitions of

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opponents as well as an equal share in the outcome relate directly to this type of agreement. De Klerk also touches on the equality of the status of the contributors, which is in line with the Social Contract.

Looking back at the negotiation process, De Klerk specifically mentions the absence of effective power-sharing mechanism as one of his deepest regrets (1998A:387; 389). He said that, should the NP win the next election by a two-thirds majority, they would entrench a consensus-seeking mechanism in the constitution (1996B). He finds simple majoritarianism lacking when dealing with the inclusion of minorities in any effective decision-making, as this system completely excludes minorities from participating effectively in the way in which they are governed (De Klerk, 1998A:396). He seeks a majority not based on race, but rather on 'common values and a shared vision of how the country should be governed' (1998A:397). De Klerk calls for ways to continue the type of negotiation and search for consensus which marked the negotiation process in a search for consensus on dealing with present and future problems (De Klerk, 1998A:398).

De Klerk notes specifically the dissensus among South Africans on the past. He wishes for all parties to come together to reach consensus on the 'past and present realities of our country' (1998A:383). Here it becomes clear that De Klerk wished to create an outcome more compatible with that of a Social Contract than was produced. However, upon reflection, De Klerk finds that the agreement was 'much closer to our opening positions than to those of the ANC' (De Klerk, 1998A:388). Asked whether the country 'turned out the way you thought it would when you made those changes in 1990', De Klerk answered that he thought that 'we have basically achieved what we set out to achieve' (De Klerk, 2004:2). De Klerk listed some of the positives in South Africa in 2004: 'the constitutional certainty, the adherence to the constitution, but most important of all, what is in place is the underlying goodwill between all the people of South Africa, a sort of commitment to make the new South Africa work' (De Klerk, 2004:2).

De Klerk's views on the constitutional negotiations, the Interim Constitution of 1993 and the 1996 Constitution reveal several indicators consistent with each of the concepts listed in Chapter 3. However, De Klerk's opinions and beliefs seem to generally reflect the values and beliefs that define a Social Contractarian political culture, even though it seems that he believes that while this was what he had aimed for during negotiations, the Social Contract was not successfully formed.

6.2.3. Dawie de Villiers

As a minister in FW de Klerk's cabinet, Dawie de Villiers played the role of negotiator at Codesa II, and served on Roelf Meyer's negotiating team at the MPNP. De Villiers continued his role a negotiator serving in the Constitutional Assembly until 1996.

In 1992, De Villiers clarified what the NP meant by power-sharing. He stated that it would mean that minorities or smaller parties' opinions would 'not be totally ignored', and the implementation of mechanisms that 'protect minorities from abuse of power' (De Villiers, 1992). To De Villiers, this meant that the constitution could only be changed with the assent of a very high percentage of voters, suggesting a seventy-five per cent majority. This type of mechanism is associated with the Constitutional Contract.

By August 1993, the interim constitution was almost fully drafted. De Villiers believed that the ANC had conceded on several matters, including the Government of National Unity and a more extensive Bill of Rights. He noted his belief that 'the transitional constitution must actually be the next constitution, it must be a full constitution and I think what is developing here is a full constitution' (De Villiers, 1993).

In Parliament in November 1993, De Villiers noted the level of compromise during the negotiations (Hansard, 1993:14246). He continued by saying that ultimately, no party was 'completely satisfied' with the agreement, but that the agreement was acceptable to all in providing a balance between parties' interests (Hansard, 1993: 14246). He also noted that 'despite the shortcomings, we are proud of what we achieved' (Hansard, 1993: 14247).

De Villiers mentions accusations that the NP had not succeeded in entrenching power-sharing in the constitution. He however refutes this by mentioning the different forms of power-sharing in the Interim Constitution, specifically noting that 'power… in the constitution is divided in such a way that the exercising of power does not lead to the domination of power' (Hansard, 1993:14248). He mentions the importance of the proportional list electoral system which 'ensures representation … for smaller parties' (Hansard, 1993:14248).

De Villiers strongly believed that the Government of National Unity should not be a temporary arrangement (1994). He noted that a first-past-the-post, winner-takes-all system would not work in South Africa, but rather a more accommodative system in which all parties

are required to cooperate (De Villiers, 1994). This type of system is conducive to the formation of a Social Contract.

In October 1996, De Villiers said that 'We've got a non-racial democracy with a constitution that is better than most constitutions that I know of with a Bill of Rights protecting not only black rights but white rights, particularly white rights when it comes to things like possessions, etc., and now after a period of renegotiation there is very little in the new constitution that we can cry out and say that this is totally foul, this is unacceptable. Looked at as a whole, it's a very good constitution' (De Villiers, 1996). This approach to the constitution is reconcilable with one of the indicators of Social Contractarian thinking.

6.2.4. Tertius Delport

Tertius Delport was a minister in F.W. de Klerk's government, and played a significant role as negotiator during the multi-party negotiations. At Codesa II Delport represented the government along with Gerrit Viljoen. He was involved in Codesa Working Group 2. Delport has not written memoirs and as such this section relies on interviews conducted by Patti Waldmeir and Padraig O'Malley.

According to Delport in 1990, the NP sought a multi-party democracy and minority protection in the settlement agreement (1990). He proposed a Bill of Rights as well as political structures to entrench 'some form of group rights' (1990). He suggested a bicameral approach, ensuring minority involvement in the second chamber, adding that groups would not necessarily be based on race, rather interest groups (Delport, 1990).

In 1992, Delport expressed his personal belief that the NP was 'dealing with people who are not committed to negotiations, who are not committed to a peaceful settlement. They are only committed to grabbing all of the state power in this country' (Delport, 1992). He added that he did not trust the ANC and that he saw 'no sense in negotiating with them' (1992).

Delport defines negotiating as 'give and take' (1993), but was not confident in Roelf Meyer as a negotiator. He believed that Meyer should not have been lauded for the Peace Accord, and that the Accord 'set the pattern' for negotiations to come: 'you take what they give you and you are happy with what you get' (Delport, 1994). Delport advocated one solution: 'to have a mix, have one of the councillors being elected by all the citizens and the other half by

the taxpayers. Because we are not going to end up with proper representation of those who have got to pay the bills' (Delport, 1994).

In November 1994 Delport said in an interview with Patti Waldmeir that 'it will become obvious that we [the NP] have no power because we have what one would call majority party rule' (Delport, 1994:2). He argues that the concept of consensus holds no 'real legal value'. He continues to say that there 'is no power-sharing'. In 1998, Delport said that 'I was the first one to say we have co-option, not power sharing, we're co-opted into government and sit there like puppets with no real influence whatsoever. Well … influence but not power. It was protection of influence and influential position… power as a contribution, you're in a position to where power lies to make an input, input protection but not power sharing' (Delport, 1998).

Delport speaks of the failure of the Government of National Unity, saying that the NP 'had no real power, nothing, and Mr Mandela was increasingly isolating, ignoring F.W. de Klerk'. He continued by saying that NP was 'in fact, and I don't think my colleagues will really admit it, but in the last round of negotiations now for the final constitution there was no compromise and there was a total unwillingness from the ANC's side to make compromises on the delicate issues' (Delport, 1996). On the Property Clause, Delport says that the NP was 'sold out once again'. He said that the clause held no guarantee on keeping property (1996).

Delport believed that there was 'no way we [the NP] [were] going to change this constitution in my lifetime and we've got to work within these parameters now' (1996).

Delport's strong opposition if the concept of consensus as well as his advocating of a mixed, numerically-based electoral system shows a way of thinking compatible with the Constitutional Contractarian thought. Delport is clearly unhappy with the resulting agreement, which in turn hampers the formation of a Social Contract.

6.2.5. Colin Eglin

Colin Eglin was a member of the Democratic Party (DP) (which would later form part of the Democratic Alliance) during the period of negotiations in South Africa, and played the role of negotiator during Codesa I, Codesa II, the role of chief negotiator of the DP at the MPNP, and he was a member of the Constitutional Assembly. His published memoirs *Crossing the*

Borders of Power: The Memoirs of Colin Eglin (2007) provide significant insight into his opinion regarding the 1993 and 1996 Constitutions.

Colin Eglin became involved in talks seeking to find common ground with the ANC in October 1985. The purpose of these talks was not only to gain insight into each other's positions, but also to 'develop an understanding of each other's point of view' (Eglin, 2007:211). After these exploratory talks, members of the then-PFP (Progressive Federal Party) noted the ANC's apparent 'passion for South Africa' and that they 'were certainly not agents of Moscow engaged in the "total onslaught"' which had been the general view adopted by the then NP government (Eglin, 2007:211). The willingness of Eglin, as part of the PFP at that point, to fundamentally redefine his opponents is a clear indicator of the starting point of an approach by Eglin consistent with those of someone who pursues the ideal of creating a Social Contract.

However, in 1986, after the leader of the PFP Van Zyl Slabbert abruptly left politics, Eglin commented that the incumbent government was 'stubborn and short-sighted' (Eglin, 2007:218). This shows that while Eglin was taking steps towards changing his perception of the ANC, he was still sure of the confrontational nature of the NP government, who would also act as an opponent during the coming negotiations.

Eglin announced the DP's belief that the barriers of apartheid should be broken down in order to build a new, non-racial democracy. He believed that this could only be done through mutual trust and cooperation (Eglin, 2007:263-264). He specifically notes that 'it is not good enough for those who have [disseminated] apartheid to repeal their discriminatory laws. In the interest of peace and constructive politics they must undo the damage they have done to the fabric of our society' (2007:264) Eglin knew that in order to achieve this, mechanisms would need to be created which would 'redress undesirable imbalances in the ownership and occupation of land' (Eglin, 2007: 264). At first glance, this reference to righting historical wrongs can be placed within the Benchmark Agreement framework, as Benchmark negotiators are particularly concerned with redressing past injustices. However, as later indicators will show, Eglin was not seeking a Benchmark Agreement.

In preparation for the multiparty negotiations the DP placed specific importance on getting to know the ANC – this allowed them to once more change their perceptions of the 'enemy' to that of a negotiating partner, going so far as to refer to the members of the ANC as

'concerned fellow South Africans' (Eglin, 2007:267). After a conference in Bermuda in April 1990, Eglin had changed his perceptions of other groups favourably as well – specifically, Gerrit Viljoen, Minister of Constitutional Development in the NP government, and Oscar Dhlomo, secretary-general of the IFP (Eglin, 2007:268).

At Codesa Eglin was one of six people in a sub-committee which was tasked with drafting a Declaration of Intent. Taking part in this process caused Eglin to note that he 'felt part of history in the making' (2007:269). A shared ownership of the negotiations and its outcome is integral to the formation of a Social Contract. This Declaration of Intent would eventually play a role in changing the power relationship between the NP and the ANC as it stipulated regular elections, causing the NP to take note of the temporary nature of its dominance. According to Eglin, this changed the way in which the NP approached the negotiations: the NP grasped the fact that they may be a minority in the new dispensation (2007:270).

Eglin mentions the concept of 'sufficient consensus' on which decision-making during Codesa and the MPNP was based. Eglin finds this as an 'invaluable procedural tool' during the negotiations as it allowed for the negotiations to go forward even when there was some element of disagreement (Eglin, 2007:269).

On the interim constitution, Eglin said that had it been the final constitution, the DP would have rejected it as inadequate (Hansard, 1993: 14254). He said that the DP had accepted the interim constitution on the grounds that it paved the way toward democracy, but that they would fight for several changes in the final constitution (Hansard, 1993:14256). In an interview in 1993, Eglin said that the 'concept of the government of national unity is clearly not going to be a permanent feature' (Eglin, 1993). Eglin also found the 'shape of the regions in relation to the centre' written in the interim constitution to be changeable, but that 'for the rest the essential structures are there and will probably persist' (1993).

The DP put special focus on the Constitutional Principles as they knew that this would be an important feature when the final Constitution was drafted. Eglin finds that 'the issue was resolved neither by firm debate nor by sloppy compromise, but by what I have termed "the chemistry of negotiation". By the time the elected CA was required to comply with the constitutional principles drawn up by Codesa, the basic principles were to a large extent 'owned' by all the political parties' (2007:284). This feeling of collective ownership is congruent with Social Contractarian thinking, as for the Social Contract to form, all parties

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need to feel some sense of ownership in the agreement. Upon reflection of the negotiations in Kempton Park, Eglin finds that a 'mutual understanding' was formed during the talks (2007:303). This is indicative of a Social Contract.

The DP argued strongly against the definition of minorities as racial groups, but rather a group with which one could voluntarily associate. However, the DP was also against the simple majority rule that the ANC was advocating (Eglin, 2007:284). In an interview with Patti Waldmeir in 1994, Eglin noted that while minorities weren't mentioned numerically in the Interim Constitution, the ANC's commitment to the GNU would force it to 'dilute its kind of majority hegemony and so will the minorities also… be accommodated' (Eglin, 1994A:16). The DP proposed a mechanism built into the final constitution that would grant political minorities 'access to power' – this would come in the form of a Bill of Rights 'guaranteeing all citizens equality before the law, freedom from discrimination and freedom of association, speech and political mobilisation' (Eglin, 2007:285). The proposal falls in line with the Social Contractarian thinking: institutions that reconcile majority rule with minority rights generally promote a Social Contract.

Eglin takes specific note of an element of mistrust between F.W. de Klerk and Mandela (2007:271). Without a strong element of good faith, the formation of a Social Contract is unlikely. The collapse of Codesa prompted Eglin to tell De Klerk that the NP government had 'won' on a number of issues thus far, noting that they had been 'too keen on winning, too greedy for its own good' (2007:289). This argument can be reconciled with the kind of approach that negotiators who favour a Constitutional Contract would have: the NP was seeking a win-lose Constitutional Contract while it should have been seeking a positive-sum Social Contract. Eglin maintained that working toward a win-win situation would be more constructive.

The DP pushed for the Constitutional Assembly to make decisions on the grounds of consensus – a measure which is associated with the concept of a Social Contract – but that should this not be possible, a 70% majority would be required (Eglin, 2007:265). In Parliament in 1996, Eglin urged the Chairperson (at that time Cyril Ramaphosa) to 'look at the spirit of trying to achieve consensus' when adopting the final Constitution (Hansard, 1996:17). Eglin notes that the 'real' negotiations were between the NP government and the ANC, labelling himself and the DP as a 'small player', and mentioning that in order for a proposal by such a small player as themselves to be successful, it would have to be in

conjunction with either the ANC or the NP government (2007:272). After the Record of Understanding was signed in September 1992, Eglin was very much aware of a series of bilateral meetings taking place between the ANC and the NP (2007:295). Although the ANC and the NP were the most notable and important players during the negotiations, Eglin felt that the process to draft the new constitution would have to be inclusive for it to be accepted by all South Africans (2007:296). The notion of an inclusive process is congruent with the concept of the Social Contract.

An issue that Eglin was specifically concerned with, was a clause in the constitution that removed members of parliament from their seats should they leave the party in which they were originally elected to the position (2007:302). Eglin contended that this would place too much power in the hands of party leaders and leave no room for party member to express personal views on issues as this could potentially result in a loss of their livelihood. Eglin declared this to be 'contrary to the spirit of the transitional constitution' (2007:302).

On the electoral system planned for the 1994 election, Eglin declared it to be an interim system: 'the electoral system in its very simplistic single list is not going to survive, proportionality will survive but not in the particular form' (Eglin, 1993). In 1994, Eglin continued by saying that 'there's a common view that while you want proportionality to give you the overall fairness, you also need constituencies in order to make people directly accountable' (Eglin, 1994). In 1996, Eglin spoke again of the adding of constituencies to the electoral system, as this would make members of parliament 'directly accountable' to their constituents (Hansard, 1996:251). Eglin continually expressed his concerns regarding the electoral system based on party lists as opposed to on the basis of constituencies. He found that this would not ensure effective proportional representation within government and make members 'agents of their political parties rather than representatives of the people' (2007:302). Eglin's continued support of a more accommodative electoral system, specifically in favour of a constituency based system, is consistent with the arguments that buttress the case for a Social Contract.

Eglin experienced the Constitutional Assembly to be an 'agreed, structured process' (2007:131). He uses the symbol of an, if not quite round, but oval table when referring to the talks during this phase, and notes the importance of the decision-making rule of a two-thirds majority (2007:313). Eglin found that there was 'a great desire to reach consensus all along and that's why smaller parties like the DP were able to play a part' (1996). However, in the

last few weeks before the final date for the submission of the final constitution to the Constitutional Court, Eglin was of the opinion that the 'reality of what was in truth a two-sided negotiating table revealed itself when… Mandela and De Klerk met and decided how the issues would be dealt with' (2007:302). Eglin voiced his concern that several issues that should have been discussed within the Constitutional Assembly had been decided bilaterally (2007:315).

Nevertheless, when it came to voting for or against the new constitution, Eglin said that 'for us to vote against a constitution that is the product of negotiation between all leaders of all sections of the South African people would be for us to turn our backs on the very thing the DP and its predecessors fought for.. [R]ather than concentrating on the negative features we should see the bigger picture and claim to have been part-owners of the historic constitution-making process' (2007:315). Eglin saw himself as a custodian of the constitution, tasked with making sure that the values written in the constitution be 'entrenched and not eroded' (2007:335). This is an indication that the meaning Eglin invested in the Constitution was that of a Social Contract.

Upon adoption of the final Constitution, Eglin highlighted the significance and the importance of 'a special committee of Parliament to keep the constitution under constant review… to ensure that it is adjusted in terms of the needs and requirements of the time' (Hansard, 1996:251). Eglin also places specific importance on the first section of the constitution, saying that when in doubt, 'we… can go right back to section 1 for the founding provisions of our constitution' (Hansard, 1996:250). To argue for this type of ongoing revision is reconcilable with Social Contractarian thinking.

On the issue of capitulation of either of the major parties (the ANC and the NP), Eglin is of the opinion that 'history will show that the only real capitulation was the NP from apartheid. In historical terms that was the real capitulation, the rest is all a mechanistic kind of adjustment, there's no capitulation in that sense' (1993).

Congruent with the formation of the political culture essential to a Social Contract, Eglin notes the DP's commitment to 'enduring values are entrenched not only in the constitution, but also in the hearts and souls of the people of this country' (Hansard, 1993:14257). Eglin is of the opinion that the 1996 Constitution guarantees a continuing multi-party democracy by ensuring regular elections and a place for minority parties in the legislature (1996). However,

Eglin believes that there is an 'inadequate guarantee for property rights' in the 1996 Constitution (1996). Eglin mentions another specific issue on which he feels that the 'intention of the Constitution has not been fulfilled' (2007:360). He finds that the current electoral system (that of a party list system) does not promote the representative democracy originally envisioned, and calls for a revision of this system. He takes specific note that the party-list system is not entrenched in the constitution and that it should be revised in order to reflect the original intention of a representative government (Eglin, 2007:361). This means that the electoral system does not facilitate a process of mutual compromise and accommodation, which is definitive of a Social Contract. It is clear that Eglin was in favour of such a system.

6.2.6. Tienie Groenewald

As the former head of the Department of Military Intelligence, Tienie Groenewald formed part of the 'Committee of Generals' that took part at the Codesa and MPNP negotiations. For this purpose of this study, interviews with Groenewald by The Executive Intelligence Review (1993) and by Patti Waldmeir (1994) will be closely analysed.

Groenewald believed that by 1989 the ANC had been defeated militarily. However, 'the UDF was still operating strongly, the trade union movement was operating strongly, the youth in the schools were still very active' (Groenewald, 1994:6). Militarily, the government could declare a victory against the ANC, but not politically, 'because no political alternative was forthcoming, that was the big problem' (Groenewald, 1994:6).

In an interview with Patti Waldmeir in 1994, Groenewald stated the importance of a political solution as opposed to a military solution to the continuing South African conflict (Groenewald, 1994:3). Groenewald also mentions the problem that negotiators approach the negotiations with different backgrounds and with divergent constitutional thinking (1994:3). On the one side, American liberal thinking was influencing the negotiators. On the other side, the side of the ANC, the thinking was based on the socialist, centralist view, with a strong focus on centralised government, emanating from the Soviet Union (1994:4). He argues that the idea of European federalism was not put on the table at the Codesa negotiations.

According to Groenewald, the negotiating platform consisted of three main political groupings: the NP and its supporters; the ANC/SACP/COSATU alliance and its supporters; and the COSAG (Concerned South Africans Group). Fourteen of the parties at the MPNP are

'controlled' by the NP and the ANC (Groenewald, 1993:29). Groenewald is of the opinion that the COSAG group is 'more representative of the people of South Africa than either the ANC or the Nationalist Party' (Groenewald, 1993:29).

Groenewald was very concerned that the ANC would get joint control of South Africa, which would mean that it had joint control over the Defence Force. He argued that other parties did not have control of armies and as such the 'the playing field becomes very, very uneven. It becomes such that the whole weight shifts toward the ANC. This is not what negotiations are all about' (Groenwald, 1993:30). He continued by saying that the attitude of the ANC up until that point (April 1993), had been 'either you do as we say or else we stop negotiating and we turn to violence, which is a classic communist technique (1993:31).

Groenewald was adamant that before a 'transitional executive council' could be established, the form that the state was going to take should be discussed (1993:30). Groenewald was advocating a 'constitution which will last us for scores of years, a constitution which will really be a final solution and not a temporary solution', arguing that both the ANC and the NP were seeking a temporary solution (Groenewald, 1993:31). Groenewald reasoned that the interim constitution created problems for the ANC – arguing that what held the ANC together was apartheid, and as soon as apartheid went away, the ANC will start to fall apart (1994:15).

Groenewald strongly believed that PW Botha had been the harbinger of change, as opposed to FW de Klerk. Groenewald said that 'all FW did was he climbed on the back of PW and made a complete balls-up of it' (Groenewald, 1994:5). Groenewald also speaks of his disappointment in Roelf Meyer and his negotiating team: 'the first thing that shocked us was the fact that the Roelf team never kept one of their agreements with us, they sided with the ANC on every single issue' (1994:22).

Groenewald's argument that the main decision-makers at the negotiations were not fully representative of South Africa is interpreted here as being hostile to the formation of a Social Contract. His reference to an 'uneven playing field' not being 'what negotiations are all about' is congruent with low-context negotiation. Groenewald voices his concern about the badgering nature of the ANC's bargaining technique. Groenewald is in favour of a long-lasting, permanent constitution, which is reconcilable with a Constitutional Contract. He does however state that FW de Klerk made a complete 'balls-up' of the negotiations, suggesting that he was not satisfied with the solution at that point. This means that a Social Contract

could not be formed, as one of the participants is not supportive of the solution or the negotiations leading up to the agreement.

6.2.7. Tony Leon

As a member of the Democratic Party (DP), Tony Leon became involved in the constitutional negotiations in 1991 at the start of Codesa I. At Codesa, Leon played the part of advisor in Working Group 2, which dealt with how South Africa would be governed in the new dispensation (Leon, 2008:203). In 1994, Tony Leon became leader of the DP. He continued to participate in negotiations until the adoption of the final Constitution in 1996 (Leon, 1998:41). Tony Leon's memoirs *On the Contrary* (2008) as well as a compilation of his speeches *Hope & Fear: Reflections of a Democrat* (1998) provide a significant base for the understanding of his views and beliefs.

In August 1989, Leon made clear his own as well as the DP's commitment to negotiations, to be commenced without delay. He sought a South Africa 'at peace with itself and the world' (1998:14). His party called for 'equal rights, simple justice, economic growth, minority protections, [and] care for the elderly' (1998:16). The DP sought a system which would be inclusive and democratic, with an entrenched Bill of Rights to protect basic rights (1998:16). This type of system, inclusive with a Bill of Rights, is in line with Social Contractarian thinking, if it promotes accommodative behaviour.

After F.W. de Klerk's 2 February 1990 speech, Leon reiterated the importance of accepting a Bill of Rights, which would be adjudicated by an independent court (Leon, 1998:9). He found that the implementation of such a Bill would 'be a bridge over the troubled waters raging in our country – a bridge over the conflicting ambitions of absolute power' (Leon, 1998: 9). To Leon, a Bill of Rights would represent the common ground between the parties in conflict. In this same statement in Parliament, Leon implored the government as well as other politicians to create a 'culture of rights in a climate of liberty' (1998:10). The idea of a 'culture of rights' is associated with the political culture favourable to the formation of a Social Contract. Leon saw liberalism as the common ground between the different schools of thought entering into negotiations (1998:71). He also advocated the 'protection of minorities and accommodation of electoral losers' within a democratic system, though he did not propose a workable model for achieving this (1998:72).

Leon refers to De Klerk's decision to allow Codesa to draft an interim constitution and an elected Constitutional Assembly to write the final constitution as a 'key concession' (2008:202). On the issue of how the constitution would be ratified, the NP proposed a two-thirds majority on all clauses, and a 75% majority for the Bill of Rights. They later conceded dramatically on this, settling on two-thirds majority on all clauses (Leon, 2008:207). After the signing of the Record of Understanding, De Klerk was a 'much-reduced negotiator', having conceded almost all of the NP's 'non-negotiable bottom lines' (Leon, 2008:213). However, Leon also notes that towards the end of 1992, the ANC would also make 'vital concessions' (2008:214). Leon found that the fixing of an election date had a negative impact on negotiations (2008:232). However, Leon mentions that being 'in the public gaze' forced negotiators at Codesa to make progress (2008:216).

In parliament in November 1993, Leon made clear his thoughts on the incumbent NP: according to him, the NP had 'served its historic mission', implying that the NP should be disbanded. (1998:25). The NP was set to be one of the biggest contributors to the final Constitution, which would mean that the DP would be negotiating with a party that they (the DP) did not believe should have a strong position in these deliberations.

In 1993, Leon noted the importance of flexibility in a constitution: 'constitutions which do not bend will in time surely break' (1998:26). He also noted the importance of the Bill of Rights in the Interim Constitution, noting that it would 'move South Africa to that culture of persuasion' (1998:26). As argued in Chapter 3, more flexible agreements within a democratic culture promote the formation of a Social Contract. Leon did, however, find some fault in the Interim Constitution. Leon is not optimistic about the Property clause, claiming that it 'does not provide a coherent right to property at all' (Hansard, 1996:175). He specifically noted the Property Clause as being overly detailed, noting that case law would have provided for all the clauses added by the ANC and the NP (Leon, 1998:26 -27). Constitutional Contracts have the tendency to be very detailed, and Leon shows a clear aversion to this type of agreement. However, Leon refers to the 34 Constitutional Principles as 'immutable', which would make these Principles impossible to deviate from, which would be consistent with a Constitutional Contract (2008:305).

In November 1993, the DP fought strongly against proposals by the ANC and the NP that 'will enable a new state president to effectively veto the nomination of any person proposed for a seat on the new Constitutional Court' (Leon, 1998:43). The DP was deeply concerned

with this agreement between the ANC and the NP, referring to it as a 'bilateral agreement' (Leon, 1998:43). Leon continued to criticise the Technical Committee on only receiving proposals from the NP and the ANC, saying that should this truly be the case, the 'multiparty' negotiations were a ruse for bilateral negotiations between the two main parties (1998:46). Negotiations that are not inclusive generally do not produce the political culture associated with the formation of a Social Contract.

Leon quotes Cyril Ramaphosa's terse remark on the concept of 'sufficient consensus which was implemented during the negotiations: 'it means that if we, the NP and the ANC agree, everyone else can get stuffed' (Ramaphosa, in Leon, 2008:203).Leon is sceptical of the continuing bilateralism during the negotiations for the final constitution.

However, in December 1993, Leon backtracked to say that while it was 'far from perfect', the Interim Constitution (1998:47):

> *...is the product of a process that which by its nature was imprecise, untidy and fractious. If one party, including my own, had been able to say 'This is a 100% victory for us' then the Constitution would have not been the product of compromise, but a treaty of a surrender by one or another party. In truth, the constitutional package which will govern our lives and country for, possibly, the next five years is an amalgam of several crucial factors: firstly, it is an accurate reflection of the balance of power and the constellation of political forces as they stand in November/December 1993 ... therefore, this draft interim Constitution at least holds the promise that it will span the great divide between the old and the new South Africa.*

Leon clearly states that he believes that the Interim Constitution was a product of mutual compromise, which would be favourable to the eventual formation of a Social Contract. When referring to the Interim Constitution, Leon calls it a 'triumph of freedom' (1998:76).

In April 1994, Leon was very critical of the NP's performance during the preceding negotiations, referring to it as 'dismal' and 'flaccid' (1998:29). He specifically mentions some of the 'bilateral deals' made between the NP and the ANC as being overly favourable toward the ANC and falling far short of the NP's goals (1998:29). Leon felt it was very important for not only the NP and the ANC's opinions to be reflected 'n the new constitution, but also the opinions of the opposition (1998:31).

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According to Leon (2008:305), the ANC's dominance (at 62% of the vote) would be reflected in the final constitution. The final constitution would reflect the will of the ANC far more than in the Interim Constitution. However, the ANC had not achieved the required two-thirds majority that would have allowed them to completely dominate the drafting of the final constitution, and the small margin left would be filled by the opposition (Leon, 2008:305).

In his book, *On the Contrary*, Leon takes a quote from Time magazine (2008:235):

> *In one of his typically nonconformist essays, Bertrand Russell once dissected the fallacy of regarding oppressed peoples as morally superior. The fact that they are tyrannised, the British philosopher observed, does not mean that they will perform wonders of nobility and high-mindedness once given their freedom.*

Leon also felt it was very important that the parties in the negotiations 'shed our past identities as victims or vanquished, as blacks and as whites, and seek a common South Africanism' (1998:220). Thinking in terms of victims and perpetrators is an indication of the approach related to the Benchmark Agreement, while attempting to search for common ground and a 'common South Africanism' suggests a Social Contractarian approach.

Leon is specifically negative toward the use of race or gender quotas. He notes that South Africa should be built on 'merit, not quotas' (1998:78; 80). In 1995, Leon continued to openly reject any form of quotas. When Parliament announced that 80% of its posts 'may only be filled by blacks', Leon called it 'reverse discrimination' and added that while past imbalances needed to be addressed, a 'crude system of racial quotas' would not achieve this (1998:225; 231). Quotas are usually an indication of a Constitutional Contract, and Leon's open criticism of this shows a rejection of the rigidity of a Constitutional Contract.

In 1995, Leon stated that 'we need rather to promote it [the Bill of Rights] as a central concept so that all sides – minorities and majorities – will relinquish their claims to absolute power and use the Bill of Rights as an instrument for achieving true reconciliation and justice' (Leon, 1998:32). Leon stated the DP's belief that the Constitution is supreme and 'not just an instrument for party-political manipulation' (1998:37). Leon sought 'common visions for the future and a shared agenda as to how to achieve this', which is an attitude that can be associated with the formation of a longer-lasting Social Contract (1998:82).

On the night before the vote on the final constitution was to take place, Ramaphosa conceded on an issue regarding state subsidies for independent/private schools, according to Leon, 'in exchange' for the DP's vote in favour of the final constitution (2008:311). Leon however was not 'enchanted' with the final draft, as some of his colleagues in the DP were (2008:312).

Leon mentions some concessions by the ANC, including 'considerable protections for minorities at local government level, and… (strictly limited) independent powers for the newly created provinces' (2008:220). While Leon was not completely satisfied with the final constitution, he notes that his party was 'so fixated on signing a deal that a flawed inclusive new order was preferable to the discredited and exclusionary old one; even the negation of a key principle would not cancel our assent' (2008: 224).

In 1996, Leon spoke in Parliament on the adoption of the final Constitution. His findings were that it would institutionalise the rule of law, and that the DP's contribution to the Constitution would aid in building a Democratic South Africa (1998:53). Leon believed that his party had made a significant contribution to the federalist elements within the constitution (1998:55). He found some aspects of the Constitution lacking, and was set to deliver these objections, with specific regard to the Bill of Rights, to the Constitutional Court when it was revising the final draft of the Constitution. The DP found that the Constitution as it stood would not meet the demands of a divided society (Leon, 1998:54).

The DP was specifically displeased with the clause preventing members of parliament from crossing the floor 'on matters of conscience and principle', referring to it as 'undemocratic' (Leon, 1998:54). They argued against proportional representation and rather advocated direct constituencies; were in favour of 'instruments for promoting democracy and accountability' (including the Public Protector and the Human Rights Commission), but concerned that the mechanisms for appointment of these positions would 'allow the majority party to appoint its own watchdogs' (Leon, 1998:55). Leon advocated a constituency-based participative system of local government election instead of the simple party-list system used for national elections. He argued that democracy only works effectively when representatives are held personally accountable (Leon, 1998:259 and Hansard, 1996:438). This type of constituency-based system would be conducive to a Social Contract.

In line with a Social Contractarian view, Leon stated that 'We [the DP] want South Africans to walk the road ahead with a common purpose, a common road map under a common flag'

(1998:56). According to Leon, the 'transformation to democracy' would be 'over' once the final Constitution had been ratified (1998:231). He did however note that the final constitution was 'not the end of the journey towards the new South Africa. It is an important milestone on a never-ending road' (1998:56). Leon believed that building a unified country would entail an ongoing process of nation-building, but within the rule of law, where 'everyone is equal under that law' (1998:210).

Commonly associated with the strict amendment procedures of the Constitutional Contract framework, Leon speaks out on the amendment procedures of the constitution (1996):

> *If you think that the constitution, and I do, provides a reasonable framework for multi-party democracy and for the advancement of fundamental human rights then you mustn't make that document capable of easy amendment. Now in the first draft it was ridiculously easy to amend the constitution, a simple two thirds majority in one chamber. That's now changed to the extent now you've got to have both chambers, on the Bill of Rights you've got to have a certain fixed percentage of the total number, there's got to be a whole process gone through. That is better than it was but if they were really serious about empowering not just minority parties but empowering individual dissent and minority viewpoints and protecting them, then they would have made that Bill of Rights almost impossible to amend or extremely difficult to amend.*

Leon refers to 1994 as 'a new, bold and necessary chapter in the 350-year-old book of our nation and we have to account for the pages and the chapters – many of them soaked in blood, suffering and suspicion – which preceded them' (1998:264). While this may be interpreted as in line with a Benchmark Agreement, Leon's previous allusions to the Social Contract view are significant. Leon's belief in ongoing participatory democracy as well as his criticism of quotas and bilateral negotiation indicates a preference for a Social Contract. Looking back at the period of transition, Leon declares that he is 'humbled and privileged… to be part of a process rectifying that historical wrong [apartheid]' (2008:4).

6.2.8. Mac Maharaj

Mac Maharaj played an important role on the side of the ANC during the negotiations process. He formed part of Ramaphosa's team at the deliberations leading up to the Record of Understanding, and negotiated directly with Fanie van der Merwe of the NP during the

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MPNP. Maharaj notes that while 'they' (the NP government) were 'very very concerned when I came into the negotiations process', they concluded that he was a man of integrity (Maharaj, 1994A). a series of interviews by Patti Waldmeir and Padraig O'Malley provide the basis for the assessment of Maharaj's beliefs and opinions, with a follow up, in-depth interview by the author.

Maharaj explains the act of negotiating as such: 'Compromises and concessions are very interesting for selling a package… Good line, good persuasion, useful negotiating tactic.' (1993). Maharaj states that negotiations between conflicting parties by nature 'mean a give and take and a compromise' (Maharaj, 2000A). Conversely, when O'Malley questions Maharaj on Patti Waldmeir's approach to her book on the negotiations, Maharaj responds that 'Patti's concept is a winner/loser concept and it's a wrong way of approaching negotiations' (Maharaj, 2000B). In 2014, Maharaj stated that 'we started as opponents, and in the process we became partners in a process that took SA to democracy based on one-person-one-vote enshrined in the final Constitution adopted [by] the two houses of parliament sitting together as a Constitutional Assembly' (Maharaj, 2014). Maharaj was very clear that the relationship between the parties involved was 'not static' (Maharaj, 2014).

Referring to the Record of Understanding, Maharaj said that it was not a surrender or sign of defeat on either side. Rather it was 'a reflection of the changed balance of forces internally and externally' (Maharaj, 1997). According to Maharaj, the Record of Understanding reflected the reality: the NP was no longer a legitimate government and represented a minority. Maharaj refers specifically to the Record of Understanding of 26 September 1992 as a point where the negotiations where 'irreversible' (2014).

In 1994, Maharaj admitted that while he had realised that negotiations were inevitable, the ANC approach would have to be to 'pursue a strategy that doesn't say we are heading for negotiations. Build your strength so you can wage the struggle for any eventuality' (Maharaj, 1994B). Maharaj was not entirely committed to the negotiations, showing that he would like the ANC to maintain another source of power, perhaps in order to create leverage. However, in 2014 Maharaj said that from De Klerks's February 1990 speech 'the ANC committed itself to mounting all-round pressure to ensure that formal negotiations took place' (Maharaj, 2014).

In 1993, Maharaj claimed that the ANC used the argument of certain deals being hard to sell to their grassroots supporters as enhancing 'the moral high ground' (Maharaj, 1993). On the unilateral suspension of the armed struggle before the August 1990 negotiations which lead to the signing of the Pretoria Minute, Maharaj says that the ANC asked itself what it could do to gain the moral high ground in order to force the NP to 'respond in kind' (Maharaj, 2000B). This continued referral to the moral high ground as a bargaining chip is congruent with a Benchmark Agreement.

In an interview with Patti Waldmeir in 1995, Maharaj admits that he was 'very disgusted with FW [de Klerk] as a person' (Maharaj, 1995A:1). Maharaj continued to note his negative feelings on De Klerk, likening his experience to that of Nelson Mandela's losing confidence in De Klerk. According to Maharaj, De Klerk 'likes to behave like he knows, he is going to tell us how to run government' (Maharaj, 1995A:2). Maharaj found De Klerk he couldn't relate to De Klerk, and referred to De Klerk as 'pretty racist' (1995A:2). Maharaj found Meyer to be a 'difficult guy', referring to him, as well as 'their culture', as 'very officious' (Maharaj, 1995A:14).

Regarding the issue of trust, Maharaj is ambivalent. He notes that he 'never approached FW [de Klerk] from the point of view do I trust him or don't I. I accepted that he will try and slip something past us' (Maharaj, 1999). He continues by saying that (Maharaj, 1999):

> *…trust is not the issue for me. What is important is that you recognise that you are rivals sitting at a table, that you are seeking an outcome which will give you as a particular political force greater space to gain advantage from it but that you conduct yourself in such a way that no matter how much heat is generated at the moment you are constantly keeping your eye on the ball, that you are not engaged in negotiations simply to bring it to an end so that you can revert to the earlier status quo.*

Maharaj's continued negativity towards De Klerk as well as Meyer would make the formation of a Social Contract almost impossible. Maharaj does not believe that trust is necessary for negotiations, and as such is a value position that is not compatible with the political culture needed to nurture a Social Contract.

On the draft constitutional proposals of 1993, Maharaj felt that a win-win situation had been created, but that the IFP was curbing the final agreement by refusing 'to accept a situation

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where all can emerge as winners' (Maharaj, 1993). However, on the Interim Constitution, Maharaj found that the 'other side' (the NP) held 'third power in hoping to co-opt us… we must understand the sunset clauses and the negotiating process' (1995A:4). Maharaj was hoping to manipulate the power relationship so that the ANC 'will be in the position to say now we have created the condition where we can co-opt them for our needs' (Maharaj, 1995A:4). This shows an inclination toward thinking about the negotiations process as a more fluid and changeable agreement in the form of a Benchmark Agreement. Maharaj was hoping to change the power relationship in such a way that the ANC held the stronger position and could impose its will unilaterally.

On the issue of the Sunset Clauses and creating a vice presidential post for FW de Klerk, Maharaj said that the ANC waited to deliver this idea until they knew that both the ANC and De Klerk's personal interests could be accommodated (Maharaj, 1995A:13). By April 1995, Maharaj found that the 'transition was moving smoothly' and that they had 'it on track' (1995B). Maharaj considered the right wing to be under control, and on the issue of the economy, he noted that the ANC was ready to commit to an agreement 'that all of us can agree with' (Maharaj, 1995B).

The issue of amnesty had proved a contentious area in the negotiations. The wording finally settle on was that there 'shall be amnesty', which according to Maharaj meant 'not that there may be amnesty, but that there shall, a mandatory form' (1998). Maharaj refers to the issue of amnesty being settled by means of a trade-off for the decision-making procedures in the cabinet: 'that meeting did not even spend five minutes after we settled the post-amble [concerning amnesty] on a discussion which is what agendas on the cabinet decision making' (Maharaj, 1998). Trade-offs are usually found in a Constitutional Contract.

While recognising that the NP would continue to push for permanent power-sharing, Maharaj was certain that an elected Constituent Assembly would not permanently entrench power-sharing (1993). In the period of five years in which the Government of National Unity would rule, 'the arrangements must be such that there cannot be a denial of majority rule. They must be such that they lead the country towards majority rule, an acceptance of majority rule' (Maharaj, 1993). However, in 2014, Maharaj said that he 'would assert that both in the period of the GNU and up to the present, it is seldom that cabinet decisions are arrived at through a formal vote' (Maharaj, 2014). Maharaj is adamant that while the ANC was elected 'by overwhelming majority', they continued to seek a 'spirit of consensus' (Maharaj, 2014).

On the settlement itself, Maharaj believes that it 'favoured all parties in the sense that it created the conditions where all parties could take advantage of it and benefit from it' (1997). He stated that the NP failed to make use of this opportunity by continually trying to weaken the ANC, while Mandela negotiated to become 'better and stronger' (1997).

Referring to the term 'consensus-seeking spirit', Maharaj (2014) states that it meant that members of the coalition, specifically the ANC, the IFP and the NP, would be involved in 'considerable discussions' and agreements would reflect 'compromises that each of the coalition partners could live with.' Maharaj does however mention that the 'requirement of consensus-seeking does not feature in any of these [34 Constitutional] principles' (2014).

Maharaj felt that throughout the negotiations, the NP had tried to 'co-opt' the ANC, but that the ANC had anticipated this strategy and had avoided it. He said that 'we [the ANC] only carry out that negotiation with that perspective with the view that once April takes place there'll be a changed relationship where our objective would be to co-opt them because we now sit in that framework' (Maharaj, 1995B). Maharaj was very clear that by 1999, the constitution would not include 'enforced coalition' (1995B). Maharaj also says that 'views are not immutable, the Constitution is not mechanical. It will change. That's the nature of the convention of ideas' (2014). Maharaj continues to mention the changing power relationship and the ability of co-opting one's opponent once that relationship has changed. This type of thinking is associated with a Benchmark Agreement.

6.2.9. Nelson Mandela

As a prominent leader within the ANC, Nelson Mandela played an integral role in the secret meetings leading up to the negotiations in the early 1990s. He was elected president of the ANC in July 1991, having been interim leader since his release from prison. He remained president of the ANC throughout negotiations, and became President of South Africa in the 1994 election. While not officially labelled as negotiator during the negotiations, Mandela was tasked with breaking deadlocks with NP/government leader F.W. de Klerk as well as leading the ANC's decision-making during the process. From his memoirs *Long Walk to Freedom* (1994) as well as a compilation of previously unpublished works, *Conversations with Myself* (2010), insight into Mandela's beliefs and opinions during the negotiations may be gained.

In a letter to F.W. de Klerk in December 1989, Mandela made clear his resolution that talks were the only way forward for South Africa. Mandela explained that the ANC's willingness to enter into negotiations would serve as the 'honest commitment to peace' that the government had requested, refusing to suspend the ANC's armed struggle (1994:543). Mandela continued to say the he was in full support of the ANC's Harare Declaration, which 'put the onus on the government to eliminate obstacles to negotiations that the state itself created… [including] the release of political prisoners, the lifting of all bans on restricted organizations and persons, the ending of the State of Emergency and the removal of all troops from the townships' (1994:544). Mandela also noted that without a commitment to a ceasefire from both sides, no talks could take place.

In a meeting with De Klerk in December 1993, Mandela rejected outright the NP/government's proposal of group rights. Mandela saw this as a way to preserve 'white domination' and told De Klerk that is was 'unacceptable' (1994:544). However, after this meeting, Mandela found that De Klerk was 'a man we could do business with' (1994:545). For a Social Contract to form, opposing parties need to revaluate their perceptions of each other. Here, Mandela was learning that he could work with the enemy.

Mandela knew that there was a 'middle ground between white fears and black hopes', opening the way for negotiations (1994:559). All pre-negotiations (including those held in secret) had led Mandela, and with him, the ANC, to believe that a contract zone existed. Without both parties realising the existence of a contract zone, no negotiations could take place. However, Mandela found that just the fact that negotiations were going ahead was a victory for the ANC, because it meant that the government could not sustain apartheid any longer, and a show of the government's weakness, and it signified what the ANC had been fighting for (1994:583). In an interview with Patti Waldmeir Mandela said that the struggle of the ANC was 'to normalise the country's political and economic situation. These negotiations are a milestone in it.' (Mandela, 1992:1).

According to Mandela, the ANC's mission, as well as his own goal was a 'non-racial, united and democratic South Africa based on one-person, one-vote on a common voters' roll' (1994:560). In Mandela's view, De Klerk's goal was a power-sharing system based on group rights. For the ANC, this would mean continued minority power in South Africa: exactly what they had been fighting against. De Klerk was strongly opposed to winner-takes-all majoritarianism, calling for proportional representation. He continued to seek some form of

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minority veto. Mandela was strongly opposed to this in any form. He referred to is as 'apartheid in disguise, a 'loser-takes-all' system' (1994:569).

Arguing for the suspension of the armed struggle in 1991, Mandela stated that it 'was necessary to show our good faith' (1994:578). In an interview with Hermann Giliomee in 1992, Mandela said that the greatest concession that the ANC had made at that point was the suspension of the armed struggle (Mandela, 1992:7). He reiterated the ANC's commitment to peace, 'because we had no other alternatives' (1992:4). By May 1991, the relationship between the opposing parties was changing. Mandela quotes Thabo Mbeki as saying that 'each side had discovered that the other did not have horns' (1994:570). A fundamental redefinition of opponents was taking place. The meetings between the parties 'represented… an end to the master/servant relationship that characterised black and white relations in South Africa. We had the meeting not as supplicants or petitioners, but as fellow South Africans who merited an equal place at the table' (Mandela, 1994: 570). Entering negotiations on equal standing is a low-context negotiation indicator, placing this type of thinking into either the Constitutional Contractarian or Social Contractarian conceptual frameworks.

The ANC campaigned fiercely for an elected constituent assembly to draft the new constitution (Mandela, 1994:570). The agreement reached on the first day of Codesa was the 'minimum acceptable constitutional threshold for the new South Africa', including a Bill of Rights, a multi-party democracy, and the supremacy of the constitution. The constitution would be safeguarded by an independent judiciary (Mandela, 1994:587). However, after a scathing closing speech made by F.W. de Klerk and a contemptuous retort by Mandela, Mandela felt that 'much trust had been lost' (1994:589). Without trust and good faith from both sides, the evolution of a Social Contract would be unlikely.

After the referendum held by the NP/government in 1992, Mandela found that the NP/government 'toughened their negotiating positions', emboldened by the support that the referendum had received (1994:590). Mandela did not believe that this was a smart move by the NP/government. Mandela attributed the breakdown of Codesa II to the NP/government's 'insistence on an unacceptably high percentage of votes in the assembly to approve the constitution (essentially a back-door veto); entrenched regional powers that would be binding on a future constitution; an undemocratic and unelected senate that had veto power over legislation from the main chamber; and a determination to make an interim constitution negotiated by the convention into a permanent constitution' (1994:595).

In a draft letter to F.W. de Klerk in 1992, Mandela wrote that he found contradictions in De Klerk's behaviour, specifically regarding his lack of action to curb the ongoing violence, which undermined his perception that they were both acting in good faith (Mandela, 2010:334). After the terrible surge of violence at Bisho, both sides tried to rebuild good faith within the negotiations (Mandela, 1994:597).

The ANC continued to oppose the idea of power-sharing. When Joe Slovo proposed a Government of National Unity that would expire after five years, after which the ANC would attain its goal of simple majority-rule government, the ANC considered a shift in their position (Mandela, 1994:598). The cabinet in the GNU would make decision by consensus and not as suggested by the NP/government, by a two-thirds majority.

According to Mandela's view, the NP/government 'gave way on our insistence on a single ballot paper of the election' (1994:603). In the sequel to his autobiography, which was partly published in the book *Conversations with Myself* (2010), Mandela notes the 'core principle of the Freedom Charter which declares that South Africa belongs to all its people, black and white' (2010:357). He also notes the rule of law, noting that no one, including the President, is above the law in South Africa (2010:357).

After accepting the Nobel Peace Prize together with F.W. de Klerk in 1993, Mandela praised De Klerk for having 'the foresight to understand and accept that all the people of South Africa must, through negotiations and as equal participants in the process, together determine what they want to make of their future' (Mandela, 1994:604). Mandela also notes in his autobiography that '[t]o make peace with the enemy, one must work with that enemy, and that enemy becomes your partner' (1994:604).

The ANC won a 62.5% majority in the 1994 election. Some within the ANC were not satisfied with the result as it missed the crucial two-thirds majority it had needed to write the constitution without input from other parties. Mandela, however, was 'relieved', knowing that without the input of other parties, 'people would argue that we had created an ANC constitution, not a South African constitution' (1994:611). Mandela is clearly not in favour of unilaterally writing the constitution, instead advocating a shared ownership of the constitution. In 1992, he stated that the African and Afrikaner nationalism were 'going to become combined and solve the problems of the country' (1992:3). Redefining one's

opponent and creating a shared ownership of the agreement is associated with the political culture conducive to the formation of a Social Contract.

6.2.10. Thabo Mbeki

Thabo Mbeki, who would later become president of South Africa, played a vital role in the secret meetings leading up to the substantial negotiations in the early 1990s. Mbeki was present at the Groote Schuur Minute, and started out as leader of the ANC's negotiating team. He was later replaced by Cyril Ramaphosa. At Codesa I and Codesa II, Mbeki lead the ANC's team in Working Group 3, and he was part of Ramaphosa's team at the MPNP. The assessment of Mbeki's views relies primarily on two interviews conducted by Patti Waldmeir (1995A; 1995B) as well as a book of his speeches (Corrigan, 1999).

Mbeki specifically mentions what the NP has 'lost' and what they have 'gained'. According to him, the NP has not lost 'whatever prosperity they had, they haven't lost language and a whole manner of things', nor has the transition had a 'negative material impact on them' (Mbeki, 1995A:3). What the NP has gained, according to Mbeki, is 'a rediscovery of South Africaness – they are proud to be South African' (Mbeki, 1995A:3). He also finds the new political arrangements to be beneficial to the NP, adding that having a deputy president and several cabinet ministers meant that the NP was 'very much part of the process of governing the country… So I think in reality in terms of the trappings of power they think they have got a fair share and they probably have' (Mbeki, 1995A:3). Mbeki does not believe that anyone on the side of the NP could have 'produced a result that was any different' (Mbeki, 1995A:8). Arguing in terms of wins and losses falls in line with a Constitutional Contract.

In a book of speeches and quotes by Thabo Mbeki, *Mbeki: His Time Has Come*, compiled by Corrigan (1999), some insight into Mbeki's opinion on the 1993 and 1996 constitutions can be identified. More specifically, at a business conference in London in September 1990, Mbeki defined what the ANC meant by majority: 'When we speak of a majority, we refer to a political majority and not one that is defined in racial or ethnic terms. At no stage have we ever spoken of black majority rule' (Mbeki, 1990, in Corrigan, 1999:23).

In 1995, Mbeki assured the media that the ANC was not drafting an 'ANC constitution', but rather a constitution that could be supported by all South Africans (Mbeki, 1995, in Corrigan, 1999:23). That same year in a speech made in Vienna, Mbeki stated that 'nobody would lose and everybody would gain from sharing a common nationhood' (Mbeki, 1995, in Corrigan,

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1999:33). At the same conference, Mbeki spoke of the development of a national consensus on 'the basic constitutional and political requirements which would assure everybody that they are assured of equal and inalienable rights in a free and prosperous society' (Mbeki, 1990, in Corrigan, 1999:23).

Mbeki is of the opinion that over the years that it took from negotiations to the elections, 'some kind of consensus about some things' was forming among the participants (Mbeki, 1995B). Mbeki believed that all the parties involved had one purpose: 'to get rid of apartheid and the consequences of apartheid' (Mbeki, 1995B). Because of this, Mbeki held that a 'more classical opposition' party would only emerge in time.

Mbeki is convinced that all parties had to make compromises to achieve the outcome, and the no party will be 'happy with all its provisions' (Hansard, 1996:91). He mentions specifically the Property Clause as a provision that the ANC was unhappy with, but had complied with in the spirit of 'give-and-take' (Hansard, 1996:91). In the same speech in the Constitutional Assembly in 1996, Mbeki identified the final Constitution as 'another peg in the negotiated transition process begun in 1990, but we have not yet completed that process' (Hansard, 1996:90). This type of argument is usually found in negotiators congruent with a Benchmark Agreement.

In 1998, Mbeki stated that the ANC-run government believed that 'any changes to the constitution must reflect a broad consensus. It must also involve not only the other parties in Parliament, but also the citizens of the country, who have already played such an important role in drawing up the constitution' (Mbeki, 1998, in Corrigan, 1998:24). This focus on a consensus among participants is reconcilable with Social Contractarian thinking. However, Mbeki is later quoted as saying that 'the negotiations for an interim constitution were "contrived elements of a transition" necessary to end white domination. At no time did the ANC consider them "as elements of permanence"' (Giliomee, 2012:361). Mbeki felt that the constitution 'is meant to overhaul and redress socio-economic distortions and imbalances which are so deeply embedded in the fabric of society… the task of maintaining and defending the unity and the integrity of the state should be done with appreciation and sensitivity to the rich diversity of our demography, ethnicity, language, culture and environment' (Mbeki, 1995, in Corrigan, 1999:23). This type of thinking is usually exhibited when seeking an agreement akin to a Benchmark Agreement. Mbeki's opinion shows indications of all three categories.

6.2.11. Roelf Meyer

Roelf Meyer replaced Gerrit Viljoen as chief negotiator on the side of the NP/government in May 1992. Meyer was Minister of Constitutional Affairs in De Klerk's cabinet and chairman of the cabinet sub-committee on negotiations, and chief negotiator. Meyer would continue to be chief negotiator throughout the MPNP. Several interviews with Meyer conducted by Padraig O'Malley as well as some interviews by Patti Waldmeir and the author provide the basis for the assessment of Meyer's opinions and beliefs regarding the 1993 and 1996 Constitutions.

Meyer talks specifically about the period between May and September 1992 during the negotiations as bringing about 'credibility' and a feeling of mutual trust between the ANC and the NP. Meyer beliefs that the NP and the ANC 'started as opponents, even enemies. We were part of parties lined up against each other. Later, we started to understand and respect each other and this lead to trust. There was not trust at the beginning, but at the same time we took an interest in one another' (Meyer, 2014). He believed that the ANC wasn't certain that the NP was serious about a democratic outcome and holding on to minority rights (Meyer, 1994A). Meyer refers to the NP's strong approach after the emboldening effect of the referendum in March 1992 as being a mistake in the building of trust, believing that they could put more pressure on the other side. Meyer is adamant that without the trust-building of the May-September 1992 period, neither the Government of National Unity nor the elections would have been successfully brought about.

During the negotiations it was decided that the interim constitution would be changed after the elections. In June 1992, it was decided that a new and final constitution could only be ratified by a two-thirds majority (Meyer, 1994A). Meyer saw this as a 'continuous process of constitution-making'. Meyer identifies this as well as the formulation of the power-sharing in the executive as concessions made by the NP (1993). Meyer's view on the outcome is that 'it worked out in the end better than I even hoped for throughout the period of four years' (1994A). Meyer refers back to the unilateral decision of the setting of a fixed timeframe and keeping to that timeframe as integral to the process (1994A).

Meyer is convinced that (Meyer, 1994B:9):

> *…the solution that we arrived at on the one side, we gained more than we expected,*
> *and on the other side we probably lost more than we expected, and in that sense not*

probably for FW [De Klerk] only, but for others too. The way in which the power-sharing model was to some extent reduced was not what they intended originally. But on the other side, I must say that the approach that we have outlined at that stage, '91 and even still during the first part of '92, was not a workable model, it was not even something that could work, could produce a result. I mean, even looking back at the situation now where we are today, it would have been a disaster to have that kind of rotating presidency as the executive model… I think it was at no stage a realistic model.

Meyer mentions the relationship between Mandela and De Klerk as being strained from Codesa I until after the election, noting that Mandela had lost trust in De Klerk. Meyer believes that this lack of trust was detrimental to the process (Meyer, 1994B:13). When asked about his working relationship with Cyril Ramaphosa, Meyer notes their difference in negotiating styles but recognition on each side that the other person 'means best for the country' (Meyer, 1994B:14). He refers back to the NP's negotiations in Working Group 2 as not being 'in the best spirit of negotiations' as they took different positions on the issues 'from almost day to day' (1994B:14).

In a public lecture given by Roelf Meyer and Cyril Ramaphosa on the 28th of June, 1996, in Belfast, Ireland (transcribed by Padraig O'Malley), Meyer talked about letting go of prejudices, noting specifically F.W. de Klerk's willingness to surrender power. He stated that the NP 'always thought that we could tell the other side what to do, because we were in government. It was only when we realised that was not the way to resolve things that things started to moved forward' (O'Malley, 1996:18). In an interview with Patti Waldmeir, Meyer mentions the fact that the NP had to 'fight against the historic background' (1995A:10). He knew that ' there was only one way to find a negotiated solution and that is to bring a balance on how to share power in the country, for us to give up and for them to take' (Meyer, 1995A:11).This notion of changing perceptions and a fundamental redefinition of the conflict is associated with the Social Contractarian thinking. Meyer also praised the fact that Mandela did not hold on to the grudge of apartheid, or continually refer back to the atrocities committed during this time (1996:18). Meyers argued that by being prepared to 'let bygones be bygones', the process continued to move forward constructively (O'Malley, 1996:19).

Meyer explicitly states the importance of the NP's reassessment of the problem in South Africa: '…it was only when we decided that we were facing a political problem [as opposed

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to a security problem] that we were forced to the conclusion that we had to look for a political solution to the problem. Which meant we had to sit down and find the negotiated political answer' (O'Malley, 1996:20). The realisation that negotiation is the only viable option creates a situation conducive to the formation of a Social Contract, as parties refrain from enegaing in other activities in order to advance their ideals and show commitment to negotiations, which provides a basis for mutual trust. Realising that the problem could not be resolved by the NP government alone, and that other parties, more specifically the ANC, would have to be involved, created a platform from which a Social Contract could be formed. To Meyer, it was also important that negotiators attempt to form an understanding of each other's positions (1996:20). This is also reconcilable with the Social Contract.

Meyer believes that it would not 'be good for the country for one party to have that much power' (should the ANC win the 1994 elections with a two-thirds majority) (1994C). However, Meyer was of the opinion that the ANC would not 'be so concerned about writing their own constitution because they are basically happy with the existing constitution. This constitution will remain' (Meyer, 1994C).

Meyer was optimistic that the ANC would concede on a continuing model of power-sharing after the initial period of five years, noting that the 'transition' will not be over within that timeframe (Meyer, 1995B). While the exact composition of the power-sharing arrangement may change, Meyer believed that 'for the sake of further stability, the concept of … the Government of National Unity should be extended for a further period at least' (Meyer, 1995B). Meyer realised that for there to be 'non-racial cooperation' in the country, some type of 'mechanism' would have to be entrenched (1995C). He suggested the continuation of the Government of National Unity, or something based on the model. Meyer believed that without such a mechanism, there would be a 'polarisation between black and white' (1995C). This type of mechanism is congruent with one of the conceptual properties of a Social Contract. According to Meyer, proportional representation can be used in order to 'allow political parties to act as vehicles for minorities' (Meyer, 1990). In the Constitutional Assembly in 1996, Meyer noted his belief that 'constitution-making never stops' and that the Constitution should hold a mechanism which facilitated this, ensuring that the Constitution remain 'a dynamic document' (Hansard, 1996:155).

By the end of 1995, Meyer was convinced of the 'spirit' prevailing in the Constitutional Assembly: 'I think amongst the other parties the spirit that prevails is that we would like to

find general consensus on the new constitution. In other words that there would not even be, look for a vote, but rather overall general consensus' (Meyer, 1995C). The continuing 'spirit of consensus' is indicative of the political culture that typifies a Social Contract. Meyer finds that the respect for individual rights is the 'core of the spirit of the Constitution… This was the key n ensuring that no one is superior to the other' (Meyer, 2014). Meyer also spoke of the need for 'collaborative decision-making' as forming part of the spirit of the agreement. This type of decision-making is indicative of Social Contractarian thinking.

After the adoption of the final Constitution in 1996, Meyer reiterated the negotiations' focus on consensus: 'I think it remains one of the smaller miracles of the whole process right from the start up to the very last moment on 8th May that the intention remained amongst the ANC, National Party and most of the other parties too to arrive at a constitution that could be adopted through consensus' (Meyer, 1996A). He believed that the search for consensus was the driving force not only at Codesa and the MPNP, but also in the Constitutional Assembly. Meyer is adamant that the ANC 'fought hard to get a constitution through consensus' (1996A).

Meyer highlights the fact that opposing sides had differing expected outcomes, but one point on which there was clear agreement was the 'paradigm of equality, the equal status of individual rights' (Meyer, 2014). Meyer refers specifically to the Bill of Rights as espousing this, and that with the Bill of Rights 'we overcame the paradigms of the past' (Meyer, 2014).

Regarding the Property clause, Meyer stated that it was 'a give and take situation right up to the very end and the ANC I think in some respects gave quite a lot at the end' (Meyer, 1996A). The Education clause 'was also a question of give and take, but there on both sides' (Meyer, 1996A). This type of give and take argument is usually indicative of Constitutional Contractarian thinking. Just before the vote on the 1996 Constitution, Meyer tasked NP adviser Rassie Malherbe with drawing up a list of the items that the NP had lost/won during the negotiations (also mentioned in Chapter 4). Meyer states that there was a need for an 'objective' look at the negotiations up until that point (Meyer, 2014). This type of 'balance sheet' gives insight into the mind-set of the NP members at the time, which is congruent with Constitutional Contractarian thinking.

On the issue of the electoral system, Meyer notes that the system was built on the basis of compromise: 'It was thought at the time that the proportional list system would help ensure

that smaller parties are not overrun by bigger parties, and that a system of constituencies would be overrun by one party' (Meyer, 2014). He does however concede that South Africans need to reflect on whether this was a true assessment, advocating the start of a new debate on the electoral system. He is in favour of a more 'practical system, like the German system which is a mix of proportional list and constituencies' (Meyer, 2014). Meyer also very clearly states that changing the electoral system 'won't affect the agreement' (Meyer, 2014).

Meyer mentions the NP's gains and losses in a typically Constitutional Contractarian statement in the Constitutional Assembly in 1996 (Hansard, 1996:194):

> *If one looks at the overall perspective –and various speakers on the side of the NP have, of course, indicated our positions on various chapters of this constitution and stated where we were either totally happy with the contents, satisfied with the compromise reached or unhappy with the end result – and if one puts all those in a basket and weighs them in terms of a profit and loss account or a balance sheet, so to speak, then I think one can say that the overall impression is that we have effectively achieved the goals that we have set for ourselves in terms of this process.*

Meyer concedes that had the NP written the constitution, there are elements that would differ. However, he is of the opinion that (Meyer, 1996B):

> *…the constitution to a great extent remains a compromise on some critical issues, on matters of principle in some cases but that is not the point. I think we have a product that we can be proud of. It's almost an idealistic constitution in the sense that it sets a set of ideals to which we can aspire and hopefully implement over the time to come as far as society in general is concerned.*

Meyer reports that he 'felt good' about the Constitution: 'I personally felt very strongly about this constitution. Three quarters of my life went into it over the last six years and I feel personally so emotionally committed and involved in it that I almost can say it's my constitution' (Meyer, 1996A). Meyer identifies three key factors to the success of the negotiations: (1) trust; (2) the inclusive nature of the process; and (3) taking ownership of the process by not allowing the interference of a third party (Meyer, 2014). Meyer places an overwhelming importance on the element of trust and trust-building, which places his statements within the Social Contract framework.

When reflecting on the final result, Meyer considered that his 'ego was probably satisfied with the result I could show at the end of the day, if that was important but my approach was rather to look at the score board, not how I could personally behave but what I could achieve and to go back to my principle and say well, there it is' (Meyer, 1995A:12). This argument in terms of a 'scoreboard' is congruent with one of the indicators associated with the Constitutional Contract.

As to whether the agreement has or will change, Meyer stated that 'as time goes on, generations will find ways to improve and change the Constitution. The Constitution can be amended with majority support; there must be an overall desire for the change, that's why there are in built majorities for changing the Constitution.' Meyer's focus on an accommodating mechanism as well as trust and consensus is also reconcilable with the Social Contract. According to Meyer, 'until today there have been no breaches of this contract. The Constitution is one point of reference South Africans can still agree on' (Meyer, 2014).

6.2.12. Valli Moosa

Valli Moosa was involved with the United Democratic Front and formed part of the ANC's negotiating team at the MPNP. Moosa served as 'co-convenor' in Working Group 2 at Codesa (Moosa, 1992). Moosa talks about the challenges faced within the ANC during the negotiations. The ANC faced the dilemma of 'determining what was within the realm of possibility and at the same time keeping with the overall objectives of the liberation movement and fighting for that inside the ANC itself' (Moosa, 1994A). Interviews with Moosa by Patti Waldmeir as well as Padraig O'Malley from 1991 to 1998 give insight into his values and opinions for the purpose of this study.

In 1991, Moosa stated that the ANC leadership had 'lost confidence in De Klerk' (Moosa, 1991). To him, trust was not an essential component of negotiations: 'negotiations take place between adversaries otherwise there is no point in negotiating… We have never trusted them and I don't think we are ever going to trust them, but that does not mean negotiations cannot take place' (Moosa, 1991). He continued by saying that the ANC had to 'mobilise the strength we have to bring them to the point where they would have no choice but to adhere to agreements arrived at.' Changing the political playing field so that agreements happen in the party's favour is an indicator associated with the Benchmark Agreement.

On the NP/government negotiators, Moosa says that he 'didn't think they were smart' and that he 'wasn't impressed by them' (1992). Moosa is adamant that the NP were not negotiating 'for altruistic reasons', but rather that they would not settle for an agreement 'which meant that there was nothing in it for them' (1994B). According to Moosa, the ANC had to determine what it was the NP wanted. He mentions that the ANC was specifically concerned with the civil service: 'The civil service would not make the settlement happen if it meant the day after elections that they all walked the streets, lose their pensions and walked the streets' (Moosa, 1994B). The ANC could deal with this concern by introducing the idea of the sunset clauses, and Moosa noted that the ANC 'had to accept from our side that a negotiated settlement entails compromises. We have to compromise somewhere or we are not serious about a negotiated settlement' (Moosa, 1994B). Moosa was prepared for compromise, but argues against any compromise that would 'prevent democracy in itself' (1992). This type of quid pro quo argument is associated with Constitutional Contractarian thinking. He realised that for participants to accept the agreement, they had to feel that they had a part in it (Moosa, 1994B).

In November 1993, Moosa stated that 'the settlement package is very, very favourable from our [the ANC's] point of view' (Moosa, 1993). He continues by saying that not only does the Interim Constitution pave the way forward for elections, but also 'begins in earnest the entire process of democratising the state' (1993). Moosa notes that the Interim Constitution is 'long, it's convoluted, [and] it has all sorts of details in it…' (Moosa,1995B). To him, the Interim Constitution played the role of an 'instrument' for the South African transformation.

According to Moosa, the ANC did not necessarily view the Interim Constitution as a starting point for the new constitution, but instead saw the Constitutional Assembly as drafters of a completely new constitution (Moosa, 1995A). He states that while the negotiations at Kempton Park (Codesa and the MPNP) were aimed at negotiating a settlement, the Constitutional Assembly were drafting a new constitution; 'the best constitution this country should have' (Moosa, 1995A). He believed that while it would be better to adopt a constitution by consensus, a lack of support of specifically the IFP would not halt the process.

Moosa pledges his loyalty to the 1996 Constitution (1998):

> The ANC is of the view that the SA constitution represents and embodies the values
> of our struggle and therefore the ANC will always and must protect this

constitution, uphold it, protect it and mobilise loyalty towards the constitution. The core values of the constitution are set out in the open lines of the constitution, section one of the constitution called 'Founding Principles', and those are values that should always be deeply respected.

This feeling of ownership is congruent with Social Contractarian thinking. He also points out which aspects of the 1996 Constitution are most important to him (1998):

...values which talk about the pursuit of equality, non-racialism, non-sexism, multiparty democracy, etc., regular elections. If you tamper with those principles you are in fact overthrowing the constitution, that's what you're doing if you amend provisions in the constitution which provide for universal adult franchise, multiparty democracy, regular elections, you are in fact overthrowing the constitution.

Moosa (1996) refers to any form of discrimination, be it race, gender, religion or sexual orientation as 'unconstitutional'. He does however concede that certain aspects of the Constitution may require amendment occasionally (1998). He notes that changing the Constitution with a two-thirds majority is sticking to the original agreement, and that such a change would hinge on this rule (1998).

Moosa advocated a system of proportional representation as he believed that this would guarantee parties with enough support a place, and a say, in the Constitutional Assembly (1991). On the local level electoral system, Moosa states that 'in any local authority area one should have at least 30% of all the councillors, which is what the case would be now, at least 30% of all the councillors should be from the former white local authority area. It also means of course that at least 30% would be from the former black local authority area. It's a kind of a softening of the impact of democracy on those that fear it' (Moosa, 1995).

Moosa advocated a 'lean, short and easy to understand' constitution (Hansard, 1995:113). He identified the importance of avoiding 'unnecessary details so that the constitution become a durable constitution and so that it does not become obsolete after a few months, requiring numerous amendments' (Hansard, 1995: 114). Moosa was also against the use of numerical values in the constitution: 'once we have put such numbers in a constitution, we could find after a year or two that those numbers are wrong. The need to change them again would begin to question the actual durability of our constitution' (Hansard, 1995:114 – 115). Moosa

reiterated the view that all parties in the Constitutional Assembly sought consensus on the final Constitution (Hansard, 1996:17-18). This type of constitution is reconcilable with Social Contractarian thinking.

Moosa repeated the ANC's view that human dignity was the basis of the final Constitution, placing enormous importance on the first clause of the constitution (Hansard, 1996:238). Moosa believed that the final Constitution had entrenched 'a mechanism to ensure that people co-operated with one another' (Hansard, 1996:239). In interpreting the 1996 Constitution as being such a type of mechanism, he endorsed the view that Constitution was to serve as a Social Contract.

Moosa's opinion can be interpreted as vacillating between a Benchmark Agreement, a Constitutional Contract and a Social Contract. However, his focus on consensus as well as his argument against numerical values are reconcilable with the Social Contract.

6.2.13. Cyril Ramaphosa

Cyril Ramaphosa replaced Thabo Mbeki as lead negotiator of the ANC and proceeded to lead the ANC's negotiating team in Codesa I, Codesa II and the MPNP. During the Codesa negotiations, Ramaphosa took the lead in Working Group 2, which was set to define general constitutional principles and the mechanism for writing a new constitution. In his biography on Ramaphosa, *Cyril Ramaphosa*, Butler (2007:ix) writes that Ramaphosa is 'invariably unrevealing about his beliefs and opinion', but a close reading of several interviews conducted with Ramaphosa provide insight into his personal beliefs.

Before 1976, Cyril Ramaphosa had a clear idea about whites: they were the enemy, and responsible for the suffering of blacks. White people 'were not to be trusted' (1995A:4). After going to prison and being released in 1977, Ramaphosa made a fundamental shift away from this type of thinking. He realised that in order to realise the objectives of the ANC's struggle, he had to come to the realisation that 'there were whites we could actually work with' (Ramaphosa, 1995A:4).

In a public lecture given by Roelf Meyer and Cyril Ramaphosa on the 28th of June, 1996, in Belfast, Ireland, some insight can be found into their personal feelings surrounding the constitutional negotiations. The purpose of this lecture was for these two major negotiators in the South African transition to impart some aspects of their experience to other countries (in

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this case, Ireland) which were experiencing similar types of conflict. A transcribed version of this lecture is authored by Padraig O'Malley. O'Malley writes in his introduction that ' in the absence of alternative and the commitment on the part of both the ANC and the NP to a negotiated settlement, they made the tough and sometimes unpalatable compromises that resulted, in their own words, in a 'win-win' situation' (1996:2).

According to Ramaphosa, at that time they had 'just finished the process' (1996:11). By finalising the new constitution (on the 8th of May 1996), the Constitutional Assembly had brought the process to a close. In his own words, Ramaphosa viewed the constitution as one which would govern South Africa 'hopefully for generations to come' (1996:11). The element of permanence is associated with the Constitutional Contract.

Ramaphosa specifically noted his own part in the process as a privilege. He stated that the constitution 'is a document that forbids for all time the oppression of one South African by another' (O'Malley, 1996:11). Ramaphosa also mentioned the importance of involving all political parties in South Africa in the negotiation process (O'Malley, 1996:13). By involving all interested parties, parties 'owned the process, and the process was theirs to move forward to the next phase' (O'Malley, 1996:15). However, Ramaphosa also highlighted the importance of bilateral meetings in order to break deadlocks (O'Malley, 1996:15). Feeling part of the process and including all the interested parties is an indicator of the formation of a Social Contract.

Regarding the element of trust, Ramaphosa (1991) notes that negotiations tend to take place between adversaries:

> *…people who have two interests that are conflicting and when you contest for state power you always find that negotiations are between enemies. Enemies don't usually trust each other and they don't really respect each other but you see that grows out of a process. As you go on you build relationships, you cut deals on small little issues that may be insignificant and as you both deliver, as your stature grows in the eyes of the other then you become more trustful of the other.*

Asked whether he trusted the NP government in 1993, Ramaphosa replied that it was 'difficult to trust a lot that has proved untrustworthy', arguing that the government did not keep to the agreements they made (Ramaphosa, 1993). Upon reflection, Ramaphosa said that creating trust amongst parties was one the most important features of the negotiations. He

argued that 'without this trust we would never have been able to reach the settlement that we eventually reached… in the end individuals involved had to have some form of chemistry' (O'Malley, 1996:15). This type of 'chemistry' and continual trust-building is reconcilable with the framework of a Social Contract.

By August 1993, Ramaphosa admitted that while the ANC had made compromises, they had not compromised on fundamental issues. In 1996, Ramaphosa talked of the reciprocating nature of the concessions made during the negotiations. He takes specific notice of the NP's unbanning of the ANC, for which the NP wanted some form of reciprocity. He also mentions the ANC's suspension of the armed struggle, in return for which they required the resumption of negotiations (O'Malley, 1996:26). Ramaphosa stated that in turn for the adoption of the concept of a government of national unity (which the ANC was originally strongly set against), the ANC asked that the NP 'had to make sure that the civil servants were part of the settlement; that the defense force was part of the settlement; that the police were part of the settlement' (O'Malley, 1996: 27). This is congruent with the concept of the Constitutional Contract, in contrast with some of Ramaphosa's previous statements.

According to Ramaphosa, both the ANC and the NP 'failed in our original objective', or fell short of their ideal settlement (O'Malley, 1996:27). By realising that neither party could completely defeat the other, 'we were left with no alternatives: there had to be an accommodation, a compromise, and the compromise had to be a win-win type of situation' (O'Malley, 1996:27). Ramaphosa states that the ANC had always opposed any form of power sharing, but that in order for the negotiations to move forward, they had to 'give up a number of things', including a winner-takes-all system (O'Malley, 1996:27). Perceptions of this type of win-win outcome are congruent with one of the conceptual indicators of a Social Contract.

On the outcome of the 1994 elections, Ramaphosa (1994) said that:

> *Not achieving two thirds, in my view, has not reduced the stature of the ANC or the influence of the ANC and the ANC has a great deal of stature, it has a lot of influence in our country and it's beginning in a very informal way to show that it can lead, it can influence the turn of events in our country in a positive way and I think in the end persuasion of other parties, even in drafting the constitution is what we should rely on most because in the end you want to have a constitution that will be broadly acceptable to all South Africans and you want to have a constitution*

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which you know all parties have drafted by fighting for certain principles which they can try and have other parties accept. You therefore don't really need, if you are ANC, a two thirds majority. You want to get other parties on to your side through gentle consistent persuasion to come on to our side.

Ramaphosa stated that the Interim Constitution could serve as reference when drafting the final Constitution, but that the final Constitution would not be a reflection of the Interim Constitution (Ramaphosa, 1995). Ramaphosa described the constitutional principles as 'cast in stone' (Ramaphosa, 1993) and that they were 'very happy' with these principles. He was of the opinion that the constitution would have to set out principles 'that will enhance the reconstruction and development of the country' (1995). He (1991) held that 'we [the ANC] are not going to hold out rights for people on a racial basis, and especially rights for people on a racial basis or ethnic basis or even regional basis, because if you do that in a constitution or whatever document, that would be a recipe for disaster'. Ramaphosa (1991) refers to the Bill of Rights as the 'core of [a] constitution'. On the issue of property, Ramaphosa (1991) was clear: 'The government must give up land that it owns because of the injustice that our people have suffered throughout the years. The government must release all tracts of land that it owns and give it to people'.

In an interview with Patti Waldmeir, Ramaphosa admitted that in a way he tried to get into Roelf Meyer's mind, trying to understand and analyse his opponent's position. To Ramaphosa it was clear that both parties were seeking a settlement, but that their ideas of what this settlement would embody were divergent. Ramaphosa says that Meyer 'wanted to win so that he can be able to demonstrate to his bosses that he had hoodwinked us … but I knew that he wanted to emerge victorious and in a away I never wanted to come back home knowing that we had been hoodwinked, we had not achieved our objectives and we had been defeated at the hands of people like Roelf' (1995A:13). Ramaphosa refers to a critical moment in the bilateral negotiations with Roelf Meyer where he had taken 'things to the precipice because it was important we [the ANC] should win that battle and one and for all gain the upper hand' (1998). Ramaphosa refers to the outcome of the negotiating process as a 'magnificent victory' (1994). Arguing in terms of wins and losses is reconcilable with one of the conceptual indicators of the Constitutional Contract.

In April 1996 in Parliament, Ramaphosa, as the Chairperson of the Constitutional Assembly, spoke of the 'spirit of give-and-take' that was continually exhibited by all parties in the

Constitutional negotiations of the Constitutional Assembly (Hansard, 1996:83). He continued by saying that 'no constitution could satisfy the needs of each and every participant in each and every party', but that 'all parties, in my view, emerge a winners in this document' (Hansard, 1996:83).

Asked to rate the Final Constitution on a scale of one to ten, Ramaphosa rated it 'an eight and a half, possibly a nine', noting that like any other document it was 'not flawless' (1996). He continues by saying that the ANC 'got quite a bit of what we wanted'. Ramaphosa identified a 'good measure of consensus' in the debates and negotiations in the Constitutional Assembly (Hansard, 1996:229). He also mentioned the importance of moving toward a 'win-win situation' (Hansard, 1996:229). Ramaphosa pointed out his belief that 'we still have to transform South Africa into a truly democratic, non-racist and non-sexist country, and to make it a country where all our people can enjoy justice and prosperity. These objectives, much as some of them may have been attained, have not all been fully attained' (O'Malley, 1996:32).

Ramaphosa describes the 1996 Constitution as 'a Constitution acceptable to all' (Hansard, 1996:85). Ramaphosa pointed out the Chapter 9 Institutions as 'aimed at supporting democracy'(Hansard, 1996:85):

> *The Public Protector will monitor and take steps to remedy governmental abuse or corruption. The Human Rights Commission and the Commission for Gender Equality will deepen and establish a formidable human rights culture and ensure gender equality, respectively. The Electoral Commission is aimed at preventing the manipulation of elections, while the Auditor-General will monitor State finances.*

On the final Constitution, Ramaphosa (1998) believes that:

> *…in the end the constitution has an in-built mechanism of a review of the constitution on an ongoing basis and that should be relied upon in the light of current experiences to see whether certain provisions are still working as they did. A constitution can never be a static document. The American constitution has been amended millions of times and similarly our constitution needs to be reviewed in terms of those guidelines that we've got in the constitution to see how best it can be made more effective particularly for governance to be much stronger and more effective.*

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This statement moves away from the fixed nature of the Constitutional Contract and towards the more fluid and changeable Social Contract. Arguing in terms of gains and losses as well as the importance of trust building and mutual compromise places the interpretation of the constitution by Ramaphosa into aspects of both the Constitutional Contract and Social Contract conceptual frameworks.

6.2.14. Joe Slovo

Joe Slovo was the leader of the SACP and a member of the ANC. He was a delegate at the Codesa I, Codesa II and the MPNP. Slovo played an integral role in the negotiations by proposing the idea of 'Sunset Clauses'. After the 1994 elections he became Minister of Housing in Mandel's parliament until his death in 1995. Slovo's autobiography, *Slovo: The Unfinished Autobiography* (1995), does not cover the timeframe addressed in this study. However, several interviews with Slovo conducted by Padraig O'Malley, Hermann Giliomee as well as Patti Waldmeir provide the platform for the assessment of his values and beliefs in line with the conceptual framework.

In an interview with Hermann Giliomee in 1988, Slovo identified the reasons for the government's movement towards negotiation as 'for the first time they were beaten in a battle, not in a war, but in a battle which foretold perhaps what could happen to them in the future, because they no longer have military superiority, or even ground superiority.' He felt that PW Botha was at the point where he would 'begin discussing the process of moving towards majority rule' (Slovo, 1988: 5). Slovo shows that he saw the ANC in a position of strength entering into the negotiations.

Slovo went further to say that 'if the entire block shows signs that it is really prepared to engage in a dialogue moving towards majority rule then the mechanisms, the process, and the pace, are all things which depend on the actual power relationship. Then each organisation has to decide if it is getting enough to make a qualitative step forward and not just a surrender' (1988:6). Slovo was clearly in favour of majority rule for the ANC, but that the 'power relationship' would govern the outcome.

Slovo identifies areas of common concern between the ANC and the NP government, including the Bill of Rights and the prevention of incursions on human rights (Slovo, 1992B). He did however make it clear that he did not believe that the future economic system of the

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country should be decided by the negotiations, but rather by an elected future parliament (1992B).

Slovo also mentioned that not only would wealth be redistributed, but that blacks would be put in positions where they could 'learn on the job'. He conceded that it may not work at first, but that it would require a balance between retaining those already in the jobs in order to make the process 'smoother' (1988:7). In an interview with Patti Waldmeir in 1990, Slovo again stated the ANC's main goal as bringing about the redistribution of wealth in order to 'redress the imbalances in the economic sphere'.

Slovo believes that the ANC had been consistent in their bottom lines while trying to 'accommodate the fears and concerns of the other side', conceding that during the negotiating period his own views had changed, albeit slightly (Slovo, 1993B). On the issue of the GNU, Slovo says that the ANC made the concession 'not just in order to entrap the other side to reach a settlement but even if we decided not to institutionalise it in the form of legal imperatives, it is in our interests, in the interests of governance, in the interests of getting over the hump that we are going to be forced to get over after April 27th, it is in the interests of our constituency' (1993B).

In an interview with Padraig O'Malley in 1993, Slovo very specifically refers to F.W. de Klerk as a 'negotiating enemy' and a 'political enemy' (1993A). The formation of a Social Contract is unlikely when negotiators do not fundamentally redefine their opponents.

Slovo refers back to De Klerk's insistence on a form of minority veto, saying that De Klerk had proposed this so that 'the country couldn't be governed without the agreement of whites in all major respects' (Slovo, 1994). Slovo is of the opinion that the ANC 'won the battle' on this issue, forcing De Klerk to concede in the Interim Constitution. Slovo continues by saying that 'although there is a GNU there is majority rule and whether that GNU would work depended not on a constitutional mandate of sharing decision making but basically on the spirit of the concept' (Slovo, 1994). Slovo's interpretation on the clause concerning decision-making in the Cabinet is that decision will be taken by simple majority. He notes the wording in 'the spirit of national unity', but states that this in practice means by simple majority (Slovo, 1993B). Arguing against the 'spirit' means that Slovo's views cannot be reconciled with the Social Contractarian perspective.

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6.2.15. Gerrit Viljoen

Gerrit Viljoen played the role of lead negotiator and main constitutional and political advisor of the NP until May 1992 when he resigned and was replaced by Roelf Meyer.

According to Viljoen, at the start of the negotiations both the NP and the ANC had concluded that violence would not produce a solution. Violence would have to be eradicated and negotiation would have to take its place (Viljoen, 1994:1). Viljoen refers to the secret talks that had been taking place leading up to the official negotiations. He considers these talks as integral in establish one's opponents as 'reasonable people' (Viljoen, 1994:1). Viljoen was later impressed with the intelligence and logic of his oppenents in the negotiations (1994:10). The redefinition of one's opponents is integral in the establishment of a Social Contract. He also considers the fall of the Soviet Union and the 'collapse of… socialism worldwide' as playing a central role in reducing the risks involved in negotiations. This 'influenced thinking away from the fear that any major concession would result in national suicide' (Viljoen, 1994:1).

For Viljoen, negotiations mean 'that the process would [not] be simply an imposed solution by a black majority but a negotiated solution produced by the interaction of minds, by give and take, so by definition then starting form such a road wouldn't imply a solution in which you have to give up everything but the method to be followed implied a give and take in which even a black majority would be subject to restrictions preventing it from misusing its power' (Viljoen, 1994:1). This argument in favour of a process of give and take is reconcilable with the Constitutional Contract.

Viljoen continues to speak in terms of a quid pro quo relationship with the ANC, referring to the ANC's suspension of the armed struggle under certain conditions met by the NP. The NP had certain demands as well, including the rejection of communism. In negotiations with Mandela the NP tried to find a 'formula that would be acceptable to him and to us' (Viljoen, 1994:5).

In July 1991, Gerrit Viljoen spoke of the NP's continued insistence on the definition of minority groups in the constitution. He was of the opinion that the NP's thinking had moved away from this view, realising that 'once groups are defined in a constitution, there's a certain rigidity and a certain inflexibility which militates against the concept of voluntary association' (Viljoen, 1991). He defined power-sharing as a system 'where after an election

in everything the majority takes all, but that there are areas in which the majority must also persuade the minority to obtain its support, either in an absolute sense or in the sense of having a say' (Viljoen, 1991). Asked whether this type of power-sharing would be part of the 'final solution', Viljoen said that 'no solutions are final' (1991).

The NP believed that black majority rule was not an eventuality, and that going 'beyond simple majority rule and … meaningful checks and balances… and protection to minorities' was at the forefront of the NP's requirements for a new constitution (Viljoen, 1994:7). While Viljoen believes that 'a significant number of checks and balances' were achieved in the agreement, it was not in the way that they had originally planned: 'But from the outset I and those working closely with me and certainly FW de Klerk realised that we won't be able to get all that we ask for and we'll have to swallow certain things as part of a give and take process' (Viljoen, 1994:7).

Viljoen describes the Interim Constitution and the Constitutional Principles as 'not ideal in the eyes of many of them [the parties involved] but which is something with which all of them can live, in other words by way of compromise' (Viljoen, 1993). Viljoen talks of the 'de-demonisation of the opponent' and the realisation that a solution can be reached by means of 'give and take' (Viljoen, 1997). In retrospect, Viljoen notes that the NP negotiators could have put more pressure on the ANC to include some form of continuing power-sharing in the executive.

Viljoen places the NP proposal of a rotating presidency in the position of an ideal settlement, knowing that the chances of achieving such a presidency were very slim (Viljoen, 1994:14). Viljoen makes clear his concern that a measure for ensuring the meaningful participation of whites in local government was not incorporated. However, he sees the power-sharing aspect of the constitution as a 'major success' (1994:14). Viljoen's argument in terms of quid pro quo and give-and-take is congruent with one of the conceptual properties of the Constitutional Contract, while his opinion regarding a more inclusive local electoral system is reconcilable with one of the conceptual indicators of a Social Contract, placing the meaning he invests into the Constitution into both categories.

6.2.16. Leon Wessels

For two years, Leon Wessels was a fulltime negotiator on the side of the NP/government together with Roelf Meyer, Dawie de Villiers and Tertius Delport. He also served in F.W. de

Klerk's cabinet. He took part in Codesa I; Codesa II; and the MPNP. After 1994, he became deputy chairman of the Constitutional Assembly which drafted the 1996 Constitution (Wessels, 2010:247; 251).

In an interview with Padraig O'Malley in July 1990, Wessels did not completely dismiss majority rule (contrary to the NP's continued dismissal thereof), carefully mentioned power-sharing and group rights, and noted that the process which was underway was irreversible (Wessels, 2010:300). He also noted the importance of getting the greatest possible consensus among all South Africans. Asked what he meant by this 'consensus', Wessels replied that 'The consensus is about the founding provisions, the structure (framework) of the constitution as well as the transformative nature (achievement of equality, advancement of human rights) provided for in the Constitution' (Wessels, 2014).

Wessels refers specifically to Section 45 (1) (c) of the 1996 Constitution, which allows for the establishing of 'a joint committee to review the Constitution at least annually' by the National Assembly and the National Council of Provinces, as providing for the continuation of talks on an annual basis (Wessels, 2014). He continues by saying that '[a]nyone who felt strongly about any particular issue should have the opportunity to continue the debate and not be sidelined', but that the ANC later viewed this provision as a 'nice to have' and that 'those for whom it was intended have never properly used it' (Wessels, 2014).

According to Wessels, if the majority of white people walk away from the negotiation table, or if the majority of black people walk away, there would be no political agreement (2010:302). He continued to espouse this view in August 1990 in Oslo, where he noted 'the challenge is to live in a spirit of true nation-building to reach out to the future on the other side of apartheid' (Wessels, 2010:238), alluding to the idea of an ongoing social contract. In this same speech, he mentions the 'common goal of true freedom and South Africanism' (2010:238).

Wessels believes that after the 2 February speech made by De Klerk, De Klerk believed that he 'would be able to control and to manage everything the way he wanted it and that amongst others would mean managing the process to such an extent that he would end up in a favourable position in the elections themselves' (Wessels, 1995:13). Wessels does not criticise the final agreement made by De Klerk: 'it was the way the transition was taking

shape, caving in in the sense that it was giving up power but after all it was power that was not representative and legitimate' (1995:20).

Wessels describes getting to know people like Chris Hani, Ronnie Kasrils and Joe Slovo and becoming 'friends with them' (Wessels, 1996). Wessels very specifically uses the term 'negotiating partners' (Wessels, 1990):

> *I believe that the negotiating partners should not look at one another as adversaries. They may not agree on all the issues, but I believe that you would find they may agree on some issues and differ on other issues. That's the way I would like to see it. In other words, the consensus may go from one to the other. I don't think it will be in the interest of the process if we arrive as adversaries, people sitting across the table from one another.*

From Wessels' retelling of his experience as negotiator in his autobiography *Vereeniging: Die Onvoltooide Vrede* (Union: The Unfinished Peace), some clear indicators of a low-context negotiator arguing in favour of a Constitutional Contract can be found. He notes the 1996 Constitution as 'the solid foundation for the people of South Africa to transcend the divisions and strife of the past' (2010:255). He also takes note of the NP's wish that there would always be a constitutional government as well as a parliament, alluding to an element of permanence, which is consistent with the values and beliefs of a Constitutional Contractarian perspective (Wessels, 2010:302).

Wessels refers to the 'art of negotiation': 'you reach a settlement and an agreement that does not meet with all the demands that you set, but that it meets with a majority of demands of everybody' (Wessels, 1990). Wessels knew that as a negotiator and as a politician he would have to determine his Realistic Settlement, and for him this was democracy in a constitutional state (Wessels, 2010:259).

Wessels also refers to the countless compromises made during the negotiations (2010:259). He found that the only common denominator, the only viable option, between those involved in the negotiations was the formation of a *Rechtsstaat*, and the NP's Realistic Settlement at this point was a government of national unity within a constitutional democracy (Wessels, 2010:261). Wessels identifies one of the major concessions by the NP as power-sharing as a transitional arrangement, while the NP had been pushing for power-sharing on a permanent basis (Wessels, 1993). However, Wessels is of the opinion that the process 'was not an

individual effort of the effort of one group of one political part', quoting Nelson Mandela: 'When you negotiate you don't talk to yourself. That is why we had to compromise' (Wessels, 2014).

Asked whether the NP had grown concerned that the ANC would win a two-thirds majority in the 1994 elections and 'single-handedly' write the Constitution, Wessels replied that 'if the NP and all the other parties together can't prevent a two thirds majority then they do not deserve to have that particular leverage over the constitution' (Wessels, 2000B). Wessels says that 'the ANC carries 60% support with it and it has to be reflected in the constitution, but 60% does not mean 100% and therefore they are still sensitive to suggestions and proposals from other parties, also from the NP' (Wessels, 1996). In 1994, Wessels raised his concern that 'the [propotional] list system is not the ideal system', but that for the time being it served the purpose of bringing forth successful elections (1994). He however does not mention an alternative.

Wessels does recognise the need for ongoing constitutional discussions, mentioning that the constitution itself provides for the continuation of talks on an annual basis, which is the essence of Social Contractarian thinking. However, in line with the Constitutional Contractarian view, he notes that these talks should continue '*binne die hoeke van die grondwet'* (within the parameters of the Constitution), and only on 'issues of national importance' (2010:277). Wessels himself concedes that there were few issues addressed during the negotiations that the parties valued equally – for example, the ANC delegation were deeply concerned with the issue of poverty, having been directly influenced by uneducated or modestly-educated family and friends, and as such sought to create a government that would have extensive power in order to address socio-economic inequality by means of socio-economic rights; while the NP/government sought limited government power and opposed the inclusion of socio-economic rights (Wessels, 2010:253-254).

Wessels continues to espouse views congruent with the conceptual framework of the Constitutional Contract when he clearly states that a constitution cannot solve the problems of a country: 'A constitution is the rules which govern – a constitution does not deliver services, but determines who delivers those services and what should happen to them should they not deliver that service' (2010:259-260). Moreover, Wessels clearly states that 'no one comes unsullied to the negotiating table' (2010:265), showing that he does not believe that

one party held the higher ground over the other (Benchmark negotiators tend to stress the unequal standing of those entering into negotiations).

Wessels views the position of the NP government as 'on the back foot' from the start of negotiations until the signing of the 1996 constitution (2010:59). He describes many South Africans' view on Codesa and the new Constitution (2010:59): 'not as historical events to get rid of old baggage and start anew, but rather as funerals.' However, Wessels regards the Constitution as a 'historic bridge' between the deeply divided past and the future founded on human rights and equal opportunities (2010:60). This 'historic bridge' which Wessels refers to can be interpreted as the 'contract zone' within which the parties came to the negotiation table. In February 2000, Wessels was adamant that 'our responsibility is the whole constitution; it's the whole Bill of Rights' (Wessels, 2000A).

In 1996, just before the vote on the final constitution, Roelf Meyer asked one of the NP's technical advisers to draw up a document which detailed all the NP/government's negotiation 'profits' and also that which they could possibly lose (Wessels, 2010:281). Wessels refers to this document (attached as an appendix) and notes that '[w]alking away would have given the ANC a blank cheque to draft their own constitution unilaterally' (Wessels, 2014). Arguing in terms of gains and losses also represents the Constitutional Contractarian view. However, Wessels clearly states that there was a 'spirit of accommodation' present in the Constitutional Assembly (1996). When describing the NP's feelings toward the 1996 Constitution, Wessels 'saw that none of the people looked like they believed the Constitution was the fruit of their labour' (2010:282). Wessels later also noted that the members of the NP 'were so disgruntled' (Wessels, 2014). The feeling amongst the NP was not one of a shared agreement, but rather one of having lost – indicative of the perception that the process was about trade-offs, about winning on some issues, losing on others, and that they lost more than they won. In short, a Constitutional Contract that did not favour them in overall terms.

Wessels names Section 1 of the 1996 Constitution as the most important aspect of the final agreement (Wessels, 2014). To him, this section represents the essence of the agreement: 'that is why it is entrenched with a 75% majority' (Wessels, 2014).

Asked what the intention of the concept of 'broadly representative' mentioned several times in both constitutions meant, Wessels answered that the purpose was to 'nurture a spirit of

inclusivity', as opposed to being used as a rigid quota (Wessels, 2014). This is reconcilable with the Social Contract.

Wessels (2010:289) noted that 'transformation did not end with the 1994 election or the adoption of a constitutional *rechtsstaat* in 1996. It was just the beginning of the building of a fairer society, for all'. He understood that the negotiations meant the start of a new political dispensation. However, Wessels believes that this transformation should happen within the confines of the Constitution, which is a view not reconcilable with the fluid nature of the Benchmark Agreement.

Wessels refers specifically to the NP's withdrawal from the GNU as undermining 'the idea of creating a convention (culture) of seeking consensus on matters of national interest' (2014). Wessels understands the 'unwillingness, or inability, to form alliances across political divisions – across language, culture and colour boundaries' as the greatest challenge in South African civil society (2010:278). This shows that the constitution does not instil a process which rewards accommodative behaviour.

Wessels mentions that the idea of Lijphart's consociationalism intrigued him at the start of negotiations, but that 'PW Botha and the shambles of the tricameral parliament killed anything that leaned in the direction' (Wessels, 2014). Lijphart's consociational democracy is congruent with Constitutional Contractarian thinking.

Leon Wessels' opinions regarding the constitutional negotiations as well as the 1996 Constitution include indicators across the spectrum, but a clear preference towards a the static nature of Constitutional Contractarian thinking comes to the fore. His arguments in terms of gains and losses, as well as the supremacy of the constitution in all decision-making and ongoing debate indicate a view compatible with the thinking of a Constitutional Contractarian negotiator.

6.2.17. ANC Debate

In the late 1980s and early 1990s, a debate emerged among ANC and SACP members concerning the ultimate goal of what they termed the 'liberation movement', and how this goal would be achieved. This debate was published in several publications, with some of the writers publishing under pseudonyms in order to protect their identities. Not all of these writers were negotiators of the Constitution; but are included in order to provide the full

context to the arguments of those who did become negotiators. The opinions of these writers can be placed within the framework of Social Contract/Constitutional Contract/Benchmark Agreement by assessing certain elements and indicators found within the debate.

In 1986, SACP-member Jeremy Cronin stated in the journal *Transformation* that the goal of the SACP within the ANC-SACP alliance was to 'end the forcible denationalisation of the African majority, to end the Bantustan system, and to reject all federal, confederal and other regionalised confections designed to perpetuate, in one form or another, white minority rule' (Cronin, 1986:75). Cronin mentioned the importance of 'nationalising and redistributing the wealth of the monopolies' (1986:75-76).

Under the pen name of Sisa Majola, ANC and SACP activist Jabulani Nobleman Nxumalo wrote that capitalism was 'at the root of their [the revolutionary masses'] misery' in the African Communist Journal (1987:39-40). He goes on to note that 'the people' still wish to 'settle scores with the regime of national oppression' (Majola, 1987:41). He reiterates Cronin's final aim of socialism (1987:42). He argues strongly against a 'deal with the racist regime', noting that such a compromise would be a sign of weakness (1987:44 - 45). He also very specifically states that 'the democratic republic of the Freedom Charter is only the beginning of a political process that will ultimately end with the establishment of socialism' (1987:47). The SACP elements within the ANC advocated a strong form of socialism at this time, and stated that as their ultimate end goal. This type of thinking can be placed within the Benchmark Agreement, as the overarching goal of socialism is superior to the establishment of a democracy.

Under the pseudonym 'Brenda Stalker', Sylvia Neame (member of the SACP) wrote in *Sechaba*, the ANC-run publication, that the 'chief aim of the liberation movement in conducting talks is to isolate the most extreme elements in the White population and to look for a basis for acceptable compromise, a compromise with an important element of 'national consensus'' (1988:120). She finds that a 'genuine compromise' would lead to more democratic rights, which would in turn grant the liberation movement state power, which would 'be a decisive element for further progress' (1988:26). Stalker suggests a systematic, stage by stage process focused on talks in order to realise the objectives of the National Democratic Revolution (1988:26).

In the same publication, Thando Zuma argues strongly against 'talks' as the only means of achieving these goals, stating that neither 'the perspective of insurrection' nor the 'people's war' has been abandoned (1988:10). The argument whether to abandon the armed struggle in order to advance negotiations continued among the ANC and SACP members. Under the name Alex Mashinini, Jabulani Nxumalo (known as 'Mxala') wrote in *Sechaba* in 1988 that the 'end goal' of the movement was the 'transfer of power' (1988:26). He noted that absolute victory was 'impossible', and that compromise would have to be made by both sides, resulting in 'partial victories for warring parties' (1988:27).

While this type of thinking is reconcilable with some aspects of the concept of the Constitutional Contract, he goes on to state that partial victories can be 'transformed' by politicians and political parties into absolute victories (1988:27). To him, the biggest foreseeable problem was the limitations the negotiated settlement would impose on the 'program of social emancipation' (Mashinini, 1988:27). This type of argument is closer to an understanding of the issue in terms of the concept of the Benchmark Agreement, as he does not view the 'partial victory' to be obtained as final, but rather as a changeable and unfixed agreement.

Also in *Sechaba*, in contrast to Mashinini, Neil Zumana, another presumed pseudonym, wrote that the 'mass democratic movement [had] no reason to surrender or settle for partial victories' (1989:29). He quotes Oliver Tambo as speaking of 'absolute victory' (1989:29).

In 1990, after De Klerk's public release of Nelson Mandela and unbanning of the ANC, Ahmed Kathrada, who would become a negotiator in the constitutional negotiations, stated that while both parties at the negotiating table will make compromises, each would 'strive to adhere to its own objectives' (1990:11). He also makes it clear that negotiations form *part* of the ANC struggle – other strategies had not been abandoned (1990:11). As then head of the ANC Department of Information and Publicity, he stated that 'the strategic objective of a negotiated settlement is the transformation of the social order, not its reform. The aim is to dismantle apartheid, not restructure it so as to make it more palatable to our oppressed and exploited people. The goal, in short, is to negotiate a transfer of power to the democratic majority' (1990:11-12).

In 1992 in the *African Communist*, Cronin set out three strategic frameworks 'informing our national liberation movement' (1992:41). He labels the first 'don't rock the boat', a

framework based on negotiated pacts between elites. 'Rational bargaining' would inform this strategy. He argues however that while the ANC and the NP's starting points are the same (both aim to move away from apartheid), their end goals are divergent. He argues that there is 'no common vision on the direction and character of the move' (1992:43). If no common vision exists in the view of the participating parties, there can be no Social Contract.

The second framework, labelled 'turning on the tap', focused mainly on using mass struggle as a 'tap to be turned off and on according to perceived progress or otherwise at Codesa' (1992:44). Cronin argues that this strategy is 'elitist and instrumentalist' (1992:44). The third strategic framework is referred to as 'The Leipzig Way': 'It is a perspective in which people transfer power to themselves in an insurrectionary moment' (Cronin, 1992:44). However, the 'relatively powerful repressive machinery of the apartheid regime' would likely curb this initiative (1992:47).

Cronin insists that while 'partial and limited areas of consensus may occur between the national liberation movement and the ruling bloc (making negotiations possible), there is a fundamental, long-term, antagonistic contradiction between the primary class forces on the respective sides' (1992:49). He states that the transfer of political power would come as a process rather than an event, which is congruent with the Benchmark Agreement (1992:51). It can be inferred from this that Cronin does not envisage a long-term contract between opposing parties. Instead, agreement will be temporary and lead, over time, to the ultimate transfer of power to the 'liberation forces'.

In the same publication, Joe Slovo, who would later become a negotiator for the SACP, pointed out that negotiations were only *part* of the 'struggle for real people's power' (1992A:36). He makes it clear that 'the possibility for and the relative success of negotiations have little to do with mutual trust, or good faith, or some special chemistry between leaders. We are negotiating with the regime because an *objective balance of forces* makes this a feasible political strategy' [emphasis added] (Slovo, 1992A:36). This type of argument is inconsistent and incompatible with the concept of the Social Contract.

Slovo sees the outcome of negotiations as a more favourable position for the 'liberation movement… from which to advance' (1992A:37). He notes the inevitable nature of the agreement as a compromise, but as long as it 'does not permanently block a future advance to non-racial democratic rule in its full connotation'; the agreement will be acceptable

(1992A:37). He notes several concession made by his party, including special majorities for the ratification of the constitution, but states very clearly the conditions to which they would not agree, including a minority veto and the entrenchment of compulsory power-sharing (1992A:39). This view is congruent with the concept of the Benchmark Agreement – noting specifically that the outcome of negotiations is changeable, and that any agreement made should not constrict the ultimate goal of the ANC/SACP.

In a response to this, Pallo Jordan describes the ANC's core strategic approach as 'the destruction of the colonial state' (1992:7). Jordan makes clear that he labelled the De Klerk government as 'opposition' as opposed to a negotiating partner, referring to the 'conflictual nature of the relationship … structured by the diametrically opposed interests the two represent' (1992:8 - 9). To Jordan, negotiations form only one aspect of a strategy. He states that 'one or other party to the dispute must go under. Negotiations, in such a situation, are not aimed at composing differences, but are *aimed at the liquidation of one of the antagonists as a factor in politics'* [emphasis added] (1992:10-11). Jordan is advocating a win-lose situation.

Nzimande (1992) also criticises Slovo's approach. He labels Slovo's compromises as dangerous, noting that their main strategic objective should be the handing over of power to the people (1992:17). He shows severe mistrust of the De Klerk government. Nzimande saw negotiations as 'a site of struggle: it enabled the national liberation movement to relate its own unbanning not to being a break with the past but *a continuation of a long process of national democratic revolution under new conditions'* [emphasis added] (1992:19). He does not agree with Slovo on any of the proposed compromises. He fears the emergence of an entrenched power-sharing regime (1992:21). He states clearly his feeling toward the NP: 'There are irreconcilable differences between the objectives of the white ruling bloc in South Africa and the national liberation movement. The first step towards the total abolition of apartheid is the *total and decisive defeat of the National Party, which is our immediate enemy* in terms of national democratic transformation' [emphasis added] (1992:22). He maintains that an elite pact will not lead to 'real democracy' (1992:23).

Jordan as well as Nzimande's distrust of the De Klerk government and the NP reveal that neither hold an interpretation of the new (yet to be) negotiated constitution as compatible with either the conceptual framework of the Social Contract or the Constitutional Contract, but rather a win-lose outcome in which the ANC/SACP are completely victorious.

Also published in the African Communist, Raymond Suttner stated that by sitting down at the negotiating table with 'the enemy', the 'contradictions between us' do not disappear (1992:30). He writes that in order to succeed in realising their goals, the ANC would have to use their strength. He finds that 'no settlement will satisfy our people's aspirations unless it is part of an ongoing process of empowerment and transformation' (1992:34). He argues against 'unilaterally imposing our will', stating that had such a move been possible, they would have done so (1992:36).

From this debate within the ANC/SACP alliance is become clear that those taking part in the debate were not in favour of any type of long-term, fixed contract. None of these writers had fundamentally redefined their opponent into negotiating partners, and were, in 1992, still concerned with a 'complete victory' – even if through a temporary 'partial victory'. It is important to note this type of thinking within the ranks of the ANC as these writers play a formative role in the opinions and decisions of the negotiators. None of these writers are inclined towards a shared outcome, but rather at creating a changed political arena within which to achieve their ultimate goals, away from the NP. This debate can be accommodated within the conceptual framework of the Benchmark Agreement, moving away from low-context outcomes and towards temporary markers in order to achieve a superior goal. In this case, the superior goal is that of the National Democratic Revolution.

6.3. Conclusion

In order to gain access to the original negotiators opinions and views, several resources were consulted. In some cases, negotiators were contacted by email in order to conduct interviews with them. Several negotiators were contacted, including Leon Wessels, FW de Klerk, Roelf Meyer, Mac Maharaj, Thabo Mbeki, Cyril Ramaphosa, Tertius Delport, and Fanie van der Merwe. In several cases I received no response. In other cases, the data gathered was not usable. Some of the memoirs consulted also did not yield information relevant to the study, including Benjamin Turok, Ahmed Kathrada and Joe Slovo. Seven negotiators' memoirs were closely consulted and usable, listed in the bibliography. Eighty-nine full-text interviews with negotiators were used in this assessment, as well as one full-text speech and three books of speeches of negotiators. Several articles written by negotiators were also used, as well as the words used by negotiators in parliamentary sessions found in Hansards.

Several negotiators have revealed themselves as congruent with the conceptual framework. Colin Eglin provides an apt example of a Social Contractarian thinker, showing a preference for inclusive negotiations with a focus on a constituency-based electoral system. FW de Klerk represents an overlap between Social Contractarian thinking and Constitutional Contractarian thinking. De Klerk's original thinking is congruent with the Social Contract – a focus on accommodative, inclusive behaviour and ongoing negotiation. He does however concede that this did not occur.

Mac Maharaj represents the Benchmark Agreement, with a clear preference towards a constantly changing agreement, a contract that evolves as society and the power relationships change. Thabo Mbeki shows signs of all three types of thinking, and his view are reconcilable with several of the concepts.

Leon Wessels' views and opinions are reconcilable with the Constitutional Contract. His insistence that all future decision-making be dictated by the Constitution as well as his focus on give and take makes him an apt example of the thinking present within this concept.

Chapter 7: Summary of Findings and Conclusion

7. 1.   Introduction

The dispute presented in Chapter 1 of this study highlights the argument between former President F.W. de Klerk and current Deputy President Cyril Ramaphosa as a clear dissensus on the nature of the 1996 Constitution. The puzzle arising from this dissensus is that it follows from an outcome widely supported by those involved in its drafting, with 85 per cent of the Constitutional Assembly supporting the adoption thereof.

While several studies have addressed the process and so-called miraculous outcome, this study has sought to identify the meanings that the original negotiators invested into this outcome at the time. The study aimed to address whether this dissensus was present during the negotiating process (1990 to 1996), and whether the negotiators' agreement on the formal text of the constitution obscures fundamentally diverging interpretations.

The conceptual framework in Chapter 3 identified three conceptual types of written outcomes of negotiations about accords: the Constitutional Contract, the Social Contract and the Benchmark Agreement. Each concept was operationalized into key terms and indicators, identifiable within the written document itself.

In order to categorize the negotiators' opinions into this typology, it was first necessary to study the process of negotiation that took place in South Africa, with specific focus on the substantive negotiations between 1990 and 1996. This in-depth timeline allowed for the understanding of negotiators' viewpoints at specific times and on certain issues, as well as how these negotiators' opinions fall in line (or not) with the perspective of the parties they were part of during the negotiations.

Both the 1993 and the 1996 Constitutions were studied at length in order to determine whether the texts contained aspects that would be open to interpretation as being indicative of any one of these three conceptual descriptions. Relevant sections were highlighted. It should however be noted that this is not a study in law, but rather a study of political perceptions in the form of individual interpretations of the nature of the Constitutions. Such a study of law and the letter of the Constitutions would comprise an entirely different study. Some clear indicators of characteristics of both the Social Contract as well as Constitutional Contract

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were identified, with specific emphasis on the use of the terms 'spirit of consensus' and 'broadly representative'. How these terms are perceived, however, is not necessarily identifiable within in the texts themselves, but is rather found in the opinions and views of the original negotiators.

Chapter 6 looked at the original negotiators in turn. Many negotiators were involved during the South African process, and more than 400 delegates made up the Constitutional Assembly after 1994. A study of each individual negotiator would comprise a much larger study, and would be the product of a research design different to the one used here. Determining who were negotiators and what roles certain players played proved difficult, more so than anticipated. This study chose negotiators who wrote memoirs and on whom relevant data was available. The study is an in-depth understanding of a few negotiators as opposed to an interpretation of many, making it a qualitative study.

The information available was sorted in order to place quality over quantity – only sources where the original negotiators themselves expressed their views were used. It became clear during the course of the study that while numerous sources were available regarding individual negotiators, few could claim to be authentic voice of the negotiator. It also became clear that it is difficult to distinguish the voice of the negotiator from the voice and opinion of the party which he or she represented during the timeframe. The focus of this study was the individual and not the party, which made certain sources irrelevant or unusable. Care was taken to separate the opinion of the negotiator from the opinion of the party, and as such the focus of the study was primarily on memoirs and full text interviews conducted with the negotiators.

This Chapter will provide a summary of the thesis, as well as an in-depth review of the findings. Each research question will be addressed in turn. New insights in the field of research will be explored, as well as new questions arising from the research.

7. 2.   Research Questions

A Conceptual Framework

The first research question revolved around the construction of a conceptual framework:

Can a conceptual framework be constructed with which to classify and categorise the range of divergent interpretations that constitutional negotiators can assign to negotiated democratic institutions which are aimed at resolving long-standing internal conflicts?

A survey of the literature presented in Chapters 2 and 3 showed that negotiations who succeeded in resolving conflicts in deeply divided societies invariably lead to written outcomes, often in the form of a constitution. The theory of negotiation lead to the identification of three positions that negotiators can identify: an Ideal Settlement, a Realistic Settlement and a Fall Back Position.

A further look at the relevant literature lead to the identification of three different types of outcomes: the Constitutional Contract; the Social Contract and the Benchmark Agreement. Each concept was operationalised by establishing a set of indicators with which to empirically observe the concept. The Constitutional Contract was identified as a rigid, fixed, written document, while the Social Contract placed focus on 'process over institutions', and on an accommodative political culture. The Benchmark Agreement stood apart in assigning negotiated outcomes as being part of and subject to a larger, superior goal and changeable in a culture of ongoing bargaining shaped by ever-changing power relations.

Certain concepts proved more difficult to identify with observable empirical indicators than others. The Constitutional Contract in its nature is more easily identifiable given its written form, with indicators such as quotas, fixed targets and permanence. The Social Contract comprises a different set of indicators, while some of these indicators overlap with the Constitutional Contract. The Social Contract was most easily identifiable by the kind of process that could emerge from institutions, such as the electoral system, with a focus not on a proportional list system, but rather any system that is conducive to the process of vote pooling.

The Benchmark Agreement is not as easily operationalised as in its nature it is fluid and changeable. This type of agreement tends to be found in cultures that regard contextual factors, located within the particular history of conflict as salient. This kind of agreement tends to focus on past injustices, and tend to identify victims and perpetrators, with the concomitant implication that all negotiators are not equal in moral standing.

In order to apply this conceptual framework, the South African negotiated outcomes concluding with the 1993 and the 1996 Constitutions was identified as a case study.

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Negotiators' views and opinions were analysed in order to identify dispositions reconcilable with each of the concepts identified in Chapter 3.

Additionally, the operationalisation of the concept 'Social Contract' contributes to knowledge as contemporary studies, for example that of Basset (2004), uses this term but leaves it undefined and unoperationalised.

Diverging Interpretations

The second research question brought the focus onto the South African process:

Was there present among the ranks of the negotiators of the South African Constitution diverging interpretations of this outcome at the time of concluding the settlement, that is, did the constitution have different meanings to different negotiators?

It has become evident from the findings that there were indeed present among the ranks of the negotiators of the South African Constitution diverging interpretations of this outcome. While certain negotiators placed focus on the mutual trust built up between parties, others negated the necessity of trust in negotiations.

It also became apparent that while some negotiators (specifically negotiators in the NP) viewed the interim Constitution as a basis for the final Constitution, other negotiators (notably within the ranks of the ANC) preferred to draft the final Constitution from scratch. Colin Eglin and Tony Leon found the Interim Constitution to be acceptable, but warranting several changes, while Kader Asmal and Valli Moosa found the Interim Constitution overly detailed. Roelf Meyer and Dawie De Villiers both thought that the Interim Constitution would serve as a good basis for the final constitution, while Cyril Ramaphosa and Valli Moosa argued that the final constitution would not be a reflection of the interim Constitution.

Negotiators' divergent views on specific clauses also became evident during the course of the study. The property clause as well as the issue of amnesty was clearly contested. Colin Eglin and Tony Leon argued that the final agreement encapsulated in the Property Clause provided an 'inadequate guarantee for property rights', while De Klerk found that the NP had 'won' on this issue. Tertius Delport found that the NP had 'sold out' on this clause, and that it did not provide a guarantee on keeping property, while Mbeki noted that the ANC was unhappy with the Clause, but that it formed part of a give and take.

Several negotiators mentioned the consensus present in the Constitutional Assembly during the negotiations on the final Constitution. Colin Eglin, Kader Asmal, Leon Wessels, Thabo Mbeki, Roelf Meyer, Valli Moosa and Cyril Ramaphosa mentioned the importance of this sense of consensus. Eglin, De Klerk, Maharaj and Ramaphosa stated the importance of establishing a win-win outcome.

A number of negotiators mentioned the redefinition of their opponents, including Eglin, De Klerk, Asmal, Wessels, Meyer, Ramaphosa and Viljoen. By contrast, Slovo, Maharaj and Moosa had not fundamentally redefined their opponents, continually viewing those they were negotiating with as 'opponents' as opposed to 'partners'.

On the electoral system, the negotiators were divided. Eglin and Leon advocated the use of constituencies, while Asmal argued that for the time being (1994), proportional list was the best option because of the uneducated electorate at the time, but that the system could later evolve into one based on constituencies. Wessels found the proportional list system 'not ideal', while Delport was in favour of a numerically-based, mixed system. De Villiers and Moosa were in favour of the proportional list system.

Eglin argued that the GNU should definitely not become a permanent fixture, while both Meyer and De Klerk advocated the prolonging of the period of five years. Eglin, Asmal, Moosa and Ramaphosa were in favour of the ongoing revision of the constitution, while Wessels agreed he mentioned that this could only take place within the confines of the Constitution.

From this it becomes clear that divergent opinions were present amongst some the negotiators of the meaning of several clauses in the constitution.

Categorisation

If divergent, can these interpretations be categorised according to the conceptual framework constructed for this purpose?

This framework proved significantly helpful in identifying whether the views of the negotiators were divergent – on several levels, drastic differences between negotiators during the negotiating period came to the fore. I was able to place several original negotiators into either, some or all of the concepts by a close reading of their memoirs, speeches and interviews conducted with them. From Chapter 6, which places each studied negotiator into

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one, two or three of the categories, a comprehensive summation of the findings shows that the negotiators can be categorised in to the conceptual framework established in Chapter 3. However, the Benchmark Agreement proved more difficult to establish as certain elements inherent in this type of agreement are only identifiable once the agreement has been implemented.

It became clear that certain interpretations were more easily categorised than others: while being able to locate the views of some negotiators within the concepts of Constitutional Contract or Social Contract, identifying those views congruent with the Benchmark Agreement proved more difficult. It was found that the nature of a Benchmark Agreement as such may not be solely identifiable within the opinions or views expressed by the negotiators, specifically at the time leading up to the agreement. A Benchmark Agreement may be more easily identifiable after the outcome has been implemented (thus after 1996). The nature of the Benchmark Agreement in itself makes it difficult to identify during the initial negotiating period as often negotiators seek to conceal this view. Negotiators that have a Benchmark Agreement in mind tend toward Constitutional Contract-like agreements which are then altered by the dominant party once the power relationship has shifted decisively in their favour.

Also, negotiators can fall into one, two or all of the categories. It became evident that while negotiators may be categorised within all three concepts of the framework (Thabo Mbeki), their opinions are not necessarily specific to the indicators of one single concept. The Constitutional Contract and the Social Contract concepts tended to overlap, as both concepts fall within the low-context negotiator framework. At times dispositions to these two concepts were indistinguishable.

It has become evident that the Social Contract may be more easily identifiable in actual constitutional politics emerging from the new regime than in the original text, but that the negotiators' opinions on certain clauses and the intention of the original texts help to identify the intention of committing to a Social Contract. Several negotiators mentioned the continual consensus-seeking in the Constitutional Assembly in the same 'spirit' as the preceding negotiations. Negotiators from all strata felt personally involved in the drafting of the final Constitution, as well as in the upholding of the Constitution. However, whether this political culture of continuing compromise within the spirit of negotiation has been fostered in a

changing society remains to be studied, as it is part of the 'so what' question which is not addressed by this study.

Validation

On the basis of the findings to the questions above, does the case study validate the said conceptual framework devised for classifying interpretations of consensually negotiated constitutions?

Face validity was tested by measuring the concepts by means of indicators. These indicators were identified within the views and opinions of the negotiators, validating the concepts. Content validity was gained by defining the concepts, elaborating on this definition and developing indicators that 'tap all parts of the definition' (Neuman, 200:183). Several sources of evidence were used, and a clear chain of evidence was established. The conceptual framework is supported by previous studies and tested theories. Construct validity was established by clearly specifying the conceptual definitions within clear boundaries. Overlaps between concepts were later identified as being detrimental to the conceptual framework.

The definitive findings partially validate the conceptual framework. The problem of identifying the Benchmark Agreement during the negotiations leading up to the agreement has however become evident.

7. 3.   Insights

This study has brought significant insight into several concepts, including the Social Contract in a changing society. The Social Contract is identifiable within a system that fosters process over institutions, with specific focus on the working of the electoral system. The Social Contract is vested in the political culture as opposed to in the written text, but the written text does facilitate these types of process by entrenching mechanisms for ongoing negotiation and revision. However, as has become evident from Leon Wessels' opinion, while these mechanisms exist within the Constitution, it does not mean that they are effectively used. Though this study does not address which of the three concepts is 'better', it is clear that countries seek long-lasting, durable constitutions. Several authors take up this subject, including Elkins *et al* (2009), Sisk (1995) and Horowitz (1991). Characteristics associated with the Social Contract, such as flexibility and an inclusive process, tend to be associated with longer lasting constitutions. The question remains whether South Africans should be

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actively seeking to build a Social Contract, and whether a Constitutional Contract can evolve into a Social Contract. The Malaysian constitutional bargain serves as an apt example of this type of evolution (Haasbroek, 2007). A system based on a Constitutional Contract in Malaysia was revised in 1971 in order to promote interethnic coalition. The Malaysian electoral system provided a platform for ongoing compromise, and what started out as a Constitutional Contract soon evolved into an effective Social Contract which reconciled interests of all groups by promoting a system of ongoing negotiations and accommodative behaviour (Horowitz, 1991:154-155; and Haasbroek, 2007:82-85).

An interesting finding regards the formation of the Social Contract. Many indicators of building blocks for a Social Contract can be found in the 1996 Constitution. Support for this process is also present in the opinions of the some of the negotiators. It is clear that several of the negotiators' views are reconcilable with the concept of the Social Contract and as such worked to create circumstances conducive to the formation thereof. The question remains, has the Social Contract emerged in South Africa? Horowitz (1991) does argue that a change in the national electoral system to include constituencies (as argued by several negotiators) would create circumstances more favourable to the formation of a Social Contract.

Another insight from this study is into the concept of the Benchmark Agreement. While three (Valli Moosa, Thabo Mbeki and Mac Maharaj) negotiators' opinions can effectively be placed within this category, it proved difficult to definitely place either negotiator as deliberately agreeing to the outcome in order to change it in the long run, once the power has shifted in their favour. A study of political culture later, after 1996, may produce a more conclusive result, as well as a study of ANC policy documents, 'Strategy and Tactics' (1997; 2002; 2007; 2012). Negotiators seeking a Benchmark Agreement may make use of promises of either a Constitutional Contract or Social Contract in order to advance the agreement.

7. 4.   Questions for further research

The South African Constitution does not specifically require a proportional-list system. Several negotiators mention the possibility of changing this system to include constituencies, which would be conducive to the formation of a Social Contract. Asmal (2011) notes that the South African electorate was not educated enough/illiterate at the time the electoral system was decided (1994). However, in the past 20 years that has changed significantly, with the South African literacy rate has risen to more than 90% from an estimate of 61% in 1991,

voiding this argument (Pretorius, 2013; and Race Relations Survey 1994/1995:224). Should the South African electoral system be revised? The question remains whether political leaders will be open to such a suggestion.

If the electoral system is changed, can a Social Contract develop in South Africa?

The question may be asked whether new generations of leaders have been instilled with the values and beliefs espoused by the original negotiators. While this study is not concerned with the current political leaders of South Africa, it is of great significance whether their opinions reflect those of their predecessors.

By looking at policies after 1996, will dispositions representative of the Benchmark Agreement approach be more easily identifiable?

7. 5.   Conclusion

The following figure represents the relationship between the three concepts explored during the course of this study. At point A in the diagram, the concept of the Constitutional Contract and the Social Contract overlap. Here, traditional indicators of low-context contracts can be found, including the written nature of the contract. The overlap at Point B is harder to establish. From the research is has become evident that high-context negotiators often use Constitutional Contractarian means to produce immediate gains, placating their opponents for the time being as the relationship changes in their favour.

Figure 7.1: The Relationship between the Constitutional Contract, the Social Contract and the Benchmark Agreement
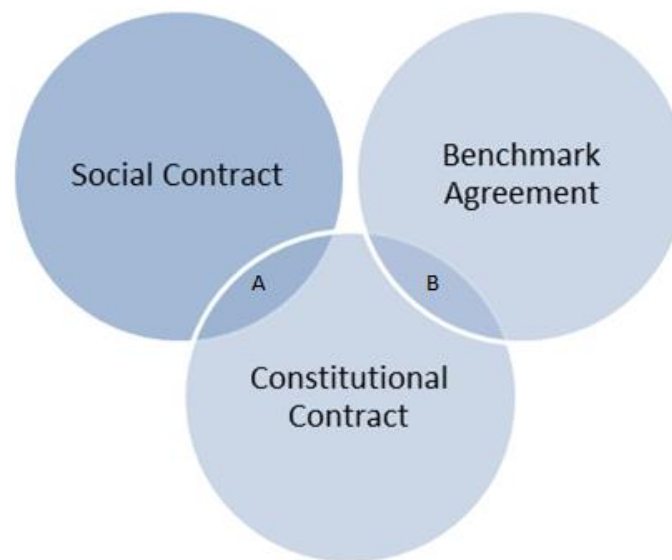
Source: Author's own compilation

The nature of a study such as this often results in the asking of more questions, and allows for further research. This study sought to answer four research questions and succeeded in doing so by meticulous research. The nature of the so-called miraculous South African outcome was put under a microscope once more. However, no previous study has identified these diverging interpretations of the outcome itself, in the form of the Constitution. It remains to be seen whether the South African Constitution can withstand the test of time, and whether interpretations will continue to diverge, or will move towards convergence. Future studies of the attitudes, opinions, values and beliefs of stakeholders in South Africa, as well as the factors that determine such convergence/divergence, can track this process,

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Appendix A

WAAROM DIE NASIONALE PARTY VIR DIE GRONDWET MOET STEM

A. DIE PROSEDURELE IMPERATIEF

1. Indien die NP aankondig dat hy teen die grondwetlike teks gaan stem, verloor die Party effektief sy invloed op die verdere verloop en inhoud van daardie teks.

2. Indien die NP sou aankondig dat hy teen die grondwetlike teks gaan stem - wat nie later kan wees as Maandag-middag nie, anders wat gaan die NP-sprekers in die debat sê? - laat dit twee dae aan die ANC om die huidige ooreengekome teks deur amendemente, wat na goeddunke van die voorsitter van die GV ter Tafel geneem mag word, só te verander dat dit hulle pas. Dit is prosedureel moontlik, omdat al sou die Reëls dit nie toelaat nie, kan die GV die Reëls met 'n gewone meerderheid ophef. Hieronder sal aangetoon word watter winste die NP in die huidige teks behaal het wat in daardie omstandighede geheel en al van die tafel gevee kan word.

3. Selfs indien die ANC die ooreenkomste in die huidige teks gestand doen, sal 'n verwysing na die Paneel steeds die deur vir hulle ooplaat om daarna verdere wysigings ten kwade aan te bring. Indien die opinie aanvaar word dat daar slegs twee tekste ingevolge artikel 73(5) ter sprake is (wat nie vasstaan nie), naamlik die teks soos verwys na die Paneel en die teks soos gewysig deur die Paneel, is daar **niks** in die Grondwet wat die GV verbied om enige van die twee tekste te wysig wanneer dit na afloop van die Paneel se werksaamhede 'n teks moet goedkeur nie. Die bepaling sê nie dat die

2

GV na ontvangs van die Paneel se teks of in die afwesigheid van 'n aanbeveling van die Paneel, onverwyld oor die beskikbare teks moet stem nie.   Die bepaling sê dat die GV die teks binne 14 dae moet **goedkeur** - enige wetgewende instansie sal dus steeds geregtig wees om in die goedkeuringsproses wysigings aan te bring.

4.   Moontlike wysigings wat die ANC in sulke omstandighede kan oorweeg, sluit onder andere in:

Skrapping van tweederde-meerderhede, ook vir die verskansing van die grondwet

Skrapping van die 18-jaar-vereiste by stemreg

Versterking van regstellende aksie

Skrapping van eiendomsreg

Verswakking van taal- en kultuurregte

Verswakking van reg tot vrye spraak

Afskaffing van toegang tot inligting en administratiewe geregtigheid

Invoeging van 'n werkershandves (insluitende verbod op "scab labour" en invoeging van minimum-loon)

Skrapping van vrye ekonomiese deelname

Skrapping van akademiese vryheid

Algehele afwatering van beperkingsbepaling

Algehele horisontale werking

Skrapping van die tweede Huis van die Parlement

Verswakking van opposisiepartye se rol in Parlement

Afskaling van uitvoerende gesag-aanspreeklikheid

Afskaffing van veelparty-deelname aan aanstelling van regters

Retrospektiewe misdade

Afskaffing van kultuurkommissie en kultuurrade

Afskaling van provinsiale magte

'n Nuwe finansiële hoofstuk

Versterking van beheer oor openbare administrasie

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Wysigings aan hoofstuk oor veiligheidsdienste

B.   WINSTE EN VERLIESE IN DIE ONDERHANDELINGE

Die resultaat van die onderhandelinge soos gereflekteer in die huidige teks, moet gemeet word aan die vereistes wat die NP in *Our Future Together* gestel het.

1.   Winste

A.   Die kernsaspekte wat die NP in die Grondwet wou sien, **en wat deur suksesvolle onderhandeling in die huidige teks verskyn**, is die volgende:

'n Demokratiese stelsel gebaseer op die volgende uitgangspunte:

1.1   Een soewereine staat met een burgerskap.

1.2   Algemene volwasse stemreg.

1.3   Gereelde, vrye, geheime veelparty verkiesings.

1.4   Verteenwoordigende en verantwoordelike/aanspreeklike regering.

1.5   Grondwetlike oppergesag en verskansing.

1.6   'n Beregbare en afdwingbare handves van regte.

1.7   'n Onafhanklike en onpartydige regbank.

1.8   Skeiding van magte as beginsel.

1.9   Uitvoerige demokratiese kruiskontroles.

1.10   Drie verskanste vlakke van regering.

1.11   Grondwetlik verskanste verdeling van bevoegdhede tussen die vlakke.

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4

'n Veelparty-uitvoerende gesag

Sterk provinsiale regering ooreenkomstig federale beginsels

'n Tweede huis van die Parlement

Uitgebreide meganismes vir minderheidsbeskerming

'n Handves van fundamentele regte, spesifiek ten opsigte van -

* deelname aan ekonomiese aktiwiteit

* eiendomsreg

* taal en kultuur.

B.   Die ander belangrike kwessies vir die NP is die volgende.
Hulle is ook suksesvol beding:

'n Grondwet verskans met 'n tweederde-meerderheid

Verskansing van die *essentialia* van 'n demokratiese staat met 'n
75%-meerderheid

Grondwetwysigings wat die provinsies raak, moet afsonderlik deur
die twee Huise goedgekeur word

'n Verwysing na God in die Aanhef

Die naam "Republiek van Suid-Afrika"

Die vlag

Elf amptelike tale

Behoud van die taalbeginsels in die ou artikel 3

Een Suid-Afrikaanse burgerskap

Universele stemreg vir 18-jariges

Proporsionele verteenwoordiging

Verkiesings op die basis van kieserslyste

Onafhanklike verkiesingskommissie

Nasionale Vergadering bly in beginsel dieselfde

Behoud van die huidige ledetal

Versterking van die rol van minderheidspartye

Verskansing van die Opposisie en die Leier van die Opposisie

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5

Sterk komiteestelsel

Beskerming van minderhede se rol in die wetgewende proses

Verwysing van wette na die Konstitusionele Hof

Volle aanspreeklikheid van die Uitvoerende Gesag

Verteenwoordiging van provinsies in die tweede Huis

Deelname van die tweede Huis aan die wetgewende proses

Behoud van die amp van President

Minstens een Adjunkpresident

Ministers as 'n reël lid van Parlement

Voorsiening vir Adjunkministers

Veelparty-deelname by aanstelling van regters

Meer parlementslede in Geregtelike Dienskommissie

Verskansing van handves

Sterk gelykheidsbepaling

Behoud van bepalings oor taal, godsdiens en kultuur

Moedertaalonderrig

Meer realistiese sosio-ekonomiese regte

Sterker kinderregte

Akademiese vryheid

Versterking van die reg op inligting

Betekenis en effek van beperkingsbepaling

Retrospektiewe misdade geskrap

Beperkte horisontale werking

Kultuurrade

Kommissie vir kulturele aangeleenthede

Provinsiale strukture dieselfde

Eie grondwette, wat mag afwyk, vir die provinsies

Provinsiale bevoegdhede uitgebrei: eksklusiewe magte en funksies

Uitbreiding van lyste funksies

"Overrides" beperk: nie-inmenging beginsel is ingevoeg

Asimmetrie en subsidiariteit

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6

Sterk bepalings oor interowerheidsverhoudinge en samewerkende regering

'n Inkomste-delingsmodel vir die finansiële verhouding tussen die vlakke van regering

Plaaslike regering as volwaardige regeringsvlak

Behoud van plaaslike regeringshoofstuk

Proporsionele verteenwoordiging en wyke op plaaslike vlak

Plaaslike regering in die Finansiële en Fiskale Kommissie

Erkenning van tradisionele leiers en inheemse reg

Behoud van huidige finansiële beginsels

Onafhanklike Reserwebank

Behoud van Finansiële en Fiskale Kommissie

Professionele, bevoegde en onpartydige publieke administrasie

Onafhanklike Staatsdienskommissie

Deelname aan aanstelling van spesiale grondwetlike ampte en kommissies

Bepalings oor veiligheidsdienste, veral ten opsigte van verantwoordbaarheid

2. Verliese

Veelparty uitvoerende gesag

Twee volksliedere

Enkeltaal-onderwysinstellings

Grondhervormingsklousule

Uitsluiting vir werkgewers

Doodstraf

Aborsie

Toewysing van Parlementslede aan landdrosdistrikte

Parlementêre komitee vir minderhede

Terugverwysing van wetsontwerpe na Kabinet

Ratifisering van aanstellings deur tweede Huis

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7

Sterker deelname in aanstelling van regters

Termyne van regters

Grondwetlike beskerming van onafhanklike vervolgingsinstansie

Internasionale Deklarasie oor minderhede

Raamwerkwetgewing by provinsies

Sekere funksies nie op lys van provinsiale bevoegdhede

Geen stem vir nie-residensiële belastingbetalers

Buurtrade

Verhoogde meerderhede by aanstelling van spesiale ampte en kommissies

C. UITSTAANDE KWESSIES

Die moontlikheid - hoe gering ookal - bestaan steeds om ten opsigte van enkeltaal-instellings, die grondhervormingsklousule en uitsluiting vordering te maak na Woensdag toe. Hierdie deur sal toe wees as die NP aankondig dat hy teen die Grondwet gaan stem.

D. POLITIEKE OORWEGINGS

1.   In terme van die pad wat die NP vanaf 2 Februarie 1990 begin loop het, wat moes uitloop op 'n demokratiese staat met effektiewe minderheidsdeelname en -beskerming, kan die NP beswaarlik **téén** 'n grondwet stem waarvan redelikerwys verwag kan word dat dit aan die Grondwetlike Beginsels voldoen en waarin al die eienskappe wat hierbo in paragraaf B.1 genoem is, uitdruklik verskyn en verskans is. Veral gemeet aan die verskansing van demokratiese uitgangspunte en die ander effektiewe meganismes vir minderheidsbeskerming, sal daar 'n besondere swaar onus op die NP rus om aan te toon waarom hy teen 'n grondwetlike teks stem wat aan die Grondwetlike Beginsels waaraan hy meegewerk het, voldoen.

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2.   In 'n reeds uiters sensitiewe en onsekere ekonomiese situa-
sie, sal verreken moet word watter opsie die minste skade gaan
veroorsaak: 'n grondwet waarmee die sake-gemeenskap weliswaar
probleme ondervind, of 'n referendum, met die gepaardgaande
voortgesette onstabiliteit en onsekerheid, oor 'n grondwet **waarvan
die inhoud tans totaal onseker is**.

3.   Ten opsigte van die prinsipiële argument, kan niemand die
NP daarvan beskuldig dat hy sy beginsels of sy ondersteuners ver-
saak as hy vir die grondwet stem nie.   EERSTENS, in die lig van al
die winste hierbo aangetoon, en ingevolge waarvan 'n verskanste
demokratiese stelsel verseker word, kan die verlies van die uit-
staande sake geregverdig word.   TWEEDENS is die NP nie alleen
reeds op rekord dat hy teen daardie spesifieke aspekte gekant is
nie; hy is reeds Vrydagaand in die Grondwetlike Komitee daaroor
uitgestem toe besluit is oor watter teks op 8 Mei gestem sal word.
Die NP kan nou met groot beslistheid aankondig dat hy onder pro-
tes vir die grondwet stem, ondanks die aspekte wat hy verwerp,
maar dat hy dit in landsbelang, dalk primêr in belang van sy eie
ondersteuners, moet doen.   Daar rus 'n geweldige verantwoorde-
likheid op die NP om die afhandeling van die grondwet nie aan die
ANC alleen oor te laat nie.   In hierdie lig kapituleer die NP nie
wanneer hy vir die grondwet stem nie, maar berei hy die weg voor
vir sy nuwe offensiewe benadering as die sterkste opposisieparty.
'n Stem vir 'n grondwet met hierdie spesifieke uitstaande kwessies,
kan 'n regverdiging wees vir onttrekking aan die RNE en die
opneem van 'n volwaardige opposisierol.