



## **Post Apartheid South Africa's Democratic Transformation Process: Redress of the Past, Reconciliation and 'Unity in Diversity'**

*Kristin Henrard, University of Groningen, The Netherlands*

### **Introduction**

Discussions pertaining to reconciliation in post-apartheid South Africa mainly focus on the Truth and Reconciliation Commission (TRC) and its work.<sup>1</sup> However, a good understanding of the complex issues of transformation in this divided society requires a broader approach. Reconciliation involves not only telling the truth about the past and forgiveness, but also requires reparation for material and other forms of deprivation and the restoration of a human community in a spirit of respect for human rights and democracy. Indeed, it also necessitates the creation of a society within which the chances of reoccurrence of the kinds of gross violations of human rights that occurred in the past are reduced to a minimum. Consequently, the evaluation of the constitutional negotiation process and the way in which the themes of redress of the past, overcoming the legacy of apartheid and nation-building played their role are equally if not more important. The provisions of the Bill of Rights as well as some other sections of the Constitution are important building blocks in this reconciliation and transformation process. The ongoing implementation of these constitutional provisions and the perceptions surrounding that process also has an important impact on the actual transformation and reconciliation process.

A brief description of the most striking features of the apartheid regime is followed by an explanation of the overall constitutional negotiation process, which is particular to South Africa. Subsequently, the constitutional basis, relevant legislation and a brief description of the TRC process, as well as its current status and overall assessment of its actual impact on reconciliation, are discussed. A fourth paragraph then goes on to analyze the constitutional negotiations with respect to the provisions dealing with controversial issues like equality, language and education, self-determination and minority rights, and land. The implementation of the constitutional provisions with respect to equality, language and education, self-determination and land reform is ongoing and confronted with several hurdles. Nevertheless, there is a steady progression and the concomitant transformation will hopefully entail a higher level of reconciliation in South African society.

### **The Most Relevant Features of the Apartheid Regime**

It is appropriate to give an overview of events, policies and mechanisms related to the apartheid era that explain not only the heightened sensitivity in post-apartheid South Africa to certain concepts and techniques but also certain reactions and attitudes of the Afrikaner, coloured and Indian population groups. Several historical events and regulations of the apartheid system have negatively tainted, amongst others, the concepts of group classification, group rights, ethnicity/race, minority rights, and self-determination.

Apartheid is generally said to start after the 1948 election victory of the National Party (NP), which used that concept and program as the focus of its election campaign (Davenport 1991: 519; Worden 1994: 87). However, segregationist policies

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<sup>1</sup> I adopt an institutional focus regarding the reconciliation process in South Africa, which does not consider the role of individuals in the reconciliation process. However I want to highlight that this institutional focus does not imply a denial of the importance and impact of specific persons, like Nelson Mandela.



and attempts to classify the South African population were already noticeable centuries before, effectively since the early roots of colonialism in South Africa (Brown 1988-1989: 40; Worden 1994: 112). By the end of the 18th century certain racially discriminatory regulations were in place (Worden 1994: 66-67), but it has been argued that 'it was only in the period between the end of the Anglo Boer War in 1902 and the 1930s<sup>2</sup> that a cogent ideology of segregation emerged and was implemented' (Worden 1994: 72). Although apartheid started as an Afrikaner project, which is visible in several of its preferential measures for Afrikaners, it managed to get broader white support, as it also entailed distinct advantages for the white English speaking population.

Apartheid is characterized by its central policy of 'divide and rule', which was aimed at ensuring white survival and hegemony by dividing the non-white population along racial and even ethnic lines (Kashula & Anthonissen 1995: 98; Bennett 1995: 7). Consequently, the corresponding majority was divided into a host of minority groups, which could no longer pose a threat to the white minority (including both the Afrikaners and the English population). In that way apartheid can also be described as a scheme to disempower the non-white population<sup>3</sup> while giving privileges to the white, and especially the white Afrikaner population. That design of apartheid was *inter alia* demonstrated by the official language policy, which excluded any indigenous language and was limited to English and Afrikaans, by the job reservations for Afrikaners in the public service and by the attempt to promote the Afrikaner people through a highly compartmentalized education system (Pelzer 1980: 136-139, 163; Wilkins & Strydom 1978: 253). Consequently, apartheid was suitably described as a pervasive system of affirmative action for the white population and especially for the Afrikaners (Sachs 1992: 98; Sonn 1993: 6).

Apartheid and its labyrinth of regulations were based on an imposed group membership on the basis primarily of race but, for the black population, also ethnicity (Manby 1995: 27; Kotze 1997: 2). The entire classification process was legally imposed and ascribed, more specifically on the basis of the 1950 Population Registration Act, and often arbitrarily implemented (Coetzee 1995: 90; Harries 1989:110). The act distinguished four major racial categories, namely white, black/African<sup>4</sup>, coloured and Indian/Asian. The apartheid regime indeed did not limit its racial classifications to black and white but also further subdivided the overwhelming non-white majority in three sub-groups namely Africans, coloureds and Indians/Asians. In furtherance of its divide and rule policy and in an attempt to prevent the emergence of a unified resistance movement, the apartheid government deliberately created an intermediate position for the coloureds and the Indians (Carrim 1996: 47, 50).

The preferential treatment of these two population categories, *inter alia* in respect of the distribution of resources (Manby 1995: 28), contributed to some kind of internalized white racism and a concomitant condescending attitude towards the

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<sup>2</sup> The impact of the Broederbond, established in 1918, on this increase in segregationism cannot be underestimated. The bond was formed after the Anglo Boer War as a reaction against English dominance (Wilkins & Strydom 1978: 141) and its major goals were achieving Afrikaner unity, supporting the Afrikaner's love for his language, traditions and history, and more importantly, maintaining and promoting Christian values (Pelzer 1980: 14).

<sup>3</sup> For a description of the apartheid regime in terms of (a denial of) multi-culturalism, see Soudien 1998: 128; Cross & Mkwana-Twala 1998: 28.

<sup>4</sup> The term 'black' does not have an unambiguous meaning in South Africa. During the 1960s to the 1980s 'black' referred to non-white and thus to and the Africans and the coloureds and the Indians; whereas from the 1980s onwards 'black' referred to the Africans and currently there exists considerable confusion about the exact coverage of the term.

African population (Carrim 1996: 47; Sonn 1993: 66). This apartheid strategy entailed for the coloured and Indian population group an ambiguous but still marginalized position, which has ongoing implications and effects (Galiguire 1996: 14-15).

Furthermore, the African group was subdivided in ethnic categories, such as Zulu, Xhosa, Ndebele etc. Subsequently, this rigid scheme was implemented and extended to just about every area of human life through various pieces of legislation. The most important of these acts, revealing the all pervasiveness of the classification and concomitant segregation (Davenport 1991: 328), include the 1950 Group Areas Act (implementing nationwide and obligatory residential segregation), the 1953 Reservation of Separate Amenities Act (instituting obligatory segregation of all public amenities), a host of pass laws and labour control legislation (to support the segregated residential pattern while instituting migrant labour for the black population), the 1953 Bantu Education Act (and the other acts implementing segregation in education) and the 1959 Promotion of Bantu Self-Government Act. The latter Act laid down the basis for the policy of independent homelands or Grand Apartheid (Davenport 1991: 336-341).

Verwoerd and his successors implemented a broad plan of political and social engineering, called 'separate development' or Grand Apartheid, which attempted to concentrate and limit African political rights to the respective, ethnically defined Bantustans (Bennett 1995: 7). Indeed, '(e)thnic homeland loyalty was to replace national political aspirations in a move which the state hoped would defuse calls for the moral necessity of African self-government within South Africa itself' (Worden 1994: 110-111). The above analysis of Grand Apartheid elucidates why ethnicity is such a sensitive concept in post-apartheid South Africa (Bonthuys 1993: 128). Because the Grand Apartheid strategy was justified in terms of self-determination for the distinctive ethnic groups, that concept, as well as a system of federalism on ethnic grounds, are burdened with negative connotations and thus looked upon with suspicion in contemporary South Africa.<sup>5</sup>

Several issues pertaining to education during apartheid should be mentioned as they present sensitive issues in the current, post-apartheid phase. A first issue is the racially segregated structure of education in South Africa, which went hand in hand with marked differences in state funding, affecting teacher/pupil ratio, qualifications of the teachers and other quality features. The curriculum was also differentiated on racial lines so that the distinctive groups could be prepared for the jobs they were meant to take up. 'Bantu Education' or the system for the African population can be described as a system that prepared for a subordinated position in the workplace via a focus on practical subjects and an inferior curriculum (Davenport 1991: 535; Dube 1985: 93-97). Even tertiary education was designed to be segregated from 1959 onwards as most of the faculties in the open universities were closed to African, Indian and coloured students and separate

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<sup>5</sup> For a balanced approach to issues of language and ethnicity, see *Report of the Commission on the Demarcation/Delimitation of SPRs* 1993: 4, 13. The Commission was asked to make up a report on the demarcation of the territorial sub-units of South Africa (states, provinces or regions - thus SPRs). The Commission was instructed to take into account ten criteria which included demographic considerations and cultural and language realities (*ibid.*, 4-5). The Commission makes the following remark on the basis of comparative research regarding language criteria: 'it seems that regions should not be 'gerrymandered' at the cost of geographical and economic cohesion merely for the sake of language homogeneity. The reorganization of homogeneous language and cultural regions may provide the opportunity for the exploitation of ethnic sentiments, claims and counter claims and constant new majorities and new minorities. On the other hand, regional boundaries should not cut across the spontaneously formed areas where particular language communities live' (*ibid.*, 13).



ethnic institutions of higher education were set up 'as agencies of academic apartheid' (Davenport 1991: 535).

Language policy regarding education has been and still is a very sensitive issue in South Africa. Under apartheid the policy regarding the African population, was constructed in such a way as to promote ethnic identity while hampering proficiency in the official languages in order to limit access to employment (Currie loose leaf: 3.1-37.2; Desei & Taylor 1997: 169). Indeed, the principle of mother tongue education was conveniently applied to further the political interests of division amongst all communities' (Heugh 1995: 42). The sudden change from mother tongue instruction to the double medium or 50/50 policy (English/Afrikaans) caused a great deal of the educational backlog among African students<sup>6</sup> and caused major upheavals.<sup>7</sup>

The concept of Christian National Education was based on Afrikaner exclusivity and aimed at single medium institutions for Afrikaners. During apartheid, education was the only sector in which a strict distinction was made between Afrikaners and English-speaking people (Dube 1997: 87; Heugh 1995: 42). Christian National Education furthermore required schools to educate their students about and in line with the spirit of Christian values (Malherbe 1977: 147). The official apartheid policy wanted to give a Christian character to state schools and targeted state funding preferentially to private schools with such a character (Beckman 1995: 97). Furthermore, the courses that were part of the public curriculum, namely 'religious studies' or 'biblical studies', had an essentially reformed and very conservative theological perspective in the sense that the focus was on Christian essentials, while hardly anything was said about other world religions.

### ***The Constitutional Negotiation Process in General***

In the 1980s there were increasingly intense negotiations between the National Party (NP) government and the African National Congress (ANC) and other parties from the resistance movement. Eventually, this led to President De Klerk's famous speech, 2 February 1990, at the annual opening of parliament, which set in motion the protracted constitutional negotiation process leading up to the first multiracial elections in April 1994 and the first democratic constitution for South Africa (De Klerk 1994: 4-6; Manby 1995: 35).

An important issue for all sides to the negotiation process was the process envisaged for achieving a constitution to govern the post-apartheid, democratic South African state. The need for some kind of transitional period and related mechanisms was obvious to every one but the issue was mainly whether there would be a one or a two stage process. For the NP government it was important to be able to secure certain things for the future and limit the 'damage' of giving up power. For the ANC, on the other hand, it was crucial that 'the Constitutional Assembly should be bound as little as possible by the non-elected negotiating forum' (de Villiers 1994: 38). Consequently, the NP was in favour of a one stage process so that the negotiating parties at the Congress for a Democratic South Africa (CODESA) would draft the Constitution. This would have ensured an important voice for the NP in the formulation of the eventual Constitution. The ANC, however, was in favour of having an elected body being responsible for the drafting of the so-called

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<sup>6</sup> The shift from mother tongue education to the dual medium English/Afrikaans education occurred at a stage when the students did not have the adequate proficiency in these two languages to meet the requirements of the syllabus which was in any event cognitively impoverished.

<sup>7</sup> The 1976 Soweto uprisings, rather significant for the entire resistance movement, were mainly caused by the inflexible attempt to implement the 50-50 policy after 1975.

'final' Constitution so that it would have full democratic legitimacy (Coveliers & Veys 1998: 236), while the period before the adoption of the latter constitution would be governed by an interim constitution, drawn up at CODESA (Van Wyk 1994: 143; Corder 1994: 498).

During the course of the negotiations at CODESA a two-stage process was accepted with sufficient consensus and it was a firm point of departure for the Multi-Party Negotiation Process (MPNP) negotiation round (Corder 1994: 500). The eventual acceptance of this unique process of constitution-making entailed a compromise (Erasmus & de Waal 1997: 40-41) and confirmed that compromise politics was one of the forces of the process securing its eventual success (de Klerk 1994: 10). In the first stage an interim Constitution would be drafted by the negotiating political parties before any democratic election. That Constitution would govern the country during the period covering the first democratic elections and during the negotiations leading up to the adoption of the so-called final Constitution. 'In order to give greater comfort to all parties, it was agreed that the final Constitution could not erode the fundamental values and principles contained in the interim Constitution. Agreement was reached on a series of 34 Constitutional Principles with which the final Constitution had to comply' (Chaskalson & Davis 1997: 430). These 34 Constitutional Principles undeniably imposed constraints on the subsequent negotiation process as they provided the obligatory foundation for the 'final' constitution.<sup>8</sup>

Consequently, the negotiation process in general reflects a genuine concern for reconciliation and reconstruction, especially because of the conscious choice to include the previously ruling minority and to take its concerns seriously.

***The Truth and Reconciliation Process: Constitutional Foundation, Relevant Legislation, Basic Structure and Assessment of its Overall Impact***

The negotiations leading up to the 1993 or interim constitution also dealt with the question of how to deal with the human rights violations of the past during the transition to democracy. Several factors necessitated compromises in the new South Africa and this resulted in the remarkable post-amble entitled National Unity and Reconciliation, which provides for the grant of amnesty for politically motivated offences along the lines set out in an Act of Parliament. According to Sarkin, this implied that 'the drafters of the interim Constitution recognized the primacy of reconciliation and reconstruction to the pursuit of national unity and peace and they accepted the principle of amnesty as a necessary tool for this purpose' (Sarkin 1996: 620). A process of public truth telling was considered to be an essential component of the healing process and grant of amnesty necessary to reveal that truth to the utmost extent. Parliament enacted in 1995 the Promotion of National Unity and Reconciliation Act (no 34 of 1995; henceforth PNURA) and determined that the central objective of the Truth and Reconciliation Commission would be to overcome the injustices of the past by promoting national unity and reconciliation (PNURA, section 3/1).

It should be underlined that the work of the Commission was limited to gross violations of human rights, which were exhaustively enumerated. Consequently, more general injustices, like the forced removals of millions of people do not fall within the brief of the Commission (PNURA, section 1/9). The land issue or actual

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<sup>8</sup> This also explains why section 71(1) and (2) of the interim Constitution state that the 'Final' Constitution will only come into effect when the Constitutional Court has certified that it complied with these Constitutional Principles.



redress of the systemic racial discrimination are not touched upon through this process.

The Act provides for three committees to achieve the objectives set out for the Commission, namely the Committee on Human Rights Violations, the Committee on Amnesty, the Committee on Reparation and Rehabilitation. The Committee on Human Rights Violations has to inquire into human rights violations, gather information and evidence of these and record them (PNURA, section 14), while the Committee on Reparation and Rehabilitation has to gather evidence concerning the identity of victims, their fate, present whereabouts and the type of harm suffered by them (PNURA, section 25).

The Committee on Amnesty has to decide the individual amnesty applications according to the essential requirements as stated in the Act, namely that the actions in question should have had a political motive and that the applicant makes full disclosure of all relevant facts (PNURA, section 20).

Significantly, the Act states that amnesty rules out the possibility of criminal or civil suits against those to whom it is granted (PNURA, section 20/7). This provision has been very controversial and certain victims of apartheid abuses even challenged it in terms of the Bill of Rights of the 1993 Constitution before the Constitutional Court in 1996. The scope of this paper does not allow me to discuss this case in any depth. Suffice it to say that the Court rejected this challenge on the basis of two rationales: the necessity of amnesty legislation for a democratic transition and the value of truth resulting from the bargain at the heart of the amnesty legislation.<sup>9</sup> According to the Constitutional Court, the amnesty legislation was probably a necessary precondition for a successful transition. In its evaluation the Court also considered it important that no blanket amnesty was granted and that there were strict requirements of full disclosure and of political objective before individual applicants can obtain amnesty.

By the end of June 2001, the TRC's work was basically complete and the main outstanding task was the compilation of the final report (ANC News Briefing 6 June 2001). When assessing the impact of the TRC process on reconciliation, it is striking that opinion polls to this effect have been widely divergent. Nevertheless, there seem to be several indications that the TRC had a rather negative impact, and in any event did not contribute significantly to reconciliation since there is strong evidence of ongoing racial isolation, impeding reconciliation (ANC News Briefing 11 June 2001). Indeed, 'it can rightly be said that the Commission has succeeded in its main task of telling the essential story of what happened between 1960 and 1993. Nonetheless, not all the truth emerged and the objective to achieve national reconciliation was, as a result, seriously undermined' (Klaaren & Varney 2000: 574). Although it can be argued that the approach to amnesty by the TRC has a number of safeguards to limit impunity, amnesty decisions have been particularly controversial. Furthermore, it is important to underline that several reprehensible acts of the apartheid regime, like the forced removals, are not covered by this process.

The reparation process arouses negative feelings and resentment because of the government's slow pace in finalising its policy on reparations. While the limited resources of the state are an important factor explaining government's reluctance

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<sup>9</sup> Constitutional Court of South Africa, *The Azanian Peoples Organization and others v the President of the Republic of South Africa and others*, CCT 17/1996, 25 July 1996. For an in depth discussion of this case, see Sarkin 1996: 626-630. See also Klaaren & Varney 2000: 581-586.

to acknowledge reparation as a right of victims (Jenkins 2000: 417), government's conviction that the TRC process should be mainly about finding the truth and restoring dignity to the victims also plays a considerable role. This obviously causes feelings of disillusion and discontent with the process on the side of the victims (Jenkins 2000: 449), and can also be argued to disempower them to some extent (Jenkins 2000: 480).

### ***The Constitutional Negotiations Regarding Specific Matters, Especially Relevant to Reconciliation***

#### Equality, including affirmative action (in the public service)

In view of apartheid's divide and rule policy, its legacy of group-based discrimination (Currie 1994: 154) and the exclusion of the non-white population from political participation, it is understandable that there was throughout the negotiations extensive emphasis on equality and the need to redress previous disadvantages, on democracy and on nation-building (Kentridge loose leaf: 14.1; De Waal 1998: 153). There can be no doubt that the equality principle 'lies at the heart of the constitution and pervades it'.<sup>10</sup> Regarding the equality principle, it should be underlined that 'the Constitution is not neutral as between different conceptions of equality. It subscribes to a particular vision of equality, one which is usually called substantive equality' (Kentridge loose leaf: 14.35), which can be contrasted with mere formal equality. Substantive equality demands a contextual approach, which takes into account differences in circumstances. In this regard, substantive equality allows and even requires remedial measures 'geared to redressing both individual and group disadvantage created by a history of oppression and apartheid' (Kentridge loose leaf: 14.35). Consequently, the principle of affirmative action to address disadvantages due to past discrimination in itself was easily agreed upon for the 1993 Constitution (Davis 1994: 210; Van Wyk 1994: 158), which sharply contrasts with the controversy surrounding its formulation in the 1996 Constitution and its implementation.

Understandably, in view of the history of legally instituted and entrenched discrimination under apartheid, the equality section of both the 1993 and the 1996 Constitution contains a non-discrimination clause (Constitution, 1993, section 8/1). Equality before the law and equal protection of the law (ibid.) are also taken up so that the entire section deals with most aspects of the equality principle as distinguished and recognized in international law. Regarding the non-discrimination provision, it should be remarked that indirect discrimination is expressly included, which can be related to the pervasive impact of apartheid policies and the desire to prevent any re-appearance of these and related policies

A problematic issue in the negotiations for the 1996 Constitution was the affirmative action clause in general, and the recognition of the need for affirmative action in the public administration. Although the principle of affirmative action as a means of addressing disadvantages due to past discrimination was not contentious, the exact formulation of the affirmative action clause was. Eventually the following formulation was agreed upon:

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

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<sup>10</sup> Constitutional Court of South Africa, *Fraser v The Children's Court and Others*, CCT 31/, 5 February 1997, 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC), § 20.



categories of persons, disadvantaged by unfair discrimination may be taken (Constitution, 1993, section 9/2).

Arguably, this clause clarifies that affirmative action is an implementation of and not an exception to the equality principle, thus confirming the fact that the constitution embraces a substantive conception of equality (Kentridge loose leaf: 14.35-14.36).

The debate on affirmative action does become rather more contentious the more it is applied to concrete situations or fields of law, as exemplified by the discussions with respect to the chapter on public administration. Whereas the transitional provisions of the 1993 Constitution had secured the positions of the members of the public administration of the old order (Constitution, 1993, section 236/2), the ANC felt very strongly about the need to include a constitutional commitment to affirmative action in that specific chapter, as otherwise the *status quo* would remain. The Democratic Party (DP) and the NP, however, felt that a general affirmative action clause in the Bill of Rights would be sufficient.

The minister of constitutional development, underscored that in view of the fact that during apartheid the public service had excluded non-white people more than in any other area in South African society, the affirmative action principle should be repeated in the provisions on the public service to emphasize its importance. At the beginning of the post-apartheid era, it was indeed the case that '(o)fficials who dominate senior positions in these institutions ... are predominantly white, and many or most still harbor strong sympathies for the apartheid order they served for many years' (Ellmann 1994: 27). However, it is difficult to deny in relation to the civil service that 'the make up ... is an issue with ramifications for the future of *ethnic and racial* politics in South Africa' (Ellmann 1994: 27).

In the end the following clause was included as one of the basic values and principles governing public administration, which demonstrates that 'affirmative action in the public administration has won the day' (Ellmann 1994: 27):

Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles: ... (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and *the need to redress the imbalances of the past to achieve broad representation* (1996 Constitution, section 195). (italics added)

#### Language and Education

Prior to elaborating on the issues raised during the constitutional negotiations pertaining to language and education, some demographic information seems on point. A glance at the constitutional provision on the status of languages already reveals the extent of the linguistic diversity present in South Africa. Next to the 11 official languages (Afrikaans, English, Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, isiNdebele, isiXhosa and isiZulu), that provision also mentions in a non-exhaustive enumeration of languages used in South Africa: Khoi, San, Nama, German, Greek, Gujerati, Hindi, Portuguese, Tamil, Telegu, Urdu, Arabic, Hebrew and Sanskrit.

The results of the official census of 1996 pertaining to the 11 official languages clearly establishes that no single language is overwhelmingly dominant, and that English is only the mother tongue of a mere 8.4 % of the South African

population. The most numerous linguistic group are the Zulu, isiZulu being spoken by 22.9%, while isiXhosa by 17.9%. Afrikaans is, due to its prevalence among coloureds, the mother tongue of a large group of South Africans, namely 14.4%. The other language groups are, in descending order of demographic importance: Sepedi (9.2%), Setswana (8.2%), Sesotho (7.7%), Xitsonga (4.4%), Siswati (2.5%), Tshivenda (2.2%) and finally the Ndebele (1.5%).

The respective status of the languages spoken in South Africa, the regulation of language in education and 'separate' schools for distinctive population groups proved sensitive issues during the negotiation process, which can once more be related to apartheid's legacy. *Several* (white) Afrikaners were and still are very concerned about the status of their language, especially in relation to English, which can be explained by the severe language struggles in the past (Currie loose leaf: 37.1). On the other hand, most parties felt strongly about the fact that something should be done about the previously undervalued and neglected African indigenous languages. An attempt to accommodate, to a reasonable extent, all sides to the debate resulted in a very extensive and detailed provision.

It was no problem for the National Party (and other 'white' parties) that there would be 11 official languages as long as Afrikaans was among them.<sup>11</sup> They did, however, bargain for a non-diminishment provision,<sup>12</sup> which would ensure that the rights and status of the pre-1994 official languages were maintained and entrenched (Currie loose leaf: 37.6-37.7), so as to prevent the erosion of Afrikaans in favour of English. The other parties could accept such a provision to the extent that it was understood that 'it was envisaged that the other nine languages would be developed to the point that all eleven languages enjoyed the same status and rights' (Currie loose leaf: 37.6). Although it was not required that all eleven official languages were treated equally (Sachs 1994: 9-15), it was agreed that efforts should be made to develop and promote the equal use of all official languages.<sup>13</sup> The possibility of provincial legislatures to declare any of the national official languages as official language(s) of the province (Constitution, 1993, section 3/5) can furthermore be considered as 'an attempt to recognize and accommodate the regional concentration of various linguistic groups' (Brand 1997: 692). Provision was also made for the establishment of an independent Pan South African Language Board, which is meant (*inter alia*) to further the development of the official languages and to promote multilingualism in South Africa (Constitution, 1993, section 3/10a).

Education was not as much a cause for deadlock in the negotiations during the CODESA and MPNP rounds as in those preceding the adoption of the 1996 Constitution. Agreement was relatively easily reached on a guarantee for equal access to educational institutions.<sup>14</sup> The equalization of educational opportunities is indeed crucial in view of apartheid's policy of separate but unequal education as that had

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<sup>11</sup> Section 3(1), 1993 Constitution: 'Afrikaans, English, isiNdebele, Sesotho sa Leboa, Sesotho, siSwati, Xitsonga, Setswana, Tshivenda, isiXhosa and isiZulu shall be the official South African languages at national level, and conditions be created for their development and for the promotion of their equal use and enjoyment.'

<sup>12</sup> Section 3(2), 1993 Constitution: 'Rights relating to language and the status of languages existing at the commencement of this Constitution shall not be diminished, and provision shall be made by an Act of Parliament for rights relating to language and the status of languages existing only at regional level, to be extended nationally in accordance with the principles set out in subsection (9).'

<sup>13</sup> Section 3 (9) (a), 1993 Constitution: 'Legislation, as well as official policy and practice, in relation to the use of languages at any level of government shall be subject to and based on the provisions of this section and the following principles: (a) The creation of conditions for the development and for the promotion of the equal use and enjoyment of all official South African languages'

<sup>14</sup> Section 32(a), 1993 Constitution: 'Every person shall have the right - (a) to basic education and to equal access to educational institutions'



resulted in grossly inferior education for the African population and the concomitant under-qualification of this population group (Dlamini 1994: 589-590).

The freedom to choose the medium of instruction<sup>15</sup> was very important to the parties representing the previously disadvantaged groups, in view of the mandatory regulation during apartheid. It also remains very significant for an important section of the Afrikaner population, because this would enable them to choose mother tongue instruction, which is felt to be vital to maintain and promote the Afrikaner language and culture. However, it was clear to everyone that there are certain practical constraints to its complete realization and the right to choose the medium of instruction was thus made dependent on a requirement of 'practicability'.

Finally, the urge of certain Afrikaners to have separate educational institutions, conforming to their specific cultural values was also voiced. In so far as there would be no racial discrimination, this was something the ANC could agree to. However, subsequent events during the negotiations leading up to the 1996 Constitution demonstrated, that there were some attempts to circumvent such a prohibition by relying on arguments of culture and the like. This attempted circumvention incited resentment, and burdened the ongoing negotiations.

Indeed, two of the issues that remained unresolved until the very last moment in the constitutional negotiations leading up to the 1996 Constitution concerned the provision on the status of languages and the provision in the Bill of Rights on education. These matters involved core principles for the two major parties, namely NP and ANC, and the formulation of the respective clauses remained contentious even after the momentous three-dimensional agreement on minority protection issues.

For a good understanding of the sensitivity of the language clause, it is appropriate and even necessary to give some information about the general trend as to language use in the public sphere after the adoption of the 1993 Constitution. Despite the 1993 Constitution's insistence that the state was required to promote the equal use and enjoyment of all 11 official languages (Constitution, 1993, section 3/1), there was (and is) an undeniable shift towards mono-lingualism in the public sphere, with the effect that English is increasingly emerging as the *lingua franca*. The establishment of the Language Plan Task Group (LANGTAG) as an advisory body to the minister of Arts, Culture, Science and Technology in December 1995 was *inter alia* meant to counter this trend. LANGTAG's mandate was to advise the minister on a coherent national language plan which would aim at promoting national unity, while at the same time promoting respect and tolerance for linguistic and cultural diversity. Although both the draft and the final report of the language board only came out after the adoption of the (first version of) the 1996 Constitution, both reports criticize the official attitude in the national and also the provincial sphere of government for moving towards an English-only policy.

Both the NP and the Freedom Front (FF) fear(ed) that Afrikaans was going to be marginalized and eventually completely swamped by English, and they wanted therefore the retention of the 1993 Constitution's non-diminishment provision. Although the negotiators of the other parties, and especially the ANC, realized that it was vital to find a balanced way to calm this fear, the ANC was adamant about the fact that the non-diminishment provision was not acceptable in the long run. For the ANC it was vital that there should be the constitutional possibility to improve the

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<sup>15</sup> Section 32(b), 1993 Constitution: 'Every person shall have the right - (b) to instruction in the language of his or her choice where this is reasonably practicable'.

indigenous languages by reducing the status of Afrikaans so as to reach an equitable overall use of and status for all 11 official languages. In the end, the deadlock was resolved by an *in se minor*, but for the NP symbolically important, addition to one of the other subsections of the language clause. The NP was only prepared to agree that the non-diminishment provision be dropped on condition that the section dealing with 'use of language for purposes of government' at the national and provincial levels would require that this could not be only one language.<sup>16</sup> The party felt that such a provision would at least counter the tendency that only English would be used at these levels.

The proclamation of 11 official languages in section 6 of the 1996 Constitution, as in the 1993 Constitution (Young 1995: 65), has important symbolic value (Currie loose leaf: 37.2), especially for the speakers of the nine African languages, which used to be deprived of such status. The feeling of inclusiveness that is created by this linguistic policy should not be underestimated and confirms that accommodation of a state's population diversity tends to have positive implications for the project of nation-building (Currie loose leaf: 37.5). Nevertheless, it is striking that the 1996 constitution no longer has the equal treatment of the 11 official languages as an - albeit distant-objective, but 'merely' the equitable treatment and parity of esteem of these languages (Constitution, 1996, section 6/4). 'Equitable' treatment can be considered to strengthen the internal reference to subsection 2, which expressed the need for positive measures by the state to elevate the status of the official indigenous languages. 'Equitable' would make explicit that there is, in view of the 'history of official denigration and neglect' of these indigenous languages, a need for differential and preferential treatment and not merely formally equal treatment (Currie loose leaf: 37.5). However, 'equitable treatment' may also acknowledge that not all 11 official languages should or can always be used for all purposes. 'Parity of esteem' would then 'insist(s) that considerations of practicality aside, a sincere attempt must be made to ensure that particular languages do not dominate while others are neglected' (Currie loose leaf: 37.6), and would imply a rejection of an over-powering *lingua franca*.

Finally, the right to education, and more specifically the issue of language in education and single medium institutions, proved to be the greatest stumbling block of all and was only resolved 7 May 1996, the day before the adoption of the (first version of) the 1996 Constitution (Currie loose leaf: 35.7; Loban 1997: 107). Eventually, the discussions turned around the issue of single medium institutions, as pressed by the NP (and the FF), which was (after many rounds of negotiations) integrated, to a certain extent, in the subsection on the medium of instruction. The starting point of the controversy around the education provision had been the NP's proposal for a right 'to educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race and, provided further that the state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it has been established on the basis of a common language, culture or religion'. Whereas such a right to state-funded schools with a distinctive linguistic, cultural or religious character was considered to be imperative by the NP to protect and promote the Afrikaner culture and language, while offering the same advantage to other minorities, this was completely unthinkable for the ANC as it would imply a return to Verwoerdian (apartheid) practices (Currie loose leaf: 35.6-35.7).

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<sup>16</sup> Section 6 (3) (a), 1996 Constitution: 'The national government and provincial governments may use any particular official languages for the purposes of government,..., but the national government and each provincial government must use at least two official languages.'



Furthermore, the judgement of the Constitutional Court in the *Gauteng education case* of 4 April 1996 had clarified that the analogous section 32 of the 1993 Constitution (which did not contain the explicit words 'at their own expense'), reflected the appropriate option about state obligations regarding the funding of minority schools. According to the Constitutional Court, the state has, under section 32(c), 1993 Constitution, a mere negative obligation of non-interference regarding private efforts to that effect.

This judgment influenced the eventual formulation of the right to set up independent educational institutions, in the sense that the 1996 Constitution makes explicit that this is 'at their own expense' and that two other provisos are added to the one that prohibited racial discrimination (Constitution, 1996, section 29/3). The Constitutional Court had indeed held that the 1993 Constitution also implied that these independent institutions should be registered with the state and should live up to certain minimum standards.<sup>17</sup> The outcome of this case furthermore 'increased anxiety about the formulation of the education clause on the side of the Afrikaners' (Malherbe 1997: 63). Subsequently, the NP insisted on the need for a right to single medium institutions in the public education sector, which indicated a shift of emphasis in its claim regarding the right to education. However, the ANC was not open to any concessions in this regard and the NP finally agreed to a 'much diluted version' of its original proposal in the provision on the medium of instruction:

Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, *the state must consider all reasonable educational alternatives, including single medium institutions*, taking into account (a) equity; (b) practicability and (c) the need to redress the results of past racially discriminatory laws and practices (Constitution, 1996, section 29/2). (italics added)  
should this note on italics be an end note?

Although the NP's feeling in hindsight was that 'they have lost this one', it can be argued that this subsection makes 'express concessions to minority interests' (Kriel loose leaf: 38.15). The factors which the state is to take into account when implementing the right to receive education in the official language or languages of choice apparently have some but not much potential for single medium Afrikaans institutions. Although the third factor does not seem to be conducive to a choice for single medium Afrikaans institutions, this might be balanced out in certain circumstances by the 'equity' factor, for example in areas where the majority of the people speaks Afrikaans. Furthermore, and in view of the collective aspect of an educational institution of this kind, section 31 and its recognition and protection of the collective dimension of the rights of persons belonging to (cultural, religious and) linguistic communities, can arguably also be used to canvass claims of single medium institutions for linguistic communities.

At the same ultimate session where section 29(2) was agreed, the DP also proposed an additional subsection (Constitution, 1996, section 29/4), which would provide for the possibility of state subsidies for independent educational institutions, as catered for in section 29 (3). This proposal was readily accepted by the ANC and welcomed by the NP since it carries the possibility of their 'educational institutions based on a common language, culture or religion' to be private but nevertheless state-funded.

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<sup>17</sup> Cf. Constitutional Court of South Africa, *Gauteng Education case*, §§ 10-11.

In the end, the further implementation of the education clause, its application and eventual adaptation, will demonstrate to what extent this provision effectively caters for minorities and accommodates South Africa's overall population diversity (Brown 1997: 3).

#### Self-determination, the *Volkstaat* and Minority Rights

Claims of certain Afrikaners for self-determination, and more specifically a *Volkstaat*, proved to be a controversial issue during the 1993 constitutional negotiations which remained outstanding until the last moment. In the end, the ANC made several concessions so as to make the constitution as inclusive as possible and to persuade all parties to participate in the elections. Eventually, constitutional amendments were agreed to in the Constitution of the Republic of South Africa Amendment Act 2 of 1994 so as to placate the parties advocating a *Volkstaat*. The amendment provided *inter alia* for a *Volkstaat* Council and another Constitutional Principle dealing with the right to self-determination for a community sharing a common 'cultural or language heritage' (Corder 1994: 504-505).

Constitutional Principle XXXIV of the 1993 Constitution embodies a qualified recognition of a right to self-determination, not limited to the internal dimension of that right (Currie loose leaf: 35.33), in that it states that would not be precluded: 'constitutional recognition for a notion of the right of self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognized way'.

The *Volkstaat* Council was meant to 'enable proponents of the idea of a *Volkstaat* to constitutionally pursue the establishment of such a *Volkstaat*' (Constitution, 1993, section 184/B1). Nevertheless, it should be pointed out that the Council's powers were not far-reaching as it was envisaged to be an advisory body that has powers to gather information and make representations on the *Volkstaat* issue to the Constitutional Assembly, entrusted with the elaboration of the 1996 Constitution (Van Wyk 1994: 165', 168).

Indeed, one of the sensitive issues in the 1996 constitutional negotiations was the right to self-determination for an ethnic group ('a community sharing a common cultural and language heritage') and the way in which CP XXXIV would be realized in the 1996 Constitution in view of its merely permissive wording. Self-determination on ethnic grounds tends to have many negative connotations due to apartheid's Grand Apartheid scheme, but the idea of a *Volkstaat* was furthermore perceived to be an attempt to perpetuate the concept of apartheid and to hold on to privileges gained during that era. Nevertheless, the ANC was aware of the fear felt by *some* Afrikaners that their language and culture would be swamped (and die) if they did not have some form of (preferentially territorial) self-determination.

During the public negotiations, virtually no reference was made to the right to self-determination and its shape in the final Constitution (Currie loose leaf: 35.33). In view of the Freedom Front's mandate and its focus on the *Volkstaat* ideal, that party argued that CP XXXIV legitimized their demand for constitutional recognition of a territorial *Volkstaat*. The ANC resisted such a recognition and relied *inter alia* on the fact that the first interim report of the *Volkstaat* Council, as presented to the Constitutional Assembly (CA), had demonstrated that there was a lot of internal division on the future shape of such a *Volkstaat* (Currie loose leaf: 35.34). Whereas initially these discussions only involved the ANC and the FF (bi-lateral), eventually, as time-pressure was getting stronger and the need to make 'deals' grew, this issue was settled at a 'marathon of 36 hours of negotiations' 18-19 April 1997 (Currie



loose leaf: 35.5; Strydom 1998: 900-901). During several hours of that marathon there was a tri-lateral of the ANC, the NP and the FF. Since during the previous bi-laterals between the ANC and the FF the ANC had formulated promises of cultural councils and rights analogous to article 27 ICCPR, the NP joined the discussion to further their goal of including minority rights in the constitution.

Eventually, the result of this tri-lateral was a three-dimensional agreement on a Commission for the Protection and Promotion of the Rights of Cultural, Religious and Linguistic Communities, cultural rights like article 27 ICCPR (section 31) and a provision on self-determination, the wording of which mimics CP XXXIV. Although the word 'community' is used instead of 'minority', the similarities between article 27 ICCPR and section 31 are striking. The concept 'community' was preferred because 'minority' is related to the apartheid ideology and because the former concept would express ties of affinity and connectedness rather than ties of blood (Currie loose leaf: 35.12). It can nevertheless be argued that 'the most pragmatic way to deal with the difficulties of definition of the term community is to see it as doing more or less the same work as the term it substitutes for article 27's category of a 'minority'' (Strydom 1998: 899-900). Apartheid's abuse of ethnicity furthermore explains the use of 'cultural' instead of 'ethnic' (Currie loose leaf: 35.12).

It was decided that this Commission would be provided for in the chapter on State Institutions Supporting Constitutional Democracy, thus confirming the link between democracy and minority protection. The Commission is to be broadly representative of the several communities in South Africa and is empowered to monitor, investigate, research, educate, advise and report on issues concerning the rights of these communities (Constitution, 1996, section 185/2). Further details should be provided by the legislation which will actually establish this commission (Constitution, 1996, section 185/4). Section 185 (1) explicitly enumerates the following primary objectives of the Commission, which reveals that it is meant to contribute to the accommodation of South Africa's population diversity (Erasmus & de Waal 1997: 35.34):

- (a) to promote respect for the rights of cultural, religious and linguistic communities;
- (b) to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and
- (c) to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.

Secondly, agreement was reached on the inclusion in the Bill of Rights of a section with additional 'cultural rights', meant to reflect the spirit of article 27 ICCPR. The rights are indeed framed as collective rights, more specifically in terms of 'members belonging to .... communities' and arguably enshrine a right to identity. There was some contention about the exact wording of the clause, namely whether it would be negative like article 27 ICCPR or positive, but eventually the first option was taken up and section 31 (1) (a) of the 1996 Constitution reads as follows:

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.

The third and final component of the package agreed to by the ANC, FF and NP was that a provision would be added to the Constitution which would enshrine the content of CP XXXIV. The eventual provision, which was acceptable to the parties, is equally vague in its formulation as the Constitutional Principle and so open-ended that it cannot be said to enshrine a right at all (Currie loose leaf: 35.33-35.34):

The right of the South African people as a whole to self-determination, as manifested in this Constitution, *does not preclude, within the framework of this right, recognition of the notion of the right of self-determination* of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way determined by national legislation (Constitution, 1996, section 235). (italics added) should this note on italics be an end note?

The fact that national legislation will determine the acceptable ways of implementing self-determination underscores that section 235 actually does not grant a right to self-determination to communities but leaves this to the discretion of the national legislator. Nevertheless, it was argued that 's 235 requires that the phrase "self-determination" is interpreted so as not to exclude the possibility of vindication of the right of self-determination by external or by internal political means' and also that the expression 'community sharing a common cultural and language heritage' refers to an ethnic minority (Currie loose leaf: 35.34). Consequently, section 235 would at least leave the door ajar to forms of both external and internal (even with a territorial dimension) self-determination for 'minorities', thus securing the possible emergence of a *Volkstaat*, however tenuous that possibility might seem.

It should be pointed out that the section concerned, section 235, is part of the chapter with General Provisions and thus not of the Bill of Rights (Strydom 1998: 907). Finally, the overall tendency of the 1996 Constitution to move away from recognition of self-determination that would result in a *Volkstaat*, is clearly demonstrated by the fact that the *Volkstaat* Council can be abolished by Parliament at will (Constitution, 1996, schedule 6, item 20/5).

This three dimensional agreement lead to many spontaneous and very emotional speeches by several of the party leaders present at the Constitutional Sub-Committee. Roelf Meyer (NP) underscored that in this way the real needs of *all* cultural groups are accommodated and that it consequently amounted to an important step in the creation of a country where *all* peoples feel at home. Valli Moosa (ANC) added that these agreements capture in a democratic manner the aspirations of the country in that it may be a new way of dealing with the 'national question' without contradicting the concept of nation-building. The speeches of the other parties also acknowledged the importance of this breakthrough dealing with the stigmas of the past and working towards unity in diversity. Although these provisions came about due to claims and demands put forward by political parties representing (a section of) the Afrikaner population, it is clear that all parties realized and underscored its broader potential, namely for all population groups in South Africa that have a distinct identity and a wish to preserve that.

Without wanting to negate the importance of this kind of agreement so soon after apartheid was formally abolished, it should also be put in perspective by the overall picture. Section 31 and the provision for the Commission imply the introduction of collective rights and the recognition of collective interests (Currie loose leaf: 35.5) and thus amount to the entrenchment of some kind of minority rights (and minority



protection). Although at first sight this contradicts the ANC's strong rejection of special treatment for ethnic/cultural groups, it was the 'price' they were willing to pay to placate the Freedom Front by accepting the weak recognition of the right to self-determination, while giving the National Party the minority rights it wanted (Currie loose leaf: 35:5; Sacks 1997: 679).

It is appropriate to mention at this point that the ANC has emphasized the overall objective of nation-building in subsequent talks on the establishment of that Commission (and the rights provided for in section 31). At the same time it also acknowledged the need to accommodate the country's population diversity, thus taking up the theme of unity in diversity. It is not clear to what extent the prime objective of national unity and nation-building will leave effective scope for genuine protection and promotion of diversity, as are made possible by sections 31 and 185 of the 1996 Constitution (Sacks 1997: 672). Further implementation as well as application will show whether the ANC, as the dominant political party, senses that the goal of nation-building can be furthered, instead of threatened, by accommodating South Africa's population diversity effectively. In the end, the exercise will be about finding the right balance between promoting unity and accommodating diversity, which is not a straightforward matter and requires thorough consideration of all the relevant circumstances.

#### Land and Property Rights

During the 1993 constitutional negotiations, the property clause of the Bill of Rights 'was a bone of contention right from the outset' and 'a constitutional strategy providing for the restoration of rights in land to persons who had been dispossessed of such rights as a result of racially discriminatory policies were ... intensely negotiated' (du Plessis 1994: 97).

Eventually, the negotiators agreed on the one hand on a formulation of the right to property in the 1993 Constitution which implied that no expropriation of property could take place without just and equitable compensation based on a number of factors including the market value of the property. The white community and the political parties defending their interests had put up a serious struggle to obtain this protection (Jenkins 2000: 450).

On the other hand, the 1993 Constitution dealt with a limited right to restitution in the provision on equality and enabled parliament to make a law that would provide for restitution of land for people who were dispossessed of a right in land by racially discriminatory law. This was done in the Restitution of Land Rights Act 22 of 1994, which involve a Commission on the Restitution of Land Rights and a Land Claims Court. The remedies provided for range from restoration of dispossessed land rights, alternative state-owned land, compensation or alternative relief.

The property clause also proved contentious during the negotiations leading up to the 1996 Constitution. The ANC wanted to have sufficient possibility for land reform processes, falling short of restitution. Positive rights of redistribution and tenure security were also advocated. The 1996 Constitution grants in section 25 of the Bill of Rights constitutional protection to land redistribution and tenure reform in addition to land restitution. The state is obliged to take reasonable, legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. Generally, 'the state exercises a wide discretion, but the discretion is not completely undefined and does not render nugatory the state's obligation' (Eisenberg loose leaf: 40.9).

The 1996 Constitution itself does not contain any detailed provision pertaining to land-restitution but the provisions of the Restitution of Land Rights Act still govern this matter.

The constitutional negotiation process in post-apartheid South Africa has clearly demonstrated the importance of compromise thinking and the search for a balanced approach, to as to accommodate the population diversity in a divided society and to contribute to reconciliation and reconstruction. Important considerations in the post-apartheid South African society, influencing the democratic transformation process, include redress of the past, nation-building, and the protection of diversity (unity in diversity). These themes do not always point in the same direction. As the following paragraphs will demonstrate, the actual implementation process is very slow and often highly deficient, and undoubtedly hampers the reconciliation process concomitantly.

### ***The Implementation Phase***

Although the agreement on these constitutional provisions and its contribution to the reconciliation and reconstruction process cannot be overestimated, the actual and ongoing implementation is equally, if not more, important.

However, the scope of this paper does not permit me to elaborate too much on this matter. Consequently, I will limit myself to some broad-ranging remarks and evaluations. Most affirmative action schemes developed and implemented up until now have been controversial, especially affirmative action in the public service and the Employment Equity Act. There are strong misgivings among the white, coloured and Indian population in this respect. The last two categories were in an intermediate category under apartheid and feel that they are now not black enough because affirmative action policies are perceived to be completely or mainly geared towards the African population groups. On the side of the white population, most complaints seem to focus on the irrational and rigid way in which affirmative action policies are implemented, overemphasizing numbers and lowering of standards. Typically, debates relating to affirmative action for victims of past discrimination and the use of the dreaded apartheid classifications reigned supreme.

Overall, post-apartheid South Africa has chosen to adopt a substantive conception of equality but it is still searching for the exact balance in achieving that, without alienating the population groups that were (more or less) privileged under apartheid.

The actual practice regarding language use for purposes of government and other related public functions, like the public broadcaster, are a far cry from the promising constitutional principles of the 1996 Constitution. Consequently, there is a rather uniform complaint about the dominant status of English as *lingua franca* and the concomitant negation of meaningful multilingualism, as demanded by the Constitution. Although certain public institutions and national departments are trying to develop language policies which contribute to the right of identity of the various linguistic groups in South Africa, while taking practical constraints and considerations of nation-building into account; there seems a *de facto* denial of several constitutional principles with respect to the status of languages and multilingualism.

Education is in general a very sensitive matter in post-apartheid South Africa, which is revealed by numerous teacher strikes and instances of student unrest,



because of the lack of financial aid for most students from previously disadvantaged backgrounds, the lack of racial transformation at schools and tertiary institutions, the decisions regarding choice of medium of instruction - especially at tertiary institutions - and the overall restructuring of the curriculum.

The theme of equal access to and integration of educational institutions is very important and should be seen against the background of racially structured education during apartheid. At the level of schools, non-discriminatory access is required and protected, while with respect to tertiary education several attempts are made to facilitate access for students from previously disadvantaged communities by adopting a flexible and progressive method to establish ability for higher education. A very sensitive aspect of curriculum choices is the policy pertaining to language of instruction. The Constitution determines in section 29(2) that 'everyone has the right to receive instruction in the official language or languages of their choice in public educational institutions where that education is reasonably practicable'. At the level of schools the national minister of education has proclaimed National Norms and Standards regarding Language Policy. These can be considered as a genuine attempt to realize the individual student's choice regarding medium of instruction as much as reasonably possible, while taking resource and other practical constraints into account. Recently, the minister has acknowledged the severe problems of effective implementation and he announced drastic changes with respect to enforcement and the like. The language policy for tertiary institutions is not completed as yet, although several activities are in progress.

Overall, the 1996 Constitution moves away from a recognition of a right of self-determination that might result in a *Volkstaat*. Since the coming into force of the 1996 Constitution, negotiations between the ANC and the FF are ongoing without, however, any significant break through. Nevertheless, it is striking that whenever there is a strong reaction by Afrikaners, due to perceived threats to their language and culture by one or another new policy document, which includes stronger claims to retreat and even use of violence and secession, there is a revamp of high-level negotiations. In view of the lack of progress on the official level and the increasing unlikelihood that an official *Volkstaat* will come about, there are some private initiatives towards the development of a *Volkstaat*, one of which, Orania, appears to be rather successful (ANC news briefing 10 August 2001). It remains to be seen how this town will develop, what reaction it will provoke from both the wider public and the authorities, but it sends a strong signal to the state that certain Afrikaners choose to separate instead of integrate and take this kind of action because they feel that their right to identity is not sufficiently protected.

Finally, the actual implementation of the land claims and broader land delivery process is rather slow. The resulting situation has caused severe feelings of resentment amongst the black population and has led to several instances of threats about land invasions in the Eastern Cape and the Northern Province and even actual land invasions in Gauteng (Bredell), the Western Cape (Khayelitsha) and Kwazulu-Natal. Government is well aware of the resulting dangers of a proliferation of land invasions and is committed to speeding up the project cycles for land restitution (ANC news briefing 12 July 2001).

### **Conclusion**

South Africa's reconciliation and reconstruction process is clearly ongoing and will presumably take another couple of decades before it is fully concluded. The Truth

and Reconciliation process in itself has a dubious or rather ambivalent impact on reconciliation in this deeply divided society, which is related to the adverse impact on race relations, the restricted scope of its mandate and the like. Whereas the entire constitutional negotiation process and its goals of unity in diversity, redress of the past and nation-building appear highly beneficial towards reconciliation, the actual implementation of the relevant provisions is slow, often deficient and consequently tends to inhibit this process. It is in any event remarkable that a country so deeply scarred and divided by apartheid, develops a constitution which not only contains individual human rights, but also 'minority rights' and a reference to self-determination for cultural communities. The constitutional foundations to achieve a system that successfully accommodates a plural society's population diversity and contributes to reconciliation are available, but everything will depend on the actual implementation over the coming years and decades.

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