

Recognition without empowerment: Minorities in a democratic South Africa

Richard Simeon* and Christina Murray**

Many commentators, both inside and outside South Africa, predicted that, once the heavy hand of white minority rule was lifted, ethnic and linguistic divisions within the African majority would gain new salience, resulting in widespread conflict in a divided South Africa. These predictions have not been borne out. South Africa remains a highly diverse, and highly unequal, society. But a political accommodation across the broad racial divide has been reached; and divisions within the African community, while still present, have decreased, rather than increased. Why? We consider a number of explanations, but focus our attention on the South African constitutional design, which gives strong recognition to diversity and difference in private life, while seeking to the greatest extent possible to prevent ethnocultural differences entering the public sphere. We trace this through the fundamental principles set out in the Constitution, the Bill of Rights, the designation of a multisphere government, and other provisions. As the significance of ethnocultural difference has declined, South African politics has become increasingly focused on economic differences.

The new democratic South Africa, the result of the transition in the early 1990s from the minority-dominated apartheid regime to a democratic “non-racial” and “non-sexist”¹ regime, has proudly proclaimed itself to be a “rainbow” nation,² united in its diversity.³ These words encapsulate the vitory of the African National Congress (ANC), for which a nonracial South Africa was a central aspiration. But many observers of the transition have thought that managing diversity would be a fundamental challenge to the new nation. How could reconciliation be achieved between the newly empowered black

* Professor of political science and law, University of Toronto. Email: rsimeon@wcfia.harvard.edu

** Professor of constitutional law and human rights, University of Cape Town. Email: Christina.Murray@uct.ac.za

¹ S. AFR. CONST. 1996, ch. 1, §1

² This was a term coined by Archbishop Desmond Tutu to describe post-1994 South Africa. The phrase was given weight by President Nelson Mandela in his first month of office, when he announced: “Each of us is as intimately attached to the soil of this beautiful country as are the famous jacaranda trees of Pretoria and the mimosa trees of the bushveld—a rainbow nation at peace with itself and the world.” See KATHRYN A. MANZO, CREATING BOUNDARIES: THE POLITICS OF RACE AND NATION 71 (Lynne Reinner 1996).

³ S. AFR. CONST. 1996, pmb1.

majority and the white minority, given the legacies of apartheid, minority rule, and the continuing and profound economic and social inequalities between black and white people? How would the now-disempowered (but not disenfranchised) white minority respond to its new status? What relations would develop between the so-called African⁴ majority and other historic minorities—white people, the largely Afrikaans-speaking⁵ “coloured” population,⁶ and those of Indian descent? Also, would the old linguistic and tribal divisions, so assiduously cultivated by the apartheid regime in a divide-and-rule strategy that included tribal “homelands,” or “bantustans,” assert themselves once the common enemy was removed? Would Xhosas, Zulus, and others be at each others’ throats once the underlying black-white division was eradicated?

These were and, to some extent, remain important questions. What is most noteworthy is that a considerable number of external commentators predicted that some or all of these fault lines would have a profound effect on the new South Africa, and that they would prove exceptionally difficult to manage. Observers debated alternative constitutional and institutional strategies for containing the potential conflicts.

It is now more than a decade since the adoption of the Constitution of 1996, and more than fifteen years since the transition began. Today, many issues related to minorities, in fact, do remain on the South African political agenda, although none of them seems likely to divide the country as had been predicted. There are, indeed, deep divisions within contemporary South Africa, within its governing party, the ANC, and between it and its allies. The most significant division remains that between white and black South Africans though the

⁴ Note that all the terms are contested. Except where indicated otherwise, this paper uses the terminology of Statistics South Africa, the government statistical service. These are the terms used by the apartheid government now used to assess the success of measures intended to remedy the effects of apartheid.

⁵ Approximately 82.1 percent of the colored population in South Africa speaks Afrikaans. See STATISTICS SOUTH AFRICA, *THE PEOPLE OF SOUTH AFRICA POPULATION CENSUS 1996*, 12 (1998).

⁶ It is notoriously difficult to offer a definition of “colored” in South Africa. Even the apartheid classification in the Population Registration Act 30 of 1950 relied on relative and intuitive concepts, defining colored people as being *not* European and *not* African or black, but generally accepted as “members of the race known as Cape Coloured.” See IAN GOLDIN, *MAKING RACE: THE POLITICS AND ECONOMICS OF COLOURED IDENTITY IN SOUTH AFRICA* xvi (Longman 1987) (noting that no single definition of colored person exists). Similarly, the term “mixed race” is unsatisfactory since it tends toward racial identification based only on parentage. Although miscegenation between white European settlers and indigenous peoples undoubtedly contributed to the emergence of the colored people in South Africa, Peter Carstens refers to Cape Coloreds as “those South Africans of mixed cultural and racial stock whose ancestors include Europeans, Khoi and other indigenous African people, and Asians”: Peter Carstens, *Cape Coloureds*, in 9 *ENCYCLOPEDIA OF WORLD CULTURES: AFRICA AND THE MIDDLE EAST* 58–60 (John Middleton & Amal Rassam eds., GK Hall & Company 1994). The label “mixed race” ignores the fact that today the parentage of colored persons can rarely be attributed to a particular “race” or “races.”

threat it offers has receded in the years since the 1994 elections. Other sources of conflict relate more to competing economic and class divisions and differing economic strategies than they do to the culturally based dichotomies that were expected to dominate modern politics.

In this paper, we ask why and how this is so. Specifically, why have levels of hostility among the many racial or ethnic groups composing the South African rainbow nation been relatively low? And how can we explain this largely peaceful transition to democracy? Much of the explanation lies in the nature of the transition, particularly, in its historical context, the timing and length of the process, and the style of leadership in the most significant parties. These factors still have a profound (although perhaps waning) influence on South African politics. Indeed, the degree to which the accommodation reached in the transition will survive the changing modes of political interaction is yet to be seen. However, these matters are not the focus of this paper. Here we are concerned primarily with issues of constitutional design. We begin with a brief analysis of the demographic characteristics of modern South Africa and of the historical forces that have shaped these traits. We then turn to the debate about how the many dimensions of difference found in the country should be reflected and represented within the new constitutional order. Should differences be recognized, emphasized, and institutionalized; or should they be blurred, transcended, and crosscut? In the comparative literature on the management of diversity, this remains one of the most contentious questions. It was also vigorously debated both among South Africans themselves and among outside observers. In particular, we focus on the debate, which has dominated the international literature, between the political scientists Arend Lijphart, the prime advocate of the “consociational” model that envisions a South Africa based on distinct, autonomous groupings,⁷ and Donald Horowitz, an advocate of a more integrationist model.⁸ Each has had important allies and supporters within South Africa.

Next, we explore the answer that South Africans provided in their final Constitution: namely, a strategy we describe as “recognition, without empowerment.” This approach is consistent with a broader South African attitude. As Anthony Butler puts it, “Black South Africans combine awareness of the

⁷ Lijphart has written widely on consociationalism and elite accommodation. See AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* (Yale Univ. Press 1977); Arend Lijphart, *Constitutional Choices for New Democracies*, 2 J. DEMOCRACY 72 (1991); Arend Lijphart, *Prospects for Power-Sharing in the New South Africa*, in ELECTIONS'94 SOUTH AFRICA: THE CAMPAIGNS, RESULTS, AND FUTURE PROSPECTS 221 (Andrew Reynolds ed., James Currey 1994); Arend Lijphart, *The Wave of Power-Sharing Democracy*, in THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT AND DEMOCRACY 40 (Andrew Reynolds ed., Oxford Univ. Press 2002); Arend Lijphart, *Constitutional Design for Divided Societies*, 15 J. DEMOC. 96 (2004).

⁸ DONALD L. HOROWITZ, *A DEMOCRATIC SOUTH AFRICA? CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY* (Univ. Cal. Press 1991).

artificiality of tribal division with pride in the diverse history and culture of African peoples.”⁹ We then fast-forward to the present. What is the status of the diverse minorities in South Africa today, what are the current debates, what are the possibilities for the future? “Identity politics,” we conclude, have not disappeared from South Africa, although such politics do not dominate the landscape.¹⁰ This, we argue, is explained by a number of factors: by the views and attitudes of leaders of the liberation struggle, reflecting the long history of nonracial and inclusive politics; by the demographic fact that there is no single ethnic or linguistic majority in South Africa; by the design of South African institutions, which emphasize inclusion rather than institutionalizing difference; and by the overarching accommodation between black and white South Africans, in which political power unambiguously flowed to the former, while the latter have largely retained their economic position.

We do not wish to paint too rosy a portrait; ethnic tensions remain present in many forms. Evidence of this includes the continuing (though much-diminished) tension between the two largest African groups, the Xhosa and the Zulus, and the related concerns of smaller groups that they will be marginalized; the worries by white and colored Afrikaans-speakers and speakers of other languages about the survival and status of their language; the claims by representatives of the colored and Indian communities that they are marginalized in modern South Africa; and a resurgence of claims by “traditional authorities” for a greater role.¹¹ Relations between the black majority and the white minority also remain fundamental. While now conducted in the language of normal political debate, black resentment at continuing white economic privilege, a parliamentary opposition that speaks largely for the white community, and contentious policy debates over issues such as affirmative action remain important aspects of South African politics. Despite these areas of contention (inevitable in any society as diverse as South Africa), this paper will focus on the by-and-large peaceful transition and consolidation of democracy in South Africa.¹²

⁹ Anthony Butler, *The State of the African National Congress*, in *STATE OF THE NATION: SOUTH AFRICA 37* (Sakhela Buhlungui, et al. eds., HSRC Press 2007).

¹⁰ For an excellent assessment of identity politics in contemporary South Africa, see Steven Friedman, *A Voice for Some: South Africa's Ten Years of Democracy*, in *CONTESTED TERRAIN: ELECTORAL POLITICS IN SOUTH AFRICA'S FIRST DEMOCRATIC DECADE 3* (Jessica Piombo & Lia Nijzink eds., David Philip 2005).

¹¹ For examples of tension between ethnic groups, see text accompanying *infra* note 132; for concerns about the survival of Afrikaans, see the discussion of Afrikaans schools in text accompanying *infra* notes 100–1108; For a discussion of “colored” identity in South Africa, see *NOW THAT WE ARE FREE: COLOURED COMMUNITIES IN A DEMOCRATIC SOUTH AFRICA* (Wilmot James et al. eds., Lynne Reinner 1996). For a discussion of the claims of traditional leaders, see *LUNGISILE NTSEBEZA, DEMOCRACY COMPROMISED CHIEFS AND THE POLITICS OF LAND IN SOUTH AFRICA* (HSRC Press 2005).

¹² See Friedman, *supra* note 10, at 3; see also TOM LODGE, *MANDELA TO MBEKI 174* (David Philip & James Currey 2002).

1. Mapping diversity in South Africa

By almost any measure, South Africa is a remarkably diverse society. But how these diversities are defined and measured and how they are played out in the political process is itself a contentious issue.

First, the national census, *Statistics South Africa*, classifies the population by racial group.¹³ Here the image is of a society dominated by one racial group—“Africans”—who make up 79.4 percent of the total. “Whites,” a category that includes both Afrikaans and English speakers and a number of other citizens of “European” descent, make up 9.3 percent. Slightly less numerous is the “coloured” group at 8.8 percent. People of Indian and Asian descent make up just 2.5 percent of the population.

Midyear Estimates for South Africa by Population Group and Gender (2005)¹⁴

Population Group	Male		Female		Total	
	number	% of total population	number	% of total population	number	% of total population
African	18,320,400	79.4	18,885,300	79.3	37,205,700	79.4
Colored	2,036,700	8.8	2,112,100	8.9	4,148,800	8.8
Indian/Asian	565,100	2.4	588,800	2.5	1,153,900	2.5
White	2,148,100	9.3	2,231,700	9.4	4,379,800	9.3
Total	23,070,300	100.0	23,817,900	100.0	46,888,200	100.0

The apartheid regime, of course, institutionalized the dominance of the white minority in all spheres of life. The liberation struggle, as a result, was largely cast in terms of the black majority’s search for equality against white resistance.¹⁵ It is important to recall, however, that a small number of members of the white population was also prominent in the fight against apartheid. As we shall see, the central goal in the constitution-making process for the white minority was to ensure a liberal democratic constitution, which would include some important restraints on unlimited majority rule. It was clear, nonetheless, that any plausible version of democratic politics in South Africa would have to reflect the power of the black (or perhaps the African) majority.

There are some important differences in the racial composition of the South African provinces. In three largely rural provinces—Limpopo, Mpumalanga, and North West—Africans make up over 90 percent of the population. In three

¹³ STATISTICS SOUTH AFRICA, MID-YEAR ESTIMATES FOR SOUTH AFRICA BY POPULATION GROUP AND SEX 1 (2005), available at <http://www.statssa.gov.za/PublicationsHTML/P03022005/html/P03022005.html>.

¹⁴ *Id.*

¹⁵ Following the usage of many of those opposed to apartheid, “black” here refers to everyone who is not white.

others—Free State, Eastern Cape, and KwaZulu-Natal—they range from 80 to 90 percent. In Gauteng, the most populous, urbanized, and industrialized province, almost three-quarters of the population is African while others represent just over a quarter of the population. In two provinces—the large Western Cape that includes Cape Town and the huge but sparsely populated and more rural Northern Cape—the colored population constitutes the majority. This is changing in the Western Cape as Africans from the Eastern Cape and other parts of the country migrate into the province.

Racial Composition of South African Provinces¹⁶

	Black African	Colored	Indian/Asian	White	Total
Eastern Cape	87.5%	7.4%	0.3%	4.7%	100%
Free State	88.0%	3.1%	0.1%	8.8%	100%
Gauteng	73.8%	3.8%	2.5%	19.9%	100%
KwaZulu-Natal	84.9%	1.5%	8.5%	5.1%	100%
Limpopo	97.3%	0.2%	0.2%	2.4%	100%
Mpumalanga	92.4%	0.7%	0.4%	6.5%	100%
Northern Cape	35.7%	51.6%	0.3%	12.4%	100%
North West	91.5%	1.6%	0.3%	6.6%	100%
Western Cape	26.7%	53.9%	1.0%	18.4%	100%
Total	79.0%	8.9%	2.5%	9.6%	100%

The second dimension of difference in South Africa is reflected in its linguistic diversity, though language is also—in some ways—a surrogate for ethnic identification within the larger “African” group. While Africans constitute a clear national majority, there is no such single-group dominance with respect to language. IsiZulu is the most widely spoken home language (23.8 percent), followed closely by isiXhosa. Afrikaans, spoken both by many whites and much of the colored population, ranks third, followed by English. Other languages—siSwati, Tshivenda, and isiNdebele, as well as others—are the home languages spoken by far fewer people.¹⁷

Again, language use varies across regions and provinces. In the Eastern Cape, for example, more than 80 percent speak isiXhosa, followed by Afrikaans. In KwaZulu-Natal, more than 80 percent speak isiZulu as their home language. Afrikaans is the majority language in the Western Cape and Northern Cape. In Free State, Limpopo, and North West, minority languages such as

¹⁶ STATISTICS SOUTH AFRICA, *ACHIEVING A BETTER LIFE FOR ALL: PROGRESS BETWEEN CENSUS’96 AND CENSUS 2001* 16, Table 2.1 (2001), available at <http://www.statssa.gov.za/Publications/Report-03-02-16/Report-03-02=16.pdf>.

¹⁷ It should be noted that most South Africans speak at least two and usually three or four languages. Moreover, for all that Afrikaans was in many ways a language identified with the white apartheid government, it is spoken as a second or third language by many Africans.

Sesotho, Setswana, and Sepedi predominate. In cosmopolitan Gauteng, no single language commands a majority.¹⁸

Languages Most Often Spoken at Home 2001¹⁹

Language	1996	2001
isiZulu	23.8%	22.9%
isiXhosa	17.6%	17.9%
Afrikaans	13.3%	14.5%
Sepedi	9.4%	9.2%
English	8.2	8.6%
Setswana	8.2	8.2%
Sesotho	7.9	7.7%
Xitsonga	4.4	4.4%
siSwati	2.7%	2.5%
Tshivenda	2.3%	2.2%
isiNdebele	1.6%	1.5%
other	0.6%	0.5%

These data suggest that there was a rich potential for the emergence of a politics of language, tied closely to ethnic identity, in the new South Africa. This was especially the case in light of the apartheid regime's strategy of highlighting linguistic, ethnic, and tribal differences in order to frustrate African unity. The most dramatic instance of this strategy was the creation of the bantustans, or homelands, designed to contain designated ethnic groups in ethnically homogeneous regions, using language to determine ethnicity.

Ten of these homelands were created in South Africa.²⁰ All were essentially puppet regimes, despite a number having some nominal independence. Building on the homeland (or reserve) structure of the past, the National Party government's first move in this regard, after its election in 1948, was the introduction of the Bantu Authorities Act in 1951.²¹ The system was developed further in the 1959 Bantu Self-Government Act,²² and again in 1970 with the Black Homelands Citizenship Act,²³ which designated Africans as citizens of their remote and poor homelands, not of South Africa. Between 1976 and 1981 four of these bantustans were declared independent and raised their own

¹⁸ STATISTICS SOUTH AFRICA, CENSUS 2001 (2001), available at http://www.statssa.gov.za/census01/html/key%20results_files/key%20/results.pdf.

¹⁹ *Id.*

²⁰ Another ten in South African-controlled territory of South West Africa (now Namibia).

²¹ Bantu Authorities Act 68 of 1951.

²² Bantu Self-Government Act 46 of 1959.

²³ Black Homelands Citizenship Act 23 of 1970.

flags in celebration of the inauguration of their presidents.²⁴ A major task for the transformed South African regime was the reintegration of these areas into the country, including their incorporation into the nine new provinces, which, unlike the bantustans, were not designed as ethnic enclaves. There was resistance from some bantustan elites; but a more important consequence proved to be the lasting legacy of corruption and poor administration that has plagued several provincial governments. Building on British colonial practice, the old regime had supported and placed on salary many so-called traditional leaders, relying on ethnic and linguistic identities and hierarchical and elitist attitudes toward authority and government that were—and remain—in sharp contrast to the modern aspirations and design of the new Constitution.²⁵

Ethnicity and language are not the only, or the most important, divisions in contemporary South Africa. Class and economic divisions, closely aligned with race historically, have long run through South African life. Trade unions, represented by the Congress of South African Trade Unions (COSATU), and the Communist Party of South Africa (SACP) were important elements of the liberation struggle's coalition, in alliance with the ANC. Not surprisingly, a major element of the apartheid strategy was to protect the privileges of the white working class against black competition. Class, as we shall see, remains important in South Africa. Moreover, while class is still largely determined by race, the emergence of a new black middle class, partly as a result of specific government policies, has introduced an element of class politics into the life of the majority as well.²⁶ Economic inequality has grown rather than diminished since the end of apartheid.

The colored population centered in the Western Cape and the Northern Cape is another dimension of difference with political consequences. Historically, the old regime accorded some limited recognition and privileges to this community, creating a political separation between the colored community and the majority African population. Today, many members of the colored community feel excluded from the new regime. They argue that the colored minority is not accommodated by either of the dominant political parties in the new South Africa, which may be viewed as having their roots, on the one

²⁴ The bantustans were independent in name only, remaining heavily influenced by and dependent on the South African government. None received international recognition. See JOHN DUGARD, *INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE* 101–102 (3d ed., Juta 2005).

²⁵ The 1996 Constitution continues to recognize traditional leaders: S. AFR. CONST. 1996, ch. 12. Moreover, their authority has been secured and, perhaps, enhanced over the past ten years. See Tom Bennett & Christina Murray, *Traditional Leaders*, in *CONSTITUTIONAL LAW OF SOUTH AFRICA*, ch. 26 (Stuart Woolman et al. eds., Jutas 2006); NTSEBEZA, *supra* note 11.

²⁶ *But see* JEREMY SEEKINGS & NICOLI NATTRASS, *CLASS, RACE AND INEQUALITY IN SOUTH AFRICA* 370–375 (Univ. of KwaZulu-Natal Press 2006) (observing that, despite the fact that policies since the end of apartheid have not been pro-poor, and despite a growing consciousness of class, the emergence of political attitudes that are differentiated along class lines has been very limited).

hand, in the liberation struggle (ANC) or, on the other, in the race politics of apartheid (Democratic Alliance or DA). In neither of these is the colored population at home or at ease.²⁷ Indeed, empirical evidence from Afrobarometer confirms that the colored community does not feel fully included in the ANC.²⁸ Politics in the Western Cape province and in the city of Cape Town are now a closely fought battle, seesawing between the largely African ANC and the DA, which is supported by significant segments of the colored population as well as the traditional white elite.

The much smaller Indian community, based chiefly in the eThekweni (Durban) area of KwaZulu-Natal, provided a disproportionate share of leadership in the liberation struggle. But, for reasons similar to those regarding the colored population, the Indian community also faces marginalization in the new South Africa. Survey data shows that the Indian population does not identify fully with either the majority ANC or the DA.²⁹

Finally, gender remains a deep fault line within South African society. In traditional African societies, as elsewhere in the world, patriarchies prevail and women are subordinated despite their enormous contributions to both economic and social life. The 1996 South African Constitution places considerable weight on gender equality and a nonsexist society. However, inequality and the sexual exploitation of women remain a profound problem, not easily addressed by constitutional norms or policy pronouncements. Although there has been much progress in making major South African institutions more representative of the ethnic makeup the country, there has been much less progress in making them more representative in terms of gender. For example, in 1994, at the start of the transition, there were only three black male and two white female judges in South Africa. By 2005, there were 82 Africans, colored, and Indians on the bench (41.4 percent) while 108 judges were white. By contrast, there were twenty-eight women—less than 15 percent.³⁰

²⁷ See, e.g., NOW THAT WE ARE FREE, *supra* note 11; Megan Addis, *Between a Rock and a Hard Place: The Marginalization of Coloured and Indian Interests in South African Politics*, 27 ISSUE: J. OPINION 37 (1999).

²⁸ Karen E. Feree, *The Micro-Foundations of Ethnic Voting: Evidence from South Africa* (Afrobarometer, Working Paper No. 40, 2004). The official opposition, the Democratic Alliance, made significant electoral gains among colored voters in the 2004 elections. Susan Booysen, *The Democratic Alliance*, in ELECTORAL POLITICS IN SOUTH AFRICA 129, 142 (Jessica Piombo & Lia Nijzink eds., Palgrave Macmillan 2005).

²⁹ For an empirical study, see Feree, *supra* note 28. For theoretical studies, see Herman Giliomee, James Myburgh & Lawrence Schlemmer, *Dominant Party Rule, Opposition Parties and Minorities in South Africa*, in OPPOSITION AND DEMOCRACY IN SOUTH AFRICA 161 (Roger Southall ed., Frank Cass 2001); Addis, *supra* note 27.

³⁰ The public service presents a similar picture. See SOUTH AFRICA PUBLIC SERVICE COMMISSION, STATE OF THE PUBLIC SERVICE REPORT 2005 11 (2005). The Department of Public Service and Administration (D.P.S.A.) resolved in 2003 to have thirty percent of its senior management positions filled by women by March, 2005: SOUTH AFRICA DEPARTMENT OF PUBLIC SERVICE & ADMINISTRATION, A STRATEGIC

2. Designs for a new South Africa

Given these diverse elements, and the divisive and exploitative history that gave rise to them, a fundamental question confronted South Africans as they began the democratic transition. What sort of constitutional order would facilitate reconciliation, mitigate conflict, embrace democracy, human rights, and the rule of law, and so provide South Africans with a framework for governance enabling a new government to meet the immense developmental challenges ahead?

In the late 1980s, as the apartheid government began to experience more pressure both from within and from the international community, it became apparent that a move to democracy was not only possible in South Africa but inevitable. The central question for scholars and policy makers was, therefore, not whether South Africans would or should adopt democratic institutions but, rather, what sort of democratic institutions were most likely to secure stable and legitimate government in South Africa. The common assumption uniting all those involved in the debate was that the design of new South African political institutions would be a key factor affecting the potential for peace and stability. In short, institutions and political engineering mattered. However, beyond this common assumption, policy makers and scholars diverged quite significantly in their convictions regarding which democratic institutions would be best suited for the new order. The ANC was deeply committed to a nonracial system in which ethnicity had no relevance.³¹ Scholars such as Philip Mayer,³² Michael Macdonald,³³ and Roger Southall³⁴ agreed with the ANC and

FRAMEWORK FOR GENDER EQUALITY WITHIN THE PUBLIC SERVICE (2006-2015) DPSA CONSULTATION DOCUMENT, at 4, available at http://www.dpsa.gov.za/documents/ee/Strat_frmwrk.pdf [hereinafter, *A Strategic Framework*]. This objective was achieved only a year later in March 2006. The current goal is to have half of senior management positions filled by women by 2009. Geraldine J. Fraser-Moleketi, *Foreword to A Strategic Framework*. Women are better represented in the body of DPSA employees. In March 2005, the public service employed 1,073,033 people. Of these, 86.5 per cent were black, while 53.3 per cent were women. *A Strategic Framework*, at 7. See also John-Mary Kauzya, *Managing Diversity in the Public Service: One of Africa's Least Tackled Issues* (paper presented to the American Society for Public Administration, March 2002); Katherine Neff & Frederick Uys, *Realizing a Representative Bureaucracy in South Africa: Success or Failure?* (paper presented to the Midwest Political Science Association, April 2005).

³¹ See TOM LODGE, *BLACK POLITICS IN SOUTH AFRICA SINCE 1945* 82–86 (Ravan Press 1983); and Nhlanhla Ndebele, *The African National Congress and the Policy of Non-Racialism: A Study of the Membership Issue*, 29 *POLITIKON* 133–146 (2002) (for a discussion of the emergence of non-racialism in the ANC).

³² See Philip Mayer, *Class, Status and Ethnicity as Perceived by Johannesburg Africans*, in *CHANGE IN CONTEMPORARY SOUTH AFRICA* 153 (Leonard Thompson & Jeffrey Butler eds., Univ. Cal. Press 1975).

³³ See Michael Macdonald, *The Siren's Song: the Political Logic of Power-Sharing in South Africa*, 18 *J. S. AFR. STUD.* 709 (1992).

³⁴ See Roger Southall, *Consociationalism in South Africa: The Buthelezi Commission and Beyond*, 21 *J. MOD. AFR. STUD.* 77 (1983). See also GERHARD MARE, *BROTHERS BORN OF WARRIOR BLOOD: POLITICS AND ETHNICITY IN SOUTH AFRICA* (Ravan Press 1992).

advocated a Westminster-style majoritarian democracy in South Africa. The National Party, supported by scholars including Lawrence Schlemmer, Hermann Giliomee,³⁵ David Welsh,³⁶ Donald Horowitz,³⁷ and Arend Lijphart³⁸ advanced arguments for power-sharing models. Even within the majoritarian and power-sharing camps, a great deal of variation existed as to the specific institutional designs that would create a lasting and democratic peace.

The root of these divergent prescriptions was not a simple disagreement over the benefits of different conflict-regulating mechanisms. Instead, the debate concerning which democratic institutions were best suited to South Africa reflected a more fundamental clash in beliefs about the nature of ethnicity in the country, specifically, and the fluidity and malleability of ethnic identity, more generally.³⁹ There was great disagreement among scholars about the salience of ethnic identity in South Africa, and there were many different predictions about how ethnic identifications might change with the ending of apartheid. Each of the perspectives on ethnicity in South Africa was intimately connected to a belief about the nature of ethnic identity more broadly, with some scholars holding primordial perceptions of ethnicity and others believing ethnic identity to be a socially constructed and fluid phenomenon. The section to follow will outline the various institutional models advanced by scholars and policy makers for the new democratic South Africa and tie each of these models to their theoretical underpinnings regarding ethnicity.

2.1. The Lijphart-Horowitz debate

Two of the most prominent foreign observers of the developments in South Africa were political scientists Arend Lijphart and Donald Horowitz—both noted students of other divided societies. Lijphart and Horowitz were in agreement that the fundamental divisions within South African society went well beyond the black-white division upon which the liberation struggle was focused.⁴⁰ For Lijphart, “it is wrong to characterize the basic problem in terms of a dichotomous black-white conflict. Far from being homogeneous communities, the black and white groups are each deeply divided. . . .”⁴¹ For Horowitz, South Africa “is also characterized by ethnic cleavages within the racial categories.”⁴²

³⁵ See HERMAN GILIOREE & LAWRENCE SCHLEMMER, *FROM APARTHEID TO NATION BUILDING* (Oxford Univ. Press 1989).

³⁶ See FREDERICK VAN ZYL SLABBERT & DAVID WELSH, *SOUTH AFRICA'S OPTIONS: STRATEGIES FOR POWER SHARING* (David Philip 1979).

³⁷ See HOROWITZ, *supra* note 8, *passim*.

³⁸ See AREND LIJPHART, *POWER-SHARING IN SOUTH AFRICA* (Univ. Cal. Berkeley 1985).

³⁹ HOROWITZ, *supra* note 8, at 1.

⁴⁰ See Macdonald, *supra* note 33, for an excellent survey of these differences.

⁴¹ LIJPHART, *supra* note 38, at 19.

⁴² HOROWITZ, *supra* note 8, at 42.

Both also predicted that once the scourge of apartheid had been removed, these differences would gain greater prominence. Said Horowitz: “There is a potential for intra-African conflicts to supersede Black-White conflicts. ...”⁴³ As Lijphart put it: “[E]thnic cleavages are currently muted by the feelings of black solidarity in opposition to white minority rule, but they are bound to re-assert themselves in a situation of universal suffrage and free electoral competition.”⁴⁴

Lijphart and Horowitz also agreed that, in such a divided society, with an extremely lopsided majority and minority, simple majority rule would not suffice. It would result either in civil war, or exclusion of the minorities, or both. Lijphart suggested that “majority rule in plural societies spells majority dictatorship and civil strife.”⁴⁵ Horowitz agreed that the political institutions that emerge in divided societies must “counter conflict and foster inter-group accommodation.”⁴⁶ Both argued that there must be some form of power sharing.

But here they diverged. For Lijphart the answer was “consociational democracy.” Given the racial and ethnic differences and the strength of their associated identities, the proper response would be, first, to institutionalize them by way of substantial autonomy for each group, whether by way of federalism or by other means. Second, consociational democracy would promote accommodation among elites through power sharing at the center, with inclusive cabinets, a proportional electoral system that guarantees that all groups have at least some voice in the legislature, proportionality in the allocation of public positions in the public service, the judiciary, and the military, and mutual vetoes for minorities on issues crucial to them. For Horowitz, as well as for other critics, consociationalism would freeze, entrench, and otherwise perpetuate the very divisions it was meant to accommodate.⁴⁷ Moreover, it was suspiciously close to the apartheid policy of “separate development,” manifested most egregiously in the bantustans. Horowitz believed that ethnic and racial differences were more fluid, more of a social construct, than Lijphart was prepared to accept. For Horowitz, these differences would remain salient in a new South Africa, to be sure, but the preferred strategy was an integrationist or centripetal design, one that would create strong incentives for political leaders to build coalitions cutting across racial and ethnic groups. Horowitz’s preferred option was to rely heavily on the electoral system. His choice was “vote pooling,” best achieved through single member districts, using a transferable

⁴³ *Id.* at 70.

⁴⁴ *Id.* at 20.

⁴⁵ LIJPHART, *supra* note 38, at 19.

⁴⁶ HOROWITZ, *supra* note 8, at xiii.

⁴⁷ See, e.g., GEORGE TSEBELIS, *NESTED GAMES: RATIONAL CHOICE IN COMPARATIVE POLITICS* (Univ. Cal. Press 1990).

vote to ensure that each elected member is supported by a majority of constituents.⁴⁸

We focus on the Lijphart-Horowitz debate for two reasons: first, because their views—within the South African context—were called on frequently in support of or in opposition to various alternatives; and, second, because the debate between integrationist and consociational strategies—whether to institutionalize differences, or to blur, crosscut, and transcend them—has become one of the central theoretical and practical questions running through the literature on the accommodation and management of difference in modern societies.⁴⁹ However, this ethnic/linguistic pluralist perspective was by no means the only lens through which one could analyze the emerging South Africa. Indeed, Horowitz⁵⁰ identifies no fewer than twelve competing sets of images and narratives, themselves overlapping and evolving, and each associated with alternative political goals and constitutional prescriptions.

For example, the ANC's 1955 Freedom Charter embraced an inclusive view, namely, that "South Africa belongs to all who live in it, black and white."⁵¹ Ethnic divisions were real, but they were essentially the creations of apartheid, and once that was abolished then a democracy based on neither race nor ethnicity would be able to emerge. In a free and democratic South Africa, equal rights would be guaranteed for all.

This view contrasted with that of other groups, such as PAC (the Pan Africanist Congress) and AZAPO (the Azanian Peoples Organisation), which propounded a more "Africanist" and majoritarian view. The first task was to abolish colonialism and introduce majority rule. Linguistic and ethnic differences within the African community were again perceived to be socially constructed creations of white domination, with no place in the new South Africa. Simple demographic facts meant that a majority government would be an African government.

⁴⁸ For a careful review of the electoral system debate—in particular, of the relative merits of single member versus proportional representation models in divided societies, see Andrew Reynolds, *Constitutional Engineering in Southern Africa*, 6 J. DEMOCRACY 86 (1995).

⁴⁹ For excellent recent statements of the Horowitz-Lijphart debate, see Donald L. Horowitz, *Constitutional Design: Proposals versus Processes*, in *THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT, AND DEMOCRACY* 15 (Andrew Reynolds ed., Oxford Univ. Press 2002); Arend Lijphart, *The Wave of Power-Sharing Democracy*, *THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT, AND DEMOCRACY* 37 (Andrew Reynolds ed., Oxford Univ. Press 2002).

⁵⁰ HOROWITZ, *supra* note 8, at 3–8. See also Robert Mattes, *Democracy Without the People: Political Institutions and Citizenship in the New South Africa* (paper submitted to Harvard Univ. Comm. for Afr. Stud. Occasional Papers Series 2005).

⁵¹ The Freedom Charter (June 26, 1955), available at <http://www.anc.org.za/ancdocs/history/charter.html>.

The white community itself was divided between the larger and politically more dominant Afrikaner community, and the smaller but, historically, economically more dominant English speakers. They were united in their fear of unfettered majority rule. For some, the preferred option was to create a liberal regime, with strong guarantees of individual rights, a commitment to constitutionalism and the rule of law, and with checks and balances to restrain the majority and to ensure limited government. Others argued for a “two nations” model. At one extreme, this envisioned the creation of an Afrikaner *Volkstaat*, in which an Afrikaner society would coexist with the African nation. But the model that most appealed to those who supported protection for separate identities was consociationalism. This meant each racially or linguistically defined group would have some considerable degree of autonomy and its own sphere of influence, the incorporation of all groups into the executive, mutual vetoes on issues critical to each group, and so on. A truly federal South Africa in which groups had some true political autonomy was an important part of such proposals, both to provide checks and balances and to provide political space for the constituent groups.⁵²

Other, more radical groups argued that such consociational proposals were little more than “a refurbishing of traditional segregationist ideology by emphasizing ‘group plurality’ rather than race as a continuing basis for white dominance, and/or were part of a ruling-class strategy for coopting subordinate racial elites within a profoundly conservative, yet ‘de-racialised’ and ‘power-sharing’ framework.”⁵³

All these and many other views contended both within and between the various communities as South Africans began to contemplate the future of a postapartheid South Africa in the 1980s. Of course, these were not abstract theoretical debates. They took place in a context of escalating violence. While the fundamental conflict was between white and black, some of the worst violence took place within the black community, between the ANC and the Inkatha Freedom Party (IFP), a Zulu nationalist movement⁵⁴ represented by

⁵² The first developed model of a consociational solution for South Africa was published by the government of the KwaZulu bantustan in 1981. See THE BUTHELEZI COMMISSION, 1–2 THE REQUIREMENTS FOR STABILITY AND DEVELOPMENT IN KWAZULU AND NATAL (1981). For a review and critique, see Southall, *supra* note 34.

⁵³ See Southall, *supra* note 34, at 77.

⁵⁴ It is debatable whether or not to describe the IFP as a “nationalist” movement. Certainly its rhetoric and its goals of greater autonomy for KwaZulu-Natal point in that direction. But others, including Zulu supporters of the ANC, reject this idea, and its implication that South Africa is a “multinational” country. Nevertheless, Zulus are the only group in South Africa analogous to Canadian Quebecers or Spanish Catalans.

Mangosuthu Buthelezi, leader of the KwaZulu bantustan, and his Inkatha movement. Elements of the outgoing regime, interested in division in the African community, contributed to the violence.⁵⁵

3. Constructing “The New South Africa”

The South African transition was a lengthy process.⁵⁶ Few believed that it could be achieved peacefully, and, indeed, violence erupted sporadically throughout the process. The transition began with the release of political prisoners, most notably Nelson Mandela, and the unbanning of the ANC and other organizations that opposed apartheid. The negotiators had two fundamental tasks: first, to bring an end to the protracted struggle; second, to develop a constitutional framework for the future democratic governance of South Africa.⁵⁷ The changed international environment following the end of the Cold War facilitated the process. Each side had considerable bargaining leverage now that the dominant white group realized it could not hold on to power forever, and the majority of Africans realized they could not prevail over white military power. The story of the resulting negotiations has been well told.⁵⁸

For the whites, it was critical to negotiate a settlement while they still held the reins of power and before democratic elections, which would inevitably spell the end of their political domination and of their ability to shape the new constitution. For the blacks, there could be no legitimate constitution until after elections, and its ratification by a democratically elected parliament. As a result, the constitution-making process proceeded in two stages. First, the parties negotiated an interim constitution (IC) in 1993.⁵⁹ Then, the first democratic elections were held, in 1994. Following that, the newly elected upper

⁵⁵ The complicity of certain members of the South African Defence Force was confirmed by a report completed in 1992 but made public only in 2006. For a summary of the Steyn report, see Chiara Carter, *Apartheid Army's Deadly Secrets*, INDEPENDENT ONLINE, Apr. 30, 2006, at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20060430083249898C116766 (last visited May 30, 2007). See also Shula Marks, “The dog that did not bark, or why Natal did not take off”: *Ethnicity and Democracy in South Africa—KwaZulu-Natal*, in ETHNICITY AND DEMOCRACY IN AFRICA 183 (Bruce Berman, Dickson Eyoh & Will Kymlicka eds., Ohio Univ. Press 2004).

⁵⁶ Of course, taking the concept in its fullest sense, the transition is not yet complete.

⁵⁷ Christina Murray & Richard Simeon, *Parachute or Strait-Jacket: The Legacy of South Africa's Pacted Constitution* (paper presented at Constitution Building in Africa, Post-1989, a workshop of the Global Legal Studies Initiative, Univ. of Wisconsin Law School, Oct. 15–16, 2005).

⁵⁸ See, e.g., THE SMALL MIRACLE: SOUTH AFRICA'S NEGOTIATED SETTLEMENT (Steven Friedman & Doreen Atkinson eds., Ravan Press 1994); ALISTAIR SPARKS, TOMORROW IS ANOTHER COUNTRY (Chicago Univ. Press 1996); THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA'S BASIC LAW (Penelope Andrews & Stephen Ellmann eds., Witwatersrand Univ. Press 2001); RICHARD SPITZ & MATTHEW CHASKALSON, THE POLITICS OF TRANSITION: A HIDDEN HISTORY OF SOUTH AFRICA'S NEGOTIATED SETTLEMENT (Witwatersrand Univ. Press, 2000).

⁵⁹ S. Afr. (Interim) CONST. 1993.

and lower houses, constituted as a constitutional assembly, had two years in which to negotiate a final constitution. In order to maintain some bargaining power in the final negotiations, the outgoing government succeeded in winning agreement on a set of thirty-four “constitutional principles,” which were appended to the IC.⁶⁰ These were to govern the last negotiations. The new Constitutional Court would have to certify the final constitution as being in full compliance with these principles before it could take effect. In the event, once agreement in the constitutional assembly was reached in 1996, the results of its work were duly submitted to the Constitutional Court. The Court found a few sections at odds with the agreed-upon constitutional principles and some final changes were made to the text before it was formally proclaimed South Africa’s new Constitution.⁶¹

The broad architecture of the Constitution is clear: South Africa is to be “one sovereign democratic state.”⁶² It is committed to equality, human rights, non-racialism and nonsexism, constitutionalism and the rule of law, and to free competitive elections. In short, it is a model of modern liberal constitutionalism. The Constitution does not assert unlimited majoritarianism, nor does it envisage the kind of binational state that some whites had argued for. It does explicitly recognize differences (“united in our diversity”),⁶³ but it seeks to build a model in which differences can be reflected in cultural and social life yet are not to be entrenched and institutionalized in the political process.

3.1. Elections, legislatures, and executives

Lijphart and others strongly recommend proportional representation in the electoral systems of divided societies. Proportional representation ensures that even small minorities will be guaranteed representation and a voice in legislatures. By promoting a multiparty system, it creates a strong tendency to form inclusive, broadly representative coalition governments, thus avoiding the potential domination of a single group. (The danger, of course, is that in an ethnically mixed society, it may also engender a large number of narrow, ethnically based parties, making stable government hard to achieve.)

South Africa has one of the purest proportional representation systems in the world. The first goal of the system has been achieved. In the first democratic elections of 1994, twenty-seven parties competed, of which seven won

⁶⁰ *Id.* sched. 4.

⁶¹ Significantly, the Constitutional Court found that provisions relating to the allocation of power to the provinces did not comply with the principles. The principles concerning the devolution of power to provinces had been negotiated, with no little difficulty, before the 1994 election and Inkatha’s participation in the 1994 elections was conditional on their inclusion. For a comparison of the interim and final constitutions, see Per Strand, *Finalizing the South African Constitution: The Politics of the Constitutional Assembly*, 28 *POLITIKON: S. AFR. J. POL. STUD.* 47 (2001).

⁶² S. AFR. CONST. 1996, ch. 1, § 1.

⁶³ *Id.* pmb.

seats.⁶⁴ The overwhelming majority of votes went to the ANC (252 of 400 seats in the National Assembly), with smaller numbers accruing to the IFP and the largely white and colored National Party (forty-three and eighty-two seats, respectively); the remainder was scattered among four other small parties.⁶⁵ In the third general election, in 2004, even more parties competed, of which twelve won at least one seat. But the largest parties achieved even greater control. The ANC held 279 seats with close to 70 percent of the vote; the National Party (NP)⁶⁶ had disbanded, and the white opposition was concentrated in the DA; meanwhile, the IFP was left with just twenty-eight seats and 7 percent of the vote. The rest of the parties' percentages were in the single digits.

Thus, proportional representation has indeed facilitated a multiparty system. It has not encouraged coalition government, but this is chiefly because of the continued, overwhelming popular support for the ANC, which is still seen as the party of liberation and as a broad-church, umbrella party, with support across all classes and linguistic groups within the black majority. The ANC needs no coalition partners in order to govern. For the same reason, proportional representation has not fostered the instability and division some had feared.⁶⁷

However, an important element in the compromise that led to the 1993 interim constitution was a provision for power sharing that would be in place only for the first five years of democracy. It required that the first elected government be a government of national unity (GNU). Any party winning 20 percent of the seats in the National Assembly (distributed on a pure list proportional representation system) would be entitled to appoint a deputy president,⁶⁸ and any party with more than 5 percent of Assembly seats would be entitled to representation in the cabinet.⁶⁹ As a result, former National Party president F. W. de Klerk became deputy president, and Mangosuthu Buthelezi, leader of the IFP, became one of nine minority party politicians in the cabinet. This was pure Lijphart, as it were, designed to ensure stability by including

⁶⁴ Elections results are found at <http://www.electionresources.org/za/1994> and <http://www.electionresources.org/za/2004>.

⁶⁵ See ELECTIONS '94 SOUTH AFRICA: THE CAMPAIGNS, RESULTS, AND FUTURE PROSPECTS (Andrew Reynolds ed., James Currey 1994); LAUNCHING DEMOCRACY IN SOUTH AFRICA: THE FIRST OPEN ELECTIONS OF APRIL, 1994 (Richard W. Johnson & Lawrence Schlemmer eds., Yale Univ. Press 1996).

⁶⁶ Reconstituted as the New National Party (NNP) from 1998 to 2004.

⁶⁷ There is a handful of ethnic parties in addition to the IFP. The tiny United Christian Democratic Party has its roots in a form of Tswana nationalism developed in the Bophuthatswana bantustan. See Peris Sean Jones, *From 'Nationhood' to Regionalism to the North West Province: 'Bophuthatswananess' and the Birth of the New South Africa*, 98 AFR. AFF. 509 (1999). There is also a Muslim party with seats in Parliament. However, neither threatens to "ethnicize" politics.

⁶⁸ S. AFR. (Interim) CONST. 1993, § 84.

⁶⁹ *Id.* § 88.

representatives of the major oppositional forces in the new regime.⁷⁰ It had been suggested that shared government meant that members of the outgoing apartheid government would bear some responsibility, as well, for the transformation and thus ensure that the ANC was not held wholly responsible for all the problems that would arise in the face of its reforming agenda. This argument made the interim arrangement a slightly less bitter pill for the ANC to swallow.

The GNU was important as a transitional device. However, it did not endure. The National Party soon withdrew, preferring a more Westminster style of opposition,⁷¹ while the other major opposition party in the new South Africa, the IFP, continued to be represented in the cabinet until 2004.⁷² Today, with the final remnants of the NP having joined the ANC, the leading opposition party, the Democratic Alliance (DA), fills the traditional role of the opposition. The government in South Africa now follows the Westminster pattern. The difference is that the electoral dominance of the ANC (winning more than two-thirds of the vote in the 2004 elections), together with the fact that elections remain in large measure an “ethnic census,” where “voters do not so much register a choice as an identity,”⁷³ means that alternation in government for the foreseeable future is unlikely. In other settings, the South African system of proportional representation might have resulted in multiparty coalition government. But the enormous popularity of the ANC has forestalled this.⁷⁴ In general, then, majority rule has won out over a power-sharing model as the

⁷⁰ A very nice analysis of this is found in Jonathan Steele, *South Africa in Transition: Persuading the Old Rulers to Help Build a New Country*, *GUARDIAN*, Apr. 30, 1994, available at <http://www.guardian.co.uk/southafrica/story/0,,1191576,00.html> (last visited May 26, 2007).

⁷¹ The term refers to the British model of parliamentary government, which normally entails a single-party government, responsible to a majority in the House of Commons, and operating by majority rule. Thus the governing party in the Commons faces the “opposition” across the floor.

⁷² The last leader of the New National Party, Martinus van Schalkwyk, remains in the cabinet, but now as a member of the ANC. In KwaZulu-Natal ties between the ANC and the IFP have all but ended. The IFP governed the province until 1999; between 1999 and 2004 the ANC and IFP governed in coalition and described themselves as partners. Since 2004, when the ANC won the provincial elections, although formal ties between the parties remain, the relationship between them is not strong. Edward West, *ANC-IFP Ties “In Name Only” Now*, *BUSINESS DAY*, Oct. 25, 2006.

⁷³ See James L. Gibson, *The Legacy of Apartheid: Racial Differences in the Legitimacy of Democratic Political Institutions and Processes in the New South Africa*, 36 *COMP. POL. STUD.* 777 (2003), citing HOROWITZ, *supra* note 8, and Robert Mattes, Helen Taylor, & Cherrel Africa, *Judgement and Choice in the 1999 South African Election*, 26 *POLITIKON: S. AFR. J. POL. SCI.* 235 (1999). See also Friedman, *supra* note 10; Antoinette Handley, Christina Murray & Richard Simeon, *Learning to Win, Learning to Lose* (paper presented at a workshop, “Learning to Lose,” Univ. Toronto, Mar. 2006).

⁷⁴ Normally, proportional representation systems are associated with multiparty coalition government and Westminster systems with single member electoral systems. The overwhelming support for the ANC gives it the majority to operate the Westminster-style system of government.

structure of South African democracy.⁷⁵ Robert Mattes puts the point most strongly: “What ultimately resulted from six long years of constitution-making was a relatively majoritarian system with few veto players, which enables a majority to do what it wants with little effective opposition.”⁷⁶

3.2. Language and cultural rights: Recognizing diversity in the private sphere

Constitutional Principle XI stated that “[t]he diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.”⁷⁷ The primary tools for respecting minority rights are to be found in the provisions set forth in the Bill of Rights, which opens with the statement that it is a “cornerstone” of democracy in South Africa.⁷⁸ These rights take two forms: first, and most clearly set out, are the rights of individuals; second, are community or cultural rights.⁷⁹ The stage is set in chapter 1, “Founding Provisions,” which includes provisions on “human dignity,” “equality,” and “the advancement of human rights and freedoms”; “non-racialism and non-sexism”; and a “common South African citizenship” in which everyone is “equally entitled to [its] rights, privileges and benefits.”⁸⁰

The Bill of Rights, then, spells out comprehensive individual rights to equality before the law, along with a prohibition against unfair discrimination on a wide variety of grounds. There are strong guarantees of freedom of speech, expression, and association, as well as the right to a fair trial and other elements of due process in the legal system.⁸¹

Somewhat less specific are the linguistic, community, and cultural rights. These appear in various sections of the Constitution. Chapter 1 lists eleven official languages, provides for support of small indigenous languages, and states that national and provincial governments must each choose at least two official languages for purposes of government.⁸² Section 6 requires the state to

⁷⁵ See James Hamill, *A Disguised Surrender? South Africa's Negotiated Settlement and the Politics of Conflict Resolution*, 14 *DIPLOMACY & STATECRAFT* 1 (2003) (“What the South African Transition actually produced was a comprehensive victory for a majoritarian political philosophy at the expense of group-based or consociational models. ...”)

⁷⁶ Mattes, *supra* note 50, at 12.

⁷⁷ S. AFR. (Interim) CONST. 1993, sched. 4.

⁷⁸ S. AFR. CONST. 1996, ch. 2.

⁷⁹ The Bill of Rights also contains an ambitious set of social and economic rights including the right to “access to adequate housing,” S. AFR. CONST. 1996, ch. 2 Bill of Rights, § 26; rights to access to “health care services,” “sufficient food and water” and “social security,” S. AFR. CONST. 1996, ch. 2 Bill of Rights, § 27; and a right to education, S. AFR. CONST. 1996, ch. 2 Bill of Rights, § 29.

⁸⁰ S. AFR. CONST. 1996, pmbl.

⁸¹ *Id.* ch. 2, Bill of Rights.

⁸² S. AFR. CONST. 1996, ch. 1, § 6.

take “positive measures to elevate the status and enhance the use of these languages,” given their “historically diminished use and status.”⁸³ The employment of official languages by both the national government and the individual provinces is to take into account “usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population.”⁸⁴ This section further says all official languages must “enjoy parity of esteem and must be treated equitably.”⁸⁵ A Pan South African Language Board is to promote the official languages, as well as the indigenous Khoi, Nama, and San languages, sign language, and a wide variety of other languages used by South Africans in their personal and religious lives.⁸⁶

The Bill of Rights extends these provisions by granting everyone “the right to use the language and to participate in the cultural life of their choice.”⁸⁷ But the status of this language right is not precisely the same as that of most other rights. Section 30 specifies that “no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.”⁸⁸

The key language provision, the result of hard bargaining, is probably that which secures the right “to receive education in the official language or languages of [one’s] choice.”⁸⁹ This clause attempts to straddle the interests of Afrikaners, by expressly permitting “single-medium institutions”⁹⁰ (in language clearly referring to Afrikaans-medium schools), and the interests of the ANC, by emphasizing equity and “the need to redress the results of past racially discriminatory laws and practices.”⁹¹

Section 15, “Freedom of Religion,” permits religious observance in public institutions, so long as it is “free and voluntary.”⁹² Legislation may recognize cultural differences in marriage and family law, but only if such practices are consistent with other constitutional provisions.⁹³ More broadly, section 31 states that people belonging to specific cultural, religious, or linguistic communities have the right to “enjoy their culture, practice their religion, and

⁸³ *Id.* ch. 1, § 6(2).

⁸⁴ *Id.* ch. 1, § 6(3).

⁸⁵ *Id.* ch. 1, § 6(4).

⁸⁶ For a discussion of its work in language promotion and coordination, see <http://www.pansalb.org.za>.

⁸⁷ S. AFR. CONST. 1996, ch. 2 Bill of Rights, § 30.

⁸⁸ *Id.*

⁸⁹ S. AFR. CONST. 1996, ch. 2, § 29(2).

⁹⁰ *Id.*

⁹¹ *Id.* ch. 2, § 29(2)(c).

⁹² *Id.* ch.2, § 15.

⁹³ *Id.*

maintain related associations and other organs of civil society.”⁹⁴ Thus, although South Africa is clearly a secular state, it does not embrace that emphatic exclusion of religion from activities linked to the state characteristic of the United States or France. Again, there is the proviso that none of these cultural or religious rights can override other sections of the Bill of Rights.

In an attempt to ensure that the cultural and language rights enshrined in the Constitution are actively protected, the Constitution establishes the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.⁹⁵ It is one of several of the so-called Institutions Supporting Constitutional Democracy set out in chapter 9 of the Constitution. Its mandate is to “promote respect for the rights of cultural, religious and linguistic communities” and to promote peace, tolerance, and unity among them.⁹⁶ The commission’s powers are limited to monitoring, investigating, researching, educating, lobbying, advising, and reporting on issues relating to communities. It has no regulatory or enforcement powers. The membership of the Commission is to be broadly representative of the main cultural groups and of the gender composition of South Africa. However, legislation creating the commission (known as CRL) was not passed until 2002, and it did not become operational until two years later.

The government’s approach to language rights shows equally little sense of urgency. A law drafted in 2000 would go a long way to strengthening broad enjoyment of language rights. The objectives set forth in the draft are “to give effect to the letter and spirit of section 6 of the Constitution; to promote the equitable use of the official languages of South Africa; to enable all South Africans to use the official languages of their choice as a matter of right within the range of contexts specified in this Act with a view to ensuring equal access to government services and programmes, and to knowledge and information; to provide for a regulatory framework to facilitate the effective implementation of the constitutional obligations concerning multilingualism.”⁹⁷ Despite receiving cabinet approval, the text has not been introduced into Parliament.

Finally, hidden in the last chapter of the Constitution, in a grab bag of General Provisions, is a section on self-determination.⁹⁸ It states: “The right of the South African people as a whole to self-determination, as manifested in this

⁹⁴ *Id.* ch.2, § 31(1)(b).

⁹⁵ *Id.* ch. 9, § 185–186.

⁹⁶ *Id.* ch. 9, § 185(1)(a).

⁹⁷ South African Languages Bill (final draft, May 2000), available at <http://www.pmg.org.za/bills/030804salanguagesbill.htm>. Details of the policy are set out in SOUTH AFRICA DEPARTMENT OF ARTS & CULTURE, NATIONAL LANGUAGE POLICY FRAMEWORK (Final Draft, Nov. 13, 2002), available at <http://www.info.gov.za/otherdocs/2002/langpolframe.pdf>.

⁹⁸ S. AFR. CONST. 1996, ch. 14.

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.”⁹⁹ This rather Delphic provision was a response to assertions at the time of constitution making that an Afrikaner homeland or *Volkstaat* should not be ruled out completely. Today, most regard the section as meaningless, though its revival is not precluded.

Language and language-use issues in South Africa remain contentious and intertwined with issues of race.¹⁰⁰ Despite the constitutional promise that all eleven official languages will be promoted, English is ever more predominant as the lingua franca in most areas of public life.¹⁰¹ This has provoked, in particular, the Afrikaans speakers, who fear the marginalization of their language and culture.¹⁰² Their concern focuses on the language of education, which was, ironically, the trigger for the sustained resistance in the 1970s and 1980s that spelled the end of apartheid. At that time, the apartheid regime required African schoolchildren to be taught in Afrikaans. Now, traditionally (white) Afrikaans-language institutions are under pressure to accommodate African students’ demands for English-language instruction.¹⁰³

The new legal regime is relatively conservative, giving the primary and high schools’ governing bodies considerable latitude in determining both language

⁹⁹ *Id.* ch. 14, § 235.

¹⁰⁰ Afrikaans was used as a central element in the 1940s in the National Party project of mobilizing Afrikaners. See T. DUNBAR MOODIE, *THE RISE OF AFRIKANERDOM: POWER, APARTHEID AND THE AFRIKANER CIVIL RELIGION* 235–245 (Univ. Cal. Press 1980).

¹⁰¹ See Kristin Henrard, *Post-Apartheid South Africa’s Democratic Transformation Process: Redress of the Past, Reconciliation and ‘Unity in Diversity,’* 1 *GLOB. REV. ETHNOPOLITICS* 25–27 (2002); and Neville Alexander, *Language, Class and Power in Post-Apartheid South Africa* 6 (Project for Alternative Education in South Africa, Univ. of Cape Town, paper presented at the Harold Wolpe Memorial Trust open dialogue event, Oct. 27, 2005), available at http://www.wolpetrust.org.za/dialogue2005/CT102005alexander_paper.pdf.

¹⁰² The language provisions in the Constitution were challenged before the Constitutional Court in the certification process for a number of reasons including the way in which they treat Afrikaans. The interim constitution stipulated that the status of Afrikaans should not be diminished (section 3). It was argued that the 1996 Constitution contravened this provision. However, as the Court remarked, it was not called upon to gauge the 1996 Constitution against the interim constitution but against the constitutional principles. It added, less convincingly, that, in any event, by retaining Afrikaans as an official language, albeit one of eleven, the 1996 Constitution did not downgrade it. *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of SA, 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC)* para. 212.

¹⁰³ A 1999 report by the South African Commission on Human Rights demonstrates clearly the use of language by white schools as a device to exclude black pupils. Salim Vally & Yoliswa Dalamba, *Racism, ‘Racial Integration’ and Desegregation in South African Public Schools* (South African Human Rights Commission 1999), available at http://www.sahrc.org.za/final_combined_school_racism_report.PDF (last visited Jan. 6, 2007).

and admissions policies.¹⁰⁴ However, a handful of high-profile cases before the High Court¹⁰⁵ suggests that the practice at the provincial level is often less accepting of school autonomy, since provincial politicians and bureaucrats are inclined to impose their own interpretation of schoolchildren's language rights. In the Western Cape province, the court concluded that, because an Afrikaans-medium primary school was implementing a properly established language policy, the provincial government could not compel it to accept English-speaking children and offer them instruction in English.¹⁰⁶ But in the Northern Cape, the court upheld an instruction issued by the provincial government requiring three Afrikaans-medium schools to become dual medium (English/Afrikaans).¹⁰⁷ In the latter case, the schools argued that the government's instruction should be set aside because it was based on an ulterior motive and issued in bad faith. To support their claims, they cited a speech in which the provincial official responsible for education had lamented the racial exclusivity of certain schools in the Northern Cape, describing them as "lily-white," and suggesting that their policies were designed to perpetuate racial exclusivity. Again, the question of the schools' formal language policies was key to the outcome; the court held that, because the schools in question had no such policies in place, it was acceptable for the government to determine a policy, provided that policy had a valid basis.¹⁰⁸ In both cases the schools had capitulated, to some extent, to the government's demands by the time the judgment was rendered. Nonetheless, the question remains whether, as popular pressure grows for the education in English for African children, national policies will pursue that objective more aggressively.

The dominance of English in most areas of public life has had at least one important and beneficial consequence for linguistic harmony that is usually overlooked. It has meant that, although there is concern that other languages

¹⁰⁴ Universities are governed by a separate regime and have considerable autonomy. Nevertheless, tensions are evident. A leading Afrikaans cultural organization, the Federation of Afrikaans Cultural Associations (FAK), tried to insert a conciliatory note into a recent acrimonious debate (concerning the language of instruction at the historically Afrikaans Stellenbosch University) that reflects the dilemma such universities face when it is argued that the goal should be to accommodate non-Afrikaans-speaking students without eroding the position of Afrikaans as a language of instruction and research. FAK press statement, available at http://www.fak.org.za/artikel_print.php?id=73. Whether this can be done remains unclear.

¹⁰⁵ The High Court of South Africa, like its predecessor, the *Supreme Court*, is organized in thirteen geographically defined divisions, as well as circuit courts.

¹⁰⁶ *Governing Body, Mikro Primary School, and Another v. Minister of Education, Western Cape, and Others* 2005 (3) SA 504 (C).

¹⁰⁷ *Seodin Primary School and Others v. MEC of Education, Northern Cape and Others* [2006] 1 All SA 154 (NC).

¹⁰⁸ *Id.* at para. 16. Although the case concerns an order relating to the schools' language policy, the problem that the court appears to accept as needing remedying is the racial composition of the schools.

should not be neglected, there is no divisive struggle for preeminence among the indigenous languages.

Taken together, the rights and institutions set out in the Constitution amount to a strong affirmation of South African diversity as well as recognition of the presence of multiple communities. The implementation of these constitutional provisions reflects the disparate nature of the claims for the protection of diversity in South Africa. Battles over the language of education do not result in the state's insisting that one language dominate. The policy is couched in the language of diversity and accommodation with no suggestion of hegemony with respect to any single racial or other sort of group. However, the demand that African children have the opportunity to learn in their respective mother tongues seeks to undo previous disadvantages. In contrast, the claims by Afrikaners to maintain Afrikaans schools are easily perceived as claims to perpetuate long-standing privilege. Nonetheless, Afrikaners, acutely conscious of their minority status, not surprisingly, see the policy as a threat to their own cultural vitality.

Despite the recognition of diversity in personal and private lives, there is in the Constitution no suggestion that the various groups be accorded political power or authority. Several of the rights mentioned are explicitly limited by the other provisions of the Constitution. And all are subject to a limitation based on section 1 of the Canadian Charter of Rights and Freedoms:¹⁰⁹ they may be overridden by a law that is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”¹¹⁰ This is an integrationist rather than a consociational vision.

3.3. Multilevel governance

The primary constitutional device for empowering minorities (provided they are territorially concentrated) is federalism. It creates the political space for

¹⁰⁹ Section 1 of the Canadian Charter states: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Following this wording closely and its interpretation in the Canadian Supreme Court’s decision in *R v. Oakes* [1986] 1 SCR 103 (Can.), section 36 of the South African Constitution states:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

¹¹⁰ S. Afr. CONST. 1996, ch. 2, Bill of Rights, § 36.

minorities to pursue their own development priorities and to counteract the imposition of majority views. Some form of federal system was, possibly, the chief priority for the white community in negotiating the constitutional settlement. Federalist ideas were central to the thirty-four constitutional principles that were negotiated prior to the first democratic elections, and that were to govern the deliberations of the constitutional assembly. With the history of apartheid bantustans in mind, and with an agenda for economic and social development that would require a strong and effective central government, the ANC and its allies were deeply suspicious of federalism.¹¹¹ The result in the final Constitution is what might be termed “quasifederalism.” The term federalism itself does not appear. As we have noted, South Africa is to be one, sovereign, democratic state.¹¹²

However, chapter 3 of the Constitution sets out a system of multilevel government, with national, provincial, and local governments constituting “spheres” that are to be “distinctive, interdependent and interrelated.”¹¹³ All three spheres are independently elected. Chapter 3, entitled “Co-operative government,” requires that all three respect each others’ powers and responsibilities and enjoins them to “cooperate with each other in mutual trust and good will.”¹¹⁴ The national government is accorded broad legislative power to legislate on “any matter” except those contained in a short list of “exclusive” provincial powers.¹¹⁵ In addition to their limited exclusive powers, the provinces also have the power to legislate on matters contained in a long list of concurrent powers, although the center has broad power to override provincial laws. Even in areas exclusive to the provinces, the central government may legislate when necessary to maintain security, economic unity, or national standards or to prevent a province harming others. This central legislative dominance is buttressed by the concentration of revenue-raising power at the center.

Provincial interests are to be given some protection against complete central dominance through the National Council of the Provinces (NCOP). This is the second chamber of Parliament, modeled broadly on the German Bundesrat and designed to represent provincial interests in the central legislature. Its members include ministers of provincial governments. It can initiate or amend legislation. When it considers national legislation directly affecting the provinces (“Section 76 legislation”), each delegation votes as a single bloc on instructions from their provincial legislatures. It requires a supermajority of the National Assembly to overturn its decision. On other matters, NCOP members

¹¹¹ For a review, see Christina Murray & Richard Simeon, *Multi-Sphere Governance in South Africa: An Interim Assessment*, 31 *PUBLIUS: J. FEDERALISM*, Fall 2001, at 65.

¹¹² *Id.*

¹¹³ S. AFR. CONST. 1996, ch. 3, § 40.

¹¹⁴ *Id.* ch. 3, § 41(1).

¹¹⁵ *Id.* ch. 4, § 44(1) read with sched. 5.

vote as individuals, and a simple majority of the Assembly can overrule them. Thus the federalist elements of the Constitution clearly envisage provinces as subordinate actors within the multilevel system.

Critically, the provinces were not organized along ethnic lines. Although there was much bargaining over the geographical design of the provincial system, the final boundaries are close to those developed in the 1980s for the purpose of industrialization and development. As we have seen, several provinces have clear linguistic majorities, but there was no attempt to constitute provinces as linguistically or culturally homogeneous, as the consociational model might suggest.¹¹⁶ Indeed, in a recently contested case involving adjustment of the border between largely Zulu KwaZulu-Natal and largely Xhosa Eastern Cape, language and ethnicity were not an issue.¹¹⁷

Nevertheless, and despite the wording of the Constitution, the existence of provinces provides at least the potential for the political mobilization and empowerment of minorities. This potential has been fulfilled, thus far, in only two provinces—KwaZulu-Natal and the Western Cape.¹¹⁸ There are several reasons for the lack of provincial assertiveness. First is the overwhelming political dominance of the ANC, both nationally and in most provinces. While local and provincial bodies within the ANC have some autonomy—for example, in creating lists of candidates—the national ANC has the strongest voice. Provincial premiers are chosen not through local processes but are appointed by the center. Provincial premiers and legislatures show little tendency to act autonomously or to see themselves as vigorous promoters of provincial interests in competition with the center or with other provinces. Rather, their statements and strategies appear to follow closely not only national legislation but also the political guidelines emanating from the governing party. More recently, this pattern appears to be changing somewhat, as provincial leaders increasingly seek some autonomy, and provincial branches of the ANC chafe at central control.¹¹⁹ However, since the disputes about the HIV-Aids programs about

¹¹⁶ See Roddy Fox, *Regional Proposals: Their Constitutional and Geographical Significance*, in *THE GEOGRAPHY OF CHANGE IN SOUTH AFRICA* (Anthony Lemon ed., John Wiley & Sons Ltd. 1995); Yvonne G. Muthien & Meshack M. Khosa, *The Kingdom, the Volkstaat, and the New South Africa*, 21 *J. S. Afr. Stud.* 303 (1995).

¹¹⁷ On the contrary, Xhosa-speaking inhabitants of the Umzimkulu district were pleased to be incorporated into KwaZulu-Natal. For an analysis of the issues involved see the judgment of the Constitutional Court in *Matatiele Municipality v. President of the Republic of South Africa*, 2007 (1) BCLR 47 (CC) (S. Afr.).

¹¹⁸ As we note below, in KwaZulu-Natal where ethnic mobilization was high before the 1994 elections, ethnic politics seem to be less pronounced now. For a discussion of both cases, see Rod Alence, *South Africa After Apartheid: The First Decade*, 15 *J. Democracy* 78, 82–83 (2004).

¹¹⁹ See LODGE, *supra* note 12, ch. 2.

five years ago,¹²⁰ no province has implemented a policy against the wishes of the national ANC government.

Second, most provinces lack the bureaucratic and fiscal capacity to act autonomously. This is more especially the case with many local governments, jurisdictions that were mandated by the Constitution but finally established only in 2000. The provincial role is less to enact its own legislation than to act as an administrative unit delivering programs mandated in national legislation and funded by the center. In many provinces, even this has proven very difficult to do.¹²¹ Indeed, some South African commentators suggest that it was a mistake—necessitated by the need for political accommodation—to have established the quasifederal system.¹²²

However, two provinces are arenas for ethnically based political contestation. In the largely Zulu KwaZulu-Natal, the Inkatha Freedom Party has been the vehicle for a Zulu nationalist movement closely tied to traditional forms of leadership. It argued strongly for a robust federalism in the constitutional discussions.¹²³ The party narrowly won office in the first provincial elections,¹²⁴ only to lose to the ANC in the third democratic elections in 2004. Indeed, the dramatic decline of the IFP in recent years suggests a diminution rather than an increase in ethnic tensions within the province. Violence between ANC and IFP supporters, once endemic in the province, has now virtually disappeared. On the other hand, in the Western Cape and the metropolis of Cape Town itself, with its large colored population, there has also been a complex political contest with ethnic overtones.¹²⁵

To conclude this section: multilevel governance has provided some, albeit limited, space for minority empowerment. As a system, its primary virtue for South Africa may lie less in its capacity to empower than in its delegation of much responsibility for service delivery to the provincial and local governments, thus leaving the central government freer to concentrate on national priorities. At the same time, delegating certain responsibilities transfers to

¹²⁰ Nico Steytler, *Federal Homogeneity from the Bottom Up: Provincial Shaping of National HIV/AIDS Policy in South Africa*, 33 *PUBLIUS: J. FEDERALISM*, Winter 2003, at 59.

¹²¹ The national government has established a central agency to take over provincial administration of social grants.

¹²² This is discussed in Murray & Simeon, *supra* note 57. For an overview, see David Pottie, *The First Five Years of Provincial Government*, in *ELECTION 1999 SOUTH AFRICA: FROM MANDELA TO MBEKI* 16 (Andrew Reynolds ed., David Phillip 1999).

¹²³ See Nico Steytler, *Federal Arrangements as a Peacemaking Device during South Africa's Transition to Democracy*, 31 *PUBLIUS: J. FEDERALISM*, Fall 2001, at 93.

¹²⁴ A win widely believed to have been made possible by the ANC in order to permit the IFP to play a legitimate role in the political system and thus to forestall a more radical revolt.

¹²⁵ See Pearle Joubert, *We Have Big Race Issues Here*, *MAIL & GUARDIAN*, Sept. 15, 2006, at 15 (interview with ANC Western Cape chairperson James Ngculu).

lower levels conflicts that might become more divisive if played out at the national level. As an instance, one may note how ethnic rivalries, linked to tensions between former homeland politicians and those associated with the new regime, have played out in the province of Limpopo.¹²⁶

4. Conclusion

Complaints that the new majority South African government discriminates against its minorities remain a common part of South African political discourse. These include complaints from white people about policies, such as affirmative action and “Black Economic Empowerment,” that are seen as discriminatory. Representatives of the Indian and colored communities raise very similar concerns and worry that, once marginalized under white rule, they are now no more secure under majority rule. There is also some discussion as to whether the government favors Xhosa interests over others in its appointments.¹²⁷

But what is most striking is not the intensity of these debates but, rather, the lack of intensity. There is no suggestion that the African majority is riven by internal linguistic and ethnic differences. There is no suggestion of systematic exclusion or repression of minorities by the majority. The debates we have noted are no greater than one might expect in any other society as diverse as South Africa.

Thus, the predictions of Horowitz and others that, once apartheid rule was ended, new ethnic conflicts would polarize the country have proven unfounded. In fact, some observers, notably Anthony Butler, suggest that the very reverse has happened.¹²⁸ It is true that South Africa remains a society divided along several fault lines. The division between black and white remains the most profound. Steven Friedman argues that this preoccupation often raises trivial issues (such as membership on sports teams) and makes efforts to address profound issues like HIV-AIDS more difficult.¹²⁹ As Friedman puts it: “There are issues of race that will continue to divide us ... leaders across the spectrum need to rise to the challenge ... white leadership needs to stop fueling prejudice and the government needs to realize that defensiveness, denial and insistence

¹²⁶ LODGE, *supra* note 31, at 39, 45.

¹²⁷ “The ANC has performed this function [of controlling racial and ethnic antagonism] with exceptional dedication and success. It has relentlessly promoted non-racialism as an ideology and as a guide to practice. Moreover, it has made ethnicity almost invisible, despite a history of systematic ‘balkanization.’” Butler, *supra* note 9, at 42.

¹²⁸ *Id.* at 38.

¹²⁹ Steven Friedman, *How Obsession With Race Stops SA From Meeting Its Challenges*, BUSINESS DAY, Sept. 20, 2006, available at <http://www.businessday.co.za/articles/topstories.aspx?ID=BD4A274755>.

on control do more to fuel bigotry than to end it.”¹³⁰ White minority parties, notably today the DA, are frustrated by their minority status and engage in strident oppositional politics, while the ANC often sees DA criticism as thinly veiled racism. But the basic accommodations made in the transition process have held. Moreover, white economic privilege remains strong and has not been fundamentally threatened by ANC economic policies or by affirmative action and Black Economic Empowerment.¹³¹ Policies to ensure the redistribution of wealth and of land have been restrained.¹³² Despite the enormous disparities in population numbers and the past history of domination, the Truth and Reconciliation Commission that was established in the transition pact emphasized reconciliation over retribution,¹³³ and the new governing majority has followed this approach.

At the same time, the predicted reemergence of ethnic-linguistic conflict within the black majority has not occurred. This is not to say that such identities have disappeared. South Africans continue to identify themselves far more in terms of race than they do in class-related categories.¹³⁴ Nevertheless, the ANC and its governing partners, the South African Communist Party (SACP) and the Congress of South African Trade Unions (COSATU), are today in deep disagreement. Their differences are far more closely linked to economic and social policy—class, broadly conceived—than they are to ethnic, cultural, or religious issues.¹³⁵ It is economic issues and the issues relating to the distribution of services and

¹³⁰ *Id.*

¹³¹ *But see* Roger Southall, Does South Africa have a “Racial Bargain”? A Comparative Perspective (an unpublished conference paper April 2006, on file with authors), arguing that the racial bargain, which maintains a balance between black and white, was renegotiated with the introduction of more state interventionist and assertive black empowerment strategies in the late 1990s.

¹³² But policies are not absent. For an introduction to the debate, see *THE LAND QUESTION IN SOUTH AFRICA: THE CHALLENGE OF TRANSFORMATION AND REDISTRIBUTION* (Lungisile Ntsebeza & Ruth Hall eds., Hum. Sci. Res. Council 2007).

¹³³ Promotion of National Unity and Reconciliation Act 34 of 1995.

¹³⁴ *See* Seekings & Nattrass, *supra* note 26, at 369 (also suggesting that a shift is occurring). For instance, in a 2003 survey, the highest number of respondents (over 30 percent) identified class as the biggest division in South Africa today, over both race and party. *Id.* at 370.

¹³⁵ The latter differences do sometimes arise. In a recent battle for COSATU leadership, delegates to a convention supported one of two competing candidates based on their ethnic origin. As some delegates are reported to have said, “You can’t have two Xhosas leading COSATU” [and] “We, the Sotho provinces, will not allow Vavi [Xhosa] and his like to take over COSATU”; Vakani Mda, *Ethnic spectre looms large again*, *WEEKENDER*, Sept. 30, 2006, available at <http://www.businessday.co.za/Articles/TarkArticle.aspx?ID=2251684>.

wealth, rather than language and ethnicity, that dominate South African political debate today.¹³⁶

This raises the question of why the expected dog did not bark. Is it that those who predicted the rise of ethnocultural tensions were simply wrong—that the supposed deeply suppressed ethnic identities never really existed and were, indeed, mostly a creation of apartheid ideologues? Or were they correct in their worries, but the conflict has been largely avoided by the minority protections built into the Constitution—by proportional representation, the initial GNU, broad cultural and linguistic rights, and multilevel government? Or does harmony prevail largely because of the restraint exercised by the majority, rooted in its deep ideological commitment to unity, equality, and an open and plural society? Perhaps the explanation is to be found partly in each of these. Or does the divide between white and black, which continues to dominate all politics in South Africa, put all other actual or potential divisions in the shade? If this is the case, then Horowitz's and Lijphart's predictions may prove right in the long run—that ethnic and linguistic conflict will increase once the fundamental racial divide is closed. But there is little evidence to suggest that this will happen soon.¹³⁷

In comparative terms, India may prove to be an interesting analogue. It, too, came out of its postcolonial transition with a single dominant party, the Congress Party. Like the ANC, the Congress Party had a broad economic and social nation-building project that required strong national leadership. Like South Africa, India established a quasifederal regime in which state governments were subordinate to the central government. Since then, however, ethnicity and regionalism have become more prominent in Indian politics.¹³⁸ State boundaries have been redrawn to coincide more closely with linguistic divisions, and state governments have asserted their authority vis-à-vis the central government. It is not difficult to imagine a similar scenario in South Africa in the future.

Relative to other transitional countries in Africa, South Africa had two other comparative advantages. First, it had a strong, well-established private sector and higher levels of overall income. Thus, the state was not the only source of incomes

¹³⁶ This is fueled by data that show that inequality has increased since the transition. Despite notable progress in providing housing, electricity, schools, and clinics to disadvantaged groups, much remains to be done. See Seekings & Natrass, *supra* note 26 (noting that the South African economy had a relatively high level of redistribution under apartheid and, moreover, that by 1993, old age pensions and grants to children were the same for all races and that the poor did not fare well in the decade after apartheid).

¹³⁷ Definitive answers to this question are difficult, not least because of the limited amount of research done on ethnicity in post-1994 South Africa beyond the broad racial question.

¹³⁸ See REKHA SEXNA, *SITUATING FEDERALISM: MECHANISMS OF INTERGOVERNMENTAL RELATIONS IN CANADA AND INDIA*, 110–124, 151 (Manohar 2006).

and benefits; as a consequence, intergroup competition to control it was not nearly as intense as elsewhere.¹³⁹ Second, despite all the perversity of the apartheid era, South Africa did have an established legal system, which was continued into the new democracy.¹⁴⁰

The larger comparative question is whether, given a divided society, the most effective strategies for managing potential conflicts lie in integrationist models, which aim for universal equality, prohibitions against discrimination, individual rights, representative institutions, and the like; or in consociational strategies, which emphasize maximum autonomy for each constituent group. There can be no general answer to this question. Given a certain level of group identity and mobilization, integrationist strategies are likely to fail. Some variant of autonomy and consociationalism is required. But, when the subnational identities are weak, consociational models may well have the effect of further inventing, exaggerating, and intensifying ethnic identities, thus fueling divisions that might not have been so prominent otherwise.

The ANC strenuously resisted models that emphasized the autonomy of groups, convinced that such approaches would perpetuate division. Even the government of national unity that was to last only five years was reluctantly conceded. Instead, the Constitution seeks to limit and constrain the institutionalization of difference in the public sphere but gives difference generous recognition in the private sphere.¹⁴¹ Whether this strategy will continue to be effective, and whether it provides useful lessons for other societies remains an open question.

¹³⁹ See MICHAEL BRATTON & NICOLAS VAN DE WALLE, *DEMOCRATIC EXPERIMENTS IN AFRICA REGIME TRANSITION IN COMPARATIVE PERSPECTIVE* 237–238 (Cambridge Univ. Press 1996).

¹⁴⁰ See Nicholas R. L. Haysom, *Constitution Making and Nation Building*, in *FEDERALISM IN A CHANGING WORLD: LEARNING FROM EACH OTHER* 224–225 (Raoul Blindenbacher & Arnold Koller eds., McGill-Queen's Univ. Press 2003).

¹⁴¹ The constitutional provisions on this subject should also be seen in the context of international obligations to respect ethnic and cultural differences. For instance, in protecting the rights of cultural, religious, and linguistic communities, section 31 of the South African Constitution uses language very close to that of article 27 of the International Covenant on Civil and Political Rights.