

Issues and Debates in the South African Constitutional Negotiations in the Context of the Apartheid Evil and the Struggle for Democracy

Paper delivered by Z. M. Yacoob, Justice of the Constitutional Court of South Africa
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Introduction

On 27 April 1994, South Africa held its first democratic elections. The event was historic, indescribably poignant and undoubtedly significant for millions of South Africans. None of us had ever voted before. The vast majority of us, all black citizens, had been oppressed and exploited for generations at the hands of a minority white regime that executed the evil apartheid scheme. Our people had struggled hard and made many sacrifices to achieve democracy. Millions of people had been evicted from their homes, and many, many thousands banned, imprisoned, detained, tortured and killed.

These elections marked the end of apartheid and were the culmination of a protracted struggle for democracy, delicate negotiations and the adoption of an interim Constitution. After further negotiations, a final Constitution came into force in 1997. We are now in the process of realising the promises of this Constitution for all. I have been asked to speak today largely because the struggles of our people with the help of the world resulted in a negotiated Constitution that is the basis for a truly democratic society. In other words, I am here because of our oppression, our struggle and our success. I thank the Law School for giving me the opportunity to share some experiences and ideas and hope that this will be both relevant and helpful.

I start by talking broadly about the evil of apartheid and the struggle for democracy. I will, in this context, try to characterise the negotiating process, highlight some of its major elements and debates and describe their resolution.

Apartheid in South Africa

White occupation of South Africa commenced at the middle of the seventeenth century in the Cape of Good Hope. The Union of South Africa that approximates to the territory of South Africa today was constituted in 1910, occupied and controlled by white settlers. White settlers and African residents never lived side by side in harmony and in a spirit of mutual respect. The resources of our country had always been exploited by and for the benefit of whites alone. African people played a secondary subsidiary role.

The resistance of African people took organisational form with the formation of the African National Congress in 1912. During the period 1912 to 1948, the process of the exploitation and oppression of black people in South Africa became substantially more organised, severe and focused. An undoubtedly oppressive landmark of this period was the 1913 Land Act that severely restricted African people in their ownership, occupation and control of land. Resistance during this period consisted mainly of negotiations with growing levels of protest. After 1948, apartheid became structured and was more ruthlessly applied. The minority white parliament ensured that all economic and political power remained in white hands. The vote-less majority

was dehumanised in every conceivable way. Some examples are the forced removal of millions of black people from land; job reservation in favour of whites; unequal education and wages; the reservation of separate facilities including parks and park benches, taxis, buses and trains for the use of white people alone; and unequal pensions and grants. Indeed the vote-less majority was regarded as expendable and consigned to townships and homelands in which they were forced to eke out their miserable existence. The resistance of the majority also grew during this time and was met by the banning of people and their organisations, house arrests, treason trials, detention without trial, torture during detention, deaths in detention, and so on. Increased resistance in the latter days of apartheid was met by unrestrained police and army action during protests, unprovoked killing of people suspected of being activists, and untold disappearances. But the resistance of the people of South Africa was unstoppable. Banned peoples' organisations continued to grow in stature and strength, and South Africa was increasingly isolated in the international arena. Finally, by 1990, the South African regime had no choice but to negotiate towards democracy.

The Character of the Negotiations

We must at the outset identify why there were negotiations between the South African regime and, in effect, the African National Congress. Some say that they were the result of a change of heart in members of the white regime who realised the unfairness and inhumanity of their past conduct and wanted to make amends and ensure the creation of a fair and just South African constitutional order. I doubt that. The more likely reason is that oppression was becoming counter-productive. The peoples' resistance could not be quelled, international isolation continued to grow and the regime was finding it impossible to govern. It was perhaps realised that the salvation of white people in South Africa was inextricably bound up with some degree of accommodation of all the people within the country.

On the other hand, the African National Congress too could not continue with the struggle indefinitely. Guerrilla warfare was unlikely to topple a sophisticated well-armed regime in the short or medium term. The need for the reconstruction of South African society and the alleviation of suffering was both real and urgent.

The negotiations were therefore not between groups of people who aimed at achieving the same result. They were conducted between representatives of the majority of people on the one hand, and those of the white minority, on the other. The minority was in power and in control of almost all resources. Essentially, the minority sought safeguards to ensure that majority power disturbed minority privilege as little as possible. The majority desired minimal curtailment of its power to ensure it was in the final analysis able to effect transformation of South African society for the benefit of all. The essence of the dispute was about whether and the extent to which majoritarianism would be qualified in the new order.

Constitutionalism

In the late 1980s, minority representatives repeatedly said that they did not favour a "winner takes all" situation. They did not wish to be oppressed by a majority. It seemed ironic at the time that a minority whose hallmark had been brutal immoral control and oppression of the majority required protection from that majority. Nelson Mandela, our first and most venerable President, articulated the African National Congress vision early in the negotiating process. A majority parliament would not be supreme in the future South African order. The Constitution would be supreme. All law and government action would be subject to the Constitution. In the South

African context, constitutionalism was a qualification of majoritarianism. It was the key that unlocked the process of negotiation.

An important preliminary issue was about who should prepare the Constitution and how this was to be done. The majority required this to be done by legitimate representatives of the South African people with their full participation. The minority, on the other hand, contended that constitution writing was the province of lawyers and political experts with knowledge and expertise. They would determine what was good for all. This debate was settled by agreement on what may be described as the two-stage constitution-making process.

There was first an interim Constitution agreed by negotiators and passed by the minority parliament. It provided for “one person one vote”, the protection of certain fundamental rights, and for the country to be governed by elected representatives while the final Constitution was being prepared and adopted. To this end, the interim Constitution provided for the second stage. There was an elected Constitutional Assembly empowered to adopt the final Constitution.

But the Assembly’s powers were limited. It was to be bound by certain constitutional principles that had been hammered out and made part of the interim Constitution. There were 34 of these. They constituted a framework beyond which the Assembly was not to go. They required, amongst others, the entrenchment of universally accepted fundamental human rights, the division of power between national and provincial governments, local government structures, a single independent judiciary, and equality. I would suggest that the two stage constitutional process too, in its limitation of the powers of the Constitutional Assembly, was in reality a qualification of the majoritarian approach.

The Courts

The acceptance of a society in which the Constitution was to be supreme and the obligation of the Constitutional Assembly to comply with certain constitutional principles brought the judiciary and its transformation into sharp relief. The new constitutional order would ultimately be protected by the courts. Almost all judges in South Africa at the time of the negotiations were white males appointed by the Minister of Justice of the minority regime and beneficiaries of apartheid. Most had had no experience of measuring governmental action against a constitution. Those judges, in judgments delivered in pre-1994 South Africa, traditionally made a distinction between the judges’ duty to interpret the law and the duty of parliament to make it. They almost always enforced unjust laws without comment. There were of course exceptional judges who tried hard to interpret the laws in accordance with justice, commented adversely on unjust laws, and objected to the evil of apartheid.

The minority in the negotiating process took the view that the Appellate Division, then the highest court, should perform the role of a Constitutional Court. The majority required a brand new court as the guardian of the South African Constitution, a Constitutional Court that would signal a decisive and complete break from past inequality and injustice. This would be a new beginning of the just, humane constitutional order. The parties eventually settled for a mix between the old and the new. There would be a new Constitutional Court of eleven judges but four of these would come from the ranks of old order judges.

But the transformation of the judiciary was not to be completed by the conception of a new Constitutional Court alone. The idea that judges should be appointed solely by the ruling elite, even if that elite was the genuine representative of the majority, was soundly rejected by both

sides. I suppose the minority understood best the degree to which the independence of a judiciary might be compromised by appointing judges in that way. The Constitution provides for the appointment of a Judicial Services Commission of more than twenty members, chaired by the Chief Justice and representing the judiciary, the legal profession, the political sphere and civil society. This Commission advises the President in relation to appointments of judges to the High Court and the President is bound to accept that advice. Judges of the Constitutional Court are appointed by the President from amongst people recommended by the Judicial Services Commission. The Constitution obliges the Judicial Services Commission to take account of the need to ensure that the judiciary is representative of the race and gender component of South African society. Our Constitution makes judicial transformation feasible. The eventual effective enforcement of fundamental rights in South Africa depends largely on the success of judicial transformation mandated by the Constitution.

Fundamental Rights

The inclusion of universally accepted civil and political individual human rights was no obstacle. The minority regarded the inclusion of these rights as essential for their protection. The majority wanted these rights because their violation and governmental excess had been integral to the maintenance of apartheid and injustice.

There were however important areas of debate that arose from fundamentally different points of departure of the majority and minority respectively. The majority required the bill of rights to go beyond the protection of individual civil and political rights. They wanted a substantive and not a merely formal equality clause, the inclusion of socio-economic rights in the Constitution, as well as the incorporation of labour rights. The minority representatives were not particularly eager on these issues. In my view, the essential difference between the two sides revolved around the extent to which our bill of rights would facilitate transformation of South African society. Some of the more pertinent debates are briefly discussed. I start with the equality provision.

Section 9 of the Constitution concerns equality and is reproduced in Annexure A. If the majority had proposed that the equality provision would say no more than that everyone is equal before the law, there would probably have been no debate, as the minority would have found this fully acceptable. The inclusion of the phrase “equal benefit of the law” in subsection (1) accordingly gave rise to some debate. Subsection (2) was also debated. The minority saw no reason for the inclusion of this subsection and expressed the fear that affirmative action might result in “reverse discrimination”. Subsection (2), as finally agreed, does allow for a more substantive equality than that which the minority initially wanted and does facilitate some action by government to achieve equality. In this sense, the subsection reinforces the notion that human rights are really inter-related and recognises that much work is required to eliminate the deep inequalities prevalent in our society.

There was also a difference on the grounds of prohibited discrimination to be included in subsections (3) and (4). There was some reluctance about the inclusion of sexual orientation as a ground on the basis that this might give rise to what was referred to as “unintended consequences”. Many of the participants would have been happier with race and gender as the only two grounds of prohibited discrimination.

The majority was of the view that non-discrimination was fundamental to effective transformation and that it was not enough for the duty not to discriminate to be placed only upon

the state. Discrimination had to be eliminated quickly and efficiently and this goal was sufficiently important to warrant prohibition of all people from engaging in discrimination. Negotiators for the majority were acutely aware that it would not be sufficient to protect against direct discrimination alone and that indirect discrimination could be particularly insidious. There was also a majority concern that discrimination might be difficult to prove. The minority took the view that it would be sufficient for the state to be prohibited from discriminating and that prohibition of indirect discrimination and any onus in favour of the person alleging discrimination were unnecessary. There was much debate before the approval of anti-discrimination provisions that prohibit both direct and indirect discrimination, place the obligation not to discriminate on persons as well as the state, and provide that discrimination is presumed to be unfair. (See Annexure A).

We have already discussed socio-economic rights in some detail at this conference. Suffice it to say here that there was much discussion about whether socio-economic rights should be included. The form in which they are now included in sections 26 and 27 of the Constitution (set out in Annexure A) recognises the reality that all socio-economic rights cannot be fully satisfied immediately but underlines the idea that government cannot be left to its own devices altogether in making decisions about how these rights are to be realised. These rights therefore entail a measure of judicial review over governmental action.

The starting point of the minority in relation to labour rights was that these were not strictly necessary in a new constitutional order and that traditional civil and political rights were enough. The majority position was that the undue exploitation of labour should be prevented and that the bill of rights should provide for fair labour practices. Both sides soon agreed that the issue of fair labour practices concerned employers and employees. Ultimately, the debate concerning fair labour practices came to be about the appropriate balance between the rights of workers on the one hand and employers on the other. The present section 25 of the Constitution (contained in Annexure A) reflects that balance. It will be seen that the section provides organisational and other rights for both worker and employer subject, however, to the exception that only workers have the right to strike and the right to engage in collective bargaining.

The tension between freedom of religion and the right to cultural practice, on the one hand, and fundamental human rights on the other, gave rise to intense discussion. The balance eventually struck in the negotiating process is reflected in sections 15 and 31 of the Constitution (see Annexure A) concerned with “freedom of religion, belief and opinion” and “cultural, religious and linguistic communities”, respectively. I refer to some of the salient elements of this compromise. Subsection 15(2) sets certain conditions for religious observances at institutions aimed at ensuring that they are conducted on an equitable basis and that no one is compelled to attend them. Section 15(3) expressly allows for legislation recognising traditional and other marriages and systems of personal and family law under any tradition. However, recognition must be consistent with the Constitution. Section 31 says that people may not be denied the right to enjoy their culture and practise their religion but again makes it plain that these rights may not be exercised in a way that is not inconsistent with the bill of rights. It is arguable that other rights in the bill of rights are better protected than religious customs and practices. The balance sought to be achieved between, for example, the enforcement of equality and the tolerance of inequality in religious practice is difficult to express in concrete terms and is likely to provide considerable challenges to the Constitutional Court in time to come.

Conclusion

Our Constitution and in particular the bill of rights can technically be said to represent a qualification of majoritarianism. It is true that the Constitution limits governmental action but it does much more. Our Constitution represents a value system that points decisively away from a society in which the majority is always right or in which might is right. Such a society is no better than a society that reveres the law of the jungle. Our Constitution enjoins our society to care for and empower minorities, people who are vulnerable, the powerless, and those who have traditionally been victims of abuse and denigration. So for example, the grounds of non-discrimination in the non-discrimination subsection assure protection for vulnerable, disempowered categories of people contemplated by them; the freedom of expression provision in effect protects minority expression, however objectionable that might be to the majority; freedom of religion protects those vulnerable people who belong to minority religious groupings; the fair trial provisions protect vulnerable people who are accused of committing crime, and so on. I emphasise that this protection is accorded by society to vulnerable and disempowered people not for their sakes, not as a favour to them, but for the benefit of society itself, all of its people, and the growth of a defensible system of values. The idea that there are certain things that majorities, the strong and the powerful ought never to be allowed to do, and that society has more than just a moral obligation towards the vulnerable and the powerless is neither lamentable nor a mere qualification of majoritarianism. It is also more than just an idea. It is a fundamental constitutional principle, a standard integral to our humanity. An appropriate bill of human rights may be a qualification of majoritarianism. It may limit the power of the majority but it is not a qualification of democracy. We may now rightly add this principle as an essential element of our definition of democracy. By doing this we strengthen democracy and transform it into something more than just a mechanical concept. I end by expressing the hope that this approach commended by our Constitution is one that will be adopted by all nations and peoples. If this happens, peace and humanity may just be possible in future.

ANNEXURE A

9 Equality

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

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

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

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

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

15 Freedom of religion, belief and opinion

(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions, provided that-

- (a) those observances follow rules made by the appropriate public authorities;
- (b) they are conducted on an equitable basis; and
- (c) attendance at them is free and voluntary.

(3) (a) This section does not prevent legislation recognising-

- (i) marriages concluded under any tradition, or a system of religious, personal or family law; or
- (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

23 Labour relations

(1) Everyone has the right to fair labour practices.

(2) Every worker has the right-

- (a) to form and join a trade union;
- (b) to participate in the activities and programmes of a trade union; and
- (c) to strike.

(3) Every employer has the right-

- (a) to form and join an employers' organisation; and
- (b) to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right-

- (a) to determine its own administration, programmes and activities;
- (b) to organise; and
- (c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36 (1).

26 Housing

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

27 Health care, food, water and social security

(1) Everyone has the right to have access to-

- (a) health care services, including reproductive health care;
- (b) sufficient food and water; and
- (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

31 Cultural, religious and linguistic communities

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-

- (a) to enjoy their culture, practise their religion and use their language;
and
- (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.