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SALIENT FEATURES OF THE NEGOTIATING PROCESS

*Zakeria Mohammed Yacoob**

MR. Dean, members of the University, students and friends, it is indeed a pleasure to be here today. We have spent a wonderful few days in Texas getting to know the place and the people and experiencing the warmth and affection of the Dean and everyone else whom we have met. Hopefully, what we will be able to do today is to impart some thoughts and ideas which will deepen an understanding of the process of transition which began shortly before 1994 and which is still underway in South Africa today. I make no apologies for the fact that the topic I have chosen to talk to you about does not deal specifically with the law alone. It has to do with the law in operation in a political setting. In the final analysis therefore, we will not be discussing legal technicality or nuance. We will be investigating an essentially political negotiating process aimed at legitimizing our transition.

As the topic indicates, I will be talking to you about certain salient features of this negotiating process. But before I do so, I must point out that all these salient features revolve around a common starting point or a common thread which, on the one hand, gives rise to each of these essential features, and, on the other hand, shows why they were essential and explains why there was a debate around them. That thread is that the negotiation was between representatives of the majority on the one hand, and representatives of the minority of South Africa on the other. The minority and majority had their relative interests and objectives:

The principal (if not the only) objective of the minority effort was to ensure that majoritarianism was qualified as far as possible; representatives of the majority had the opposite objective, that is, to ensure the right of the majority to govern the country was qualified as little as possible. But to understand this more clearly and to appreciate its implications for the negotiation process, some detail of contextual setting and background is necessary.

I suppose it will be accurate to say in broad terms, the negotiating process has its broad context in the struggle for democracy in South Africa. One could also say that that struggle began as early as 1652 when the people from Holland began to settle in our country. But that would be

* Justice of the Constitutional Court of South Africa. Justice Yacoob delivered this paper as part of the Alfred P. Murrah lecture series at Southern Methodist University School of Law, Dallas, Texas, on October 22, 1998.

going too far back to render a context meaningful and relevant for our purposes. It will perhaps be meaningful to suggest that in reality, the struggle for democracy began some time after 1952 and continued to intensify thereafter. Indeed, that struggle was already evident in a palpable and concrete form at least fifty years ago. It is necessary briefly to characterise that struggle and to understand what that struggle was about in order to deepen an understanding of the negotiation itself.

The struggle was between the black majority on the one hand, and the white minority on the other hand. It was occasioned by the circumstance that our country was governed by the minority regime, a regime which represented only 20% of the people of our country, a regime which was meant to ensure, and did ensure, that there was racial separation and segregation at every level, that the majority was exploited to the ultimate point, and that the minority was the beneficiary of this exploitation. The regime was premised on the foundation that the majority had no say whatsoever in the affairs of the country. That was the basis of and the reason for the struggle. The struggle was really that of the black majority, conducted largely through the African National Congress, aimed at securing the release of tens of millions of people from bondage, oppression and exploitation. The struggle for democracy gained momentum in the 1980s with the result that by 1990 the minority found it impossible to govern the country. It was then that negotiations actually began between the representatives of both sides for what was referred to by some as some kind of transfer of power. I wish to emphasise that negotiations began precisely for the reason that the struggle for democracy had intensified and that the white minority found the country utterly ungovernable. The reason certainly was not that the minority regime had a sudden change of heart to such an extent that their consciences were sensitized and that they realized that it was right for them to hand over power to the majority. What in fact happened was that as the country became more difficult to govern the majority recognized the inevitability that the more they tried to kill the resistance of the South African people, the stronger that resistance became. This means that the process of negotiation was not driven by the sensitive consciences of the minority representatives. It is probable also that the minority began to realize that the later the negotiations were commenced and completed, the more difficult it would be for them to secure a settlement reasonably advantageous to themselves.

So the minority representatives made it quite clear that while they were prepared to settle, what they did not want was "out and out majoritarianism," as they put it. That position is interestingly ironic, because this minority seemed to have been perfectly pleased with and thrived on what may properly be called "out and out minoritarianism" with its consequent racial oppression and exploitation. But the minute some kind of majority control was on the cards, then the will of the majority was something to be avoided - restricted in some way so that the minorities would not suffer unduly or be prejudiced.

As I have already indicated, the minority representatives wanted to qualify majoritarianism. A concession to some kind of qualification to what was referred to as "majority rule" was necessary to get the negotiation under way. So in 1990, the key to the entire negotiating process was the concession by the majority representatives to what may be referred to as constitutionalism. This concession must be understood in the context of the fact that in our country before 1994, the system of government was one in which the minority parliament was sovereign and supreme. The majority suffered under it. The country had no constitution worth speaking of, and our courts had made it quite clear that testing of executive or legislative conduct was beyond their province, except (and only except) where such testing was concerned, where set procedures were required. Now it was in this context that the majority representatives conceded constitutionalism very early in the negotiating process. The majority parliament would not be supreme in South Africa: the Constitution would be. This was the first qualification of majoritarianism conceded by the majority itself. May I remind you that the thesis which I am developing is that the entire negotiating process was a process in which majority rights were systematically qualified to cater for minority interests and concerns. It was then, when the minority realized that some qualification of majority power was indeed feasible, that negotiation began in earnest. That first concession, constitutionalism, is the pillar of our society.

We can now proceed to the next stage. It would have been supposed that matters such as the existence and terms of a bill of fundamental rights would be matters on which there would be considerable dispute and considerable hard negotiations. But this was not so. The reason is that the African National Congress had always made it clear that human rights were very high on their agenda and that their protection was to be a fundamental ingredient of society. The minorities were very comfortable with this because in their perception, the bill of rights represented a qualification of majority power and the protection of the individual and of the minority. So the Bill of fundamental Rights was not an issue. What was in issue, however, were two aspects in the Bill of Rights both of which were intimately concerned with the effective empowerment of the majority of people in our country.

The first of these was the extent to which the constitution of our country would allow for affirmative action. Affirmative action will be discussed tomorrow, but it is important to know that this was a hotly debated issue both at the time of negotiations, which gave rise to the interim constitution, and during the effort to agree upon a final constitution .

The second issue involved the empowerment of the majority, about which there was considerable debate, and the circumstances in which fundamental rights may be limited by any law passed by the majority government. It is necessary for me to explain here that we in South Africa have adopted the Canadian constitutional model and not the American one in

so far as our Bill of Rights is concerned. In terms of this model the Bill of Rights consists of broadly defined fundamental rights which are not absolute but which may be limited by a law of general application. However, the limitation would be legitimate only where certain prerequisites were fulfilled and certain defined circumstances existed. It follows quite interestingly, that because the Bill of Rights was seen by the minority as a vehicle for their protection, the content of limitation clause in the constitution, which defines the circumstance in which fundamental rights may be limited, was hotly debated. This is because the minorities wanted a high threshold: They did not want the majority government to pass too easily laws that would limit fundamental rights. Containing the power of the majority government to limit fundamental rights was, in effect, a qualification of majoritarianism.

But there was another debate; a debate which occurred during the interim phase of the negotiating process which demonstrates the qualification of the majoritarianism principle. That debate occurred before the interim constitution was drafted or even agreed to and was concerned with the question as to who should draft the Constitution. The majority representatives fervently urged that the Constitution for South Africa ought, in the final analysis, to be prepared after due consultation with all the people of the country, as democratically as possible, and on the understanding that the achievement of democracy should be achieved through a democratic process. The minority, of course, had a different view. They did not want the process to be controlled by the majority of people; they espoused the view that the constitution should not be written by the people of the country but by experts. They would have preferred the constitution to have been negotiated and written by lawyers and other constitutional experts in consultation with the leaders of the people. That debate was settled in a very interesting way. The parties agreed to qualify majoritarianism even further.

It was agreed that leaders and the experts who represented numerous organizations would negotiate with the object of reaching agreement in regard to certain "constitutional principles." These constitutional principles would form part of an interim constitution which, in turn, would provide for the drafting of a final constitution by members of a constitutional assembly, elected in terms of the interim constitution. This meant that the final constitution would be drafted by a democratically elected body. However, that body would be bound by the constitutional principles. Because these principles are not democratically determined, the circumstance that the constitution makers were in fact bound by them represented a considerable qualification of the majority principle.

A brief summary of the salient principles follows. Of course, the constitution was to be the supreme law of the land: there was to be an appropriate separation of powers between the executive, legislative and judiciary; there was to be a bill of fundamental human rights; the legislative process was broadly determined; and there had to be an auditor-gen-

eral and a public service commission. The constitution had to provide an independent judiciary consisting of appropriately qualified persons. The constitutional principles further required a division of powers between the national government, provincial governments, and local governments. I deal with this in more detail, because the decentralization of power was perceived to be a further qualification of majoritarianism.

The majority was unhappy of this decentralization, contending that the suggestion that federalism was good for South Africa, because it had been good for the USA and Canada, was inappropriate. The circumstances in South Africa were different. While the federal system, which was adopted by these north American countries, had been adopted at a time when previously separate and independent states were coming together, South Africa had been one country save to the extent that "Bantustans" had been created by the minority regime to facilitate further division and exploitation of the majority of South Africans. The whole idea of decentralization, therefore, did not go down too well with the majority of South Africans. The constitutional principles dealt in detail with what were referred to as guidelines for the division of power between the nation and the provinces. The principles provided that the principles of effectiveness, the need for legitimate autonomy, and the need to ensure the geographical and institutional integrity of the provinces were of considerable significance. Provinces were to have powers which were to be exercised both concurrently with the nation and exclusively by themselves. The constitutional principles made provisions for the circumstances in which it would be competent for the nation to intervene into the exclusive provincial domain and for a certain category of powers which were reserved to the nation. The interim constitution provided for a measure of decentralization of powers between the nation and the provinces that was to apply during the period of operation of that constitution and while the final constitution was being negotiated.

Another important qualification of majoritarianism was agreed upon after the interim constitution had been passed and only two weeks before South Africa's first democratic election. This necessitated an amendment to the constitutional principles which had been agreed upon and incorporated into the interim constitution. The reason for this last minute change was that one of the political parties which had been involved in the negotiating process, which represented approximately 10% of the South African people, and which had indicated that it would not take part in the elections of April 1994, because it was not in agreement with the contents of the interim constitution, indicated that it would participate in the election if one further change to the existing constitutional principles was made. What that party required was the inclusion of the principle that the powers of the provinces under the final constitution were not to be substantially less than or inferior to those powers which were to be enjoyed by them in terms of the interim constitution. The majority agreed. It is apparent that the inclusion of this constitutional principle constituted

a significant limit to the powers of the constitution makers concerning the way in which power was to be allocated to the nation on the one hand, and the provinces on the other in the final constitution.

We must deal with one more matter. That matter concerns negotiations about the judiciary in South Africa. The nature of the judiciary in the country was integrally related to the qualification of majoritarianism. I have already said that the judiciary was to be independent and impartial. More importantly, for present purposes, it must be emphasized that the judiciary would determine disputes concerning the question as to whether any majority-elected executive or legislature conducted itself consistently with the provisions of the constitution. It is thus not surprising and totally in accord with the qualification of majoritarianism principles which I expand here today that the debate about the judiciary was detailed, intense, wide-ranging, long and sometimes acrimonious.

The first debate in this regard concerned the identity of the court which was to be the highest and final court in the land in relation to the determination of constitutional disputes. Quite obviously, the minorities wanted the appellate division, which was then the highest court in South Africa, to be charged with this onerous responsibility. No doubt the minority saw advantage in the fact that the judges of this court had been appointed by the minority regime and that they belonged to a milieu in which majority rights were not considered particularly significant. The majority, of course, wanted a new institution to fulfil this purpose. They argued that judges appointed by the minority knew little about constitutionalism, about a bill of rights, or any human rights. We (and I did form part of the majority) wanted judges who represented all the people of our country, who had legitimacy with the majority of people and who were not tied to the past. That debate was resolved largely in favour of the majority, because the minorities agreed that there should be a new, separate constitutional court. But the majority representatives accommodated some of the requirements of the minority in return. Four of the eleven judges of the constitutional court in terms of the interim constitution had to be people who had been judges in the old order. The President of the country would appoint these judges.

May I at this stage say to you that not all judges of the old order were unsuited and opposed to a democracy and, in so saying, pay tribute to my colleague on the Constitutional court, Justice John Didcott, who passed away this week. He was a man with a phenomenal intellect who, though appointed in the old era, was uncompromisingly opposed to the inhuman apartheid design. He was appointed as a judge on the Constitutional court not as one of the four people who had been judges before, but by a process which had occurred later. We salute his fearless judicial contribution during the apartheid era as well as his priceless contribution to the constitutional jurisprudence of South Africa.

I return to the judiciary. How judges of the constitutional court were to be appointed was also a matter of considerable debate. The struggle

between the parties was concerned at arriving at an appropriate balance between professional and political participation in the appointment of these judges. The debate concerning the appointment of the judiciary remained varied and intense during the process of negotiation of the final constitution. This was because the aim of the majority was to transform the judiciary and judicial system so that it was able to serve South Africa, its people, and its constitution. The minority, of course, found much security in what had been and were reluctant to concede too much change. It may be argued that the transformation of the judiciary was in the interest of the majority rather than the minority and would therefore be inconsistent with the qualification of majoritarianism. The debate in regard to whether the judiciary was to be representative of the South African people was settled in favour of the majority. Then there was a debate about the qualifications of the members of the judiciary. The majority wanted a somewhat flexible position in this regard and desired a position in which the constitution stated simply that members of the judiciary should be "appropriately qualified." This would mean that the judicial service commission, a body consisting of politicians and professionals charged with the responsibility of making appointments of judges would determine whether a particular potential appointee was so qualified. The minority, on the other hand, required the qualifications of judges to be expressly stated in detail so that only those who had received legal degrees recognized in the old order would qualify. The adoption of this position would obviously have had a negative effect on judicial transformation and the attainment of judicial representivity. This debate, too, was resolved in favour of the majority.

I wish to mention one more aspect about the debate concerning the judiciary. This debate must be seen in the context of the dearth of African South Africans eligible to be judges, not because of their inability, but because of the grievous injustices of the past. The minority wanted all judges to be South African citizens, while the majority did not wish this limitation to apply. The compromise after considerable negotiations was that all judges of the constitutional court had to be South African citizens, while no such restrictions were applicable to other judicial appointments.

May I say in conclusion that the negotiating process has been an effort to achieve an appropriate balance between minority and majority interests and needs, a balance between centralization and decentralization, and an appropriately balanced affirmative action framework. We will only know far into the future whether or not the balance that was achieved was a correct one. Finally, we need to understand that the balance achieved during the negotiating process will not be static eternally. We live in a dynamic and changing society, and I am confident that the balance achieved by the Constitution will be positively affected by the creativity and imagination of the South African people. It is therefore certain that we will get the balance right in the future.

Articles

