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Negotiating the past, the present and the future: No end-state

André du Pisani*

Certain principles of justice are justified because they would be agreed to in an initial situation of equality.

John Rawls, *A Theory of Justice*, 21.

The current framework agreement between Namibia and Germany illustrates the primacy of justice and fairness in negotiations, while at the same time, tells the story of how difficult it is to substantively satisfy notions of justice and fairness. From a principled perspective of moral philosophy, it is even more difficult to answer the interdependent questions of justice and fairness, especially if negotiations deal with the presence of the past, the future, and with genocide – killing by design, annihilating the sanctity of Life itself.

The popular view that 'rational' attempts to maximize individual gains motivate the process and outcome of negotiations is not helpful in engaging meaningfully with constructs of justice and fairness. The reason for this is plain: justice and fairness can serve as a cover only to pursue self-interest often at the expense of the other party. While notions of fairness may fuel a motivation to resolve a particular problem through negotiation in the first place and thus shape the bargaining positions and expectations which parties bring to the table, negotiations are profoundly moral and political rather than legal processes.

Fairness and justice

Most moral philosophers question the universal significance of fairness in negotiations: Is it as social psychological research suggests cross-cultural, even if different cultures appear to stress different fairness principles? In negotiation praxis, fairness is often used and abused by parties to justify and bolster their negotiating positions and particular procedures and outcomes in support of their interests. Not surprisingly, parties often endorse fairness norms – and readings of them – which work in their own

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interests. Indeed, the recent 'Genocide, Apology and Reparations (GAR) Talks' confirm this interpretation.

Notions of justice and fairness are interdependent, if analytically separate, that much we know from philosophy (Aristotle, Appiah, Kant, Moore, Rawls, Levinas), social psychology (Deutsch), mathematics (Steinhaus, Raiffa) and economics (Sen, Homans and Foley). Many scholars agree that 'Justice' is a macro-concept which refers to general principles for the distribution of resources and obligations in society as a whole. Typically, the focus on justice is more on the outcome rather than the process or procedures whereby it is produced – hence the term 'distributive justice'. It is important to establish justice norms prior to and independently of any specific case to be negotiated – although their specific interpretation or application at the micro-level is often not self-evident. It is not clear to what degree this was done in these negotiations. The idea of 'fairness' is more contextual and specific. Fairness is often subjective and personal relating to a particular conflict, events, experience, negotiation and/or outcome, and includes views of how to apply any broader principle of justice regarded as pertinent to a specific context. Views on the legitimacy of one's own claims to available resources are another aspect of any notion of fairness. To complicate matters, negotiators tend to view and refer to their own norms of fairness as 'justice' – as criteria based on some higher ethics going beyond partisan perceptions, interests, and contextual factors.

Fairness raises a foundational question: 'fair to whom?' Fair to a particular party or all parties, fair in the eyes of the international community, current international law, the State parties or to future generations, or to whom? To facilitate agreement, the complex challenge is often to bring about a process and outcomes that are as fair as possible within the political and resource contexts for the group of parties as a whole and for an individual party – in an attempt to balance fairness and justice.

Negotiations work best when they meet four types of fairness that impact on them: structural fairness, process fairness, procedural fairness and outcome fairness. In any one case, all four types of fairness – as seems evident of what this writer knows of the negotiations between representatives of the Namibian- and German State – will not necessarily be present or significant to the same degree. While concerns about outcome fairness often tend to be the most contested – also in this case – in some contexts no outcome can be comprehensively fair – for example in the case of the earlier genocide perpetrated by the former German colonial forces against the Nama and Herero communities – in the allocation of a single indivisible good or burden for which there is no adequate compensation, such as killing by design or the loss of dignity. Parties to negotiations may then agree to negotiate a procedure(s) viewed as fair by the majority of parties to the negotiation through public reasoning and deliberation, and to accept whatever (unfair) solution it produces. Similarly, when a negotiation process cannot be fair in respect of any one or more of the four types of fairness – for example in recognizing the legitimate standing of all parties to the negotiations and invoking the principles of equality and proportionality, equity or difference – greater demands will follow (as evident in this case) regarding the fairness of its outcomes.

Way forward

The way forward, should be to publically affirm independently and impartially the principles of justice, such as the equality principle, the principle of retroactive moral responsibility, relevant principles from international humanitarian law applied to comparable cases such as that of the San and the Armenians, and the principle of proportionality in means and outcomes. The integrity and interdependence of the tripartite principles of acknowledgement, apology and reparations, as embodied in the 2006 resolution passed by the Namibian Parliament must be respected and implemented.

As for the different notions of fairness mentioned above, ideally, the format and process of negotiations would have to be reconfigured to address issues of standing, the role of mediators, rules and codes of conduct to govern the negotiations and ways in which these are established, the outstanding issues that need to be negotiated and in what order, the physical features of the negotiations: the location; the presence and degree of access to various audiences and parties to the negotiations, the structuring of communication between parties, and access to information, adequate research and technical support. In respect of process fairness, it would be important how the parties in the negotiations relate to and treat each other and how their notions of outcome fairness, including their choice of procedures for arriving at an agreement is derived at.

For now, Namibians and Germans should acknowledge the progress made over the past few years, not just in narrative terms, but also symbolically, recognize their mutual interdependence, value their entwined history, share their common humanity and in the interest of a more just and fairer moral outcome, continue with negotiations along a different path. The process is far from over. The real work of reconciliation within and between both societies and their people lies ahead. This calls for moral leadership and imagination. Not for crypto triumphalism and populism. For understanding as a basis for forgiveness; becoming friends to ourselves, so that others can befriend us. Not to be wise alone, but to listen to others. In all of this a range of agencies have a role to play.

While agreements viewed as respectably fair at their conclusion have a better chance of ensuring that outcomes that ignore substantive aspects of justice and fairness or are based on power inequalities are not hastily signed and implemented, the norms underlying an agreement do not necessarily represent an 'end-state' form of fairness or the final product of the negotiations. The current outcomes may not be viewed as fair in the longer term, after an agreement, but also to the extent to which parties consider it legitimate in the short and long term is actually meeting expectations of fairness. For any or a combination of reasons, the current 'agreement' may be viewed as unfair after its conclusion and require renegotiation to ensure justice and fairness and its legitimacy.

The resource provisions and interventions being proposed in the current framework amount to spatially-targeted development assistance and not reparations, even if these may have some longer-term positive effects and should, therefore, be viewed within the existing multi-pronged 'special' bilateral relations between the two countries.