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# South Africa: In Need of a Federal Constitution for Its Minority Peoples

HERCULES BOOYSEN\*

## I. INTRODUCTION

In 1996, South Africa passed the Constitution of the Republic of South Africa Act 108 (1996 Constitution).<sup>1</sup> The 1996 Constitution purports to create a united nation despite South Africa's racial and cultural diversity.<sup>2</sup> It further vows to establish a democratic society that embodies social justice and fundamental human rights.<sup>3</sup> The 1996 Constitution's recognition of liberty and democracy can facilitate a just and fair society, but only in a nation with a homogenous population and a dominant language and culture. The problem in South Africa, however, is the nation has always been, is currently, and will likely remain ethnically, culturally, and linguistically diverse.

This Article argues the 1996 Constitution will fail in bringing about a fair and equal South Africa. In fact, with its failure to provide for the right of self-determination and other minority rights, the 1996 Constitution may achieve the opposite effect—a state of total oppression, or perhaps even political violence. Part II of this Article traces South Africa's Constitutional history and reviews the past status of minority rights. Part III discusses legal protection as available to minorities under international and South African Law. Part IV analyzes relevant portions of the 1996 Constitution and shows its inefficacy in dealing with South Africa's diverse population. Finally, this Article concludes that the 1996 Constitution cannot successfully curb and eliminate the political

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1. S. AFR. CONST. (Act 108 of 1996).

2. See *id.* pmbl.

3. See *id.*

violence in South Africa without accommodating the right of self-determination. Without this right, violence and racism will continue to plague South African society.

## II. HISTORICAL BACKGROUND

### A. Constitutional Overview

Since its founding in 1910, South Africa has had five different Constitutions: the South Africa Act of 1909 (1909 Act), considered the founding Constitution;<sup>4</sup> the Republican Constitution of 1961, which made South Africa a "republic";<sup>5</sup> the Constitution of 1983, which brought people of Indian and mixed ancestry into the constitutional process;<sup>6</sup> the Interim Constitution Act 200 of 1993 (1993 Interim Constitution), which paved the way for universal suffrage;<sup>7</sup> and most recently the 1996 Constitution.<sup>8</sup>

To fulfill their nationalistic aspirations, each of these constitutions have endeavored to bring about unity among the different people of South Africa. The preamble to the 1909 Act proclaimed its desire to unify the former Boer Republics, the Transvaal and the Orange Free State, with the British Colonies, the Natal and Cape Colony, for the welfare and future progress of South Africa.<sup>9</sup> The 1961 Republican Constitution's preamble indicated the necessity of unity.<sup>10</sup> Likewise, the 1983 Constitution sought to guarantee human dignity, freedom, and the right of self-determination.<sup>11</sup> Nevertheless, these principles remain unrealized ideals, or perhaps not all the people of South Africa believed in these ideals or shared in their vision. Not one of these three con-

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4. See S. AFR. CONST. (South Africa Act, 1909); see also GRETCHEN CARPENTER, INTRODUCTION TO SOUTH AFRICAN CONSTITUTIONAL LAW 198 (1987).

5. See CARPENTER, *supra* note 4, at 218-19; see also J.P. VERLOREN VAN THEMAAT & MARINUS WIECHERS, STAATSREG 248 (1967).

6. See CARPENTER, *supra* note 4, at 278-80, 287; see also HERCULES BOOYSEN & D.H. VAN WYK, DIE 83 GRONDWET 39 (1984).

7. See S. AFR. CONST. (Act 200 of 1993).

8. See S. AFR. CONST. (Act 108 of 1996).

9. See S. AFR. CONST. (South Africa Act, 1909) pmb.; VAN THEMAAT & WIECHERS, *supra* note 5, at 232; CARPENTER, *supra* note 4, at 197-98 (describing the establishment of the Union of South Africa).

10. See CARPENTER, *supra* note 4, at 218.

11. See *id.*

stitutions was remotely successful in uniting the different groups in South Africa. How could they in light of the South African population's heterogeneous nature?

### *B. Rise of the Afrikaners and Centralized Government*

When the 1909 Act successfully united the British colonies with the Boer Republics, only eight years had lapsed since the British Empire, with its two South African colonies, waged a bloody war against the two Boer Republics.<sup>12</sup>

Once united, the more numerous Afrikaners, or Boers,<sup>13</sup> asserted their power and began to mold the state to their ideologies through authoritative means.<sup>14</sup> The Afrikaners used the Westminster (British) controlled constitution, which granted them parliament sovereignty to further consolidate their hegemony.<sup>15</sup> Thus, Afrikaners retained most, if not all, political control.

South African academics recognize that a federal system with a power division between the central and regional governments would have provided better protection to other population groups,<sup>16</sup> such as the English-speaking whites in Natal, or blacks, who at this stage were excluded from the constitutional process in every colony, except the Cape Colony.<sup>17</sup> Both the 1961 Republican Constitution and the 1983 Constitution failed to introduce any form of territorial federalism into the South African constitutional regime. The trend was towards centralization of power.<sup>18</sup>

12. See JOHN DUGARD *INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE* 334-35 (1994).

13. Boers and Afrikaners denote the same people. Both groups' ancestors are descendants from the Netherlands and other European countries and both groups speak Afrikaans, a language derived from Dutch. See WEBSTER'S THIRD NEW INT'L DICTIONARY 37, 246 (1986).

14. See JOHN DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* 27-28 (1978) (quoting Professor Leonard Thompson).

15. See *id.* at 28.

16. See *id.* (quoting Professor Leonard Thompson).

17. See *id.* at 29; see also CARPENTER, *supra* note 4, at 402.

18. See also CARPENTER, *supra* note 4, at 285.

### C. Devolution of Power and the Homeland Policy<sup>19</sup>

A devolution of power did occur in one limited respect, however, before 1994, when the 1993 Interim Constitution became effective.<sup>20</sup> When the National Party came into power in 1948, it implemented apartheid that segregated whites and other groups, and divided different black ethnic groups in South Africa into separate homelands.<sup>21</sup> The homeland authorities received particular legislative and executive power that depended upon the homeland authorities' developmental stage,<sup>22</sup> until some homelands like Transkei, Bophuthatswana, Venda and Ciskei received *de jure* independence from South Africa.<sup>23</sup>

The homelands never formed a federation, or even a confederation, with the rest of South Africa. They never had any representatives in Parliament, the highest South African legislative authority. There was no demarcation between South African and homeland authorities with respect to concurrent and exclusive legislative powers, a characteristic of federal constitutions.<sup>24</sup> Homelands were regarded as territories in the process of becoming independent from South Africa, not as organs of the South African

19. Devolution indicates a transfer in power, leading to a local government regime. It is also a type of political decentralization. *See id.* at 400.

20. *See generally* S. AFR. CONST. (Act 200 of 1993).

21. *See* CARPENTER, *supra* note 4, at 403 (discussing the constitutional process creating black homelands with "due regard for black law and custom . . ."); *see also* MARINUS WIECHERS & J.P. VERLOREN VAN THEMAAT, STAATSREG 502 (1981).

22. *See* CARPENTER, *supra* note 4, at 402.

23. *See* Hercules Booysen et al., *Comments on the Independence and Constitution of Transkei*, 2 S. AFR. Y.B. OF INT'L LAW 1 (1976) ("The South African Status of the Transkei Act, 1976, declares Transkei a sovereign independent state."); Marinus Wiechers & Dawid van Wyk, *The Republic of Bophuthatswana Constitution 1977*, 3 S. AFR. Y.B. OF INT'L LAW 85, 85 (1977) ("On 6 December 1977 Bophuthatswana . . . became . . . the second independent homeland."); Gretchen Carpenter, *The Independence of Venda*, 5 S. AFR. Y.B. OF INT'L LAW 40, 40 (1979) ("On September 13, 1979 Venda, . . . opt[ed] for full independence and a republican form of government."); G. Carpenter, *Variation of a Theme—The Independence of Ciskei*, 7 S. AFR. Y.B. OF INT'L LAW 83, 83 (1981) ("The independent republic of Ciskei came into being on 4 December 1981."); THE CONSTITUTIONS OF TRANSKEI, BOPHUTHATSWANA, VENDA AND CISKEI. 1-20 (M.P. Vorster et al. eds., 1985) (discussing the process to grant independence to black territories).

24. *See* KARL DOEHRING, ALLGEMEINE STAATSLHRE—EINE SYSTEMATISCHE DARSTELLUNG 166-67 (1991); Yoram Dinstein, *The Degree of Self-Rule of Minorities in Unitarian and Federal States*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 221, 222 (Catherine Brölmann et al. eds., 1993) (describing the characteristics of a federation).

state.<sup>25</sup> Part of the overriding homeland policy was to exclude blacks from the South African political process.<sup>26</sup> This resulted in discrediting the entire homeland policy in the eyes of not only South African blacks, but the international community at large.

If a proper homeland federation, or even a confederation, had been founded among the different homelands and the rest of South Africa, a constitutional structure that reflected South Africa's cultural and ethnic diversities would have been created. Yet, despite academic discussion suggesting a homeland confederation,<sup>27</sup> this possibility was never realized.

#### D. 1993 Interim Constitution<sup>28</sup>

##### 1. Provinces

The 1993 Interim Constitution chose to ignore South Africa's cultural and ethnic realities. Instead, it created a new order, which emphasized one single state,<sup>29</sup> universal suffrage,<sup>30</sup> human rights,<sup>31</sup> and overall democracy. The Interim Constitution acknowledged the former dependent and independent homelands as part of South Africa.<sup>32</sup> It established nine provinces, of which at least four, Natal, Northern Transvaal, North-West and Eastern Cape, substantially corresponded with former homelands.<sup>33</sup> Traditional Afrikaner districts were included in those provinces that substantially corresponded with former black homelands.<sup>34</sup> Alternatively, traditional Afrikaner provinces included parts of black

25. See *Republic of South Africa v. Government of KwaZulu* 1983 (1) SA 164, 205 (A).

26. See *Wiechers & van Wyk*, *supra* note 23; *In re Certification of the Constitution of the RSA*, 1996 (4) SA 744, 777 (CC); see also *DUGARD*, *supra* note 12, at 103.

27. See *Francois Venter, Perspectives on the Constitutions of Transkei, Bophuthatswana, Venda and Ciskei*, in *CONSTITUTIONS OF TRANSKEI, BOPHUTHATSWANA, VENDA AND CISKEI*, *supra* note 23, at 12.

28. S. AFR. CONST. (Act 200 of 1993).

29. See *id.* ch. 1, § 1.

30. See *id.* ch. 2, § 6.

31. See *id.* ch. 3, §§ 7-35.

32. See *id.* sched. 1.

33. See *id.*

34. See *id.* For example, the Ellisras and Warmbad districts were included in the Northern Transvaal Province and districts such as Aberdeen, Graaff-Reinet, and Jansenville were included in the Eastern Cape Province. See *id.*

homelands.<sup>35</sup> Afrikaner cities, like Pretoria, the former Boer capital of the Transvaal Republic, were grouped in the same province with more populous black cities, such as Soweto.<sup>36</sup>

The new territorial demarcation deprived Afrikaners in the former Boer Republics of any political control over themselves or their territories. They became marginalized, insignificant, and scattered minorities. Only in the Western Cape provinces did Afrikaans-speaking blacks and Afrikaners still form a majority over Xhosa-speaking blacks.<sup>37</sup>

## 2. Government Structure

Under the 1993 Interim Constitution, Parliamentary legislation generally prevailed over provincial law.<sup>38</sup> While the provinces had concurrent legislative power with Parliament,<sup>39</sup> the provinces lacked any exclusive powers because the Interim Constitution followed the South African tradition of a strong centralized national legislature.<sup>40</sup> The Constitution, however, abolished Parliament's supremacy by making the Constitution the supreme law of the Republic<sup>41</sup> and by binding Parliament to a fundamental human rights bill.<sup>42</sup> The 1993 Constitution also provided for power sharing between political parties at national and provincial levels.<sup>43</sup> This form of power sharing was unrealistic because although a majority political party was forced into a coalition with a minority party, the majority did not need another party to govern effectively. Furthermore, this form of power sharing could not serve group and special geographical interests.

As expected, the Afrikaners in the former Boer Republics did

35. *See id.* For example, Thaba Nchu was included in the Orange Free State Province. *See id.*

36. Together with other cities, Pretoria and Soweto comprise the province Pretoria-Witwatersrand-Vereeniging. *See id.*

37. *See generally* Mary Braid, *Afrikaans Struggles to Shake Off the Taint of Apartheid*, INDEPENDENT (London), Dec. 22, 1996, at 10.

38. *See* S. AFR. CONST. (Act 200 of 1993) ch. 9, § 126(3).

39. *See id.* ch. 9, § 126(1), sched. 6. These matters included agriculture, casinos, cultural affairs, education, health services, housing, roads, and welfare services. *See id.*

40. *See* CARPENTER, *supra* note 4, at 285.

41. *See* S. AFR. CONST. (Act 200 of 1993) ch. 1, § 4(1)-(2).

42. *See id.* ch. 3, § 7(1).

43. *See id.* ch. 6, §§ 84(1), 88(2), ch. 9, § 149(2).

not enthusiastically greet the 1993 Interim Constitution. To avoid the possibility of a civil war, the Afrikanervolksfront, representing Afrikaners striving for self-determination, and the African National Congress, the predominantly black party, signed an agreement to avoid a civil war. The agreement was concluded on December 21, 1993, before the African National Congress was voted into power in the April 27, 1994 general elections. The agreement recognized various forms of self-determination, especially the establishment of territorial entities with various degrees of autonomy.

In 1994, agreements between South Africa's political parties resulted in an amendment to the Interim Constitution.<sup>44</sup> This amendment provided for finalizing the Provinces' borders in establishing a Volkstaat, an independent state for Afrikaners.<sup>45</sup> The amendment authorized a Volkstaat to be a territorial entity to accommodate Afrikaners' right to self-determination.<sup>46</sup>

Furthermore, the amendment also established a Volkstaat Council<sup>47</sup> to make proposals to the Constitutional Assembly.<sup>48</sup> The Council's functions entailed proposing how to establish an Afrikaner Volkstaat.<sup>49</sup> In 1995, the Volkstaat Council recommended the introduction of a federated provincial system to the Constitutional Assembly.<sup>50</sup> It marked a specific territory within the Boer Republics' historical boundaries where Afrikaners comprised the majority of the population<sup>51</sup> and recommended that this area be a constituent state within South Africa.<sup>52</sup> The total area of the specified territory constituted only 3.2% of the Republic of South Africa.<sup>53</sup> The Council also recommended the establishment of certain autonomous areas with limited legislative and executive

44. See S. AFR. CONST. (Act 200 of 1993), *amended by* S. AFR. CONST. (Act 2 of 1994) [hereinafter South Africa Act of 1994].

45. See *id.* ch. 11A, § 184B(3), *amended by* South Africa Act of 1994 § 9.

46. See *id.* sched. 4, const. princ. XXXIV.

47. See *id.* ch. 11A, § 184A(1).

48. See *id.* ch. 11A, § 184B(1)(c).

49. See *id.*

50. See FIRST INTERIM REPORT OF THE VOLKSTAAT COUNCIL, ch. 4, para. 4.4, at 24 (1995).

51. See *id.* ch. 5 at 29.

52. See *id.* ch. 4, para. 4.4.2.1, at 25.

53. See *id.* ch. 5, para. 5.1.4.1, at 35.



powers.<sup>54</sup>

The Volkstaat Council's proposals for a federated South Africa were modeled after the Federal Republic of Germany's Basic Law.<sup>55</sup> The Constitutional Assembly, however, ignored these proposals, thereby raising questions as to the *bona fide* intentions of the Constitutional Assembly, the African National Congress, and the validity of the new 1996 Constitution regarding international law and its legitimacy *vis-à-vis* the Afrikaners.

### E. 1996 Constitution

The 1993 Interim Constitution was the product of negotiations between South Africa's former government and political parties, including the African National Congress. The Constitutional Assembly, responsible for drafting the new South African Constitution, had to comply with the Constitutional principles in the 1993 Interim Constitution that were regarded as a "solemn pact" between the negotiating parties.<sup>56</sup>

Initially, the Constitutional Court found certain aspects of the 1996 Constitution violated the Constitutional Principles.<sup>57</sup> Following a drafting process that lasted more than two years,<sup>58</sup> the 1996 Constitution of the Republic of South Africa<sup>59</sup> finally became effective.

The preamble to the 1996 South African Constitution espouses a united South Africa despite its diversity.<sup>60</sup> The preamble professes to establish a society based on democratic values, social justice, and fundamental human rights.<sup>61</sup> It fails, however, to account for South Africa's multi-cultural society and multi-ethnic population.<sup>62</sup> Had South Africa boasted a homogeneous popula-

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54. See *id.* ch. 5 at 35.

55. GRUNDGESETZ [Constitution] [GG] (F.R.G.); see FIRST INTERIM REPORT OF THE VOLKSTAAT COUNCIL, *supra* note 50, para 11.26-11.2.12.2, at 69-73.

56. See S. AFR. CONST. (Act 200 of 1993) pmbl.; *In re* Certification of the Constitution of the RSA, 1996 (4) 744, 780 (CC).

57. See *In re* Certification of the Constitution of the RSA, 1996 (4) SA 744, 780 (CC).

58. Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, Case CCT 37/96, para. 205, 1997 (2) SA 162 (CC).

59. See S. AFR. CONST. (Act 108 of 1996).

60. See *id.* pmbl.

61. See *id.*

62. See *id.*

tion with a clear majority in language and culture, the explicit recognition of the liberal democratic values embodied in the preamble would be sufficient to implement a democratic South Africa. The inherent conflict embodied in the 1996 Constitution's basic suppositions<sup>63</sup> are apparent in the Constitution's Founding Provisions.<sup>64</sup> Section 1 declares that South Africa is one sovereign state but under section 6(1), this one unified sovereignty has eleven official languages.<sup>65</sup> South Africa may be declared one sovereign state *de jure*, but its own Founding Principles recognize that it consists of various peoples, each with their own language and tradition.

Under the 1996 Constitution, the South African government consists of national, provincial, and local spheres that are distinctive, interdependent, and interrelated.<sup>66</sup> Parliament is the highest legislative body and consists of the National Assembly, which is elected by the general population,<sup>67</sup> and the National Council of Provinces,<sup>68</sup> which consists of representatives from the provinces.<sup>69</sup>

Parliament, as represented by the National Assembly, may legislate on any matter.<sup>70</sup> Parliament and the provinces share concurrent jurisdiction in certain defined areas.<sup>71</sup> Except in certain instances, national legislation prevails over provincial legislation.<sup>72</sup> Even in areas where provinces retain exclusive jurisdiction,<sup>73</sup> Parliament may intervene for the sake of national security, economic unity, and essential national standards.<sup>74</sup> It may also intervene to prevent unreasonable action,<sup>75</sup> a concept not yet defined by the provinces. Despite, the 1993 Constitutional Principle that prov-

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63. *See id.* ch. 1, § 1.

64. *See id.* ch. 1.

65. *See id.* ch. 1, § 6.

66. *See id.* ch. 3, § 40(1).

67. *See id.* ch. 4, §§ 42(3), 46(1).

68. *See id.* ch. 4, § 42(1).

69. *See id.* ch. 4, § 42(4).

70. *See id.* ch. 4, § 44(1)(a)(ii).

71. *See id.* ch. 4, § 44(1)(b), sched. 4.

72. *See id.* ch. 6, § 146.

73. *See id.* sched. 5.

74. *See id.* ch. 4, § 44.

75. *See id.* ch. 4, § 44(2).

inces must have exclusive powers,<sup>76</sup> no such power exists in the 1996 Constitution. Instead, legislative and executive powers are centralized in Parliament.

The 1996 Constitution provides for nine Provinces<sup>77</sup> with limited, individual executive<sup>78</sup> and legislative powers.<sup>79</sup> They are exclusive executive and legislative powers encompassing relatively trivial matters.<sup>80</sup>

In an attempt to reflect South Africa's cultural and ethnic diversity, the 1996 Constitution provides for the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.<sup>81</sup> Although the Commission is subject to constitutional limitations,<sup>82</sup> it is empowered and regulated by national legislation.<sup>83</sup> The Commission's objectives are: (1) to promote respect for the rights of cultural, religious and linguistic communities; (2) to promote and develop unity among these communities; and (3) to recommend the establishment of cultural councils for these communities.<sup>84</sup> The Commission is not founded on the recognition of any minority groups' rights, although the existence of such rights is presumed.

Under the 1996 Constitution, the Bill of Rights prohibits unfair discrimination based on ethnic origin, culture, or language.<sup>85</sup>

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76. See S. AFR. CONST. (Act 200 of 1993) sched. 4, const. princ. XIX. In *In re Certification of the Constitution of the RSA*, the Constitutional Court decided this principle was qualified by other Constitutional Principles and thus "the occasion for intervention by Parliament is likely to be limited." *In re Certification of the Constitution of the RSA*, 1996 (4) SA 849, 850. The Court's reasoning, however, ignores the clear language of Constitutional Principle XIX, which states that powers and functions at the provincial level shall include exclusive powers. See S. AFR. CONST. (Act 200 of 1993) sched. 4, const. princ. XIX.

77. See S. AFR. CONST. (Act 108 of 1996) ch. 6, § 103(1). Provincial boundaries are the same as existed under the 1993 Interim Constitution. See *id.* ch. 6, § 103(2).

78. See *id.* ch. 6, § 125(1).

79. See *id.* ch. 6, § 104(1).

80. See *id.* sched. 5. These relatively trivial matters include abattoirs, ambulance services, archives, libraries, liquor licenses, museums, provincial recreation and amenities, provincial sports, roads, and veterinary services. See *id.*

81. See *id.* ch. 9, § 181(1)(c).

82. See *id.* ch. 9, § 181(2).

83. See *id.* ch. 9, § 185(2).

84. See *id.* ch. 9, § 185(1)(c).

85. See *id.* ch. 2, § 9(3).

The Bill of Rights also protects individual rights, including: the right to receive education in the official language of choice where it is reasonably practicable;<sup>86</sup> the right to establish and maintain, at one's own expense, educational institutions;<sup>87</sup> the right to use the language and participate in the culture of one's choice;<sup>88</sup> and the right of persons belonging to a cultural, religious, or linguistic community not to be denied the right to enjoy their culture, religion, and language and the right to form cultural, religious and linguistic associations.<sup>89</sup> These rights must be interpreted, however, in conjunction with international law.<sup>90</sup>

The 1996 Constitution also explicitly refers to the right of self-determination. "The right of the South African people as a whole to self-determination does not preclude . . . recognition of the right of self-determination" to any individual community sharing a common cultural and linguistic heritage.<sup>91</sup> This provision reenacts the 1993 Interim Constitutional Principle allowing the establishment of territorial entities in which people like the Afrikaners could enjoy self-determination.<sup>92</sup> These territorial entities, however, were never actually formed.

The significance of Principle XXXIV is uncertain. Even without the reenactment, Parliament may amend the Constitution to implement territorial self-determination for any cultural community. The newly prescribed amendment procedure is, however, cumbersome where provincial boundaries, powers, functions, or institutions are affected. If territorial self-determination is to be implemented for any community on a provincial level, the difficult amendment process would inevitably ensue.

Amending the Constitution requires a bill to pass in the National Assembly, with supporting votes from at least two thirds of its members, and in the National Council of Provinces, with supporting votes from at least six provinces.<sup>93</sup> Furthermore, the spe-

86. See *id.* ch. 2, § 29(2).

87. See *id.* ch. 2, § 29(3).

88. See *id.* ch. 2, § 30.

89. See *id.* ch. 2, § 31(1).

90. See *id.* ch. 2, § 39(1)(b).

91. *Id.* ch. 14, § 235.

92. See S. AFR. CONST. (Act 200 of 1993) sched. 4, const. princ. XXXIV.

93. See S. AFR. CONST. (Act 108 of 1996) ch. 4, § 74(1).

cific province whose territory will be affected by the amendment must also approve the bill.<sup>94</sup> The implementation of territorial self-determination under the 1996 Constitution is, therefore, much more difficult than it was under the 1993 Interim Constitution. A possible purpose for the reenactment was to enable Parliament to implement territorial self-determination, on a provincial level, while circumventing the cumbersome amendment procedure.

Parliament may establish local governments<sup>95</sup> and assign powers to them.<sup>96</sup> Therefore, Parliament could implement territorial self-determination on a local government level. To achieve this, the reenactment of the Principle XXXIV was unnecessary.

### III. LEGAL EVALUATION OF MINORITY PROTECTION

#### A. International Law: The Right of Self-Determination

##### 1. Background

Ten years ago, the South African Constitution would have admirably exemplified the protection of human and minority rights. Since the fall of communism, however, this millennium's last decade has experienced a paradigm shift in international law concerning the protection of minority rights. The concept that the state, as an all embracing body to which all inhabitants and citizens pledge loyalty, has come under severe strain. Thomas M. Franck noted that "[t]he idea of the state as a multicomunal civil society is thus challenged from below by schismatic movements."<sup>97</sup> In a homogeneous society, the state is the natural representative of all its inhabitants. In a heterogeneous society, however, the state may be unable to achieve universal representation.<sup>98</sup> This implies that minority groups *need* the right to represent themselves.<sup>99</sup> Al-

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94. See *id.* ch. 4, § 74(3).

95. See *id.* ch. 7, § 155(2)(a).

96. See *id.* ch. 7, § 156(1)(b).

97. See Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT'L. L. 359, 360 (1996).

98. See Henry Schermers, *The Bond Between Man and State*, in RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG—FESTSCHRIFT FÜR RUDOLF BERNHARDT 187, 188 (Ulrich Beyerlin et al. eds., 1995).

99. See Adrien-Claude Zoller, *International Representation of Peoples and Minorities*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 301, 305 (Catherine Brölmann et

though its details may be unclear, the minority right to self-determination clearly exists, but is no longer recognized as existing only in a typical colonial situation.<sup>100</sup> The minority right to self-determination also exists in, and against, recognized states. Principles applicable to colonies could, and thus should, also apply to such minorities.

## 2. Linguistic and Cultural Rights

Although the existence of the right to self-determination is generally recognized, its juridical contents are often uncertain. Various forms of self-determination have been identified.<sup>101</sup> Initially, minority groups were accorded special cultural and linguistic rights.<sup>102</sup> If recognition of these rights effectively satisfied the minorities' yearning for self-determination, recognizing any other form of self-determination would be unnecessary. This, however, was not the case. The mere protection of the individual through recognition of specific human rights inadequately protects the individual as a member of a group.<sup>103</sup> The state should also promote retention by minority groups of their unique group characteristics.<sup>104</sup>

## 3. Territorial Autonomy

Territorial autonomy is also recognized as a form of self-determination in areas where a majority of inhabitants belong to a distinct ethnic or linguistic minority.<sup>105</sup> This form of self-

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al. eds., 1993).

100. See Frederic L. Kirgis, Jr., Editorial Comment, *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L. L. 304, 305 (1994).

101. See *id.* at 307.

102. See International Covenant on Civil and Political Rights, Art. 27, Dec. 19, 1966, 999 U.N.T.S. 171, 179; U.N. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Dec. 18, 1992, 32 I.L.M. 911 (1993).

103. See Natan Lerner, *The Evolution of Minority Rights in International Law*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW 77, 81 (Catherine Brölmann et al. eds., 1993).

104. See Thilo Marauhn, *Der Status von Minderheiten im Erziehungswesen und im Medienrecht*, in DAS MINDERHEITENRECHT EUROPÄISCHER STAATEN 410, 450 (Jochen Abr. Frowein et al. eds., 1994).

105. See Kirgis, *supra* note 100, at 307; Oscar Schachter, *Micronationalism and Secession*, in RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG 179, 182 (Ulrich Beyerlin et al. eds., 1995).

determination is expressed in federal and confederal state structures.<sup>106</sup> The relationship between cultural self-determination and autonomous territorial self-determination is not always clear. Does the right to autonomous territorial self-determination supersede the right to cultural self-determination? Is the granting of cultural self-determination a realization of the right of self-determination? Or does the right to autonomous territorial self-determination exist even though a state has already granted a minority group the right to cultural self-determination? Is there a right to autonomous self-determination?

Numerous scholars and academics have attempted to explore these issues. Daniel Thürer discusses this problem, but stops short of drawing the logical conclusion that such a right exists.<sup>107</sup> He prefers to call it a principle of purpose, a *zielprinzip*.<sup>108</sup> Further, Steven R. Ratner implies there is a right to territorial self-determination that includes the right to *autonomous* territorial self-determination. According to Ratner, international law accepts "at a minimum that long-term inhabitants of a territory have rights that can override the claims of Governments,"<sup>109</sup> and that such people "are entitled to a special voice in the strategy for internal self-determination."<sup>110</sup> Patrick Thornberry speaks of a right of participation that may lead to autonomous structures.<sup>111</sup> In addition, according to Hurst Hannum:

[O]ne may not recognize a "right" to a particular form of devolved or federal political structure, opposition to such demands by the central government should be founded on a demonstration that the regional or minority demands are

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106. See Schachter, *supra* note 105, at 182.

107. See Daniel Thürer, *Region und Minderheitenschutz—Aufbauelemente Einer Europäischen Architektur?*, in RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG 1337, 1358 (Ulrich Beyerlin et al. eds., 1995); see also Otto Kimminich, *A "Federal" Right of Self-Determination?*, in MODERN LAW OF SELF-DETERMINATION 83, 100 (Christian Tomuschat ed., 1993).

108. See Thürer, *supra* note 107, at 1358.

109. Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L. L. 590, 615 (1996).

110. *Id.* at 615-16.

111. See Patrick Thornberry, *The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism*, in MODERN LAW OF SELF-DETERMINATION 101, 134 (Christian Tomuschat ed. 1993).

unreasonable or are being met in practice, rather than on irrelevant incantations of state sovereignty or even majority rule.<sup>112</sup>

Or, arguably, on slogans of nation-building.

#### 4. Form of Self-Determination—Who Decides?

The notion of self-determination implies that the subject of this right, the minority people, must decide for themselves the form of self-determination.<sup>113</sup> The United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples (Colonial Independence Declaration)<sup>114</sup> recognizes that by virtue of their right to self-determination, people determine their political status and freely pursue their political development.<sup>115</sup> A government cannot force upon them an unwanted form of self-determination. The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Friendly Relations Declaration)<sup>116</sup> also recognizes that the right to self-determination includes the right to choose the form of self-determination.<sup>117</sup> “[A]ll peoples have the right freely to determine, without external interference, their political status” and the “emergence into any . . . political status freely determined by a people” constitutes implementation of the right to self-determination.<sup>118</sup>

112. See HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION—THE ACCOMMODATION OF CONFLICTING RIGHTS* 474 (1990).

113. See Conor Cruise O'Brien, *What Rights Should Minorities Have?*, in *MINORITIES: A QUESTION OF HUMAN RIGHTS* 11, 13 (Ben Whitaker ed., 1984); Kimminich, *supra* note 107, at 94.

114. See Declaration on the Granting of Independence to Colonial Countries and People, G.A. Res. 1514, U.N. GAOR, 15th Sess., U.N. Doc. A/L.323 (1960) *reprinted in* UNITED NATIONS RESOLUTIONS 188 (Dusan J. Djonovich ed., 1974) [hereinafter Colonial Independence Declaration].

115. See *id.* at 189.

116. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Annex, U.N. Doc. A/8082 (1970) *reprinted in* UNITED NATIONS RESOLUTIONS 338 (Dusan J. Djonovich ed., 1976) [hereinafter Friendly Relations Declaration].

117. See *id.* at 340.

118. *Id.* at 340, 341.



Contemporary international law recognizes that the ideal way to constitutionally protect minorities is to accommodate them in federal structures.<sup>119</sup> Certain requirements are, however, suggested for the implementation of territorial autonomy. The minority group should be concentrated in a well demarcated territory, in which its members constitute the majority.<sup>120</sup> Federal structures are important for the protection of minorities because in such a system the federal government and the constituent state are subordinate to the Constitution, not to each other.<sup>121</sup> Although a federal system cannot solve all the problems concerning minorities rights,<sup>122</sup> it can allow territorial autonomy without dismembering the state.

### 5. Secession

Secession can also achieve self-determination. The Colonial Independence Declaration<sup>123</sup> and the Friendly Relations Declaration<sup>124</sup> both recognize this idea. The implementation of self-determination by secession is conditional, however. The community seeking secession must have been subjected to economical and political discrimination. Also, the central government controlling the community must have rejected reasonable proposals for autonomy and minority rights.<sup>125</sup>

### 6. State Responsibility

A counterpart to the right of self-determination is state responsibility. Once the right to self-determination has been established, the metropolitan state has a duty to recognize that right and implement it. The Friendly Relations Declaration and academic

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119. See Jochen Abr. Frowein, *Das Recht der Minderheiten als Herausforderung an die Verfassungsordnung des freien Europa*, in *DAS MINDERHEITENRECHT EUROPÄISCHER STAATEN*, at VIII (Jochen Abr. Frowein et al. eds., 1994); Kimminich, *supra* note 107, at 98.

120. See Stefan Oeter, *Minderheiten im institutionellen Staatsaufbau*, in *DAS MINDERHEITENRECHT EUROPÄISCHER STAATEN* 492, 509 (Jochen Abr. Frowein et al. eds., 1994).

121. See Dinstein, *supra* note 24, at 222.

122. See *id.* at 231.

123. See Colonial Independence Declaration, G.A. Res. 1514, *supra* note 114.

124. See Friendly Relations Declaration, G.A. Res. 2625, *supra* note 116.

125. See Schachter, *supra* note 105, at 185.

opinion recognize the state's duty to acknowledge the established right.<sup>126</sup> All states owe this duty to all international community members.<sup>127</sup> The duties of states that are third parties are unclear, but arguably every state must refrain from action that deprives people of their right to self-determination. All states must also promote the realization of such a right.<sup>128</sup> The metropolitan state thus, has a more circumscribed role in implementing the right to self-determination.

The idea that there are degrees of self-determination, or that self-determination is a variable right and not an absolute one, is suspect.<sup>129</sup> This view virtually concludes that so long as a dominated minority has a "good master," they do not have the right to a specific form of self-determination. This attitude makes the right a relative one and ignores the very essence of the right of self-determination: that people can choose their own status. The supposed degrees of self-determination may be relevant, however, in gauging the reaction of other states to a self-determination movement, because self-determination issues are not domestic, but international.<sup>130</sup> Other states must also decide whether to recognize new states that emerge from self-determination struggles. Other states will also have to make judgments, or be prepared to make judgments, about the legitimacy of the implementation or denial of a self-determination movement, while still complying with their duties to refrain from action that deprives people of their right and to actively promote the realization of such a right.

### *B. South Africa's Self-Determination Policy*

South Africa is a typical African country with borders that were arbitrarily drawn by colonial powers. Neither the 1993 Interim Constitution nor the 1996 Constitution attempted to remedy this defect. The process of arbitrarily drawing borders, for the

126. See Friendly Relations Declaration, G.A. Res. 2625, *supra* note 116, at 338-39; Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 54 (1992).

127. See Franck, *supra* note 126, at 54.

128. See Friendly Relations Declaration, G.A. 2625, *supra* note 116, at 338-39.

129. *But see* Kirgis, *supra* note 100, at 308.

130. See Franck, *supra* note 126, at 54; Trent N. Tappe, *Self-Determination in a Breakaway Region of the Former Soviet Union: Evaluating the Legitimacy of Secessionist Claims*, 34 COLUM. J. TRANSNAT'L L. 255, 257 n.10 (1995).

sake of empowering the ruling élite, continues.<sup>131</sup> South Africa denies territorial autonomy to minorities in an attempt to create democracy. Democracy, or purported democracy, however, cannot be used to override the principle of minority rights, especially the right to self-determination.<sup>132</sup>

One cause of Africa's bloody history is its tendency to centralize power and not allow any territorial autonomy.<sup>133</sup> The emphasis is on nation-building together with denying autonomous territorial self-determination.<sup>134</sup> Africa's history testifies to the failure of this policy. South Africa has, with its new 1996 Constitution, simply followed the footsteps of other African countries. The high principles of democracy and human rights are not a novelty in African constitutions.<sup>135</sup> Unfortunately, these principles are rarely practiced. On the other hand, not even federal systems can guarantee African stability.<sup>136</sup> Therefore, the question is not which constitutional system can function properly in the African context, but what is legally required.

The Constitutional Assembly ignored the agreement between the African National Congress and representatives of the Afrikaners and ignored the amendments to the 1993 Interim Constitution that provided for Afrikaner territorial autonomy.<sup>137</sup> The Constitutional Court's view that the 1993 Interim Constitution only

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131. According to a television broadcast, the ruling African National Congress (ANC) government plans to change the borders of the North West Province by including the Setswana speaking Taung into the Afrikaans speaking Northern Cape because of its dwindling support in the Northern Cape Province. See *Television News* (television broadcast, Feb. 18, 1997).

132. See Werner Kaltefleiter, *The Function of Self-Determination in the Process of Nation-Building: The International Experience*, in PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON SELF-DETERMINATION HELD BY THE VOLKSTAAT COUNCIL 22, 34 (1996).

133. See *id.* at 30.

134. See P.W. Liebenberg, *Constitutional Recognition of the Principle of Self-Determination in International Context*, in FOURTH REPORT OF THE VOLKSTAAT COUNCIL 47 (1996).

135. See BENJAMIN NWABUEZE, A CONSTITUTIONAL HISTORY OF NIGERIA 19 (1982); CURRENT LEGAL PROBLEMS IN NIGERIA—PROCEEDINGS OF THE ANAMBRA STATE LAW CONFERENCE 1986, 46 (E.I. Nwogugu, ed. 1988).

136. See J.F. Kirsten, *Nigeria: A Federation Gone Wrong*, in PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON SELF-DETERMINATION HELD BY THE VOLKSTAAT COUNCIL 129 (1996).

137. See *supra* Part II.

authorized territorial self-determination without embodying any obligation, in this respect, is unacceptable.<sup>138</sup> To accept such a view is to accept that the amendments and the agreement are legally ineffective and may be ignored with impunity. Such a conclusion militates against jurisprudence. The legal nature, as well as the binding force of the agreement, is admittedly a difficult jurisprudential question. The agreement is, however, a result of negotiations between the African National Congress (ANC), professing to have enjoyed international legal existence as a representative body,<sup>139</sup> and its counterpart, an Afrikaner organization representing the Afrikaners. The fact that the Constitutional Assembly never seriously discussed a federal system granting autonomy to ethnic groups reflects the absence of *bona fide* intentions on the part of the Constitutional Assembly and the ANC government. The violation of the expectations created by both the agreement and the amendments to the 1993 Interim Constitution must certainly affect the legitimacy of the new 1996 Constitution in the eyes of Afrikaners. *Bona fides* is a general principle of law recognized by international law,<sup>140</sup> its violation cannot be without legal consequences.

The Afrikaners were not the only people with expectations of self-determination.<sup>141</sup> This was also the case with the Zulus.<sup>142</sup> The Volkstaat Council's proposed federal constitution was ignored. Under the international law requirements regarding self-determination, the ANC government had a duty to heed the minority groups' requests for the implementation of territorial self-determination. The fact that the proposals for territorial self-determination were based on recognized federal constitutional

138. See *In Re Certification of the Constitution of the RSA 1996* (4) SA 744, 780 (CC).

139. The ANC accepted, for example, the Geneva Conventions of 1949 and Additional Protocol I of 1977 in 1980. See DUGARD, *supra* note 12, at 334.

140. See ALFRED VERDROSS & BRUNO SIMMA, *UNIVERSELLES VÖLKERRECHT—THEORIE UND PRAXIS* ¶¶ 601, 645 (1984); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 18 (1990); Anthony D'Amato, *Good Faith*, in 2 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 599 (Rudolf Bernhardt ed., 1995).

141. See H.C.G. Robbertze, *The History of Afrikaner Self-Determination*, in FIFTH REPORT OF THE VOLKSTAAT COUNCIL (1996) (discussing the Zulus' quest for self-determination). The Afrikaners clearly fulfill the definition of a community as formulated by the Permanent Court of International Justice. See *Greco-Bulgarian Communities*, 1930 P.C.I.J. (ser. B) No. 17, at 21, July 31, 1930.

142. See Kaltefleiter, *supra* note 132, at 24.

principles, made their rejection unreasonable. Both the 1993 Interim Constitution and the 1996 Constitution incorporate international law into South African law, unless it is inconsistent with the constitutional provisions.<sup>143</sup> This implies that the Constitution is above international law. In view of the absence of the implementation of territorial self-determination, the Constitution, new or old, is not in accordance with international law.

#### IV. CONCLUSION

South Africa's 1996 Constitution discards minority groups' legitimate and reasonable claims for territorial self-determination. The Constitution prevents such claims by making the amendment process difficult and cumbersome. In this respect, it has fundamentally changed the South African constitutional scene. All the constitutional forerunners were flexible, allowing the government to adapt the policy of self-determination claims. Previously, simple majorities in Parliament could effectuate change. Previous governments were thus able to avoid an uncontrollable violent eruption of self-determination struggles. This advantage does not exist under the 1996 Constitution. The government can now suppress self-determination issues by arguing that the amendment process cannot accommodate such claims. Minority demand for self-determination may, therefore, smolder until they reach a critical boiling point.

Considering certain aspects of the government's policy, it is clear that despite the human rights and democratic ideals recited in the 1996 Constitution, the current government is as insensitive towards the right of self-determination of other people as any previous government. The government's insensitivity is clearly evidenced in many of its policies. For example, the government has deliberately: "cleansed" the civil service of Afrikaners and has even appointed in their place, blacks who are unable or refuse to speak Afrikaans to serve Afrikaans cities and regions. The government has also forced Afrikaans speaking universities and schools to become double medium (using both languages) or only English speaking, and has allowed traditional Afrikaner communities to be over-populated, and swamped with non-Afrikaners.

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143. See S. AFR. CONST. (Act 200 of 1993) ch. 15, § 231(4); S. AFR. CONST. (Act 108 of 1996) ch. 14, § 232.

Finally, the government has grouped different communities together, with the sole purpose of allowing non-Afrikaners to govern Afrikaner communities.

Without accommodating the right of self-determination in the Constitution, the low intensity political violence that is continuing in South Africa will not end, and may even escalate. This is said without taking into account the violence that is still permeating KwaZulu-Natal, the traditional homeland of the Zulu people.

