

CONSTITUTIONALIZING DEMOCRACY IN FRACTURED SOCIETIES

Samuel Issacharoff

Much as the terms “constitutional” and “democracy” are linked in the definitions of a just liberal society, the two embody antagonistic impulses in organizing the body politic. Democracy vests decisionmaking in majorities; constitutionalism removes from immediate popular control certain significant realms of politics. Nonetheless, no democratic selection process exists without ground rules of governance, and constitutionalism may be thought of as a particularly strong form of regulation of democracy.

Viewing constitutionalism as the enabling ground rules for democratic governance provides an insight into the emergence of a strong form of constitutional constraint in stabilizing democratic governance, in what I term fractured societies. The argument is that constitutionalism emerges as a central defining power in these societies precisely because of the limitations it imposes on democratic choice. For purposes of this discussion, I do not wish to explore the full dimensions of what is meant by either democracy or constitutionalism. Instead, I accept a rather spare definition of democracy as a system through which the majority, either directly or through representative bodies, exercises decisionmaking political power, and I use the term constitutionalism only to refer to the creation of a basic law that restricts the capacity of the majority to exercise its political will.¹ For these purposes, it does not matter whether the restraint is an absolute, as with the non-amendable provisions of the German constitution, or simply the “obduracy” of Article V of the United States constitution, or the temporal constraints requiring successive parliamentary action for constitutional reform, as in some European countries.² Under any such system, the constitution serves as a limitation on what democratic majorities may do.³

I want to focus on a function that constitutionalism serves that is not widely noted: the role of securing legitimacy for the exercise of political power in fractured

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societies. I have in mind societies that are characterized by deep racial, ethnic or religious animosities in which cross-racial, ethnic and religious political institutions do not exist. Under such conditions, the emergence of stable democratic rule requires

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dampening such animosities so that the population as a whole views the exercise of state authority as being politically legitimate, or perhaps more modestly, does not rise in armed rebellion against the state. This ability of legal restriction to provide the basis for reconstituting society has begun to attract attention as a distinct form of ordering

the transition to democratic rule. Ruti Teitel, for example, dubs this phenomenon a species of transitional constitutionalism in which law itself plays “an extraordinary constituting role” in the stabilization of democratic governance.⁴

There is a rich political science literature addressing the problem of nation building in complex, divided societies. For John Stuart Mill, democratic governance in fractured societies was a non-starter:

Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist.⁵

Subsequent work, however, looked to the national experiences in European countries such as Austria, Belgium, the Netherlands and Switzerland to claim that “consociational structures” could forge a national integration of rival elites and yield a politically stable democracy.⁶ In his classic study, Arend Lijphart identified the critical elements of the consociational experiment:

(1) government by a grand coalition of all significant segments; (2) a mutual veto or “concurrent majority” voting rule for some or all issues; (3) proportionality as the principle for allocating political representation, public funds, and civil service positions; (4) considerable autonomy for various segments of the society to govern their internal affairs.⁷

The key to the consociational model is that power will be allocated across competing interests in the society independent of the political process. Thus, elections in consociational democracies can decide which among the candidates of a particular ethnic or racial group will hold an office that was predetermined to be assigned to that particular group. Whether a particular group or interest should hold office is decided outside the electoral process through the formation of what Lijphart terms the “grand coalition.”⁸

Whether such consociational governmental structures can be transported out of the Western European context and whether they can deliver the promised political stability have been subjects of intense debate.⁹ However, the role of judicially

enforced constitutionalism offers a different avenue of nation building. Rather than securing national unity through formal power sharing along the major axes of social division, constitutionalism tends to impose limits on the range of decisions that democratically elected governments may take. In many cases, as will be seen in the central discussions in this paper, constitutionalism emerges as a rejection of the formal political arrangements that characterized consociational experiments in nation building. Rather than forecast the division of power that must hold in a fractured society, as does consociationalism, robust constitutionalism substitutes the “struggle to regulate political competition” so that the victors do not devour the process.¹⁰

In what follows I examine some of the different forms of constitutional restraint on democracy that have been employed in fractured societies from the vantage point of constitutional review of the resulting institutional structures. Examined from this perspective, it is possible to ask, “What features of constitutionalism serve best to address the problems of fractured societies?” Or, put another way, “What constitutional restrictions on majoritarian power appear conducive to the emergence of stable democratic governance?”

In part, this inquiry is a recognition of how much more sophisticated the world has become since the simple consociational models that were supposed to yield stability through formal power sharing, as in Lebanon or Sri Lanka or Cyprus or the Ivory Coast—before those countries descended into fratricidal war.¹¹ In part as well, this is a recognition of the stakes in truly fractured societies. The unfortunate lesson of history is that stable civilian governance is most likely to emerge from post-conflict societies when one ethnic group has accomplished clear dominance or destruction of the other.¹² Even with the introduction of more aggressive international peacekeeping, the key issue in nation building remains the creation of an integrated political authority claiming legitimacy beyond an ethnic or racial base.¹³

There is an emerging literature on the strong role that constitutional courts are assuming in attempting to diffuse ethnic or racial antagonisms.¹⁴ In each case, national or international courts have been forced to rule on the bounds of majoritarian politics in order to consolidate a constitutional order. Although this inquiry is informed by a broader number of national studies, for purposes of this article I focus on only two: Bosnia and South Africa. The two are unique, as far as I know, in that each represents a constitutional court required to, in effect, adjudicate the constitutionality of a constitution itself. More centrally, the two represent markedly distinct positions in the attempt to create stable democratic rule in the context of extreme social polarization, along lines of ethnicity and religion in Bosnia and race in South Africa.

As will be developed below, the Bosnian arrangement stemming from the Dayton Accords hewed more closely to the consociational model described above. The Dayton Accords created a formal power-sharing arrangement along clear ethnic lines, cemented by a tripartite executive that would be assigned geographically to an area prede-

terminated to represent one of the warring peoples. The litigation discussed emerged primarily from the organization of the executive, which ensured that the Bosniak minority living in the Bosnian Serb Republic could only choose for its executive representation from among the population that had committed the worst communal atrocities seen in Europe since the Second World War.

In some sense, South Africa confronted the same dilemma as Bosnia with two critical differences. First, the minority threatened by the exercise of untrammelled majoritarian rule was the militarily dominant white population. Second, the looming presence of apartheid made any attempt at formal assignment of power along racial lines an impermissible hearkening to the past. Whatever allure consociational

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models may have held for Dayton, they could not be directly invoked in the critical Johannesburg negotiations leading to the transfer of power from the apartheid rulers. Therefore, South Africa had to confront how to permit the creation of democratic political structures, and the inevitable emergence of black

majority rule, while allaying the fears of the white minority that this “democracy” would simply be the code for racial revanchism. Without assurances to the apartheid rulers that there would be limits to demands for revenge and redistribution, power would only have been ceded at the conclusion of a civil war—if at all. The task therefore was to create limitations on majoritarian power without formal power sharing of the Bosnian sort.

The experiences of Bosnia and South Africa fit into a broader international context. The demise of the Soviet Union and the fall of apartheid opened up the largest minting of new democracies since the end of the colonial period. Many, if not all, of these societies face the problems of religious and ethnic fracture. Comparative analyses shed light on the successes and failures in trying to stabilize democratic rule and flesh out the intuition that stable democracy requires more than just rushing to hold an election. Too often the holding of an election becomes the forum for the attempt to cement power in the hands of a dominant majority followed by a demoralizing descent into one-party rule and show elections.¹⁵ In the words of the cynical and often times culpable ex-colonialists, this was one man, one vote, one time.¹⁶

With claims for democratic governance in countries such as Iraq, the questions presented here take on greater urgency. Perhaps these questions of constitutional governance should have commanded the attention of comparative constitutionalism for some time.

ETHNIC POWER-SHARING: BOSNIA UNDER THE DAYTON ACCORDS

The Dayton Formula

The 1995 Dayton Peace Agreement marked the end of the three-year civil war in the territory of Bosnia and Herzegovina.¹⁷ The Dayton accords sought to establish peace and stability through the classic form of consociational power sharing among the dominant ethnic groups in the country: the Bosniaks, the Croats and the Serbs.¹⁸ The key governance elements were the creation of a weak central government and the reservation of significant authority to ethnically-distinct regional bodies denominated the “entities.”¹⁹

The postwar constitution of Bosnia and Herzegovina elaborates further the composition of the country. Although it designates a sovereign state incorporating “Bosnia[k]s, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina,” it also provides for “a citizenship of each Entity, to be regulated by each Entity.”²⁰ Both entities, in turn, regulate citizenship, as well as all other internal affairs through their respective constitutions.²¹ According to their constitutions, the Federation of Bosnia and Herzegovina is an entity of “Bosnia[k]s and Croats as constituent peoples,” while the Republika Srpska is the “State of Serb people and all of its citizens.”²² It is the definition of citizenship according to entity and, by extension, ethnic lines, that has served to enshrine ethnically based political power at the critical level of entity governance.

In addition to vesting power primarily in the ethnically defined entities, the same pattern of reinforcing ethnic control over political authority is reflected in the “common institutions” of the national state of Bosnia and Herzegovina. The constitution of Bosnia and Herzegovina guarantees that all common institutions are governed through tripartite executives, with one part from each ethnic group. For example, “[t]he Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosnia[k] and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska.” Although the three-member presidency “shall endeavor” to act by consensus, the reality is otherwise. While the constitution provides a mechanism allowing for a decision to be adopted by two members absent agreement among all three, more significant is the ability of any dissenting member of the presidency to block any decision deemed to be “destructive of a vital interest of the entity from the territory from which he was elected.” The challenged decision must then be referred immediately to representatives of the same ethnic group as the challenger, and it will not take effect if a two-thirds vote of the member’s “home” parliament confirms that it violates a national interest within 10 days of its referral.²³

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Legislative power is similarly doled out on an ethnic basis. The 15-member upper chamber, the House of Peoples, has five delegates from each ethnic group, each selected by representatives of the delegate's ethnic group currently serving in their respective entity parliament. Each ethnic group is given the power to shut down the chamber since a quorum of nine must, per the constitution, include three members from each of the ethnic groups. Following the tripartite convention, the lower House of Representatives consists of 42 members, "two-thirds elected from the territory of the

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Federation, one-third from the territory of the Republika Srpska." While legislation requires a majority vote, "[t]he Delegates . . . shall make their best efforts to see that the majority includes at least one-third of the votes of Delegates . . . from the territory of each Entity." This is coupled with a "vital interest" provision analogous to the one that stalls executive decisionmaking: Any member of the House of Peoples may declare a proposed legislative initiative "to be destructive of a vital interest of the Bosnia[k], Croat, or Serb people by a majority of . . . the Bosnia[k], Croat, or Serb Delegates." The matter, if not resolved by an ad hoc joint commission "comprising three Delegates, one each selected by the Bosnia[k], by the Croat, and by the Serb Delegates," is referred to the constitutional court.²⁴

Not surprisingly, the entities of Bosnia and Herzegovina seized upon the ethnic/religious basis for power distribution to entrench themselves by directly linking ethnicity with citizenship and political rights in the entities. The constitution of the Republika Srpska begins with an unequivocal invocation of its ethnic entitlement. "Starting from the natural, inalienable and untransferable right of the Serb people to self-determination on the basis of which that people, as any other free and sovereign people, independently decides on its political and State status and secures its economic, social and cultural development," the Republika Srpska proudly declares itself a "[s]tate of Serb people and of all its citizens." Its constitution also ensures that the "Serbian language of iekavian and ekavian dialect and the Cyrillic alphabet shall be in official use in the Republic." Further, while Article 28 declares that "[f]reedom of religion shall be guaranteed," it nonetheless specifies that "[t]he Serbian Orthodox Church shall be the church of the Serb people and other people of Orthodox religion." More importantly, it declares that the "State shall materially support the Orthodox church and it shall co-operate with it in all fields and, in particular, in preserving, cherishing and developing cultural, traditional and other spiritual values," conspicuously omitting any reference to the religions of Islam or Catholicism—those of the Bosniaks and Croats, respectively.²⁵

Meanwhile, the Federation's constitution preserves its status as an entity of

Bosniaks and Croats through its own decentralized system of government. The territory of the Federation is subdivided into cantons.²⁶ All but two of the 10 cantons, which are based on ethnic predominance, are deemed either a “Bosniak canton” or “Croat canton,” and, accordingly, are governed by the majority ethnic group.²⁷

Perhaps most damning to the consociational project are the incentives to validate and reinforce the ethnic cleansing of the civil war period created by this ethnic assignment of power. For example, since Serb (and only Serb) members of the state common institutions are directly elected from the territory of the Republika Srpska, it is impossible for a non-Serb to represent the people of the Republika Srpska. Consequently, there is no meaningful manner in which Bosniaks or Croats may participate in, and be represented through, the electoral or democratic processes in that entity. For any non-Serbs to return to a prewar home in the Republika Srpska means

that they must accept permanent subordinate status in the Serb-dominated and Serb-controlled entity. The same holds true for Serbs in the Federation of Bosnia and Herzegovina. Such provisions, whether by design or effect, perpetuate the ethnically entrenched division of power and territorial-

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ity among the entities emerging from the civil war—a period in which the Serb population in Republika Srpska went from 54.3 percent to 96.8 percent of the total population and the Bosniak population fell from 28.8 percent to 2.2 percent.²⁸ They also provide a natural mechanism for the historically subjugated Serbs—the majority of the population of the former Yugoslavia, yet citizens of the poorer southern part of the country—to seek redress for perceived centuries of domination, first by the Turks and then by the more economically advanced Croatian and Slovenian populations in the northern parts of the country.²⁹ This is not to exculpate the slaughter visited on the Bosniak population, but simply to reinforce the point that ethnic assignments of power seem particularly susceptible to the settling of historic scores on the basis of sheer power.³⁰ As the Bosnian constitutional court would later find,

[A]fter the Dayton-Agreement came into force, there was and is systematic, long-lasting, purposeful discriminatory practice of the public authorities of RS [Republika Srpska] in order to prevent so-called “minority” returns either through direct participation in violent incidents or by abstaining from the obligation to protect people against harassment, intimidation or violent attacks solely on the ground of ethnic origin³¹

Judicial Review of Dayton’s Legacy

The one (partial) exception to complete ethnically-based paralysis of post-Dayton Bosnia and Herzegovina comes with the constitutional court, which as the primary federal judicial body in the country is entrusted with jurisdiction to “uphold [the]

Constitution [of Bosnia and Herzegovina].” The ethnic composition of the nine-member court includes four members who are selected by the Federation House of Representatives and two members selected by the Republika Srpska National Assembly. To prevent ethnic deadlock in adjudication, however, the remaining three members of the court must be non-citizens, are selected by the President of the European Court of Human Rights “after consultation with the Presidency” and cannot be citizens of any neighboring country.³² Precisely for this reason, the court became the forum for revisiting the democratic viability of compelled ethnic power assignments inherited from Dayton.

The challenge to the constitutionality of many aspects of the Dayton accords was brought to the court at the instigation of Alija Izetbegovic, the then-chairman of the presidency of Bosnia and Herzegovina, and himself a Bosniak.³³ The provisions challenged focused on the declarations in the preambles of the sovereign power of ethnic groups.³⁴ The constitution of Republika Srpska declares itself the “State of the Serb people” and adds,

Starting from the natural, inalienable and untransferable right of the Serb people to self-determination on the basis of which that people, as any other free and sovereign people, independently decides on its political and State status and secures its economic, social and cultural development;

Respecting the centuries-long struggle of the Serb people for freedom and State independence;

Expressing the determination of the Serb people to create its democratic State based on social justice, the rule of law, respect for human dignity, freedom and equality;

...

Taking the natural and democratic right, will and determination of the Serb people from Republika Srpska into account to link its State completely and tightly with other States of the Serb people³⁵

In striking down the provisions of the preambles of the entities, the court held,

[S]egregation is, in principle, an illegitimate aim in a democratic society. There is no question therefore that ethnic separation through territorial delimitation does not meet the standards of a democratic state and pluralist society as established by Article I.2 of the Constitution of BiH in conjunction with paragraph 3 of the Preamble. Territorial delimitation thus must not serve as an instrument of ethnic segregation, but—quite to the contrary—must provide for ethnic accommodation through preserving linguistic pluralism and peace in order to contribute to the integration of state and society as such.³⁶

While perhaps an apt statement of democratic aspirations, the court was forced into a direct confrontation with the legacy of Dayton:

It is beyond doubt that the Federation of Bosnia and Herzegovina and Republika Srpska were—in the words of the Dayton Agreement on Implementing the Federation...—recognized as “constituent Entities” of Bosnia and Herzegovina by the GFAP, in particular through Article I.3 of the Constitution. But this recognition does not give them a *carte blanche*! Hence, despite the territorial delimitation of Bosnia and Herzegovina by the establishment of the two Entities, this territorial delimitation cannot serve as a constitutional legitimacy for ethnic domination, national homogenisation or a right to uphold the effects of ethnic cleansing.³⁷

The original expediency of the Dayton compromise infected every aspect of the democratic aspirations of Bosnia and Herzegovina. For example, the court notes, “the Serb Member of the Presidency. . . is not only elected by voters of the Serb ethnic origin, but by all citizens of Republika Srpska with or without a specific ethnic affiliation.” In its opinion, the Bosnian constitutional court makes many deft analytic moves to avoid some of the investiture of the Dayton Accords, but the key analytic work is done by the court’s crafting of a “functional interpretation” of the national constitution that allows it to proclaim that the “overall objective of the Dayton Peace Agreement” is to facilitate the “re-establish[ment of] the multi-ethnic society that had existed before the war.” This functional interpretation would require an analysis of the “totality of these circumstances” to unwind the institutional provisions of the Dayton Accords in favor of stronger constitutional safeguards on governance.³⁸ Toward this aim, the key section of the opinion relies on international law and the aspirational provisions of Dayton to repudiate ethnic power claims:

[E]thnic segregation can never be a “legitimate aim” with respect to the principles of “democratic societies” as required by the Convention on European Human Rights and the Constitution of BiH. Nor can ethnic segregation or, the other way round, ethnic homogeneity based on territorial separation serve as a means to “uphold peace on these territories”—as argued by the representative of the People’s Assembly—in light of the explicit wording of the text of the Constitution that “democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society.”³⁹

The court’s actual holding, by contrast, was quite narrow. This may have been the result of having to work within the limitations of Dayton, or the recognition of the frailty of the social peace in Bosnia and Herzegovina or the frank realization that the court could do little more than pronounce when it was itself badly divided. The opinion striking down the claims of ethnic hegemony in the entities was a 5 to 4 vote with the majority comprising the two Bosniak judges and the three international judges, while the Serb and Croat judges dissented.⁴⁰ In the end, the court struck down the declarations of ethnic sovereignty in the constitutions of the entities, while leaving the

development of integrative norms and repatriation of ethnic refugees to subsequent development. While the situation remains flammable, there is some small evidence of increased political accommodation and an increase in the number of refugees returning to their native villages and towns in the aftermath of the court's ruling.⁴¹

ANTIMAJORITARIAN CONSTITUTIONAL CONSTRAINTS: SOUTH AFRICA

Prior to the dismantlement of the apartheid state, South Africa operated under a Westminster-style parliamentary system in which the legislature served as the highest adjudicative body, and in which there was no independent judicial body capable of imposing constitutional hegemony. This arrangement was thought unsatisfactory in the transitional period for two distinct reasons. First, given the numerical vulnerability of the still-entrenched white minority, unbridled parliamentarism was unlikely to offer sufficient guarantees of the security of person and property in a transition to majoritarian-based democracy. Second, the struggle against apartheid had long been waged in the universal language of human rights and the role of law. Almost inescapably, that too pushed toward the creation of an independent judiciary.

Critics of the application of consociationalism to South Africa argued that the basic black-white divide and the small size of the white minority (estimated at roughly 14 percent a decade ago and now nearing 10 percent) would inevitably yield an overwhelming pressure to simple majoritarianism.⁴² Thus, although the apartheid rulers of the National Party (NP) sought some form of express minority veto over any future governmental action, they did not focus their negotiation demands on formalized power sharing of the sort envisioned through consociationalism. On the other side of the table, the insurrectionary African National Congress (ANC) had little sentimental or political attachment to the inherited political arrangements of the apartheid state and did not seek to build a new formal coalition within the confines of preexisting governmental structures. Indeed, it was the ANC that proposed both the creation of a constitutional court as part of the interim constitution and the formal abolition of Westminster-style parliamentarism.⁴³ The role of the constitutional court was an integral part of the negotiations leading to the end of apartheid and marked one of the most significant alterations to the inherited South African political institutions.⁴⁴

The fall of apartheid came with the inauguration of an interim government that used formalized power sharing to ensure all groups a mutual veto over contested governmental action—precisely the formula for consociationalism identified by Lijphart and other proponents of this approach. The interim constitution provided detailed power arrangements, along with a critical list of 34 constitutional principles of democratic governance, to which I shall return.⁴⁵ The primary mechanism was the election of a parliament by proportional representation and the assignment of the position of deputy president to the representatives of each party holding at least 80 of the

400 seats in the National Assembly. Among the powers conferred as a result of this representation in the executive was the ability to participate in the selection of some of the justices of the constitutional court, a power reserved to the executive branch. This provision alone, however, was hardly sufficient to protect the interests of the white minority. Whatever the participatory mechanisms formally adopted, there was no escaping the fact that the ANC would control the parliament and that Nelson Mandela would serve as head of state. Just as critical to the success of the interim constitutional arrangement as the power sharing was the fact that this was an interim arrangement designed to last no more than five years and required to cede power to a more formal constitution that could only be implemented if deemed faithful to the original 34 principles. Moreover, the National Assembly, required by Principle VIII of the interim constitution to be selected through proportional representation, would also serve as the formal drafting body for the final constitution.⁴⁶ As a result, the final constitution would have two critical features. First, it would bear a democratic legitimacy that could not be claimed by a negotiated compromise among political leaders, no matter how much *de facto* authority they could claim. Second, the interim principles of the constitution, rather than the formalities of power sharing, could serve to assuage minority concerns over the limits of majoritarianism.⁴⁷

The South African Constitutional Court had a power that had never before been imparted on any court.

Beyond the familiar powers of judicial review over the constitutionality of proposed legislation, the South African constitutional court had a power that, to the best of my knowledge, had never before been imparted on any court. Under the negotiated provisions of the interim constitution, the final constitution could not be adopted unless it faithfully adhered in its implementation to the negotiated general principles set out in the interim constitution.⁴⁸ And it was the constitutional court that was entrusted with the power to ensure that the final constitution conformed to the 34 principles.

Despite the breadth of material covered in the 34 principles, it is worth focusing on what may be subsumed under the category of anti-majoritarian protections. As a general matter, these take three forms. First, there is an elaborate set of rights guarantees that extends to the confiscation of property. Although the new government would be devoted to the amelioration of disparities in wealth across racial lines, Principle V provides that “[e]quality 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.” In essence, this principle extends legal protection to the white minority to prevent simple expropriation resulting from the exercise of majority power. Second, there are lim-

itations on the exercise of government power through a balancing of powers within the national government and principles of federalism. These limitations include the requirements of formal lawmaking (Principle X) through a multi-party legislature (Principle VIII), separation of powers (Principle VI), an independent judiciary (Principle VII), and a multi-party representative government based on proportional representation (Principle VIII). More unique are the constitutional guarantees to the provinces and local governments to be able to claim an "equitable share" of national

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resources (Principle XXVI) and the creation of a public service commission and reserve bank independent of legislative control (Principle XXIX). Third, there are protections provided by the supermajority processes needed to amend the constitution that require not only a two-thirds vote in the upper house of the national parliament but approval by a majority of provincial legislatures (Principle XVIII).⁴⁹ The task of ensuring compliance was given in its entirety to the constitutional court. In effect, once South Africa emerged as a full constitutional democracy, the constitutional court would stand as the ultimate arbiter of the constitution, holding full powers of judicial review. Ironically, however, the constitutional court would predate the constitution and would serve as the final body approving the adoption of the constitution itself. Hardly customary yet innovative, this arrangement seemed to satisfy the security interests of all parties and was integral to the peaceful transition to constitutional democracy.

It is of course possible to assail any political arrangement with the remnants of apartheid. As one critic has noted,

For the NP, the principles constituted a shield for the protection of the white minority and its privilege from the possible redistributive inclinations of a black-led government. In other words, the principles were the essential link between the past and the present; through them the old order would ensure its survival. For the ANC, which ascended to power through persuasion as opposed to the defeat of its adversary, rejection of the principles would likely have delayed the transition or compounded the crisis of governance then destabilizing South Africa. The establishment was willing to transfer some powers to an ANC government so long as the resulting state would have substantially inferior powers compared with those of its predecessors.⁵⁰

The comparison to the past is entirely apt. The former government was dedicated to racist domination. To the extent there would be a peaceful transition, and some prospect of democratic, multiracial rule, the criticism that the incoming government would have less power than its predecessor misses the mark. Of course it would. Absent such constitutional constraints, a racial civil war was inevitable. As all

parties to the negotiations realized, the ANC could not govern without the inherited administrative bureaucracy of the defeated apartheid regime. Nor could the ANC overcome the apartheid rules militarily. At the same time, the NP could not very well continue to hold off majority rule and believed that international sanctions would have prevented a bloody war of attrition against the majority population.⁵¹ What emerged was precisely the product of a contested negotiation.

In July 1996, the proposed permanent constitution was submitted for review to the constitutional court, which rendered its decision two months later.⁵² Of greatest significance for present purposes are the provisions that reaffirmed limitations on government and those that were struck down for what may be termed an excess of majoritarianism. These primarily concerned the attempt to preclude constitutional review from certain categories of statutes, the absence of federalist safeguards on centralized power and the lack of supermajoritarian protection for certain components of the constitution itself, including the liberty protections of the Bill of Rights. With regard to the latter, the court found a violation of the principles of the interim constitution in the failure to “entrench” the rights in question.⁵³ In summary form, the court’s majestic ruling turns on the following key understandings of permissible constitutional law:

Bicameralism and divided government: Invoking Montesquieu, the court reaffirmed the importance of checks and balances across the branches of government. The court pointed specifically to the creation of an upper house (the National Council of Provinces) that would not be based on equipopulational voting, but on the election of 10 representatives from each of the nine provinces.⁵⁴ This has great practical significance because one of the provinces is majority Zulu (hence outside the political orbit of the ANC) and two others have large concentrations of white and colored voters.⁵⁵

Federalism: The court strictly enforced Principle XXII ensuring that the national government would not encroach on the powers of the provinces.⁵⁶ Thus the court found unconstitutional those provisions that failed to provide the required “framework for LG [local government] structures,” as well as the failure to ensure the fiscal integrity of political subdivisions.⁵⁷ For the court, the South African constitution should provide only those powers to the national government “where national uniformity is required,” and only economic matters and issues of foreign policy met this restrictive definition.⁵⁸

Supermajoritarianism: The court also strictly construed Principle XV, which required “special procedures involving special majorities” for constitutional amendments.⁵⁹ According to the court, the purpose of this provision was to secure the constitution “against political agendas of ordinary majorities in the national Parliament.”⁶⁰ Various provisions of the proposed constitution requiring supermajoritarian action were nevertheless struck down for failing to create special procedures outside the

framework of ordinary legislation. Thus, for example, a provision allowing a two-thirds majority of the lower house to amend parts of the constitution failed because “no special period of notice is required; constitutional amendments could be introduced as part of other draft legislation; and no extra time for reflection is required.”⁶¹ Similarly, the court found that allowing the Bill of Rights to be amended by a two-thirds majority of the lower house failed the “entrenchment” requirement of Principle II, which, the court ruled, required “some ‘entrenching’ mechanism . . . [to give] the Bill of Rights greater protection than the ordinary provisions of the [constitution].”⁶²

Judicial review: The rejection of judicial review for certain categories of statutes was found to violate the commitment to constitutional supremacy in Principle IV and the jurisdictional guarantees for judicial power contained in Principle VII.⁶³

International law: Although not a central issue in the ultimate approval of the constitution by the court, Article 39 of the final constitution provides that, in construing the Bill of Rights, a court “must consider international law[.]”⁶⁴ Most observers will note only the valorization of international human rights norms. But the incorporation of a source of law beyond the control of the parliamentary majority again serves to constrain majoritarian prerogatives by providing an independent, non-parliamentary source of authority for courts to enforce.⁶⁵ Thus, in construing the obligations of the constitution, the court found an obligation to protect those rights recognized in open and democratic societies as being “inalienable entitlements of human beings.” While the court recognized that no consensus exists as to what entitlements are inalienable, the court required the constitution, at a minimum, to guarantee those rights which have achieved a wide measure of international acceptance. Thus, according to the court, in aggregating the fundamental rights of other societies, South Africa’s proposed constitution established a set of rights “as extensive as any to be found in any national constitution.”⁶⁶

Minority party security: Beyond the protections of proportional representation, the constitution contained an “anti-defection” principle in which a member of Parliament would have to resign if he or she attempted to switch parties.⁶⁷ Although such provisions may restrict expression of beliefs by legislators, there is an overriding concern that minority legislators could be induced to sway from their constituents’ interests to support majoritarian policies. Since by definition there are fewer minority than majority representatives, any single minority defection would have a more severe impact on the representation of the minority population than the defection of a majority legislator would have on the representation of the majority. Such defection to the majority is not only more costly, but also more likely. Minority caucuses are unlikely to be able to offer the same personal opportunities or chances for local blandishments as is the majority. In rejecting the civil liberties challenge to the anti-defection clause, the court noted that anti-defection clauses were found in the constitutions of Namibia and India and were therefore entirely consistent with democratic

governance.⁶⁸

The Constitutional Assembly then revised the constitutional draft to meet the court's concerns in October 1996 and, following a second round of judicial scrutiny, the new constitution was signed and implemented by President Nelson Mandela in December 1996.⁶⁹ The new constitution drew much fanfare, assuring even the right to "an environment that is not harmful to their health and well-being."⁷⁰ Cass Sunstein seized upon this feature to declare it "the most admirable constitution in the history of the world."⁷¹ For many champions of activist courts, the broad recognition of judicial authority in implementing constitutional principles combined with the sweeping rights guarantees sparked expectations that post-enactment cases would usher in an era of active judicial engagement with the process of dismantling the legacy of apartheid.⁷²

Consistent with its origins as the handmaiden to constitutional democracy, however, the court has played a circumspect, pragmatic role, refusing to develop a broad mandate of rights jurisprudence.⁷³ Thus, much criticism was directed at decisions such as *Republic of South Africa v. Grootboom*, in which the court distinguished

between the rights guarantees of the constitution and the deference that should be accorded the government in crafting policies to achieve those objectives.⁷⁴ To my mind, critics of the court largely fail to appreciate the true significance of the South African constitutional process and of the role played by the court in that process. Although many will be taken

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by the ample rights domain in the South African constitution, and no doubt its constitutionalization of environmental and labor organizing protections will feature prominently in future comparative law treatises, the constitutional processes in South Africa served primarily as a success story in constituting democratic rule. The use of an interim constitution defused the pressure to resolve deeply contested governance questions on a once-and-for-all basis while providing a sense of security to minority constituencies. The interim constitution, and the authority entrusted to the constitutional court, allowed for transitional democratic organization of parties and constituencies and also for a participatory legitimacy to the drafting and ratification of the final constitution. Having helped create a fledgling democracy in a deeply divided and still violent society, the court's reluctance to substitute decrees for democratic deliberation and compromise seems well in keeping with the ambitious mandates of the transitional process.

This leads to some final observations on the generalizability of the South African experience. South Africa entered the constitutional period with a developed industrial base, a well-functioning market economy and strong institutions of civil society both inside and outside the market arena.⁷⁵ Throughout the transitional period, state

power remained intact and the interim constitution could be implemented by the outgoing regime as ordinary legislation. Both the NP and the ANC were western-oriented and secular. Even so, the democratic experiment in South Africa remains fragile. Nonetheless, what emerges is the use of limitations on majority power as a mechanism for stabilizing democratic governance without the reinforcement of ethnic and racial divides created by formal power sharing.


CONCLUSION

The allure of consociationalism was its understanding that state authority could not achieve legitimacy without inclusiveness. At the same time, formal state entrenchment of racial or ethnic political power appeared historically to perpetuate—and in some instances exacerbate—the underlying societal division.

The stakes for crafting a constitutional line that mediates these divides in fractured societies are incomparably high. South Africa avoided a massive bloodletting only through a combination of good fortune in finding a negotiated pathway and a level of inspired political leadership that only rarely graces the world stage. Bosnia and Herzegovina live under the perpetual threat of a sudden descent into renewed ethnic slaughter. In these countries, a lack of legitimacy in representation would trigger either the collapse of the central government or a last stand by an excluded group. Governmental structures had to be devised that could assure participation for all, temper the threat of majoritarian tyranny and guarantee the sanctity of the individual.

I am more certain of my praise for South Africa than of my discomfort for the Dayton approach. South Africa used a modern yet innovative approach to constitutionalism to hold a workable peace in a deeply fractured society. By reducing what the governing majority in power may do, the South African constitution served to lower the stakes for playing the political game and to provide encouragement for a peaceful transition. Even without giving formal expression to the racial and ethnic divide, however, South Africa assured each group significant political power through federalism, territorial representation, proportional representation and ample checks on the executive. My sense is that the Bosnian constitutional court attempted to do the same by leaving untouched the mechanism of representation inherited from Dayton and then using the constitutional framework to undermine the hard edges of consociationalism.

This then is the point of convergence between the South African and Bosnian courts. Each saw in its constitutional authority a responsibility to mediate the inherent conflict between democratic self-governance and the risk of majoritarian oppression. Each helped its society move away from the risk of locking in social fractures that would have been present had the immediate majorities held unfettered power. At the same time, each showed itself to be quite sensitive to the need to assure meaningful minority participation in the structures of governance. Both the Bosnian and

South African courts have shown a robust appreciation of the role of a strong judiciary in mediating the inescapable tension between constitutionalism and democracy. 

NOTES

¹Jon Elster, introduction to *Constitutionalism and Democracy* (New York: Cambridge University Press, 1988), 1, in which he argues that democracy is “simple majority rule, based on the principle ‘One person one vote.’”; Robert A. Dahl, *How Democratic Is the American Constitution?* (New Haven, CT: Yale University Press, 2001), 50–51, in which the author explains that governmental units in a democratic system derive authority from majority rule; Frank Michelman captures this tension well in defining democracy as ultimately “popular political self-government” and constitutionalism as “[t]he containment of popular political decision-making by a basic law.” Frank I. Michelman, *Brennan and Democracy* (Princeton, NJ: Princeton University Press, 1999), 5–6. See also Richard H. Pildes, “Constitutionalizing Democratic Politics,” *A Badly Flawed Election: Debating Bush v. Gore, the Supreme Court, and American Democracy* (New York: New Press, 2002), 155–56, in which Pildes defines constitutionalization as subjecting the “fundamental structure of democratic processes and institutions to constitutional constraint.”

²Donald P. Kommers, “German Constitutionalism: A Prolegomenon,” *Emory Law Journal* 40 (1991): 846 (discussing the “eternity clause” of German Basic Law which bars amendments tampering with German federalism or basic political principles); John Ferejohn and Lawrence Sager, “Commitment and Constitutionalism,” *University of Texas Law Review* 81 (2003): 1930, 1954 (casting constitutions as self-restraints against “blatant majoritarian expropriation”); Samuel Issacharoff, “The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections,” *University of Texas Law Review* 81 (2003): 1989 n. 17 (listing temporal restrictions found in the constitutions of France and Finland).

³See Douglas Greenberg et al., introduction to *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York: Oxford University Press, 1993), xxi (describing modern constitutionalism as a “commitment to limitations on ordinary political power”).

⁴Ruti Teitel, “Transitional Jurisprudence: The Role of Law in Political Transformation,” *Yale Law Journal* 106 (1997): 2011.

⁵John Stuart Mill, *On Liberty, and, Considerations on Representative Government* (New York: MacMillan, 1947), 292.

⁶Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven, CT: Yale University Press, 1977), 1, in which he discusses how consociational democracy explains the “political stability” of Austria, Belgium, the Netherlands, and Switzerland.

⁷*Ibid.*, 25.

⁸*Ibid.*, 31.

⁹Donald L. Horowitz, *Ethnic Groups in Conflict* (Berkeley, CA: University of California Press, 1985), 568–76 (focusing, in a discussion of consociationalism, on the more intense ethnic hatreds in Africa).

¹⁰Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa’s Political Reconstruction* (New York: Cambridge University Press, 2000), 23.

¹¹Richard H. Dekmejian, “Consociational Democracy in Crisis: The Case of Lebanon,” *Comparative Politics* 10 (1978): 254 (describing how the 1926 constitution and National Pact of 1945 provided for a six to five ratio of Christians to Muslims in the Chamber and an even division in the cabinet); Antoine N. Messarra, *Théorie Générale du Système Politique Libanais* (Paris: éditions Cariscript, 1994); H. E. Chehabi, “The Absence of Consociationalism in Sri Lanka,” *Plural Societies* 11 (1980): 55 (accounting for the lack of consociationalism in Sri Lanka); Lijphart, *supra* note 9, 158–61 (discussing the failure of consociationalism in Cyprus); Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (New Haven, CT: Yale University Press, 1984), 184 (noting that the 1960 constitution of Cyprus provided for separately elected communal chambers for the Greek majority and Turkish minority); Connie de la Vega, “The Right to Equal Education: Merely a Guiding Principle or Customary

International Legal Right?," *Harvard Black Letter Law Journal* 11 (1994): 49 (discussing Ivory Coast's equal protection guarantees).

¹² Roy Licklider, "The Consequences of Negotiated Settlements in Civil Wars, 1945–1993," *American Political Science Review* 89, (1995): 681 (finding that in so-called identity civil wars "negotiated settlements are less likely to be stable than military victories").

¹³ UN, Security Council, *Security Council Resolution 1378*, 56th Session, 4415th mtg., 2001, U.N. Doc. S/RES/1378 (2001) (proclaiming that a transitional government in Afghanistan should be "broad-based, multi-ethnic and fully representative of all the Afghan people").

¹⁴ Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004).

¹⁵ Donald L. Horowitz, *A Democratic South Africa? Constitutional Engineering in a Divided Society* (Berkeley, CA: University of California Press, 1991), 97 (providing examples of "polarizing elections" leading to authoritarian regimes).

¹⁶ The phrase "one man, one vote, one time" is often attributed to former Assistant Secretary of State and US Ambassador to Syria and Egypt Edward Djerejian. Ali Kahn, "A Theory of Universal Democracy," *Wisconsin International Law Journal* 16 (1997) 106, n.130. Djerejian's cynicism was founded in fact: Between 1967 and 1991, for example, no country in Africa experienced power passing from one elected government to another. Horowitz, *supra* note 21, 239.

¹⁷ UN, *General Framework Agreement for Peace in Bosnia and Herzegovina*, 50th Session, Agenda Item 28, 1995, 1996, U.N. Doc. S/1995/999 [hereinafter, Dayton Peace Agreement].

¹⁸ I will focus in this section on the results of the Dayton Agreements, rather than on the negotiation process, as in South Africa. In part, this reflects the absence of full engagement with the long-term problems of ethnic governance in Bosnia as opposed to South Africa. In part, it is because I share the view of many commentators that the Dayton Accords look worse and worse in retrospect. For critical commentary, see, e.g., Fionnuala Ni Aolain, "The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis," *Michigan Journal of International Law* 19 (1998): 957; Michael Scharf, "Comparative Peace: A Look at Recent Peace Agreements," *American Society of International Law Proceedings* 94 (2000): 298; Paul C. Szasz, "The Dayton Accord: The Balkan Peace Agreement," *Cornell International Law Journal* 30 (1997): 759. Professor Szasz is the most unsparing in his criticism, labeling the arrangements in Bosnia and Herzegovina on the verge of proving a disaster. Szasz, "Comparative Peace," *supra*, 298. More hopeful on this score is the insightful analysis by Anna Morawiec Mansfield, who argues that any stabilization of the ethnic killing provides an immediate benefit of consociationalism and that the Court's intervention may assist Bosnian elites in investing more heavily in rights-oriented democratic rule. "Ethnic But Equal: The Quest for the New Democratic Order in Bosnia and Herzegovina," *Columbia Law Review* 103 (2003): 2083–86.

¹⁹ Mansfield, *supra* note 24, 2057.

²⁰ Bosnia & Herzegovina Constitution preamble, art. I, § 7, at <http://www.ohr.int/const/bih-fed> (last visited March 16, 2004).

²¹ See Aolain, *supra* note 24, 974 (noting that each entity was given wide authority to regulate "defense, police, citizenship, the issuing of passports, criminal matters, property law, finance, and even external relations and cooperation with other states").

²² Bosn. & Herz. Const. art. I, § 1; Republika Srpska Constitution, art. I, § 1 (amended 2003), at <http://www.ohr.int/const/rs> (last visited March 16, 2004).

²³ According to its constitution, Bosnia and Herzegovina remains responsible for the development of trade, customs, monetary, immigration, asylum and foreign policy, the financing of the state institutions and their international obligations, international and inter-Entity criminal law enforcement, operation of common and international communications facilities, regulation of inter-entity transportation and air traffic control. Bosn. & Herz. Const. art. III, § 1. All other governmental functions and powers are delegated to the entities. *Ibid.*, art. III, § 3; art. V, art. V, § 2(c); art. V, § 2(d).

²⁴ *Ibid.*, art. IV, art. IV, § 1. The constitution makes clear that "[t]he designated Croat and Bosnia[k] Delegates from the Federation shall be selected, respectively, by the Croat and Bosnia[k] Delegates to the House of Peoples of the Federation. Delegates from the Republika Srpska shall be selected by the National Assembly of the Republika Srpska." *Ibid.*, art. IV, § 1(a); art. IV, § 1(b); art. IV, § 2; art. IV, § 3(d); art. IV,

§ 3(e); art. IV, § 3(f).

²⁵ Republika Srpska Const. preamble; art. I, § 1; art. I, § 7; art II, § 28.

²⁶ Bosn. & Herz. Const. art I, § 2 (declaring that “[t]he Federation consists of federal units (Cantons)”).

²⁷ In the two so-called “special regime” cantons, neither Bosniaks nor Croats dominate. They are thus controlled by a proportional multi-ethnic regime. *Ibid.*, art. V, § 12.

²⁸ Constitutional Court of Bosnia and Herzegovina, *Request for Evaluation of Constitutionality of Certain Provisions of the Constitution of Republika Srpska and the Constitution of the Federation of BiH*, Case U 5/98, Partial Decision of July 1, 2000, ¶ 131, at <http://ccbh.ba/decisions/decision.asp?lang=en&decision=81>.

²⁹ For a fuller discussion of this point, see Amy Chua, *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability* (New York: Anchor Books, 2003), 170–75.

³⁰ The designation of Republika Srpska as a Serbian political entity did not quell nationalist sentiments among the Serbs. Ambassador Holbrooke recounts that even during the Dayton negotiations the Serb delegation made it clear that it would not accept Muslims as potential swing voters in intra-Serb elections. Richard C. Holbrooke, *To End a War* (New York: Random House, 1998), 290.

³¹ *Request for Evaluation of Constitutionality of Certain Provisions of the Constitution of Republika Srpska and the Constitution of the Federation of BiH*, at ¶ 95.

³² Bosn. & Herz. Const. art. VI, § 3; art. VI § 1(a); art VI, § 1(a) & (b).

³³ *Request for Evaluation of Constitutionality of Certain Provisions of the Constitution of Republika Srpska and the Constitution of the Federation of BiH*, at ¶ 1. Further complicating the picture is the fact that Izetbegovic objected strenuously to the final form of the Dayton accords as hammered out by Serbian President Milosevic and Croatian President Tudjman. Ultimately, however, Izetbegovic was forced under pressure from the United States to accede to the ethnic assignment of power through the territories. Holbrooke, *supra* note 54, 308–09.

³⁴ *Ibid.*, at ¶ 1.

³⁵ *Ibid.*, ¶ 9(A)(a) (quoting the Constitution of Republika Srpska). The Constitution of the Federation of Bosnia and Herzegovina similarly provides that “Bosniacs and Croats as constituent peoples . . . [act] in the exercise of their sovereign rights.” *Ibid.* ¶ 10.

³⁶ *Ibid.*, ¶ 57

³⁷ *Ibid.*, ¶ 61.

³⁸ *Ibid.*, ¶ 65; ¶ 73; ¶ 97.

³⁹ *Ibid.*, ¶ 96.

⁴⁰ *Ibid.*, ¶ 142.

⁴¹ See Mansfield, *supra* note 24, 2089–90 (stating that since the Court’s decision, there has been increased ethnic cooperation, new legislation and an increase in the return of refugees).

⁴² The most prominent of these criticisms is found in Horowitz, *supra* note 21, 137–45. Horowitz focused instead on different electoral arrangements to destabilize simple majoritarian lumping and provide incentives for cross-party compromises. *Ibid.*, 154–55.

⁴³ Makau wa Mutua, “Hope and Despair for a New South Africa: The Limits of Rights Discourse,” *Harvard Human Rights Journal* 10 (1997): 80 (“The Constitutional Court, which was proposed by the ANC . . . can exercise judicial review, a power that the previous Supreme Court lacked under the parliamentary supremacy model of apartheid . . .”).

⁴⁴ Richard Spitz and Matthew Chaskalson, *The Politics of Transition: A Hidden History of South Africa’s Negotiated Settlement* (Oxford: Hart, 2000), 191–209 (detailing the negotiations over the structure and functions of the Constitutional Court). While the proposal for the Constitutional Court came from the ANC, the National Party agreed, and even pushed hard to make all court appointments the exclusive authority of the executive—a move that took the ANC by surprise. Siri Gloppen, *South Africa: The Battle Over the Constitution* (Brookfield, VT: Ashgate, 1997), 230 (suggesting the failure of the NP to win a share

in the executive power, its "primary objective," debilitated its ability to achieve its agenda through the courts).

⁴⁵ Klug, *supra* note 13, 108 (noting that the development of a set of constitutional values while at the interim Negotiating Forum provided a means to avoid irreconcilable conflict during the later making of the final constitution).

⁴⁶ South Africa Constitution of 1993 (IC) § 84(1); § 97; § 71; sched. 4, Principle VIII ; § 68.

⁴⁷ Albie Sachs well noted the irony that South African apartheid was purely majoritarian among the enfranchised white minority, but that "[n]ow that the majority is going to be black, South African whites suddenly believe majority rule is a terrible thing Now that the majority stands to change color, you no longer hear people talking about majority rule but about 'majoritarianism,' which sounds worse than Marxism-Leninism." Horowitz, *supra* note 21, 98.

⁴⁸ Gloppen, *supra* note 71, 199.

⁴⁹ S. Afr. Const. of 1993 (IC), schedule 4, Principle V; Principle X; Principle VIII; Principle VI; Principle VII; Principle VIII; Principle XXVI; Principle XXIX; Principle XVIII.

⁵⁰ Mutua, *supra* note 70, 81.

⁵¹ This is a dramatically condensed version of a long process of realization through negotiations, told forcefully in Alistair Sparks, *Tomorrow is Another Country* (Chicago: University of Chicago Press, 1996), 120-225.

⁵² Certification, 1996 (4) SALR at 744.

⁵³ This is referred to as the requirement that there be "special procedures involving special majorities" for constitutional amendment and for any alteration of the constitutional guarantees of individual rights. *Ibid.* at 821 ¶ 152; 822 ¶ 156

⁵⁴ *Ibid.*, 776 ¶ 6, 788 ¶ 45; 865-66 ¶¶ 318-319.

⁵⁵ The commitment to a territorially based upper chamber was of particular significance in keeping the IFP a participant in the process of negotiations and in the Interim Government, although that party did walk out on the final accords. See Gloppen, *supra* note 71, at 204, 222-23. For general background on powers of the bicameral parliament, see The Central Intelligence Agency, *The World Factbook: South Africa*. <http://www.cia.gov/cia/publications/factbook/geos/sf.html> (last modified Oct. 5, 2004) (describing responsibilities of South African legislative organs).

⁵⁶ S. Afr. Const. of 1993 (IC), schedule 4, Principle XXII.

⁵⁷ Certification, 1996 (4) SALR at 861 ¶¶ 301-02, 911 ¶ 482.

⁵⁸ See *ibid.*, 845 ¶ 240 (explaining that the constitution mandates that legislative powers should be allocated predominantly, if not wholly, to the national government where national uniformity is required); See *ibid.*, 846 ¶ 241 (noting that the constitution expressly "requires that the determination of national economic policies, the promotion of inter-provincial commerce and related matters should be allocated to the national government"). See also *ibid.*, 849 ¶ 254 (quoting Principle XXI's requirement that "the Constitution shall empower the national government to intervene through legislation" wherever such intervention is necessary for "the maintenance of economic unity . . . [and] the maintenance of national security").

⁵⁹ S. Afr. Const. of 1993 (IC), schedule 4, Principle XV.

⁶⁰ Certification, 1996 (4) SALR at 821 ¶ 153.

⁶¹ *Ibid.*, 822 ¶ 156 (striking down a provision which required approval of a two-thirds majority of the lower house for any constitutional amendment for failing to dictate "special procedures" for ratification in addition to supermajoritarian assent); 822 ¶ 156.

⁶² S. Afr. Const. of 1993 (IC), schedule 4, Principle II; Certification, 1996 (4) SALR at 822-23 ¶ 159.

⁶³ *Ibid.*, 820 ¶ 149.

⁶⁴ S. Afr. Const. § 39(1)(b).

⁶⁵ For example, Section 35 of South Africa's interim constitution provides: "In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law." S. Afr. Const. of 1993 (IC) § 35(1).

⁶⁶ Certification, 1996 (4) SALR at 790-91 ¶¶ 50-52; 790-91 ¶ 50-52.

⁶⁷ *Ibid.*, 829 ¶ 181 n.136 and accompanying text (considering whether the anti-defection principle was unconstitutional).

⁶⁸ *Ibid.*, 790-91 ¶ 52. The minority party protections through the anti-defection mechanism was subsequently repealed by constitutional amendment. The repeal is troubling for three reasons. First, the anti-defection principle was a significant subject of debate and compromise in the creation of the overall constitutional framework. See Spitz and Chaskalson, *supra* note 71, 110-12 (discussing the origins of the anti-defection clause). Second, the proponent of the repeal was the ANC, clearly the majority party least at risk to suffer defection. Third, on my reading of the Certification decision, the structural minority protections provided the central analytic framework for compliance with the interim principles. Although troubled, the constitutional court held the repeal to apply only to the procedural requirements of constitutional amendment. The court did not attempt to impose a doctrine of structural integrity of minority protections to prevent the amendment, which perhaps signifies a retreat from the role the court assumed in the Certification decision. *United Democratic Movement v. President of the Republic of South Africa*, 2003 (1) SALR 495 (cc).

⁶⁹ Associated Press, "Constitution Signed," *Winnipeg Free Press*, December 11, 1996, p. B1.

⁷⁰ S. Afr. Const. § 24(a).

⁷¹ Cass R. Sunstein, *Designing Democracy: What Constitutions Do* (New York: Oxford University Press, 2001), 261.

⁷² *Ibid.*, 236-37 (the Constitutional Court of South Africa "has provided the most convincing rebuttal yet to those who have claimed, in the abstract quite plausibly, that judicial protection of socioeconomic rights could not possibly be a good idea.").

⁷³ For a summary of the criticisms of the South African Constitutional Court and a defense of institutional pragmatism, see Mark S. Kende, "The Fifth Anniversary of the South African Constitutional Court: In Defense of Judicial Pragmatism," *Vermont Law Review* 26 (2002): 753.

⁷⁴ *Republic of South Africa v. Grootboom*, 2001 (1) SALR 46 (CC); See *Ibid.*, 68 ¶ 41 (indicating that the constitution's guarantee of a right of access to adequate housing did not prevent the court from deferring to "reasonable" measures taken by the State to provide such housing). For a thoughtful account of this tension, see Heinz Klug, "Five Years On: How Relevant is the Constitution to the New South Africa," *Vermont Law Review* 26 (2002): 803 (analyzing the conflict over the extent of the constitution's mandate on specific policies, in the context of litigation over efforts to require the government to provide Nevirapine to prevent mother-to-child HIV transmission).

⁷⁵ This point is further elaborated in Gloppen, *supra* note 71, 271.

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