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**THE *USE OF OFFICIAL LANGUAGES ACT*: DIVERSITY AFFIRMED?**

JL Pretorius\*

**1 Introduction**

The *Use of Official Languages Act*<sup>1</sup> ("the Act") is meant to "regulate and monitor" the use of official languages in terms of arguably one of the most inclusive official language arrangements of any constitution currently in force. The eleven languages recognised as official in terms of section 6(1) of the *Constitution*<sup>2</sup> represent the home languages of more than 99 percent of the country's population. The list of official languages includes the languages of groups comprising as little as 1.58 percent of the total population.<sup>3</sup> In addition, the *Constitution* has also included non-official languages in the scope of the Pan South African Language Board's mandate "to promote and ensure respect" for languages.<sup>4</sup> It is against this background that Justice Sachs' remark that the principle of inclusivity "shines through the language provisions" of the *Constitution* must be seen.<sup>5</sup>

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<sup>1</sup> *Use of Official Languages Act* 12 of 2012.

<sup>2</sup> *Constitution of the Republic of South Africa*, 1996 ("the *Constitution*").

<sup>3</sup> Statistics South Africa 2001 <http://bit.ly/XLjzbzQ>.

<sup>4</sup> Section 6(5). This category includes the indigenous languages of the Khoi, Nama and San, commonly used community languages (including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu), as well languages used primarily for religious purposes (such as Arabic, Hebrew and Sanskrit).

<sup>5</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 363. He was referring to s 3 of the *Constitution of the Republic of South Africa* 200 of 1993 ("the *interim Constitution*"). In so far as the recognition of the principle of accommodating linguistic diversity is concerned, the official language provisions of the 1996 *Constitution* do not materially deviate from those of the *interim Constitution*. See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 210 ("The balance of NT [1996 text of the Constitution] 6 is directed at fostering linguistic diversity. We believe that NT 6 clearly satisfies CP [Constitutional Principle] XI in that regard"). On a rhetorical level, however, the *interim Constitution* could be considered to have been more outspoken regarding the promotion of multilingualism (s 3(9)(d)). One important omission in the 1996 *Constitution* is the *interim Constitution's* commitment regarding the non-diminution of language rights existing at the time of its commencement (s 3(9)(f)), which was meant to entrench the privileged position of the two languages of European descent, Afrikaans and English.

In the perception of many, however, the Act's commitment to the promotion of inclusive linguistic diversity remains ambivalent. Commentators have raised doubt as to whether the Act embodies the promotion of multilingualism visibly and forcefully enough to be able to counter the continuing trend towards English monolingualism.<sup>6</sup> Given the perceived contradiction it is necessary, therefore, to revisit the *Constitution's* message regarding multilingualism in order to decide if and how a law intended to regulate and monitor official language use could give effect to linguistic diversity.

This is not an undemanding interpretive exercise. Part of the problem is the complex structure of the official language clause itself. Its apparent ambiguity lies in the fact that at face value it is composed of three distinct parts<sup>7</sup> without an obvious organising principle. The constituent parts are the official language declaration,<sup>8</sup> the directive principles of state language policy,<sup>9</sup> and a catalogue of practical considerations to guide restrictive choices regarding official language use.<sup>10</sup> What is not immediately apparent is how these parts are to interrelate in concrete cases. Without an integrating principle, section 6 can be interpreted and applied as nothing more than the sum of its disconnected parts.<sup>11</sup> The result is that a specific language position is often the function of a selective emphasis on a particular part of the official language clause. In this way, specific phrases or subclauses of section 6 are selectively harnessed in support of particular sectional language interests. What is

<sup>6</sup> See Du Plessis 2012 <http://bit.ly/YghGr0> 11; Alexander 2012 <http://bit.ly/12ZqgyH>; Du Preez 2012 <http://bit.ly/WO9yj7> 1; Law Society 2012 <http://bit.ly/Xg5MtU> para 4; Azzakani 2012 <http://n24.cm/YyICy2>.

<sup>7</sup> Not counting s 6(5) which establishes the Pan South African Language Board.

<sup>8</sup> Section 6(1) declares the official languages of South Africa to be Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

<sup>9</sup> They are the directive to take practical and positive measures to elevate the status and advance the use of the historically diminished indigenous languages (s 6(2)), and the directives that all official languages must enjoy parity of esteem and equitable treatment (s 6(4)). For a discussion of the nature of these principles as directive principles of state policy, see Du Plessis and Pretorius 2000 *SAPR/PL* 513-515; and Roederer "Founding Provisions" 13-26.

<sup>10</sup> Section 6(3)(a) provides that the national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.

<sup>11</sup> Du Plessis and Pretorius 2000 *SAPR/PL* 507.

needed is a basis for integrative reasoning which could coherently relate to one another the recognition of the official status of a language, the directive principles and the contextual practicalities.

To bring normative coherence to the official language clause requires a broader contextual approach which seeks to integrate section 6 in the *Constitution's* underlying value structure.<sup>12</sup> The Constitutional Court has endorsed the notion – derived from the jurisprudence of the German Federal Constitutional Court – that the *Constitution* embodies an objective, normative value system.<sup>13</sup> Although the selection and designation of values considered to be "basic" and definitive of the constitutional value system<sup>14</sup> remain contested,<sup>15</sup> it is clear nevertheless, as Roederer notes, that

the notion of an "objective, normative value system" functions, like the founding values, as a standard for all governmental conduct; as a set of values that influence the interpretation of the Final Constitution, the Bill of Rights and other legislation; and as a set of values that influences whether and how the common law is to be developed.<sup>16</sup>

<sup>12</sup> *Democratic Alliance v Masondo* 2003 2 SA 413 (CC) paras 41, 45.

<sup>13</sup> See eg *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 94; *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 54; *Kaunda v President of the RSA* 2005 4 SA 235 (CC) para 218; *S v Thebus* 2003 6 SA 505 (CC) paras 27-28.

<sup>14</sup> Section 1 of the *Constitution* lists the following as the founding values of South Africa as "one, sovereign, democratic state": human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; supremacy of the constitution and the rule of law; universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness. In its interpretation clause (s 39), the *Constitution* enjoins courts, tribunals and forums, when interpreting the Bill of Rights, to promote the "values that underlie an open and democratic society based on human dignity, equality and freedom". When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must also promote the "spirit, purport and objects" of the Bill of Rights.

<sup>15</sup> Roederer "Founding Provisions" 13-9-13-17; Swanepoel 1998 *PER* 101-105.

<sup>16</sup> Roederer "Founding Provisions" 13-10. See also *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)* 2005 3 SA 280 (CC) para 21: "The values enunciated in section 1 of the Constitution are of fundamental importance, they inform and give substance to all the provisions of the Constitution"; *United Democratic Movement v President of the Republic of South Africa (No 2)* 2003 1 SA 495 (CC) para 19: "These founding values have an important place in our Constitution. They inform the interpretation of the Constitution and other law, and set positive standards with which all law must comply in order to be valid"; *S v Jordan* 2002 6 SA 642 (CC) para 106: "The State has accordingly not only the right but the duty to promote the foundational values of the interim Constitution." In the same vein, Roux argues that the founding values must be seen as "interpretative guidelines, presumptions almost, which favour a certain way of understanding the South African constitutional project." See Roux "Democracy" 10-26-10-27. For discussion of the

The Constitutional Court also subscribes to the notion that the values constituting the basic constitutional value system are mutually interdependent and that collectively they form a unified, coherent whole.<sup>17</sup> This notion underlies the widely endorsed principle of interpretation that constitutional provisions must not be read in isolation but in the context of the *Constitution* as a whole in order to preserve its normative unity or "value coherence".<sup>18</sup> This means, at a minimum, two things. Firstly, constitutional provisions should be interpreted in a way that maintains consistency in their meaning, or conceptual integrity regardless of the contexts in which they are read, ie interpretation should not result in contradictory or distorted meanings being ascribed to the same values or principles in different constitutional settings. Secondly, it requires the avoidance of arbitrary or ideologically-inspired value hierarchisation. Value competition or tension, in terms of this principle, should not be treated as unsolvable inherent value contradictions,<sup>19</sup> but by affording all competing values the optimal realisation that the circumstances allow.<sup>20</sup> In German

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role of foundational principles in Canadian constitutional law, see Hughes 1999 *Dalhousie Law Journal* 12-17.

<sup>17</sup> See eg *MEC for Education, KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) paras 63-64: "These values are not mutually exclusive but enhance and reinforce each other"; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC) para 55: "constitutional rights are mutually interrelated and interdependent and form a single constitutional value system". This is another German doctrinal import. In *Matatiele Municipality v President of the RSA* 2007 6 SA 477 (CC) para 36, Ngcobo J noted, quoting the German Federal Constitutional Court (*BVerfGE* 1, 14, as translated by Kommers *Constitutional Jurisprudence* 63) that "[o]ur Constitution embodies the basic and fundamental objectives of our constitutional democracy. Like the German Constitution, it 'has an inner unity, and the meaning of any one part is linked to that of other provisions'. Taken as a unit [our] Constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate." On occasion, the German Federal Constitutional Court has even referred to this principle as the *vornehmstes Interpretationsprinzip* (most important interpretation principle): *BVerfGE* 19, 206 at 220.

<sup>18</sup> *Executive Council of the Western Cape Legislature v President of the RSA* 1995 4 SA 877 (CC) para 204 (interpretation must respect the "design and structure of the Constitution as a whole"); *S v Mhlungu* 1995 3 SA 867 (CC) paras 45, 105 (it is a necessary interpretative technique to give "force and effect to the fundamental objectives and aspirations of the Constitution", or to preserve the "overall design and purpose of the Constitution"). See also Roederer "Founding Provisions" 13-9-13-15.

<sup>19</sup> See in this respect Swanepoel 1998 *PER* 95-149, who detects a "dialectic value tension" in the 1996 *Constitution*, especially between ss 1(a) & 7(1). The analysis, however, seems to be the result of interpretively neglecting the principle of harmonisation, and relying too heavily on perceived terminological tensions and the histories of the ideological contrasting of particular values.

<sup>20</sup> See eg *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 35: "rather than envisage the foundational values of the rule of law and the achievement of equality as being

constitutional literature, this approach has been captured in theoretical concepts such as *Harmonisierung* (harmonisation),<sup>21</sup> *praktischer Konkordanz* (practical concordance),<sup>22</sup> or *schonender Ausgleich* (careful equalisation or balance).<sup>23</sup> Hesse, for instance, argues that constitutionally recognised goods, in the practical resolution of cases, should be related to one another in a way that results in the optimal realisation of all. The principle of the unity of the constitution is violated if one constitutionally recognised good is realised at the expense of another in the course of the unprincipled "balancing" of interests or as a result of an ideological, dogmatic or otherwise abstract ranking of social goods. The normative unity of the *Constitution* requires the interpreter to optimise the realisation potential of all competing constitutionally recognised goods: all must be set limits in order that all may acquire optimal efficacy.<sup>24</sup>

From a legal-sociological point of view, this "rule of harmonisation" or "optimisation"<sup>25</sup> is of vital importance for constitutions to realise their socio-political integrative function in an optimally accommodative and inclusive manner. In concrete cases, value choices correlate and overlap with competing human interests. For instance, the deliberations of the Portfolio Committee on Arts and Culture on the controversial amendment of section 4(b) of the *Use of Official Languages Bill*<sup>26</sup>

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distinct from and in tension with each other, PIE treats these values as interactive, complementary, and mutually reinforcing"; *Victoria and Alfred Waterfront (Pty) Ltd v Police Commissioner of the Western Cape* 2004 4 SA 444 (C) 452B (the tension between the applicants' property rights and respondents' right to freedom of movement to be resolved in a manner vindicating the rights of all parties to the greatest extent possible).

<sup>21</sup> Scheuner 1963 *VVDStRL* 125.

<sup>22</sup> Hesse 1993 *Grundzüge des Verfassungsrechts* 27.

<sup>23</sup> Lerche "Grundrechtsschranken" 777.

<sup>24</sup> Hesse 1993 *Grundzüge des Verfassungsrechts* 27.

<sup>25</sup> Stern *Staatsrecht* 133.

<sup>26</sup> B23-B-2011 (*Use of Official Languages Bill*, 2011 (Gen N 737 of GG 34675 of 12 October 2011)). In the course of the public hearings on the Bill, the chairperson of the Portfolio Committee on Arts and Culture mooted the idea that one of the languages designated for official use must always be an indigenous language. She is reported to have said that "perhaps consideration should be given to making it mandatory that one of the languages was an 'African language' as in every province, bar KwaZulu-Natal (KZN), English and Afrikaans would always be present. These were realities that needed to be raised and addressed" (PMG 2011 <http://bit.ly/ZQrEO5> 2). The Department of Arts and Culture took up the suggestion and included the proposal that one of the official languages must be an indigenous language in its submissions before the Committee (Department of Arts and Culture 2012 <http://bit.ly/112daQ8> para 7.3). This culminated in a proposed amendment which provided that a language policy must identify at least three official languages that the national department, national public entity or national

illustrate how competing language interests are involved in attempts to simultaneously implement the values implied in the directive principles of affording languages equitable treatment and parity of esteem on the one hand and the development of disadvantaged languages on the other hand.<sup>27</sup> For the Constitution to realise its integrative potential, such choices require an awareness of the pitfalls of approaches which lead to marginalisation and exclusion. In *Makwanyane*<sup>28</sup> Sachs J therefore cautioned that "[w]hatever the status of earlier legislation and jurisprudence may be, the Constitution speaks for the whole of society and not just one section".<sup>29</sup>

The following discussion will consider the implications for an understanding of section 6 of interpretively embedding a provision in the underlying basic values of the *Constitution* and reading that provision within the context of the *Constitution* as a whole, in order to preserve the latter's normative unity. It will be argued that such a contextual analysis will confirm the official language clause as a manifestation of an unambiguous larger commitment to an inclusive and accommodative approach to diversity. The commitment to inclusive linguistic diversity ought therefore to occupy the normative centre of section 6. The constitutional analysis will provide the background for the consideration of how the Act has given body to this commitment in its interpretation of the section 6 instruction to regulate and monitor the use of official languages. This involves an inquiry into both the extent to which inclusive

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public enterprise will use for the purposes of government, provided that at least two of the official languages identified must be indigenous languages of historically diminished use and status. The amendment was later abandoned, after widespread criticism because it could effectively have ruled out the use of Afrikaans as an official language, and replaced by the provision which requires at least three languages to be designated for official use, coupled with the proviso that in making the choice, the diminished use and status of the indigenous languages must be given due consideration.

<sup>27</sup> This issue will be referred to again later.

<sup>28</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 362.

<sup>29</sup> See also: *Democratic Alliance v Masondo* 2003 2 SA 413 (CC) para 42: "It was through dialogue and sensible accommodation on an inclusive and principled basis that the Constitution itself emerged. It would accordingly be perverse to construe its terms in a way that belied or minimised the importance of the very inclusive process that led to its adoption, and sustains its legitimacy"; *Ex parte Gauteng Provincial Legislature: In re: Dispute Concerning the Constitutionality of Certain Provisions of the School Education Bill of 1995* 1996 3 SA 165 (CC) para 52: "The objective should not be to set the principle of equality against that of cultural diversity, but rather to harmonise the two in the interest of both. Democracy in a pluralist society should accordingly not mean the end of cultural diversity, but rather its guarantee, accomplished on the secure basis of justice and equity."

linguistic diversity defines the main objectives of the Act, as well as its institutionalisation in the implementation forms and structures envisaged by the Act.

## 2 Constitutional analysis

Since section 6 is about linguistic diversity, one way to go about ensuring that a particular reading of it promotes the foundational values of the *Constitution* and their coherence is to investigate how the *Constitution* positions itself in respect of diversity generally. If this should reveal a context-transcending principle, an exceptionalist approach in respect of section 6 would require a justification based on either unambiguous textual support or some alternative view of the principle governing official language use. Such an alternative must, however, itself be in harmony with the *Constitution's* "objective value system".

### 2.1 Equality, dignity and citizenship

Logically, an inquiry into the *Constitution's* message regarding diversity must start with the principle of equality. Apart from the fact that equality is expressly referred to as a founding principle of the *Constitution*,<sup>30</sup> it is within a constitution's notion of equality that its defining normative position towards the treatment of difference is located.

Already a superficial textual survey of section 9 points towards a predisposition in favour of broad inclusive diversity. The prohibited grounds of discrimination listed in section 9(3) represent an unusually extensive catalogue of the kinds of difference that the *Constitution* considers worthy of protection, of which linguistic diversity is one. In *Harksen v Lane*<sup>31</sup> the Constitutional Court held that what these grounds have in common is that they have been misused in the past to categorise, marginalise and

<sup>30</sup> Sections 1, 7, 36 and 39 of the *Constitution*. The Constitutional Court has frequently highlighted the centrality of the promotion of equality to the *Constitution's* objectives. See in this regard eg *S v Makwanyane* 1995 3 SA 391 (CC) paras 155-156, 262; *Brink v Kitshoff* 1996 4 SA 197 (CC) para 33; *Shabalala v Attorney-General, Transvaal* 1996 1 SA 725 (CC) para 26; *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC) para 20; *President of the RSA v Hugo* 1997 6 BCLR 708 (CC) para 74; *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 22.

<sup>31</sup> *Harksen v Lane* 1998 1 SA 300 (CC) para 50.

often oppress persons who have been associated with these attributes or characteristics. These grounds "have the potential, when manipulated, to demean persons in their inherent humanity and dignity". Because of this, the catalogue of prohibited grounds of discrimination is explicitly open-ended, since all kinds of diversity linked to "attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to treat them adversely in a comparably serious manner" are in principle afforded protection.<sup>32</sup>

The apparent textual message of inclusive diversity has been confirmed by the Constitutional Court's conceptualisation of the right to and value of equality. It has rejected a formal conception of equality in favour of the idea of substantive equality.<sup>33</sup> The Court explained its preference for the latter as the result of both the country's history<sup>34</sup> and the underlying values of the *Constitution*.<sup>35</sup> One consequence of this approach is the strong emphasis that the Court has placed on remedial or restitutive measures<sup>36</sup> to address the "stark social and economic disparities" which still plague the country as a result of its discriminatory past.<sup>37</sup> In addition to the remedial dimension, the Court – because of both the transformative historical vision and the acceptance of the value of human dignity<sup>38</sup> as core concepts underpinning

<sup>32</sup> *Harksen v Lane* 1998 1 SA 300 (CC) para 54.

<sup>33</sup> *Brink v Kitshoff* 1996 4 SA 197 (CC) paras 31-44; *President of the RSA v Hugo* 1997 4 SA 1 (CC) para 41; *Harksen v Lane* 1998 1 SA 300 (CC) para 51; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 62.

<sup>34</sup> In *Minister of Finance Van Heerden* 2004 6 SA 121 (CC) para 26 the Court said that "[t]he equality clause took shape against the backdrop of a society 'deeply divided, vastly unequal and uncaring of human worth', which produced a legacy of persistent and systemic under-privilege". See also *Brink v Kitshoff* 1996 4 SA 197 (CC) para 40; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) paras 60-61; *S v Makwanyane* 1995 3 SA 391 (CC) paras 10, 39, 218, 307 and 322; *Shabalala v Attorney-General, Transvaal* 1996 1 SA 725 (CC) para 26; *Azanian Peoples Organisation v President of the RSA* 1996 4 SA 671 (CC) para 31.

<sup>35</sup> *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 26. The Court referred to social justice, the aspirational objectives of restoring and protecting the equal worth of everyone, the creation of a non-racial, non-sexist society underpinned by human dignity, and the improvement of the quality of life of everyone.

<sup>36</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) paras 60-61; *Minister of Finance Van Heerden* 2004 6 SA 121 (CC) para 30.

<sup>37</sup> *Minister of Finance Van Heerden* 2004 6 SA 121 (CC) para 23. See also para 31: only by means of a positive commitment "progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege" can the constitutional promise of equality before the law and its equal protection and benefit be realised.

<sup>38</sup> O'Regan J comments in *S v Makwanyane* 1995 3 SA 391 (CC) para 328: "The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are

the notion of equality<sup>39</sup> – has also distanced itself from the ambivalent evaluation of difference associated with formal conceptions of equality. As Fredman<sup>40</sup> explains, since formal equality in principle commits to an individualist uniformity or sameness of treatment, it is conceptually averse to forms of differential treatment necessary to affirm or accommodate difference. Understanding equality in this way could result in "collapsing the principle of equality into one of sameness, devaluing difference and endorsing assimilation and conformity". Therefore, one of the central features of the Constitutional Court's equality jurisprudence is the "recognition of difference as a positive feature of society".<sup>41</sup> In *MEC for Education KwaZulu-Natal v Pillay*<sup>42</sup> Langa CJ confirmed the *Constitution's* commitment to affirming diversity as follows:

It is a commitment that is totally in accord with this nation's decisive break from its history of intolerance and exclusion.... [O]ur constitutional project... not only affirms diversity, but promotes and celebrates it. We cannot celebrate diversity by permitting it only when no other option remains.<sup>43</sup>

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entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in Chapter 3."

<sup>39</sup> Fredman *Discrimination and Human Rights* 15 (the positive affirmation and accommodation of difference is part and parcel of the right to equal concern and respect of difference). The Constitutional Court has frequently emphasised the centrality of the concept of dignity and self-worth to the idea of equality: *President of the RSA v Hugo* 1997 4 SA 1 (CC) para 41; *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) paras 31-3; *Harksen v Lane* 1998 1 SA 300 (CC) para 50.

<sup>40</sup> Fredman *Discrimination and Human Rights* 17. See also Ngwenya *Disabled People* 399 *et seq.*

<sup>41</sup> Albertyn 2007 *SAJHR* 258. See also *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 131: "It is no exaggeration to say that the success of the whole constitutional endeavour in South Africa will depend in large measure on how successfully sameness and difference are reconciled"; and at para 134: "What becomes normal in an open society, then, is not an imposed and standardised form of behaviour that refuses to acknowledge difference, but the acceptance of the principle of difference itself, which accepts the variability of human behaviour"; *Pillay v KwaZulu-Natal MEC of Education* 2006 10 BCLR 1237 (N) para 41: "Substantive equality involves understanding that equality includes a recognition of difference"; and at para 46: "the recognition of the cultural diversity of people by judicial officers helps to construct a society in which difference and diversity are not tied to prejudice and disadvantage but are affirmed and celebrated"; *Robinson v Volks* 2004 6 BCLR 671 (C) 682: "our constitutional society recognises the dignity of difference"; *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) para 49: "Stripped of its association with race and political dominance, cultural diversity becomes an enriching force which merits constitutional protection, thereby enabling the specific contribution of each to become part of the patrimony of the whole"; *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC) para 60: "Equality means equal concern and respect across difference".

<sup>42</sup> *MEC for Education, KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC).

<sup>43</sup> *MEC for Education KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) para 65. See also para 92: "our Constitution does not tolerate diversity as a necessary evil, but affirms it as one of the primary treasures of our nation."

The Constitutional Court has recognised the unique potential of dignity as the foundation of substantive equality, and as being able to enhance the latter principle's potential for the positive accommodation of diversity. This point is emphasised by Sachs J in *National Coalition for Gay and Lesbian Equality v Minister of Justice*<sup>44</sup> in his response to criticism of the Court's linkage of equality and dignity. The right and value of equality, when informed by the imperative of affording all persons equal respect and concern, functions as a bulwark against enforced uniformity:

[E]quality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not pre-suppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment. At best, it celebrates the vitality that difference brings to any society.<sup>45</sup>

In light of the above, Du Plessis claims that the Constitutional Court's jurisprudence has the makings of a "jurisprudence of difference", taking its cue from what some political theorists have referred to as a politics of difference.<sup>46</sup> Such jurisprudence "affirms and, indeed, celebrates the Other beyond the confines of mere tolerance or even magnanimous recognition and acceptance".<sup>47</sup>

Ngwena notes that the Constitutional Court has also underpinned the affirmation of difference with reference to the notion of a "common or equal citizenship".<sup>48</sup> A

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<sup>44</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC).

<sup>45</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 132. In para 134 Sachs J stresses the "acceptance of the principle of difference itself, which accepts the variability of human behaviour".

<sup>46</sup> Du Plessis 2009 PER 11. He refers here in particular to the work of Young *Justice and the Politics of Difference*. Young argues (173) that "[a] goal of social justice...is social equality. Equality refers not primarily to the distribution of social goods, though distributions are certainly entailed by social equality. It refers primarily to the full participation and inclusion of everyone in a society's major institutions, and the socially supported substantive opportunity for all to develop and exercise their capacities and realize their choices".

<sup>47</sup> Du Plessis 2009 PER 26.

<sup>48</sup> Ngwena *Disabled People* 166 *et seq.* See also *August v Electoral Commission* 1999 3 SA 1 (CC) para 17: "The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood"; *National Coalition for Gay and*

characteristic of full citizenship is that it is bestowed upon those that are full members of a given historical community so that they stand equal with respect not only to duties but more crucially the rights that are bestowed by citizenship status.<sup>49</sup> In sharp distinction to the exclusionary and discriminatory past, the trajectory under the new constitutional dispensation clearly points in the opposite direction: "an expansive, transformative, but yet to be completely concretised cosmopolitan notion of citizenship."<sup>50</sup> In *Minister of Home Affairs v Fourie*<sup>51</sup> the Constitutional Court held that:<sup>52</sup>

The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation.

Ngwena draws from the work of Martha Minow,<sup>53</sup> who develops a thesis of difference that has inclusive citizenship as its goal. He points out that the paradigm shift in the perception of difference that Minow propagates is a turn from a focus on differentiating between people for the purpose of creating boundaries to a focus on differentiating in order to create positive relationships, which she calls the social relations approach.<sup>54</sup> If substantive equality and inclusive citizenship are taken seriously, forms of categorisation which have the effect of legitimising status subordination should reflexively become a cause for alarm. As Ngwena argues, what

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*Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 134: "The acknowledgment and acceptance of difference is particularly important in our country where group membership has been the basis of express advantage and disadvantage. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people as they are".

<sup>49</sup> Section 3 of the *Constitution* proclaims "a common South Africa citizenship" as a foundational value. This entails that citizens are "equally entitled to the rights, privileges and benefits of citizenship; and equally subject to the duties and responsibilities of citizenship". See *Kaunda v President of the Republic of South Africa* 2004 10 BCLR 1009 (CC) paras 237-238. The right not to be deprived of citizenship is guaranteed in s 20 of the *Constitution*.

<sup>50</sup> Ngwena *Disabled People* 167. See also Ngwena and Pretorius 2012 *SAJHR* 81-115.

<sup>51</sup> *Minister of Home Affairs v Fourie* 2006 3 BCLR 355 (CC).

<sup>52</sup> *Minister of Home Affairs v Fourie* 2006 3 BCLR 355 (CC) para 60. See also *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 127: "it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group".

<sup>53</sup> Minow *Making All the Difference* 110, 173-224.

<sup>54</sup> See also Botha 2003 *TSAR* 20 (constructing categories in relational terms implies consciousness of the constitutional imperatives of respecting the human dignity and equality of all).

should be guarded against are thought processes guided by "the logic of social group reductionism that draws its impulse from cultural and institutional modes of social division that have historically been oppressive".<sup>55</sup> Constitutionally, what is important is not categorisation or the recognition of difference *per se*, but to avoid negative hierarchical categorisation which affords "legitimacy to social constructions of difference that are historically privileged and are used, or can be used, to create and sustain hierarchical human essences as apartheid shamelessly did".<sup>56</sup> Our own history testifies to the fact that categorisation is not a random process devoid of any value system and normative implications.<sup>57</sup> It can be invoked for benevolent as well as malevolent purposes to enable or disable, to maximise or minimise the life chances of groups relative to another. The notions of inclusive citizenship and substantive equality

beckon us towards a theory of relational differentiation or categorisation that is acutely responsive to the ethics of erasing systemic inequality, respecting human dignity and banishing master dichotomies and their universes of superior and subordinate social castes.<sup>58</sup>

Fredman's conceptualisation of equality<sup>59</sup> sums up the main dimensions of a substantive notion of equality informed by the affirmation of human dignity and equal citizenship. She identifies four specific substantive equality aims:

First, substantive equality should aim to break the cycle of disadvantage associated with outgroups. Second, it should promote respect for the equal dignity and worth of all, thereby redressing stigma, stereotyping, humiliation and violence because of membership of an out-group. Third, it should entail positive affirmation and celebration of identity within community, and, finally, it should facilitate full participation in society.

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<sup>55</sup> Ngwena and Pretorius 2012 *SAJHR* 112.

<sup>56</sup> Ngwena *Disabled People* 84.

<sup>57</sup> Ngwena *Disabled People* 110.

<sup>58</sup> Ngwena *Disabled People* 84.

<sup>59</sup> Fredman 2005 *SAJHR* 167. See also Fredman *Discrimination and Human Rights* 15.

Fredman's framework provides a useful basis for formulating some conclusions regarding the interpretation of section 6 of the *Constitution* in the light of the underlying foundational constitutional values of equality, dignity and citizenship, and the notion of inclusive diversity that they inspire. Firstly, the unequivocal constitutional affirmation of diversity – or the acceptance of the "principle of difference" itself, as Sachs J called it<sup>60</sup> – requires language choices to be driven by an impulse of affirmation rather than negation and the exclusion of linguistic diversity. Albertyn writes that part of the project of realising substantive equality is the untying of difference from hierarchies, exclusion and disadvantage.<sup>61</sup> Fundamental to the transformative mission of the Constitution is the "ability to establish or facilitate new and non-hierarchical normative frameworks of participation and social inclusion".<sup>62</sup> To paraphrase Ngwena, section 9 of the *Constitution's* message is that language is meant to be a category of inclusion, rather than exclusion, and the acceptance of diversity rather than a hierarchy of linguistic forms.<sup>63</sup> Substantive equality's emphasis on inclusivity prevents linguistic difference from becoming entangled in strategic power discourses in which groups are distinguished and positioned against one another, or for linguistic difference from becoming strategically necessary for the maintenance or consolidation of political power in institutional or ideological forms.<sup>64</sup>

Secondly, the existence of the element of dignity in the concept of equality has important consequences for an understanding of the directive principles of equitable treatment, parity of esteem, the development of historically diminished indigenous languages and promoting and ensuring respect for non-official community and religious languages. The phrases "parity of esteem" and "the promotion and assurance of respect" are in themselves already explicit dignity-related expressions.<sup>65</sup> They (together with the other directives referred to above) acquire

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<sup>60</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 134.

<sup>61</sup> Albertyn 2007 *SAJHR* 260.

<sup>62</sup> Albertyn 2007 *SAJHR* 260.

<sup>63</sup> Ngwena *Disabled People* 105.

<sup>64</sup> Ngwena *Disabled People* 102.

<sup>65</sup> See *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 3 SA 165 (CC) para 47 per Sachs J: "all languages [are] not simply a means of communication and instruction, but a central

even more constitutional pungency when their relation to the rights and values of human dignity and substantive equality – of which they are a particular contextual expression – is kept in mind. This relationship affords them a special status at the centre of the *Constitution's* normative core. Directive principles of state policy of this kind, which overlap with and are particularised expressions of the foundational principles of the *Constitution*, must therefore be accorded high priority, even though they do not lead to directly enforceable individual claims under all circumstances.<sup>66</sup> Bolstered by the principle of the supremacy of the *Constitution*, they nevertheless are clearly binding instructions which require at the very minimum reasonable measures of realisation.

Thirdly, the remedial dimension of substantive equality referred to above – in conjunction with the value of dignity – serves to sharpen the senses for the full normative implications of the directive principle of elevating the status and advancing the use of the historically diminished indigenous languages. This developmental directive is integrally part and parcel of the broad transformative (remedial or restitutive) project inherent in the notion of substantive equality. As a prelude to the developmental directive, section 6(2) therefore starts with the recognition of the need to redress the "historically diminished use and status of the indigenous languages of our people." The state must take practical and positive measures to elevate their status and advance their use. Section 6(2) signals a clear intention to address the consequences of at least two of the paradigms which underpinned the language policy and practices of the apartheid era, namely the ethnically determined geographical fragmentation of language rights and the privileged position of languages of European origin (English and Afrikaans). In terms of the first paradigm, indigenous African languages found official recognition only

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element of community cohesion and identification for a distinct community in South Africa." The link between equality, dignity and the affirmation of identity implied in respecting linguistic rights is also stressed in the *Oslo Recommendations on the Linguistic Rights of National Minorities* (1998) (OSCE 1998 <http://bit.ly/16Ai339>). In the explanatory note, it is said that "[e]quality in dignity and rights presupposes respect for the individual's identity as a human being. Language is one of the most fundamental components of human identity. Hence, respect for a person's dignity is intimately connected with respect for the person's identity and consequently for the person's language".

<sup>66</sup> Du Plessis and Pretorius 2000 *SAPR/PL* 514-515.

within the geographical confines of the nominally independent or self-governing ethnic "homelands". In terms of the second paradigm, the equal treatment of languages in the rest of South Africa was limited to the equal treatment of the two European languages, Afrikaans and English.<sup>67</sup>

## 2.2 Proportionality

The principle of proportionality is textually located in section 36 of the *Constitution*, which sets out the conditions under which the rights recognised in the Bill of Rights may be limited.<sup>68</sup> It is therefore intimately connected with the effective realisation of fundamental rights, a fact recognised in other jurisdictions also.<sup>69</sup> Proportionality's importance in this context alone therefore justifies classifying it as a foundational principle. As such, it is clearly relevant to measures implementing the language provisions of section 6. Although section 6 falls outside the Bill of Rights and by implication section 36, its implementation – as the above analysis has shown – necessarily involves competing official language claims which overlap with and are inextricably linked to the competing claims of other fundamental rights (eg equality, dignity, citizenship). Proportionality is therefore relevant as the fundamental constitutional principle governing competing claims of this nature.

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<sup>67</sup> Du Plessis and Pretorius 2000 *SAPR/PL* 515. The promise of s 6(2) for the elevation of the official use of the indigenous languages remains, however, largely unfulfilled. Whereas the privileged position of Afrikaans as an official language has diminished considerably since 1994, English has acquired the *de facto* status of the official *lingua franca*. See in this respect Malan 2012 *LitNet Akademies* 59-62.

<sup>68</sup> See *S v Makwanyane* 1995 3 SA 391 (CC) para 104 (the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality); *Harksen v Lane* 1998 1 SA 300 (CC) para 5 (the limitations clause will involve a weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality); *Sonderup v Tondelli* 2001 1 SA 1171 (CC) para 29 (s 36 of the Constitution requires an analysis of proportionality and a weighing up of the relevant factors).

<sup>69</sup> The German Federal Constitutional Court has depicted proportionality as a principle derived from the very nature of fundamental constitutional rights, since the latter express the general claim of citizens not to be restricted by public authorities more than is necessary in the public interest in the exercise of their freedoms (*BVerfGE* 65, 1 (44); *BVerfGE* 19, 342 (348 *et seq*). Beatty *Ultimate Rule of Law* 114 links proportionality not only to the concept of rights but also to the rule of law more generally.

Proportionality's role as an integrative principle for competing fundamental rights claims is, however, only part of its broader foundational constitutional function when viewed from the perspective of the socio-political integrative role that all constitutions have to perform in order to be effective.<sup>70</sup> This constitutional function underlies, as was noted above, the notion of the constitution as embodying a coherent, interrelated and interdependent normative structure. If a constitution is to function as such, it needs to maintain a proportional balance between competing constitutional goods (values, principles, rights and interests). Beatty argues that without a principled way of reconciling the competing goods that are part of every case, a constitution would quickly become "encrusted in a jurisprudence of confusion and contradiction and courts would themselves become one of the 'naked power organs' they were meant to suppress".<sup>71</sup> His comparative analysis of a number of jurisdictions shows that all constitutional integrative principles (such as reasonableness<sup>72</sup> or fairness<sup>73</sup>) operate with some element of proportionality at their conceptual core.

Given its comprehensive role, some commentators consider the principle of proportionality as central to a constitutional democracy.<sup>74</sup> In the case of the South African *Constitution*, the latter is expressed in the notion of "an open and democratic society based on human dignity, equality and freedom", ie the integrative normative ideal to which South Africa constitutionally aspires.<sup>75</sup> Proportionality is instrumentally

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<sup>70</sup> For an overview of the wide applicability of "proportionality principles" in different domains of the law, see Sullivan and Frase *Proportionality Principles*.

<sup>71</sup> Beatty *Ultimate Rule of Law* 163.

<sup>72</sup> See Sachs J in *Minister of Health v New Clicks SA (Pty) Ltd* 2006 2 SA 311 (CC) para 637: "Proportionality will always be a significant element of reasonableness". Sullivan and Frase *Proportionality Principles* 3 argue that proportionality in one form or another is engaged whenever government intrusion excessively invades individual rights, or whenever individual action invades the rights of others, or even when governmental action unduly invades the powers of another branch or level of government. For the relationship between reasonableness and proportionality in administrative law review, see Hoexter *Administrative law* 309-312.

<sup>73</sup> For a discussion of the element of proportional balancing inherent in the application of the fairness test in terms of s 9(3) of the *Constitution*, see Pretorius 2010 *SAJHR* 552-553.

<sup>74</sup> Beatty *Ultimate Rule of Law* 163: "The fact is that proportionality is an integral, indispensable part of every constitution that subordinates the system of government it creates to the rule of law. It is constitutive of their structure, an integral part of every constitution by virtue of their status as the supreme law within the nation state."

<sup>75</sup> Sachs J in *Coetzee v Government of the Republic of South Africa* 1995 4 SA 631 (CC) para 46, with reference to the notion of an open and democratic society, remarked: "The notion of an open and democratic society is thus not merely aspirational or decorative, it is normative,

linked to the rule of law and an essential safeguard against the abuse of power. It embodies the fundamental principle that government actions should not be demonstrably excessive relative to their moral and practical justifications.<sup>76</sup>

Expressed in its broadest and most abstract sense, proportionality is – as the legal theorist Robert Alexy argues – a principle of optimisation.<sup>77</sup> Its function is to optimally facilitate the realisation-potential of constitutional values or principles in concrete cases. All constitutional values and principles share the characteristic of being norms which must be realised optimally, ie to the greatest extent possible.<sup>78</sup> He argues that

principles are norms which require that something be realized to the greatest extent possible given their legal and factual possibilities. Principles are optimization requirements characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible. The scope of the legally possible is determined by opposing principles and rules.<sup>79</sup>

It is the primary function of the proportionality principle to relate competing constitutional values or principles and their correlative rights or interests optimally to one another in the context of the circumstances of a particular case.<sup>80</sup> This is well captured in the notion of "practical concordance", which the German Federal Constitutional Court has adopted in following Hesse to guide its judgment in cases involving competing rights claims.<sup>81</sup> It requires that contending constitutional goods must be harmonised in a way "that will preserve as much of each of them as is possible".<sup>82</sup> To comply with this principle, the state bears the burden of

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furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply and the final measure we use for testing the legitimacy of impugned norms and conduct."

<sup>76</sup> Sullivan and Frase *Proportionality Principles* 6.

<sup>77</sup> Alexy *Theory of Constitutional Rights* 66. This also shows proportionality's relationship with the rule of law as supremacy of the constitution: ie optimisation is what is required if all constitutionally endorsed values and principles are truly taken seriously.

<sup>78</sup> Kumm 2004 *IJCL* 579.

<sup>79</sup> Alexy *Theory of Constitutional Rights* 47-8.

<sup>80</sup> See Chapman 2010 *UTLJ* 177-196.

<sup>81</sup> Beatty *Ultimate Rule of Law* 45-49 discusses some of the cases where the German Federal Constitutional Court has applied this principle.

<sup>82</sup> Beatty *Ultimate Rule of Law* 46.

demonstrating that "it has reached an 'optimisation of the affected conflicting interests' and has avoided policies that are 'excessive'".<sup>83</sup>

Alexy subscribes to the standard three-pronged version of the proportionality test, namely suitability, necessity and proportionality in its narrow sense.<sup>84</sup> The requirement of "suitability" entails that a measure that restricts a principle must be closely connected to the realisation of another normative principle.<sup>85</sup> Secondly, "necessity" involves that if a principle could be equally effectively realised by more than one means, the measure least intrusive of the infringed principle must be selected.<sup>86</sup> The third element is referred to as "balancing in the narrow sense". It involves a process of assessing the relative "weight" of the substantive considerations underlying each competing principle in the circumstances of a given case.<sup>87</sup> The important point to note is that the analytical elements of the proportionality test are individually and collectively focused on the imperative of realising competing constitutional values or principles to the greatest extent possible.<sup>88</sup> The first two requirements (suitability and necessity) focus on empirical concerns, demanding that values or principles be realised to the greatest extent that

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<sup>83</sup> Beatty *Ultimate Rule of Law* 46.

<sup>84</sup> Alexy *Theory of Constitutional Rights* 66. Although s 36 of the South African *Constitution* is not worded in this specific form and is not applied in the same logical sequence, it is submitted that in substance the same basic analytical elements are present. See *S v Makwanyane* 1995 3 SA 391 (CC) fn 130: "A proportionality test is applied to the limitation of fundamental rights by the Canadian courts, the German Federal Constitutional Court and the European Court of Human Rights. Although the approach of these Courts to proportionality is not identical, all recognise that proportionality is an essential requirement of any legitimate limitation of an entrenched right. Proportionality is also inherent in the different levels of scrutiny applied by United States courts to governmental action."

<sup>85</sup> In s 36 of the South African *Constitution* this aspect of proportionality is contained in the requirement that the limitation of a right must be closely connected to the purpose it seeks to achieve (Bilchitz 2010 *SAPR/PL* 426).

<sup>86</sup> Section 36 of the South African *Constitution* also stipulates as one of the factors for contextualising the justifiability of limitations of human rights a consideration of whether or not the purpose of the limitation could have been achieved by less restrictive means.

<sup>87</sup> Alexy *Theory of Constitutional Rights* 67. In *S v Makwanyane* 1995 3 SA 391 (CC) para 104 Chaskalson P said that "[t]he limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality".

<sup>88</sup> Alexy 2005 *IJCL* 572-573: "All these principles give expression to the idea of optimization. Interpreting constitutional rights in light of the principle of proportionality is to treat constitutional rights as optimization requirements, that is, as principles, not simply as rules. As optimization requirements, principles are norms requiring that something be realized to the greatest extent possible, given the factual and legal possibilities."

is factually possible. The third requirement (balancing) is normative, requiring that they be realised to the greatest extent in the light of countervailing norms.<sup>89</sup>

Applied to section 6 of the *Constitution*, proportionality demands in general that the principle of inclusive linguistic diversity expressed in the official language clause must be related to other competing values, principles or considerations in a way which is non-reductionist and non-hierarchical. Non-reductionism requires that competing constitutional goods should be related to one another in a way which "preserves [their] plurality ... without reducing one ... into another and without lumping all of them together into some common space (like utility) that denies their plurality".<sup>90</sup> Non-hierarchical relatedness means that constitutional goods must not be pitched against each other in terms of an arbitrary abstract rank order. With reference to the case law of the German Federal Constitutional Court Beatty suggests that the proper approach to follow in order to attain the appropriate balance is "that no one of the conflicting legal positions be preferred and maximally asserted, but all given as protective as possible an arrangement".<sup>91</sup>

In more specific terms, the principle of proportionality seems especially relevant regarding two problematic areas of the application of the official language clause. The first concerns the relationship of the directive principles of state language policy (parity of esteem, equitable treatment and the development of indigenous languages) to practical considerations which may stand in the way of their optimal realisation at a given moment in time. Section 6(3)(a) provides that in the actual choice of language for government use, cognisance should be taken of factors such as usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population. It was seen above that the proportionality requirements of suitability and necessity have the objective of steering this relationship in the direction of an outcome in which principles are realised to the greatest extent that is practically possible. If section 6 contains an unequivocal commitment to inclusive diversity, the qualifying factors cannot be accorded a

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<sup>89</sup> Kumm 2004 *IJCL* 579.

<sup>90</sup> Chapman 2010 *UTLJ* 188.

<sup>91</sup> Beatty *Ultimate Rule of Law* 47.

function which diverts the focus from the realisation of the directive principles of state language policy. They can therefore not be allowed to dictate language choices on the same level as the directive principles or undermine the official status of languages.<sup>92</sup> Their function is to keep language claims based on those directive principles within reasonable bounds by indicating a relevant contextual framework for balancing competing language demands, or integrating language claims with other constitutionally recognised interests. What would be wrong, however, is to treat the practical factors as constituting an unalterable factual environment for the exercise of language rights, which must be accepted as a given state of affairs. If need be, it is this very factual environment which the directive principles are meant to transform in order to make it progressively more accommodative of and conducive to official language diversity.

To ascribe normative compulsion to the practical factors as such is to turn their relationship with the directives on its head. This is quite clear in the case of the development directive. The mere fact that a particular language is under-developed, or has historically enjoyed no or only modest popular preference as an official language, or would require the allocation of considerable resources to become an eligible candidate for official use, does not justify inaction as far as the constitutional instruction to take practical and positive measures to elevate its status and advance its use is concerned. The same applies to the other directive principles. Parity of esteem, for instance, also seems to harbour an element of progressive realisation, which in the context of the language clause means the creation of conditions promoting inclusive linguistic diversity. As argued elsewhere,<sup>93</sup> in view of the marked differences in historical privilege and levels of development, parity of esteem is not a state of affairs to be maintained, but a goal to be achieved. This may require progressively upgrading the use of previously excluded or underdeveloped languages in key aspects of the process of legislation, in the courts and in public administration. Parity of esteem sets as a goal the achievement of a state of affairs where each official language has attained the status of a regular and visible medium

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<sup>92</sup> Du Plessis and Pretorius 2000 *SAPR/PL* 526.

<sup>93</sup> Du Plessis and Pretorius 2000 *SAPR/PL* 520.

of official communication. It is clearly incompatible with language domination or hierarchisation, as well as with official monolingualism.

The second aspect concerns the interrelationship of the directive principles themselves. As was noted above, the controversy surrounding the proposed amendment to section 4(b) of the *Use of Official Languages Bill* has illustrated the extent to which the directive principles themselves can be perceived to contradict one another. The attempt to give effect to the directive of enhancing the status and use of the historically diminished indigenous languages was believed to require a choice incompatible with simultaneously respecting the parity of esteem and equitable treatment of Afrikaans. The proportionality principle requires a mindset that refrains from approaching competing principles and the rights or interests they represent in such oppositional terms. As was explained earlier, proportionality strives for an outcome where values or principles are related to one another in a way which confirms their constitutional status by affording to each of them optimal realisation in the given circumstances. This means that they are always mutually – and never unilaterally – limiting *vis a vis* one another. This is what Beatty means when he writes that proportionality requires that "no one of the conflicting legal positions be preferred and maximally asserted, but all given as protective as possible an arrangement",<sup>94</sup> or what Hesse attempted to express in the principle of practical concordance, which envisages that in order for the realisation potential of all competing constitutionally recognised goods to be optimised, all must be set limits in order that all may acquire optimal efficacy.<sup>95</sup>

Against the background of this constitutional analysis, the Act itself can be evaluated next. The main focus is on the prominence attached to the promotion of inclusive linguistic diversity (or multilingualism) in the Act. This cannot be deduced only from the rhetorical affirmation of inclusive linguistic diversity in the Act itself. What is more important is the institutional setting for and legal form in which this principle will be realised. It will appear that the Act reflects a limited normative understanding

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<sup>94</sup> Beatty *Ultimate Rule of Law* 47.

<sup>95</sup> Hesse *Grundzüge des Verfassungsrechts* 27.

of the constitutional instruction to "regulate and monitor language use". As a result, the Act is Spartan in supplying instructive normative standards for use in making official language choices. Instead, the responsibility for the latter has been entrusted to the policy functions of institutionally non-independent administrative organs within national state departments, public entities and enterprises, with largely advisory functions.

### **3 The Act's message regarding the promotion of multilingualism**

The preamble of the Act starts by confirming the official status of the eleven languages recognised as such in section 6(1) of the *Constitution*. It acknowledges the constitutional obligation that the "use of the Republic's official languages must be promoted and pursued", and reiterates the sections 6(2) and (4) directive principles. The directive principles, with the noted exception of the development directive, are again repeated in the section stipulating the objects of the Act. Section 2 provides that the Act aims to regulate and monitor the use of official languages for government purposes by national government; promote the parity of esteem and equitable treatment of official languages of the Republic; facilitate equitable access to the services provided by national government and the information available from it; and promote good language management by national government for efficient public service administration and to meet the needs of the public.

The true test for the saliency afforded to the promotion of inclusive linguistic diversity is, however, the extent to which this principle is institutionalised in the operational body of the Act as such. It appears that the real responsibility for decisions regarding official language use is located in the policy-making competence of administrative bodies. Section 4(1) obliges national departments, national public entities and enterprises to adopt within 18 months a language policy on their use of official languages for government purposes. The matters that must be addressed in the language policy include: identifying at least three official languages to be used; stipulating how official languages will be used in government communication,

notices, publications, etc; describing how the public will access language policy; providing a complaints mechanism to deal with the use of official languages; and describing how national government will communicate with members of the public whose language of choice is not one of the identified official languages or is South African Sign Language.

The important point to consider is therefore the Act's normative framework for policy formulation and the prominence that is accorded to the promotion of inclusive linguistic diversity in this respect. The Act expressly requires compliance with two guidelines only. Section 4(2)(a) provides that language policies must comply with the provisions of section 6(3) of the *Constitution* which, as has been noted above – apart from prescribing a minimum of two languages for official use – contains the practical factors to consider when making restrictive language choices. Thus, the emphasis placed on section 6(3) is not particularly encouraging. On its own, it is devoid of all inclusivity-specific guidelines, and when severed from the directive principles, it mandates unguided discretionary powers to limit official language use.

Seen from the perspective of inclusivity, the Act<sup>96</sup> does improve on section 6(3)(a) of the *Constitution* in one respect by prescribing the identification of at least three official languages that national departments, public entities and enterprises must use for government purposes.<sup>97</sup> This is followed (in section 4(3)) by the proviso that in identifying at least three official languages, every national department, national public entity and enterprise must take into account its obligation to take practical and positive measures to elevate the status and advance the use of indigenous languages of historically diminished use and status.

Unlike the development directive, the directive principles of the promotion of parity of esteem and the equitable treatment of official languages are not mentioned specifically as binding guidelines for official language policy-making in section 4. Instead, it is notable that the responsibility for the promotion of these two directive

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<sup>96</sup> Section 4(2)(b).

<sup>97</sup> Du Plessis 2012 <http://bit.ly/YghGr0> 19.

principles – which are most closely related to the promotion of multilingualism – has been expressly allocated to largely non-independent advisory and monitoring bodies. The language policies and practices of national departments, public entities and enterprises will be monitored by a national language unit and language units within the national departments, public enterprises and entities.<sup>98</sup> One of the functions of the National Language Unit is to advise the Minister of Arts and Culture on policy and strategy "to promote parity of esteem and equitable treatment of the official languages of the Republic and facilitate equitable access to the services and information of national departments, national public entities and national public enterprises".<sup>99</sup> Similarly, the departmental, public enterprise and entity language units have the advisory and monitoring function "to promote parity of esteem and equitable treatment of official languages of the Republic and facilitate equitable access to services and information of the national department, national public entity or national public enterprise concerned".<sup>100</sup>

Curiously, the directive principle of elevating the status and advancing the use of the historically diminished indigenous languages is absent from the list of functions of these bodies. This uneven treatment of the directive principles is puzzling. Only the development directive is explicitly given as a binding guideline for official language policy in section 4, but it is not included as a function of the language units. Omitted from the context of expressly listed binding policy guidelines, parity of esteem and equitable treatment are downgraded to the sphere of competence of advisory bodies. There is no constitutional basis for this apparent prioritisation, and it makes the Act's commitment to the promotion of multilingualism at best incoherent and at worst dubious.

The ambivalence regarding the promotion of multilingualism is echoed in official statements regarding the main objectives of the Act. There appears to be some confusion in the reasoning of the Department of Arts and Culture in this respect. On the one hand, spokespersons for the Department appear to situate the Act firmly

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<sup>98</sup> Sections 6 and 7.

<sup>99</sup> Section 6(1)(a)(ii).

<sup>100</sup> Section 8(e).

within the inclusive diversity vision of section 6 of the *Constitution*. For instance, the Director General described this as one of the "key principles" of the Act.<sup>101</sup> The Department's director of legal services echoed this sentiment in the Department's submissions to the Parliamentary Portfolio Committee on Arts and Culture: "the idea was that everyone would have a duty to advance multilingualism, as a constitutional obligation".<sup>102</sup> This was qualified somewhat by the reminder that the Act would be only one of the instruments used to promote multilingualism.<sup>103</sup> The Department was said to have opted to pursue inclusive multilingualism incrementally, unlike the 2003 *Language Act* which purportedly was "too wide". It was said that the Act must therefore be seen as a first step to "opening more doors" and as "providing a beginning which would eventually lead to the promotion, use and development of all official languages".<sup>104</sup>

On the other hand, however, spokespersons for the Department were at pains to distance the Act from such an ambitious objective. In the Department's submissions to the Portfolio Committee, it was contended that although the Department acknowledges the concerns relating to multilingualism and the application of section 6(2) of the Constitution, "this Bill is not the appropriate mechanism to address these concerns."<sup>105</sup> This was said in the context of responding to a submission that the Bill should include as its objective the promotion of multilingualism. In the opinion of the Department, the latter is the proper domain of the National Languages Policy Framework (2003), the Implementation Plan (2003) and the Pan South African

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<sup>101</sup> PMG 2011 <http://bit.ly/ZQrEO5> 2: "There were three key principles, which were the promotion of use of language, access to information and services, and good language management by government departments."

<sup>102</sup> PMG 2011 <http://bit.ly/ZQrEO5> 2.

<sup>103</sup> PMG 2011 <http://bit.ly/ZQrEO5> 2. See also Department of Arts and Culture 2012 <http://bit.ly/112daQ8> para 3.2: "It is evident that the provisions of section 6 give effect to Constitutional Principle CP XI that 'the diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged'."

<sup>104</sup> PMG 2012 <http://bit.ly/ZIxaAP> 4.

<sup>105</sup> Department of Arts and Culture 2012 <http://bit.ly/112daQ8> para 7.1. See also para 6.1.3: "there is no constitutional obligation on government to promulgate legislation to give effect to section 6(2) of the Constitution". The Deputy Minister for Arts and Culture is also reported to have stated that "[t]he Bill was secondary in terms of promoting multilingualism; the primary piece of legislation on this matter was the PanSALB Act. The drafters should look at drafting guiding principles that would link the two pieces of legislation and give effect to PanSALB" (PMG 2012 <http://bit.ly/ZIxaAP> 4).

Language Board.<sup>106</sup> The Minister is also credited with the astonishing remark that "[s]ince the PANSALB Act promoted multilingualism, the Bill could not do the same thing as this would cause duplication".<sup>107</sup> In terms of the Constitution<sup>108</sup> and its constituent act,<sup>109</sup> the Pan South African Language Board has a specific and limited language mandate which obviously does not cancel out the responsibility of other state organs to promote multilingualism. What is more, confining the constitutional obligation of the promotion of multilingualism to the advisory functions of the Pan South African Language Board would clearly imply downgrading a peremptory constitutional norm to a non-binding guideline.

#### **4 Relegating the most important normative choices regarding official language use to the domain of administrative policy-making**

Apart from the reference to the directive principles in the different contexts referred to above, the Act stipulates no other guiding norms for language policy. Most crucially, the Act does not provide any normative guidance of its own, either in the form of substantive guidelines or even interpretive guidance on the meaning of the constitutional directive principles of official language policy. The responsibility for making the most important normative choices regarding the use of official languages thus has not been reserved for the legislative process but has been assigned to administrative policy-making organs.

The fate of the 2003 *Languages Bill* has made it clear that it never was the intention of the government to be bound by legislation in this respect. As is common knowledge now, the Department of Arts and Culture presented the *South African Languages Bill* to the cabinet in 2003. This Bill gave a much more pronounced profile to the promotion of multilingualism as a binding constitutional obligation. It stated that one of its objects was to enable all South Africans to use the official languages

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<sup>106</sup> Department of Arts and Culture 2012 <http://bit.ly/112daQ8> para 7.1. See also PMG 2012 <http://bit.ly/ZIxaAP> 3: "Mr Paul Mashatile, Minister of the DAC said that he agreed that the issue of multilingualism was very important. The role of promoting multilingualism had to be played by PanSALB in addition to promoting, preserving and developing languages."

<sup>107</sup> PMG 2012 <http://bit.ly/ZIxaAP> 4.

<sup>108</sup> Section 6(5) of the *Constitution*.

<sup>109</sup> *Pan South African Language Board Act* 59 of 1995 (referred to as "the PanSALB Act").

of their choice "as a matter of right" within the range of contexts specified in the Bill (section 2). It contained an extensive list of guiding principles and more detailed guidance regarding language policy (section 5). Cabinet did not approve the Bill and requested the Minister of Arts and Culture, in consultation with the Minister of Justice and Constitutional Development, to investigate other non-legislative ways to regulate official language use for government purposes.<sup>110</sup>

The *Lourens* judgment<sup>111</sup> has, however, forced the government to come up with a language act of some sort. The Act has, nevertheless, in effect changed very little regarding the political choice of not incorporating binding normative standards for official language use in legislation.<sup>112</sup> The practical effect of the Act is that the latter is still a matter of policy, not legislation. Therefore, those who have depicted the Act as merely an organisational law are quite correct.<sup>113</sup> The Act simply has no normative message *of its own* regarding the critical standards for making official language choices, a fact which more than anything else accentuates the hollow victory that the *Lourens* judgment represents. This is reminiscent of a comment of Roux in a different context: "Values after all, provide standards against which conduct may be measured, whereas institutions are only valuable to the extent that they serve a valued purpose."<sup>114</sup>

Relegating the most important normative guidelines governing official language use to the domain of administrative policy-making rather than legislation is constitutionally questionable on a number of grounds. Firstly, although it is true that the *Constitution* does not limit the means of implementation of the instruction to "regulate and monitor the use of official languages" to legislation, one would have

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<sup>110</sup> PMG 2011 <http://bit.ly/ZQrEO5> 1.

<sup>111</sup> *Lourens v President van die RSA*, Unreported, Case No 49807/09, North Gauteng High Court.

<sup>112</sup> This was well appreciated by one of the Democratic Alliance's representatives on the Portfolio Committee (Dr Annelie Lotriet), who pointed out that "the Bill had been drafted to comply with the court order and not to promote multilingualism and address the language issue in South Africa" (PMG 2012 <http://bit.ly/ZIxaAP> 3).

<sup>113</sup> Du Plessis 2012 <http://bit.ly/YghGr0> 13. He contrasts the Act with a "national language law" and describes it as rather an "administrative language arrangement" (*administratiewe taalreëling*) or a "language scheme" (*taalskema*) in the vein of the Welsh Language Schemes or Language Measure.

<sup>114</sup> Roux "Democracy" 10-63.

expected core normative standards guiding the implementation of the directive principles to be embodied in a legal form with a binding force commensurate with the foundational nature of the constitutional principles involved. To have chosen the mechanism of administrative policy to bear the brunt of both the interpretive and implementation work does not demonstrate the legislature's commitment to the values underlying section 6 of the *Constitution*.

Secondly, this *modus operandi* is democratically deficient. Typically, decisions of a fundamental constitutional nature of this kind should enjoy maximum democratic legitimacy and therefore be the preserve of the legislature, and not be assigned to administrative organs. The South African Constitution does not expressly subscribe to a doctrine similar to the German notion of the *Gesetzesvorbehalt*<sup>115</sup> in terms of which fundamental decisions regarding the limitation of rights and other important constitutional positions are reserved for Parliament. However, this doctrine seems to reflect such a basic democratic sentiment that it is also relevant for South African constitutional law, which affords democracy pride of place amongst its foundational values.<sup>116</sup> Surrendering to administrative bodies the competence to make decisions which reflect relatively unfettered basic constitutional value judgments sidesteps the democratic guarantees of the legislative process in terms of *compulsory* publicity, broad public involvement and minority party participation.<sup>117</sup> These requirements have a democratic, legitimising function only if they are facilitated in the process where the fundamentally important decisions are made, which is not the case where Parliament abdicates its legislative responsibility in favour of executive or administrative bodies.

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<sup>115</sup> Article 20(3) of the *Basic Law of the Federal Republic of Germany*. See generally Hesse *Grundzüge des Verfassungsrechts* 83, 207-208; Leibholz, Rinck and Hesselbeger *Grundgesetz Kommentar* Vol 1 § 20 1026 *et seq*, Vol 2 §70 31 *et seq*.

<sup>116</sup> Section 1 of the *Constitution*.

<sup>117</sup> See Roux "Democracy" 10-38 *et seq*. Fredericks *Protection of Languages* 92-93 correctly argues that official language legislation must comply with the requirements laid down by the Constitutional Court in *Doctors for Life International v The Speaker of the National Assembly* 2006 6 SA 416 (CC). In that case the Court declared the impugned legislation invalid for failing to provide for public participation in the form of public hearings. The court interpreted the obligation to facilitate public participation (ss 59(1)(a), 72(1)(a) & 118(1)(a)) to be based on the constitutional commitment to democracy and the principles of accountability and transparency. See also *Matatiele Municipality v President of the Republic of South Africa* 2006 5 BCLR 622 (CC) para 110: "In our constitutional order, the legitimacy of laws made by Parliament comes not from awe, but from openness."

Thirdly, affording insufficiently normatively circumscribed discretionary power to administrative bodies compromises both the separation of powers and the principle of legal certainty as fundamental tenets of the rule of law. One important instance of how the legislature exercises its control function over the executive and administration – as part of the "checks and balances" that the separation of powers imply – is through the imposition of binding and sufficiently instructive standards circumscribing their discretionary powers.<sup>118</sup> This form of legislative control is also essential in providing stability and predictability and preventing arbitrary action regarding official language policy and practice across different national departments, public entities and enterprises.<sup>119</sup> By requiring "legislative and other measures" to regulate official language use, the Constitution acknowledges the complexity of the subject-matter and the need for more detailed regulatory instruments. Into this cannot be read an intention to place legislative and other measures on the same level and to negate the constitutionally endorsed guiding function of legislation in respect of "other measures".

## 5 Conclusion

In the final analysis the Act must be judged in terms of two fundamental considerations. Firstly, if Justice Sachs was correct that the principle of inclusivity shines through the language provisions of the *Constitution*, then the question is: does it shine through the Act, which after all was meant to implement those provisions? Secondly, does the Act represent clear progress in the quest for equity, clarity and predictability in official language use?

In spite of its proclaimed objectives, the Act envisages a flawed institutional setting for the promotion of official multilingualism. The primary responsibility for giving effect to the directive principles of state language policy has been entrusted to non-independent administrative organs within national state departments, national public

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<sup>118</sup> See Böckenförde "*Demokratie als Verfassungsprinzip*" 900-901.

<sup>119</sup> For vagueness as a ground of judicial review, see generally Hoexter *Administrative Law* 298-301.

enterprises and entities. Apart from lacking the necessary institutional competence, these bodies will have to function in terms of a very limited, and to some extent, confused normative framework for the promotion of multilingualism. This framework does not embody an unambiguous commitment to the promotion of official multilingualism, lacks legal certainty, and endows administrative organs with insufficiently circumscribed discretionary powers.

Given this state of affairs, the answer to both questions posed above must be negative. In so far as the Act has attempted to (re)kindle the flame of linguistic diversity, it has done so in a way that causes the "principle of diversity" to shine through its provisions only dimly, and most probably not lastingly. Neither does it represent any notable progress in the quest to achieve equity, clarity and predictability in official language use.

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### List of abbreviations

|         |  |
|---------|--|
| IJCL    | International Journal of Constitutional Law                                |
| OSCE    | Organisation for Security and Co-operation in Europe                       |
| PER     | Potchefstroom Electronic Law Journal                                       |
| PMG     | Parliamentary Monitoring Group   |
| SAJHR   | South African Journal on Human Rights                                      |
| SAPR/PL | Suid-Afrikaanse Publiek Reg / South African Public Law                     |
| TSAR    | Tydskrif vir die Suid-Afrikaanse Reg                                       |
| UTLJ    | University of Toronto Law Journal  |
| VVDStRL | <i>Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer</i> |