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Merafong Demarcation Forum -- participation and rationality in South African legislation

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NOW WITHOUT HESITATION

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Merafong Demarcation Forum, decided in June 2008 by South Africa's Constitutional Court, continues that Court's effort to decide how closely it should regulate South Africa's legislative processes. It raises some profound questions about how democratic legislatures should function, and how courts should shape their functioning -- questions I want to identify but don't expect to fully resolve.

The case grows out of Parliament's enactment of legislation to eliminate what were called cross-border municipalities -- local government units whose boundaries crossed the lines between provinces (as if, say, New York City was located partly in New York State and partly in New Jersey). It's probably not surprising that these local governments proved administratively problematic, and no one seems to have disagreed with the general idea that they should be eliminated. The problem was, which single province should a two-province municipality be put in? Draft legislation before Parliament said that Merafong, till then partly in Gauteng province and partly in North West province, should become completely a part of North West. The great majority of the residents of Merafong seem to have felt that they should be in Gauteng (the province in which two of South Africa's leading cities, Johannesburg and Tshwane [formerly Pretoria] are located), rather than in the more rural, less wealthy North West. They said so at public hearings and in demonstrations. (See para 33 of Justice van der Westhuizen's judgment, and para 135 of Deputy Chief Justice Moseneke's dissent).

The public hearings were held by the legislatures of Gauteng and North West provinces, to meet their duty -- established by earlier Constitutional Court decisions -- to provide an opportunity for public participation before the provinces cast their votes on the proposed legislation in the National Council of Provinces, the upper (and less powerful) house of the national legislature. This obligation had been found in section 118(1)(a) of the Constitution, which provides that: "A provincial legislature must -- (a) facilitate public involvement in the legislative and other processes of the legislature and its committees." As a result of the public opposition expressed at the hearings, the Gauteng legislature decided to seek an amendment of the pending national legislation to keep Merafong in Gauteng. Unfortunately, it turned out -- so the negotiators learned -- that they could not propose an amendment and that their only option, if they wanted to insist on their view about where Merafong should be, would be to exercise a provincial veto on this part of the new bill. This the delegates did not want to do and so, in the end, late in 2005, Gauteng decided to vote for the bill, including its provision moving Merafong to North West. (See

paras 36-37.)

These events raised two constitutional questions. One was whether the Gauteng provincial legislature, when it decided not to do what it had learned from its public hearing that the people wanted, thereby necessarily violated its duty to provide proper opportunity for public input into the legislative process. The answer was no. Every member of the Constitutional Court agreed, in effect, that legislatures do not have to do what the people have told them they want. This decision puts an outer boundary on popular influence on legislative choices outside of elections, and says that South African legislatures, though they provide for participation, are not forums for direct democracy. It is important, and also seems right. Representatives need to be able to make judgments, in light of popular views but not always bounded by them; otherwise, the nation loses the benefit of the special expertise that its legislators hopefully acquire about the affairs of the state.

The only member of the court who felt that the public participation requirement of the constitution had not been met was Justice Sachs. He didn't suggest, any more than the other members of the Court, that the popular will expressed at the hearings had to rule. (See para 293 of his judgment.) But he did maintain that when the legislature changed its position, it had a duty to "report back" to the community about that change.

The effect of a report back would presumably have been to galvanize community opposition, and so to make it more likely that the legislature would have felt more pressure to defer to community wishes and/or to find some alternative, previously overlooked, to defuse the crisis. Justice Sachs' position might have led the politicians to new insights; it might also have prolonged the decisionmaking process and placed legislators in acutely difficult political situations. Justice van der Westhuizen argued, however, that "[t]he possibility of the Portfolio Committee being persuaded anew by views of which it was already aware, is indeed small." (para 59) Justice Sachs was more optimistic (para 299), but of course we will never know for sure.

Would Justice Sachs' alternative have been better? The aftermath of this decision was not good; one article reports that the result of the decision to move Merafong was that parts of Merafong were "reduced ... to chaos," and that "protests have continued virtually unabated." In this case, at least, it seems arguable that anything that postponed or altered this decision would have been desirable as a practical matter. Whether his approach would have been better for Parliamentary process in general is a much harder question, taking us into a field -- the design of legislative bodies -- that no doubt calls for its own expertise.

Perhaps an even harder question -- and one more within my range -- is whether this interpretation of the relevant constitutional language was the best one. That question isn't just about whether a legislative

process including not only required public hearings but also "report backs" would be preferable to one where legislators are freer to make decisions on their own. It's also about whether the "report back" system should be read into the constitution if -- as seems to me likely -- it was not a system the constitution's drafters actually had in mind. It is not illegitimate to find in a constitution meaning that the drafters did not specifically intend (or so I would argue -- the point can be debated), but it is possible that on a point of political process as debatable as this one, a judge should be disposed not to innovate. So the other members of the Constitutional Court appear to have felt, at least on this score.

But those abstractions of constitutional theory may miss the most important point: that political life in South Africa has proved less responsive and less responsible than many of those who shaped the new constitution hoped, and therefore, perhaps, what the drafters did not think of is exactly what might now be needed. Should the justices, faced with problems the drafters did not foresee, seek to honor the drafters' broad intentions (for democracy, for justice) by finding solutions to those problems in constitutional language not specifically meant to require those results?

This is another very big question. But in this particular case it seems to have an answer. In 2009, Parliament approved another amendment to South Africa's constitution, this one returning Merafong to Gauteng province. It took years, but not an infinite number of years -- and in the end the political process corrected its own mistake. It's surely preferable, in principle, for politicians to work their own way clean, rather than to have the country come to expect only the courts to stand for principle. Here, that is what happened.

Sort of. Because that self-cleansing came only after the case had gone to the Constitutional Court, where 4 of the 10 justices would have struck down what Parliament had done. Perhaps the dissents (I've focused here only on one, by Justice Sachs) helped push the government to correct a decision that seems to have profoundly unwise. So even if the majority justices were right to uphold the constitutionality of that decision, the dissenters may also have helped cause it to be repealed.

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