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Minority Rights: Education, Culture, and Language

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35.1 THE CONSTITUTIONAL PROTECTION OF MINORITY RIGHTS

The problem of accommodating and protecting ethnic, religious and linguistic minorities in a democratic state dominated the lengthy constitutional negotiations that preceded the enactment of the interim Constitution. The same is true of the Constitutional Assembly drafting process, where agreement on issues such as the official language policy and state-funded education in minority languages eluded the participants until almost the very last minute.

The prominence of minority rights issues in recent constitutional politics is, of course, unsurprising. Few would dispute that ethnic and linguistic division has been a characteristic, perhaps definitive, feature of South African political life since colonial settlement. Prior to the 1994 constitutional revolution, a minority population had aggressively held a monopoly of political power for three centuries. Before it could be persuaded to relinquish that power the representatives of that minority insisted on constitutional protection and special status. From the very beginning of the negotiations process the standpoint of the National Party government was that a negotiated settlement would not entail a surrender to the simple majority rule that it had resisted for so long.¹ Instead the NP insisted on guaranteed shares of power for minority political parties, minority vetoes, and constitutional protection of group or minority rights.²

It is the last of these measures — the protection of the rights of cultural, religious and linguistic minorities — that is the principal focus of this chapter.³ Under the interim Constitution the Fundamental Rights chapter and the list of Constitutional Principles accorded protection to minorities in a number of ways. First, the interim Constitution contained a right to equality of treatment and freedom from unfair discrimination.⁴ The non-discrimination provision expressly outlawed discrimination based on a number of grounds of differentiation generally thought to contribute to the marginalization or oppression of minority populations: language, race, ethnic or social origin, colour, religion, belief. In respect of religion, the non-discrimination guarantee was reinforced by a right protecting religious freedom.⁵ Secondly, the Fundamental Rights chapter contained a right restraining the state from interfering with an individual's right to speak the language or to practise the culture of his or her choice.⁶ Thirdly, the chapter guaranteed rights, where practicable, to education in the language of an individual's choice and to establish educational institutions based on a common culture, language or religion.⁷ Fourthly, two Constitutional Principles — XI and XII — required minority rights to be catered for in the final Constitution. Fifthly, CP XXXIV authorized constitutional provision for what it terms a notion of the right of self-determination by any community sharing a common cultural and language heritage.

¹ In his speech to Parliament on 2 February 1990 F W de Klerk listed his government's negotiating objectives: 'a new democratic constitution; universal franchise; no domination; equality before an independent judiciary; the protection of minorities as well as of individual rights' *Debates of Parliament* 2 February 1990 col 15.

² Steven Friedman *The Long Journey: South Africa's Quest for a Negotiated Settlement* (1993) at 5–17.

³ The Bill of Rights was of course not the only area of the Constitution where minority/majority contentions were played out. Political parties fought equally hard over such traditional minority issues as federalism and regional autonomy, political representation of minority parties, land restitution, official languages, and national symbols.

⁴ Section 8.

⁵ Section 14(1).

⁶ Section 31.

⁷ Section 32(c).

The 1996 Constitution has elaborated on the requirements of the Constitutional Principles in the following manner. As did its predecessor, the Bill of Rights contains a right to equality of treatment and freedom from unfair discrimination, again listing race, ethnic or social origin, colour, religion, belief, culture, language and birth as impermissible grounds of differentiation.¹ This right applies both against the state and against individuals.² The Bill of Rights, again like its predecessor, protects religious freedom and association and political participation rights.³ Members of cultural minorities receive indirect protection from the hate speech qualification to s 16. Freedom of expression does not extend to ‘advocacy of hatred that is based on race, ethnicity . . . or religion’.⁴ Three sections of the Bill of Rights are specifically aimed at minority protection. Section 30 restrains interference by the state or by private individuals and institutions with an individual’s right to use the language or to participate in the culture of his or her choice. Section 31 accords a similar protection to a different category of right-holder — ‘persons belonging to a cultural, religious or linguistic community’. Section 29 guarantees a right to education in the language of an individual’s choice and a right to establish private educational institutions.

Outside the Bill of Rights, the Constitution requires the establishment of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.⁵ Section 235 repeats, almost verbatim, the nebulous commitments of CP XXXIV: recognition of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic, or in any other way determined by national legislation, is not constitutionally precluded.⁶

The interpretation of ss 29, 30, 31 and 235 is likely to be informed by the developing body of international law relating to minority rights. A brief description of that body of law is provided below. At the same time there are several important distinctions to be drawn between international minority rights structures and those contained in the 1996 Constitution. These distinctions are the product of historical and political influences specific to South Africa, where talk of minority protection all too rapidly becomes mixed up with talk of minority privilege. In addition to their clear impact on the construction of the Constitution, these influences will continue to be felt in the work of interpreting and enforcing the Constitution.

35.2 NEGOTIATING MINORITY RIGHTS

(a) The interim Constitution

Notwithstanding the contentiousness of the minorities issue, the language and cultural rights provisions of the interim Constitution’s rights chapter were readily agreed to by the MPNP

¹ Section 9(3). The specific enumeration of these grounds facilitates the right-holder’s burden of proof: discrimination by the state on any of the listed grounds is *prima facie* unfair (s 9(5)).

² Section 9(3) and (4).

³ Sections 15, 18 and 19.

⁴ Section 16(2)(c).

⁵ Sections 185–186.

⁶ In addition to the measures listed, the Constitution contains provisions relating to the use and promotion of official languages and other languages used by communities in South Africa (s 6). Though analytically inseparable from the question of minority rights, a detailed analysis of these provisions is the subject of Chapter 37 ‘Official Languages’ below.

participants.¹ The ease of this passage was no doubt facilitated by the uncontroversiality of the guarantees contained in s 31 of the interim Constitution, which, though reminiscent of those contained in art 27 of the International Covenant on Civil and Political Rights (ICCPR), avoided art 27's identification of a distinct group of right-holders. The reason why no more substantial minority rights protection found its way into the chapter lay in the perception, shared by the dominant parties at the talks, that guaranteeing collective rights for minorities was politically unpalatable.

The idea of providing constitutional sanction to the rights of racial minorities had prompted the NP government to request the South African Law Commission to investigate mechanisms for the recognition and protection of group rights.² Between 1986 and 1991 the Commission canvassed a number of submissions, mostly from the ranks of white right-wing intellectuals and political groupings, advocating the right of minorities to seek recognition as distinct societies and to resist assimilation into a common national culture.³ The Commission accepted the existence of what it termed numerous groups or communities and strong intergroup conflict and rivalry in South African society.⁴ Nevertheless, it disclaimed the existence of statutorily definable groups with statutorily definable rights in South Africa. According to the Commission, the needs of individuals who are members of different linguistic, cultural and religious groups would be adequately protected by individual rights in a bill of rights.⁵

The Commission's suspicion of minority rights in the sense of special status for groups is not surprising considering its determination to create a colour-blind constitutional order.⁶ In such a context claims to group rights are tainted by the concept's correspondence to apartheid discourse, in which 'group' is a code word for racially defined policies, defensively separated from each other.⁷

¹ Lourens M du Plessis 'A Background to Drafting the Chapter on Fundamental Rights' in Bertus de Villiers (ed) *Birth of a Constitution* (1994) 89 at 93. By contrast, the economic activity, fair labour practices and property rights sections of the chapter were the subject of fervent debate. See Hugh Corder 'Towards a South African Constitution' (1994) 57 *Modern Law Review* 491 at 513.

² South African Law Commission *Working Paper 25: Project 58: Group and Human Rights* (1989) at 1.

³ South African Law Commission *Interim Report on Group and Human Rights* (1991). The Conservative Party, Afrikaner Volkswag and Boere-Vryheidsbeweging testimony before the Commission expressed its dissatisfaction with mere 'minority group protection'. Instead, these parties favoured 'national group protection', which they understood as a right to Afrikaner self-determination 'in its widest form', including the right to secession (at 39–80).

⁴ *Interim Report on Group and Human Rights* at 35.

⁵ *Interim Report on Group and Human Rights* at 679–80.

⁶ *Interim Report on Group and Human Rights* at 647: 'What is certain is that the vast majority of this country's total population is opposed to further discrimination or exclusion or favouring on the ground of race or colour. We are striving for a system of equality before the law, and therefore justice, for all.'

⁷ After reviewing international legal mechanisms for the protection of minorities, the Commission deliberately steers away from a solution grounded in the recognition of group rights. It cites the perception that community or minority protection is undemocratic or anti-democratic, and that it is advocated merely to perpetuate white domination under another name (*Interim Report on Group and Human Rights* at 112). According to the Commission, community and minority protection which is aimed at furthering domination by minority groups or granting them undue preference 'would not be accepted by the majority and would ultimately be rejected'. However, if a minority perceives itself to be dominated and its needs treated with contempt, it will strive constantly to rid itself of the regime (at 113). So, the Commission concludes: 'The sensible solution would therefore be to steer a course between these two dangers' (at 113). The solution found is the protection of a number of individual constitutional rights: freedom from discrimination, a right to mother-tongue education, a right to practise a particular culture or religion of one's choice or to speak a language of one's choice.

The Commission therefore recommended the protection of individual rights to practise a culture or religion, to use a language, and to be protected from discrimination. The Commission felt that the principal protection of interests of minority populations should be found outside the Bill of Rights, in the form of constitutional arrangements such as federalism or minority representation in an upper House of Parliament or the Cabinet.¹

These conclusions were largely shared by the NP government. Minority protection in a bill of rights was not felt to be a particularly important political objective. Minority interests would be better protected at the level of distribution of governmental power, rather than by judicial mechanisms.² In its proposals for a bill of rights, the NP government went no further than the Commission on the question of minority rights, listing only non-discrimination guarantees and individual rights to speak a language or to participate in cultural life.³

Given its long-standing commitment to the establishment of a non-racial constitutional order, the ANC rejected as non-negotiable any attempt to entrench racial group rights.⁴ At most, the ANC envisaged the protection of the right to form 'cultural bodies', religious freedom,⁵ and a requirement that the state act positively to further the development of the eleven South African languages to be treated as official languages.⁶

Other political parties that could have been expected to press hard for the inclusion of minority rights in the Fundamental Rights chapter chose instead to focus on other constitutional strategies. The IFP, which during the negotiations had clamorously beaten the drum of ethnic nationalism, sought to shore up minority interests principally through federal mechanisms. The goal of the white right-wing parties was nothing less than self-determination in a wholly separate constitutional entity.⁷

The result of this history was an interim Constitution which possessed little more than a bare minimum of minority rights protections. Individuals were protected by the equality and religious freedom rights against official discrimination. Members of minority cultures were free to try to maintain their cultural identity through mechanisms which included the establishment of private schools.⁸ Only in the imaginative provisions for the recognition of official languages did the interim Constitution go beyond the minimum by specifically requiring positive action by the state to ensure the maintenance and development of minority languages.

¹ These mechanisms were the subject of a separate investigation by the Commission: see South African Law Commission *Project 77: Constitutional Models* (1991).

² Pierre Olivier 'Constitutionalism and the New South African Constitution' in Bertus de Villiers (ed) *Birth of a New Constitution* (1994) 50 at 73-4.

³ See *Government's Proposals on a Charter of Fundamental Rights* (2 February 1993), arts 6 and 34.

⁴ See e.g. Albie Sachs *Protecting Human Rights in a New South Africa* (1990) at 150: 'There just cannot be co-existence between racial group rights and non-racial democracy. It would be like saying that just a little bit of slavery would be allowed, not too much, or that the former colonial power would exercise just a small amount of sovereignty, not a lot. While the phased replacement of race rule by non-racial democracy can be contemplated, the constitutional co-existence of the two is philosophically, legally and practically impossible.'

⁵ African National Congress *A Bill of Rights for a New South Africa: Preliminary Revised Version* May 1992 art 5(3)-(5).

⁶ Article 5(6) and (7).

⁷ See further below, § 35.8.

⁸ Sections 31 and 32(c). 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), 1996 (4) BCLR 537 (CC) (the interim Constitution does not require the establishment by the state of educational institutions based on a commonality of culture, language or religion, but merely permits, where practicable, the private establishment of such institutions).

(b) The Constitutional Assembly

The requirements of the three Constitutional Principles with a bearing on minority rights set the scene for a battle over minority protection in the Constitutional Assembly (CA). The NP entered the CA process with the declared aim of securing minority rights.¹ The Freedom Front, though concentrating on using CP XXXIV to further its Volkstaat ideal, additionally sought, in the words of its leader, ‘a way . . . to ensure that there is no oppression over the minority’.² The other ethnically based political party — the IFP — chose to pursue a measure of regional autonomy through increased devolution of power to the provincial level of government.³ The ANC, habitually suspicious of claims to minority rights, was set to resist any attempt to constitutionalize measures which might be used to favour particular ethnic groups.

The 1996 Bill of Rights contains three provisions with direct bearing on minority protection — ss 29, 30 and 31. Only one of these — s 30 — had anything like a smooth passage through the drafting process. The right made an early appearance in the 19 October 1995 draft of the Bill of Rights. The Committee reported that ‘there is consensus among the parties as to the inclusion of this right in the final Bill of Rights’. Apart from occasional stylistic amendments, the right remained unchanged in all succeeding drafts of the Constitution. As was the case with its predecessor — s 31 of the interim Constitution — the individualistic phrasing of the right and its careful avoidance of any mention of ‘minority’ or ‘community’ ensured that its inclusion occasioned no controversy.

Section 31 contains what s 30 so delicately avoids. It provides a set of non-discrimination and non-interference guarantees and specifically accords these to ‘persons belonging to a cultural, religious or linguistic community’. There is no sign of this section in any of the five working drafts of the Constitution, nor in the Constitution Bill of 23 April 1996. Only in the second Constitution Bill of 6 May 1996 does s 31 appear for the first time, the result of an intense process of last-minute give and take between parties.⁴ An earlier trilateral deal between the ANC, the NP and the Freedom Front had seen the inclusion of the Minorities Commission in Chapter 9 of the first Constitution Bill.⁵ The eleventh-hour inclusion of s 31 appears to have been the result of an ANC desire to placate the Freedom Front by acceding to its demand for specific minority protection in the Bill of Rights, a demand it had initially resisted.⁶ The inclusion of s 31 might also have been motivated by fears that s 30 and the Bill of Right’s non-discrimination guarantees alone might be insufficient to comply with the requirements of CP XII.⁷

¹ ‘Minority rights must be protected — NP’ *Constitutional Talk* 1:1995 (13–26 January 1995).

² ‘Volkstaat high on FF’s agenda’ *Constitutional Talk* 1:1995 (13–26 January 1995).

³ ‘IFP seeks strong provincial government’ *Constitutional Talk* 1:1995 (13–26 January 1995). The IFP was later to boycott the CA in protest over the refusal of ANC and NP to enter international mediation over the constitutional role of the Zulu monarchy, and played no significant role in the drafting of the Constitution.

⁴ ‘The night the Constitution was settled’ *Constitutional Talk* 3:1996 (22 April–18 May 1996).

⁵ ‘Dream of a Volkstaat Fades into a Cultural Council’ *Weekly Mail and Guardian* 29 March 1996.

⁶ ‘NP, ANC strive for a Package Deal’ *Weekly Mail and Guardian* 19 April 1996.

⁷ Certainly it is unclear that, without s 31, the draft text would have complied with CP XII (collective rights of self-determination to be recognized and protected in a final Constitution). According to the Constitutional Court in the first certification decision (*Ex parte Chairperson of the Constitutional Assembly: In re Certification of the*

[continued on p 35–6]

The earliest draft of the education clause — s 29 — reveals little of the controversy that was to accompany the minority provisions of the clause until its enactment. The draft set out a right to instruction in any language in state institutions where it could be reasonably provided. There was a right to establish private schools and institutions subject to duties relating to non-discrimination and the maintenance of educational standards.¹ In the next draft, the working draft of 19 October 1995, an additional right was proposed by the NP. A right should be included, it was argued, ‘to educational institutions based on a common culture, language, or religion, provided that there shall be no discrimination on the ground of race and, provided further that the state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it has been established on the basis of a common language, culture, or religion’. According to the NP, this would guarantee a right to state-funded schools with a distinctive linguistic, cultural or religious character. According to the ANC, the formulation was an attempt constitutionally to entrench neo-Verwoerdianism — a claim to a right to state-aided Afrikaans-only schools — and therefore well beyond the political pale.²

The contention over the NP clause continued throughout the duration of the drafting process. By the fifth Working Draft of 15 April 1996 agreement had been reached by the parties not to include the NP clause, but instead, in the words of a Committee footnote, to ‘seek ways of accommodating the sentiments embodied in it’ elsewhere in the formulation of the education right. The first Constitution Bill of 23 April 1996 therefore contained no further mention of the NP clause, and a formulation of the education right largely along the lines that were suggested in the earliest draft. In the second Constitution Bill of 6 May 1996 the right to state-funded education in any language had been amended to a right to

Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC)), CP XII required ‘certain collective rights of self-determination to be recognized and protected in the [final Constitution]’. This was achieved by s 31, which, according to the Court, ‘protects cultural, religious and language communities’ (at para 220). No mention was made by the court of s 30. This suggests that the individualistic framing of the right prevented it from providing the collective protection required by CP XII. A more substantial argument that the amended draft failed to comply with CP XII was raised by the KwaZulu/Natal government in the second certification case (*Ex parte Chairperson of the Constitutional Assembly: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC)). The court again found s 31 to be the principal mechanism of compliance with CP XII: ‘The requirements of CP XII are therefore met by the provisions of . . . [s] 31, the institutional structures provided by the . . . [Constitution] and the express protection of rights of association in . . . ch 2 together with the procedural provisions governing their enforcement’ (at para 27).

¹ Clause 23 of the draft Bill of Rights of 9 October 1995 reads:

- ‘(1) Everyone has the right to —
- (a) a basic education, including adult basic education, in a state or state-aided institution;
 - (b) further education, which the state must take reasonable and progressive measures to make generally available and accessible; and
 - (c) choose instruction in any language where instruction in that language can be reasonably provided at state or state-aided institutions.
- (2) Everyone has the right to establish and maintain, at their own expense, private educational institutions that —
- (a) do not discriminate on the basis of race;
 - (b) are registered with the state; and
 - (c) maintain standards that are not inferior to standards at comparable state-aided educational institutions.’

² ‘Trio of Trouble’ *Weekly Mail and Guardian* 1 May 1996.

state-funded education in any *official* language. There was no sign of the NP single-medium schools clause, nor indeed of any of the ‘sentiments embodied in it’. Behind the drafts frantic political activity was taking place. The minority schools issue, together with the lock-out right and the property clause, turned out to be one of the three Bill of Rights issues on which the NP dug in its heels, refusing further compromise. At the same time, these three issues were not open to concessions from the ANC: ‘[T]o compromise would be “a betrayal of victims of apartheid”’.¹ Confronted by the spectre of a referendum to approve the constitutional draft in the event of the requisite majority not being obtained in the Constitutional Assembly, the NP capitulated on all three issues.

The final education clause contains a much-diluted version of the original NP proposal. The right to state-sponsored education in an official language where reasonably practicable is qualified by the requirement that the state should consider ‘all reasonable educational alternatives’ in seeking to implement the right. These include ‘single-medium’ institutions, where equitable, practicable and in accordance with the need to redress past discrimination.

35.3 THE PROTECTION OF MINORITY RIGHTS IN INTERNATIONAL LAW

(a) Introduction

Defining, establishing and protecting the rights of ethnic, religious and linguistic minorities has become one of the most pressing concerns of international law. Ethnic nationalism is a spectre haunting the contemporary international legal order. Self-determination struggles waged by ethnic minorities have led to the collapse of a number of nation states and conflict and instability in many more.² Where attempts have been made by a dominant population to suppress minority nationalism, the resultant violence has led to the displacement of thousands of people and massive human rights violations.³ Linguistic nationalism, fuelled by a perception of discrimination against the French-speaking minority, threatens to divide the century-old Canadian federation. Conflict between religious groups has sparked civil war in Sudan and Lebanon. Animated by this dismal record of violence and human rights abuse, international law aims to provide guarantees designed to accommodate and protect minority identity. By shielding minorities from the power of the state it is hoped that the struggles of minorities against persecution, marginalization or assimilation will not degenerate into a baleful cycle of violent resistance and counter-resistance.

¹ ANC negotiator Valli Moosa, quoted in ‘High Drama in Constitutional Danger Zone’ *Weekly Mail and Guardian* 1 May 1996.

² A list of only the most visible current ethnic contentions would include the former Soviet Union, India, former Yugoslavia, Myanmar, Indonesia, Iraq, Cyprus, Nigeria, Lebanon, Guyana, Trinidad, Liberia, Rwanda and Burundi. See further N Lerner ‘The Evolution of Minority Rights in International Law’ in C Brölman et al (eds) *Peoples and Minorities in International Law* (1993) at 77–8.

³ Anthony Anghie ‘Human Rights and Cultural Identity: New Hope for Ethnic Peace?’ (1992) 33 *Harvard International LJ* 341. Researchers have identified 261 groups of non-sovereign peoples regarded as being at risk of future human rights violations because of their differential status and aspirations: T R Gurr & J R Scarritt ‘Minorities Rights at Risk: A Global Survey’ (1989) 11 *Human Rights Quarterly* 375 at 392–3.

(b) Definition of a minority

If minorities are to be treated as distinct entities in international law and protected by special measures at the national and international levels, it is necessary to define what a minority is. However, despite the existence of a vast body of literature on the subject and the efforts of two subsidiary organs of the United Nations Commission on Human Rights,¹ there is no settled and binding definition of a minority in international law.²

The most influential definition has been that proposed by Francesco Capotorti, the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. According to Capotorti, a minority is

'[a] group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members — being nationals of the state — possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language'.³

There are three elements of this definition that should be underlined. First, there is an *objective element*. To constitute a minority a group must exist as a separate and distinct entity within a state. The basis of distinction is usually a characteristic such as race, religion or language which sets the group apart from other groups in the state. Secondly, a *subjective element* is required: the group must manifest a sense of community and a desire to preserve the identity of that community. The definition therefore excludes groups who seek assimilation with the rest of the population.⁴ The third element is of particular importance in the South African context: the group should be in a *position of non-dominance* in the state in which it lives. It is the social, political and legal fact of non-dominance that makes necessary the guarantee of rights. A minority is a group unable to rely on political means to protect its identity and its interests.⁵

¹ The protection of the rights of minorities has been the subject of the work of the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities since 1947. See P Thornberry *International Law and the Rights of Minorities* (1991) at 124–32. More recently, the Working Group on Indigenous Populations, a subsidiary organ of the Sub-Commission, has expanded the field of study to consider the particular needs of indigenous peoples. See H Hannum 'New Developments in Indigenous Rights' (1988) 28 *Virginia Journal of International Law* 649 at 657–62.

² See generally M N Shaw 'The Definition of Minorities in International Law' in Y Dinstein & M Tabory (eds) *The Protection of Minorities and Human Rights* (1992) 1; Thornberry *International Law and the Rights of Minorities* at 164–72.

³ Francesco Capotorti *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* (1991) UN Sales no E.91.XIV.2 at 7. Though influential, the Capotorti definition is far from being the settled orthodoxy in the field. Nevertheless, a slight reformulation of Capotorti's definition is accepted as authoritative by Sachs J in the *Gauteng School Education Bill* case (supra) at para 61.

⁴ The rights of such groups, termed 'involuntary minorities', need be protected only by a guarantee of non-discrimination. There is no need in such a case for protection of minority identity. Thornberry *International Law and the Rights of Minorities* at 10.

⁵ The inclusion of the non-dominance requirement in the Capotorti definition was intended to distinguish those minorities requiring the protection of international human rights guarantees from the situation of the white minority in apartheid South Africa. See Thornberry *International Law and the Rights of Minorities* at 8–9; John Dugard 'The Influence of Apartheid on the Development of UN Law Governing the Protection of Minorities' (unpublished paper 1989).

(c) The structure of international minority rights protection

The work of the UN Sub-Commission on Minorities suggests that the effective protection of minorities requires two categories of legal provision: measures aimed at securing equal treatment for minorities and measures aimed at the protection of minority identity. Both entail the differentiation of members of minorities, and according those members rights additional to those accorded to the population as a whole. While the goal of equality of treatment is furthered by measures protecting individual members of minorities against discrimination, it is recognized that the absence of discrimination will not in itself create equality. Special treatment of minorities may therefore be required to create equality.¹ In addition the goal of equality should not be achieved by the simple assimilation or integration of minority groups into the dominant national culture.² It is felt that international law should recognize the legitimacy of the desire of many minority groups to preserve their characteristics and traditions and to resist the loss of their identity.³ Accordingly, international minorities law is usually divided for purposes of analysis into two sets of guarantees:

first, universal non-discrimination guarantees attempt to ensure equality of treatment for all individuals including members of minorities; secondly, 'special' or additional minority guarantees are specifically aimed at the protection of the separate existence of minorities. The difference between the two concepts has been explained as follows:

1. Prevention of discrimination is the prevention of any action which denies to individuals or groups of people equality of treatment which they may wish.
2. Protection of minorities is the protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population . . . If a minority wishes for assimilation and is debarred, the question is one of discrimination.⁴

(d) Article 27 of the International Covenant on Civil and Political Rights

The primary instrument protecting the rights of persons belonging to minorities is the International Covenant on Civil and Political Rights (ICCPR).⁵ Article 27 of the ICCPR is the only expression of the right to minority identity in modern human rights conventions intended for universal application.⁶ It provides:

'In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

¹ *Minority Schools in Albania Case* 1935 PCIJ (ser A/B) No 64 at 20. (To apply the same legal regime to a majority as to a minority, whose needs are quite different, would create only a formal equality. Rather, measures for the protection of minorities are designed to ensure a 'genuine and effective' equality.)

² Capotorti *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* at 98.

³ Capotorti *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* at 97.

⁴ UN Sub-Commission on Prevention of Discrimination and Protection of Minorities E/CN.4/52, Sect V, quoted in Patrick Thornberry 'The Rights of Minorities' in D J Harris & Sarah Joseph (eds) *The International Covenant on Civil and Political Rights and United Kingdom Law* (1995) 597 at 605.

⁵ UNGA Res 2200A(XXI), GAOR 21st Session, Supp no 16, 52 (1966). South Africa signed the Convention on 20 August 1994.

⁶ Thornberry *International Law and the Rights of Minorities* at 142.

Combined with the ICCPR's non-discrimination provision,¹ art 27 is an important weapon in the struggle of minorities to preserve their separate identity, without that separateness becoming a badge of inferiority. However, the limitations of the article should not be overlooked. Notably, art 27 does not recognize minorities as collective entities possessing legal personality and rights. Rather, the individual is the principal juridical unit of the ICCPR.² Thus, while the ICCPR includes minorities within the discourse of rights, it does so in a form that denies minorities the legal subjectivity necessary for the protection of minority identity and existence.³

Article 27 has been the subject of a general comment by the UN Human Rights Committee, which has attempted to answer some of the criticism of the article.⁴ According to the Committee, the article is intended to ensure the survival and continued development of the cultural, religious and social identity of minorities. Therefore the right granted by the article must be distinguished from other personal rights conferred on one and all under the ICCPR.⁵ The Committee has emphasized that the right is a right of individuals (held by persons belonging to such minorities), and should not be confused with the collective right of peoples to self-determination.⁶ But, although an individual right, its exercise depends on the collective ability of the minority group to maintain its culture, language or religion. The right of a member of a minority is not exercised alone. Rather, the enjoyment of culture, practice of religion and use of language presupposes a community of individuals with similar rights.⁷

Accordingly, the Committee argues, the article may require positive measures by states to protect the identity of a minority and the rights of its members to enjoy and develop their culture in community with other members of their group.⁸ Provided that these measures are aimed at correcting conditions that prevent or impair the enjoyment of the rights of members of minorities, they will constitute a legitimate ground of differentiation and will comply with the non-discrimination requirements of the ICCPR.⁹

¹ Article 26 requires that, at national level, 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

² Anthony Anghie 'Human Rights and Cultural Identity: New Hope for Ethnic Peace?' (1992) 33 *Harvard International LJ* 341 at 343. The exception to the individualistic orientation of the ICCPR is art 1, which confers the right of self-determination on 'all peoples'.

³ Anghie 'Human Rights and Cultural Identity' at 346.

⁴ General Comment Adopted by the Human Rights Committee under art 40, para 4, of the International Covenant on Civil and Political Rights, No 23(50) (art 27) UN Doc CCPR/C/21/Rev 1/add 5 (26 April 1994). On the nature and authoritativeness of general comments of the Committee see Dominic McGoldrick *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (1991) at 92–6. (General comments 'are potentially very important as an expression of the accumulated and unparalleled experience of an independent expert human rights body of a universal character in its consideration of the implementation of the ICCPR'.)

⁵ Section 27 can thus be contrasted with the non-discrimination guarantees under arts 2 and 26, which apply to all individuals within the territory or under the jurisdiction of a state whether or not those persons belong to a minority. See General Comment paras 4, 9.

⁶ General Comment para 2.

⁷ Thornberry *International Law and the Rights of Minorities* at 173.

⁸ This is the view taken by the Human Rights Committee (para 6.2). This contrasts with the view of commentators that the negative phrasing of the article ('shall not be denied') prevents the inference of positive state obligations to affirmative action. See M Nowak 'The Evolution of Minority Rights in International Law' in Brölman et al (eds) *Peoples and Minorities in International Law* 103 at 109.

⁹ General Comment para 6.2.

(e) The UN Declaration on Minorities

This, the most substantial and important international human rights instrument in the field since art 27, was adopted by the General Assembly in 1992. The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities¹ was the product of fourteen years of work by a Working Group of the Commission on Human Rights. The importance of the document is that, besides setting out an affirmation of the individual rights of persons belonging to minorities, it addresses itself explicitly to the content of state obligations to respect and maintain minority identity.

The Declaration is intended to set global minimum standards.² It contains a recognition of the principle of non-discrimination as applied to minorities.³ The objective of protecting minority identity is achieved through two sets of mechanisms: those protecting minority ‘existence’ and those encouraging ‘conditions’ in which minority identity can be protected and promoted.⁴ The right to existence includes the background basic rights to be protected against genocide and forced assimilation.⁵ As to the encouragement of ‘conditions’, the state should remove legal obstacles to cultural development. It should facilitate the growth of the institutions which underpin a flourishing culture. The state should respect the distinctive characteristics and contribution of minorities in the life of the state. In the special case of aboriginal groups, the state must respect the association of those groups with their traditional territories.⁶

35.4 RIGHTS OF CULTURAL, RELIGIOUS AND LINGUISTIC COMMUNITIES: SECTION 31

‘31 Cultural, religious and linguistic communities

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community —

- (a) to enjoy their culture, practise their religion and use their language; and
- (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.’

(a) Section 31 compared with art 27 of the ICCPR

Article 27 of the ICCPR is the principal and exemplary formulation of a universal right to require state respect for the social goods of culture and language. The linguistic similarities

¹ GA Res 47/135, 18 December 1992.

² Patrick Thornberry ‘The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations and an Update’ in Alan Philips & Alan Rosas (eds) *Universal Minority Rights* (1995) at 30.

³ See arts 2(1), 2(5), 3(1), 3(2), 4(1).

⁴ See art 1(1): ‘States shall protect the existence and the national or ethnic, cultural, religious identity of minorities within their respective territories, and shall encourage conditions for the promotion of that identity.’

⁵ Thornberry in Philips & Rosas (eds) *Universal Minority Rights* at 40.

⁶ Thornberry in Philips & Rosas (eds) *Universal Minority Rights* at 41.

between s 31 and art 27 are self-evident. Both are not universal rights but rights accorded to a special category of holders — ‘persons belonging to . . . [ethnic, religious or linguistic] minorities’ in art 27 and ‘persons belonging to a cultural, religious or linguistic community’ in s 31. Both accord to this category of holders rights to use their language, practise their religion, and enjoy their culture in community with others. But while the formulation of s 31 has been influenced by art 27 and while the article will influence the interpretation of the section,¹ there are certain revealing distinctions between the two provisions.

While s 31 singles out a category of recipients for the protection of rights additional to those rights accorded to the population as a whole, the section studiously avoids referring to these recipients as minorities. The right is instead phrased as a right of persons belonging to a cultural, religious or linguistic ‘community’. In addition, art 27’s category of ‘ethnic’ minority is replaced by the rather more delicate term ‘cultural community’. The reason for these substitutions lies of course in a desire to avoid any association of the new constitutional order with the ethnic particularism of the apartheid ideology. Rather than ties of blood, the Constitution values and protects ties of affinity. Rather than recognizing rights of ‘minorities’, with the accompanying connotations of a divided population, the Constitution prefers to emphasize that it is protecting connectedness. Certainly, the term ‘community’ has warmer associations than ‘minority’. Put together, ‘cultural community’ suggests an organic *Gemeinschaft* connected by language and custom, rather than a fragmented and defensive social agglomeration.²

Politics and semantics aside, the legal implications of the substitution of ‘cultural community’ for ‘ethnic minority’ will lie predominantly in the criteria devised for establishing the existence of such a community and, for purposes of claiming the protection of the s 31 right, establishing an individual’s membership of such a community. These implications are considered further below.

Two further distinctions between s 31 and art 27 may be mentioned, though they are distinctions that do not make a difference. First, the right to form, join and maintain cultural, religious and linguistic associations in s 31(1)(b) is not specified in art 27, but is clearly included by implication in art 27’s right to practise a culture or religion or speak a language. Certainly the ability to associate with others for purposes of maintaining and developing culture is an essential component of a right to preserve the integrity of that culture.³ The

¹ The influence of the ICCPR on the interpretation of the provisions of the rights chapter is likely to be considerable. International legal obligations created by the signing and eventual ratification of the ICCPR will require interpretation of South African domestic law in conformity with its provisions. On the judicial treatment of unincorporated treaties see John Dugard *International Law: A South African Perspective* (1994) at 52–7. To the extent that domestic law cannot be interpreted to comply with the provisions of the ICCPR, legislative modification will be required before ratification can take place. In addition, s 39(1)(b) requires a court interpreting the provisions of the chapter to have regard to applicable public international law. In a concurring judgment in the *Gauteng School Education Bill* case (supra) Sachs J interpreted the minority rights sections of the Constitution against the background of international law on minority rights in general and art 27 in particular.

² See, on the distinction between social groups formed on an organic or instinctive basis (*Gemeinschaften*) and those formed on an instrumental basis (*Gesellschaften*), Ferdinand Tönnies *Community and Society: Gemeinschaft und Gesellschaft* (Charles Loomis ed and trans) (1957) at 223–31.

³ Stephen Roth ‘Toward a Minority Convention: Its Need and Content’ in Dinstein & Tabory (eds) *The Protection of Minorities and Human Rights* 83 at 111.

formulation of this part of s 31 seems to have been influenced instead by art 2(4) of the UN Minorities Declaration, which stipulates that '[p]ersons belonging to minorities have the right to establish and maintain their own associations'. The second distinction relates to the 'inconsistency' qualification in s 31, which, though not found in art 27, is uncontroversial. The Human Rights Committee confirmed in its General Comment on art 27 that 'none of the rights protected under article 27 . . . may be legitimately exercised in a manner or to an extent inconsistent with the other provisions of the Covenant'.¹ Similarly, the UN Minorities Declaration provides that '[t]he exercise of the rights set forth in this Declaration shall not prejudice the enjoyment by all persons of universally recognized human rights and fundamental freedoms'.²

Finally, a crucial difference between s 31 and art 27 lies in the application of the former to so-called horizontal relationships. Article 27 is a right which imposes duties only on the state.³ By contrast, s 31 may bind natural and juristic persons.⁴

(b) An individual right exercised communally

Section 31 accords rights, to members of cultural, linguistic and religious communities, of participation in their culture, language and religion 'with other members of that community'. This is the equivalent of art 27's phrase 'in community with other members of their group'. It has been observed that this phrase makes art 27 a hybrid of individual and collective rights. In its General Comment on art 27, the Human Rights Committee noted that '[a]lthough the rights protected under art 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion'.⁵ The right of a member of a cultural or linguistic community cannot meaningfully be exercised alone. Enjoyment of culture and use of language presupposes the existence of a community of individuals with similar rights.⁶ The same reasoning applies to s 31. The acts of enjoyment of culture, speaking a language or practising a religion are only possible in community with others. Culture, religion and language are essentially communal objects. They are the means of expression of a common sense of identity, values and traditions. Therefore an individual right of enjoyment of culture assumes the existence of a community that sustains a particular culture. Similarly, a right to use a language implies the existence of a community of fellow users of the language. An individual's right of participation in cultural life will be impugned if some harm comes to the cultural community in which that individual takes part.

¹ General Comment para 8.

² Article 8(2).

³ Article 2(1) of the ICCPR requires states to 'ensure' the rights in the Covenant to all individuals. The ICCPR therefore has horizontal effect, if not application, since persons belonging to minorities must be protected by the state from threats from both private and governmental sources. John Packer 'On the Content of Minority Rights' in Juha Rääkkä (ed) *Do We Need Minority Rights?* (1996) 121 at 155; cf General Comment para 6.1.

⁴ Section 8(2).

⁵ General Comment para 5.2.

⁶ Thornberry *International Law and the Rights of Minorities* at 173; cf General Comment para 6.2.

Accordingly, the s 31 right protects both individual and group interests in cultural integrity.¹ The hybrid scope of the right complicates its application. Though individual and group interests in cultural integrity frequently coincide, they may, equally frequently, diverge. Where an individual member of a linguistic community challenges, for example, legislation restricting the public use of his or her language, individual and communal interests in the preservation of that language converge. Should the legislation be struck down as a violation of s 31, there is a vindication not only of the individual applicant's rights but of the interests of the entire community of speakers of the language. Where, however, a community's interest in the preservation of its identity is expressed through measures restricting individual participation in the life of that community, group and individual interests are at odds.

The possibility of divergence is illustrated by two decisions of the UN Human Rights Committee dealing with art 27. In *Lovelace v Canada*² the Committee took the view that the withdrawal by a Canadian statute of a Maliseet Indian woman's right to reside on the Tobique Reserve in Canada because of her marriage to a non-Indian violated her art 27 right.³ According to the Committee, 'the right of Sandra Lovelace to access to her native culture and language, "in community with other members" of her group, has in fact been, and continues to be, interfered with, because there is no place outside the Tobique Reserve where such a community exists'.⁴

In *Lovelace* the community's interest in preserving a distinct ethnic identity through legal mechanisms discouraging inter-ethnic marriages clashed with the individual's right of participation in the life of her community.⁵ Article 27 was interpreted by the Human Rights Committee to protect the individual's rights of participation at the expense of communal interests. However, the Committee stressed that not every interference with an individual's right of enjoyment of cultural and community life could be considered a denial of rights under art 27. National legislation might legitimately define rights of residence on communal land to protect resources and preserve the identity of a people. But restrictions on rights of residence had to have a reasonable and objective justification and be consistent with the other provisions of the Covenant.

¹ S James Anaya *Indigenous Peoples in International Law* (1996) 101 (commenting on art 27).

² *Lovelace v Canada* (Communication no R.6/24), (1985) 68 *ILR* 17.

³ Section 14 of the Indian Act (1970) provided that '[an Indian] woman who is a member of a band ceases to be a member of that band if she marries a person who is not a member of that band'. The loss of membership status entailed the loss of the right to the common use and benefits of the reserve land allotted to the band. Should the woman marry a member of another band, she would acquire membership of her husband's band and associated land rights. In this case, Lovelace married a non-Indian, thereby losing her Indian status in terms of the Act and all rights of residence on reserve land. Lovelace's principal complaint in her communication to the Committee was that the Act was discriminatory. For jurisdictional reasons, the Committee sidestepped the discrimination issue, deciding the matter instead on the basis of Lovelace's claim that '[t]he major loss to a person ceasing to be an Indian is the loss of the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbours, and the loss of identity' (at para 13.1).

⁴ At para 15.

⁵ According to the Canadian government the Indian Act was 'an instrument designed to protect the Indian minority in accordance with art 27 of the Covenant. A definition of the Indian was inevitable in view of the special privileges granted to the Indian communities, in particular their right to occupy reserve lands. Traditionally, patrilineal family relationships were taken into account for determining legal claims. Since, additionally, in the farming societies of the nineteenth century, reserve land was felt to be more threatened by non-Indian men than by non-Indian women, legal enactments as from 1869 provided that an Indian woman who married a non-Indian man would lose her status as an Indian. These reasons were still valid' (para 5).

*Kitok v Sweden*¹ illustrates a situation in which art 27 may protect the interests of the community at the expense of individual interests. Here, the Committee found statutory restrictions on individual membership of a Sami village to have as their *raison d'être* the preservation and well-being of the Sami minority. Such objectives and measures were considered to be reasonable and consistent with art 27.

These illustrations make it clear that the interpretation and implementation of s 31 requires the balancing of two divergent aspects of the right. Though in essence an individual right aimed at the protection of group interests, s 31 has an additional, purely individualistic aspect. Because it is phrased as an individual right, s 31 (and, it must be added, s 30) protects individual interests in affiliation — membership of, participation in, and association with cultural, linguistic and religious communities. By contrast, the other, communal aspect of the right may at times be used to support arguments for the exclusion of individual participants in the interests of group integrity or survival. In order to preserve the identity of a group that group may wish to set restrictions on the qualifications of its members. For example, religious communities may wish to restrict access to conformists and to expel those who deviate from accepted doctrine or those who marry outside the faith.²

(c) Membership of a 'cultural, religious or linguistic community'

(i) 'Community'

Section 31 avoids the term 'minority' in art 27 and instead uses the term 'community'. The substitution might be thought a convenient sidestepping of the controversy over the definition of a minority which has bedevilled the analysis and application of art 27. However, defining 'community' is no less difficult. At its most general the word can mean simply an aggregation of people (similar to 'state' or 'society'). More precisely the modern usage of the word denotes an aggregation of people with a particular quality of relationship, held together by something in common.³ It is the quality of relationship that is crucial. One would not think of left-handed people as forming a community, although they undoubtedly share something in common. Nor would one think of the shareholders of a large public company as a community, although, unlike left-handed people, they have something in common that is a matter of their own choosing and not simply an arbitrary characteristic.⁴ What of the speakers of the Afrikaans language? They share an important characteristic, but whether the nature of

¹ (Communication No 197/1985), 96 *ILR* 637.

² See, for example, the facts of *Mohamed & another v Jassiem* 1996 (1) SA 673 (A). (Members of the Ahmadiya movement treated as apostates by orthodox Muslims, may not enter mosques, may not marry a Muslim, may not be buried in Muslim cemeteries or have any association with Muslims).

³ Raymond Williams *Keywords: A Vocabulary of Culture and Society* (1976) 75–6. See also the definition by the social anthropologist Anthony Cohen *The Symbolic Construction of Community* (1985) at 15: 'Community is that entity to which one belongs, greater than kinship but more immediately than the abstraction we call "society". It is the arena in which people acquire their most fundamental and most substantial experience of social life outside the confines of the home. In it they learn the meaning of kinship through being able to perceive its boundaries — that is by juxtaposing it to non-kinship; they learn "friendship"; they acquire the sentiments of close social association and the capacity to express or otherwise manage these in their social relationships. Community, therefore, is where one learns and continues to practise how to "be social". At the risk of substituting one indefinable category for another, we could say it is where one acquires "culture".'

⁴ Robert Thornton & Mamphela Ramphele 'The Quest for Community' in E Boonzaaier & J Sharp (eds) *South African Keywords* (1988) at 29.

their relationship with each other is sufficient to constitute a community is not clear. Afrikaans-speakers do not know each other personally, do not systematically interact with each other, and are divided in any number of significant ways such as race, class and political affiliation.¹ Yet it seems clear that most speakers of the language would feel aggrieved if a legal measure impacted deleteriously on the use of the Afrikaans language, even if the measure had little or no effect on them personally. Equally, it seems clear that should s 31 not be available to protect against measures affecting the Afrikaans language because of a restrictive definition of 'community', the right would serve very little purpose.

Arguably, the most pragmatic way to deal with the difficulties of definition of the term 'community' is to see it as doing more or less the same work as the term it substitutes for — art 27's category of a 'minority'. As outlined above, the reason for the substitution has more to do with the attitude conveyed by the word 'community' than with a desire that the word should denote a significantly different object to 'minority'. In contemporary South African discourse positive associations attach to the words 'culture' and 'community', while 'ethnic' and 'minority' are indelibly tainted by their association with apartheid ideology. Nevertheless, the purpose of s 31 is to protect the same values of cultural pluralism and tolerance that art 27 seeks to protect. There is therefore enough congruence between the two terms that definitions of 'minority' can assist in the definition of 'community'.

In international law a minority is a separate and distinct group, distinguished on the basis of race, religion or language from other groups. To be a minority the group must manifest a sense of community and a desire to preserve its identity. The group must be in a non-dominant position. It requires rights to protect it because it cannot use political power to do so. By analogy, a 'community' for purposes of s 31 should be an identifiable group, united by a common religion, language or culture, that is self-consciously a community. Self-consciousness requires that the members of the group should identify themselves as part of the group, and that they should be identifiable by other members as such. Non-dominance simply means that the community should find itself at odds from time to time with the rest of society: that its culture is not the dominant culture, that its language is not the majority language, that its religion is not the official religion of the state. The purpose of the grant of the s 31 right is to enable such a community to preserve its distinct existence against the forces of discrimination or assimilation to which it would otherwise be vulnerable.

(ii) *'Belonging'*

To claim the protection of the s 31 right, a claimant must be a person 'belonging to a cultural, religious or linguistic community'. This is the equivalent of art 27's phrase 'persons belonging to . . . [ethnic, religious or linguistic] minorities'. The Human Rights Committee pointed out in its General Comment that this phrase indicates that the right is designed to protect 'those who belong to a group and who share in common a culture, a religion and/or a language'.² The right is therefore not a right of everyone.

¹ John Sharp 'Introduction: Constructing Social Reality' in E Boonzaaier & J Sharp (eds) *South African Keywords* (1988) 1 at 14–5.

² General Comment para 5.1.

The word ‘belonging’ indicates that one is bound by some or other tie to something. It is clear then that s 31 requires claimants to prove that some tie exists between them and their group. What is unclear is what sort of tie would be sufficient. In *Lovelace v Canada* the Committee dealt in the following way with the question of Sandra Lovelace’s membership of the Maliseet ethnic minority:

‘The rights under art 27 of the Covenant have to be secured to “persons belonging” to the minority . . . Persons who are born and brought up on a reserve, who keep ties with their community and wish to maintain those ties must normally be considered as belonging to that minority within the meaning of the ICCPR. Since Sandra Lovelace is ethnically a Maliseet Indian and has only been absent from her home reserve for a few years during the existence of her marriage, she is, in the opinion of the Committee, entitled to be regarded as “belonging” to this minority and to claim the benefits of art 27 of the Covenant.’¹

The first type of connection recognized as legitimate by the Committee is ethnic origin: Lovelace was born a Maliseet. This is supplemented by evidence of continued ties of affinity with her ethnic group, such as residence among the group, association and identification with the group. In the case of s 31, the first type of connection is likely to be far less important than the second. This is because, as has been outlined above, s 31 seeks to protect ties of affinity rather than genealogy. Culture, language and religion are more a matter of shared experience than a matter of genetics. Accordingly, to prove membership of a cultural, linguistic or religious community some concrete tie of affinity must be proved to exist between the individual and that community. In the case of language such a tie would be demonstrated by showing that the language in question is the individual’s mother tongue, that the language is an important component of his or her personal and family life, that the individual identifies with the language and uses it.² In the case of religion claimants would have to show that they practise a religion and are actively involved in the religious life of their community. What is important therefore is that the individual claimant demonstrates a history of shared experience and identification with the linguistic, cultural or religious community in question. A person belongs to one of s 31’s communities because that person has historical associations with the community and has chosen to maintain those associations.

(d) Content of the s 31 right

(i) ‘May not be denied the right’

The negative phrasing of s 31 (‘may not be denied the right’) contrasts with the positive phrasing of most other rights in the Bill of Rights (usually ‘everyone has the right’). This means that, at a minimum, s 31 is a negative liberty. Members of communities may freely engage in the practice of culture, language and religion without interference by the state or from any other source.

Is s 31 more than simply a right to be left alone to practise culture, language and religion? Does the right simply require that such practices are tolerated, but not that they are supported? The answer to these questions is a matter of interpretation. On the face of it, s 31 is phrased

¹ Paragraph 14.

² Fernand de Varennes *Language, Minorities and Human Rights* (1996) at 149.

as if no more than a negative liberty. But constitutional interpretation requires one to look further than the phrasing: '[W]hilst paying due regard to the language that has been used, [an interpretation should be] "generous" and "purposive" and give . . . expression to the underlying values of the Constitution.'¹

Arguably, the purpose of the s 31 right requires more than that minority activities are simply permissible. The inclusion of s 31 in the Constitution indicates a commitment to the maintenance of cultural pluralism even where this requires positive measures to be taken by the state to ensure the survival and development of minority cultures where they are threatened by disintegration. A state committed to cultural pluralism cannot simply remain neutral as its cultural patrimony fades to a dull uniformity.

As for s 31's principal avatar — art 27 — academic opinion is divided on whether the right requires positive measures in support of minority cultures. For some, the purpose of the right is '*laissez vivre*, of allowing members of those minorities the right to maintain their language or religion freely without any assistance from the state, but also without any hindrance or oppression that has been the all too frequent burden of minorities throughout human history'.² However, the contrary opinion — that the right necessarily requires positive measures — enjoys the high authority of the Human Rights Committee:

'Although the rights protected under art 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with other members of their group.'³

The Committee's interpretation of art 27 may readily be adapted to s 31. The s 31 right requires for its exercise the existence of an identifiable community practising a particular culture or religion or speaking a particular language. Therefore, if as a result of state action or inaction, that community loses its identity, if it is absorbed without trace into the majority population, the individual right of participation in a cultural or linguistic community will be harmed. Section 31 therefore certainly requires non-interference with a community's initiatives to develop and preserve its culture. In addition, it is likely that it requires positive measures by the state in support of vulnerable or disadvantaged cultural, religious and linguistic communities that do not have the resources for such initiatives.⁴

A commitment to the support of minority rights is undertaken in s 185, which creates the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. The establishment of the Commission does not in itself answer the question whether positive measures by the state are constitutionally required. The objects of

¹ *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 9.

² *De Varennes Language, Minorities and Human Rights* at 151.

³ General Comment para 6.2.

⁴ Cf the remarks by Sachs J in the *Gauteng School Education Bill* case (supra) at paras 70 and 90 (international law and the minority rights provisions of the interim Constitution require the state not to interfere with initiatives by a minority to preserve and strengthen its culture, and might additionally require measures of assistance to particularly threatened or disadvantaged cultures).

the Commission are inter alia to promote respect for the rights of cultural, religious and linguistic communities.¹ Assessing what rights the Commission should promote remains a matter of constitutional interpretation.

(ii) *The right to enjoyment of culture in community with others*

The Constitution uses the term 'culture' or 'cultural' in two distinct senses. Schedule 4 indicates that concurrent national and provincial legislative competence is exercised on the subject of cultural matters. The adjective is used here to mean the practice of intellectual and artistic activity and the works that result from this activity.² Put simply, culture means literature, music, painting, sculpture and theatre.³ This is culture 'in the reduced sense of the word, . . . everything that is picturesque, harmless and separable from politics'.⁴

But a different use of the word is found in s 31 and in s 30 (the right of participation in 'cultural life'). In these sections culture means a particular way of life of an identifiable group of people: s 31 does not refer to 'culture' in general, but to 'their culture'. Used in this sense, the word does the work of a number of competing or synonymous terms: tradition, customs, civilization, race, nation, folk-ways.⁵ Here, culture is understood as a source of identity. It is a means of drawing distinctions between groups of people on grounds of one or more of a number of characteristics such as their beliefs, knowledge, language, rules of kinship, methods of education or forms of social relations.⁶ This second sense of the word is wide enough to include the first sense. The activities of writers, artists and musicians contribute in important ways to the cultural life of a community, but are not themselves constitutive of that culture.

What communal practices would constitute culture for purposes of s 31? A list of the main forms of cultural existence would likely include institutions responsible for the preservation and transmission of culture such as schools, libraries, publishing houses, museums and religious institutions. Culture may include the promotion and publication of literature and the arts, the practice of customs and traditions, the conservation of historical objects, and the commemoration of significant dates or events.⁷ However, such a list could not hope to cover the possible field of reference of culture. Culture is a complex social phenomenon, as much influenced by human intervention as it is an influence on human conduct. However, for purposes of compliance with s 31, international experience suggests that the institutional aspects of culture are likely to be the focus of attention: schools, publications, libraries, museums, historical monuments, places of worship.⁸ The right grants communities the

¹ Section 185(1)(a).

² Williams *Keywords: A Vocabulary of Culture and Society* at 90.

³ An example of the type of legislation envisaged by Schedule 6 is the Culture Promotion Act 35 of 1983. Section 3 of the Act empowers the Minister of National Education to establish regional councils for cultural affairs. Section 3(5) provides that the functions of such a council are the preservation and development of culture in the fields of the visual, musical and literary arts, the natural and human sciences, and of leisure and recreational activities.

⁴ T S Eliot *Notes Towards the Definition of Culture* (1962) 93, quoted in Chandran Kukuthas 'Are There Any Cultural Rights?' in Will Kymlicka (ed) *The Rights of Minority Cultures* (1995) at 228.

⁵ Robert Thornton 'Culture: A Contemporary Definition' in Boonzaaier & Sharp (eds) *South African Keywords* 17 at 26.

⁶ M Leiris *Race and Culture* (1958) 20–1, quoted in Thornberry *International Law and the Rights of Minorities* at 188.

⁷ Capotorti *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* at 63–8.

⁸ Thornberry *International Law and the Rights of Minorities* at 188.

freedom to establish and maintain such institutions without interference from any source in order to ensure their survival as a cultural entity. Certain institutional aspects of cultural life — language use at official and unofficial levels,¹ control by a cultural, linguistic or religious community of the education of its members,² freedom of and state support for religious practice³ — are accorded specific protection in the rights chapter. The task of the courts in interpreting s 31 will be to determine which other cultural institutions fall within the protected ambit of culture. Once identified, s 31 requires the state at least to refrain from threatening the existence of the institution in order not to prejudice an individual's right of participation in that institution.

(iii) *The right to practise a religion in community with others*

This aspect of s 31 must obviously be read against the background of s 15, which accords a right to freedom of religion. How does the protection of a right to religious practice in community with others by s 31 differ from the right in s 15?

Section 15 protects religious liberty in the classic sense of a negative individual claim to non-interference in the belief in and practice of religion or irreligion. For analytical purposes freedom of religion for purposes of s 15 can be divided into four rights: (a) freedom of religious choice; (b) freedom of religious observance; (c) freedom of religious teaching; (d) freedom to propagate a religion.⁴ Of these four rights, the first is clearly beyond the scope of s 31, since a choice to hold or not to hold particular religious beliefs does not relate to the practice of a religion in community with others. The remaining three rights may receive additional protection under s 31, but only in so far as the observance and dissemination of religious beliefs relates to the practice of a religion in community with other practitioners. This means that atheism or agnosticism are not covered by s 31 since such beliefs are merely held and not communally practised.

Section 31 therefore protects the practice of religion rather than religious belief. Moreover, it protects the communal aspects of religious practice rather than its purely private aspects. The right allows the establishment and maintenance of the institutions and infrastructure that make possible the practice of a religion. It grants a measure of autonomy to religious communities to establish places of worship, schools, seminaries and burial sites, to publish and distribute religious texts, to produce objects for religious rites, and the like.⁵ It does not offer protection against restrictions on the freedom of religious practice which do not affect a religious community as such. Thus, drawing on examples from US Supreme Court jurisprudence, army regulations prohibiting a Jewish serviceman from wearing a yarmulke

¹ Sections 6, 30. Section 35 guarantees accused persons the right to be informed of their rights and to use a language they understand in criminal proceedings.

² Section 29(3).

³ Section 15.

⁴ Yoram Dinstein 'Freedom of Religion and Religious Minorities' in Dinstein & Tabory (eds) *The Protection of Minorities and Human Rights* 145 at 147.

⁵ Dinstein 'Freedom of Religion and Religious Minorities' in Dinstein & Tabory (eds) *The Protection of Minorities and Human Rights* 145 at 158.

while in uniform would not engage s 31.¹ On the other hand, a measure that required orthodox Jewish congregations to cease the sexual segregation of places of worship would implicate the section.² Where a measure or action interferes with a religious community's ability to engage in the public practice of its religion, s 31 protects against such interference.³

(iv) *The right to use a language of choice*

Specific protection of an individual right to speak a language is unnecessary, since the protection of a right of enjoyment of culture implies protection of the linguistic medium through which that culture finds expression and through which enjoyment takes place.⁴ Nevertheless, a right to use a language, along with a prohibition of discrimination on grounds of language, appears in all the principal international minority protection clauses.⁵ While the enumeration of a right of language use indicates the importance accorded by both international human rights law and the Constitution to this particular aspect of cultural life, it is unclear what the practical implications of the right will be.

Clearly the language right has a negative dimension, allowing free use by an individual of a language without interference from private or public sources. This right is bolstered by the prohibition on language-based discrimination contained in s 9 and by the right of freedom of expression in s 16. Section 31 thus accords a right similar to that guaranteed in more detailed terms in a number of post-World War I Minorities Treaties. For example art 7 of the Treaty between the Allied Powers and Poland (1919) provided that '... [n]o restriction shall be imposed on the free use by any Polish national of any language in private intercourse, in commerce, in religion, in the press or in publications of any kind, or at public meetings'.⁶ Legislation preventing the use of a particular language in public places,⁷ in schools or

¹ Though, arguably, the prohibition would violate s 15. See *Goldman v Weinburger* 475 US 503 (1986).

² See *Roberts v United States Jaycees* 468 US 609 (1984). (A local ordinance prohibiting sex discrimination in any 'place of public accommodation' might extend to synagogues, in which case an exemption for religious associations would be required.)

³ See for example *Wisconsin v Yoder* 406 US 205 (1972), where the Supreme Court held that a school attendance law violated the right to free exercise of religion where its effect was to require attendance at school of children of the Amish religious community. The Amish wish to educate young children at home was 'not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group'. Compliance with the attendance law carried with it 'a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant religion' (at 216–18).

⁴ Thornberry *International Law and the Rights of Minorities* at 197.

⁵ Stephen Roth 'Toward a Minority Convention: Its Need and Content' in Dinstein & Tabory (eds) *The Protection of Minorities and Human Rights* 83 at 113. Besides art 27, mention can also be made of art 30 of the UN Convention on the Rights of the Child (reprinted in (1989) 28 *ILM* 1457).

⁶ Reprinted in Hurst Hannum (ed) *Documents on Autonomy and Minority Rights* (1993) at 682.

⁷ In some cases a state has prohibited the use of a minority language in public places. For example, the Turkish Anti-Terrorist Act 3713 of 1991 prohibits the use of the Kurdish language in public places. Similarly, Algerian legislation makes it an offence to hold public meetings or conferences or to put up signs or posters in any other domestic language except Arabic. The prohibition effectively prevents the Berber minority from using its language in the named situations. De Varennes *Language, Minorities and Human Rights* at 164–5.

universities,¹ commerce, or the press or broadcasting media² would be a *prima facie* violation of s 31. The same would hold true of restrictions imposed by a private individual. For example, an employer's seeking to restrict the use of a language by its employees while at work may constitute a violation of s 31.³

Besides the negative aspects of the right — the freedom to use a language in private and public and to establish and maintain institutions disseminating a language — international language rights guarantees contain an additional positive dimension. It is recognized that linguistic equality cannot be achieved by the mere prohibition of measures placing the speakers of different languages on an unequal footing. States should therefore strive to achieve equality in fact between speakers of different languages.⁴ States are frequently enjoined to promote minority language use through institutional mechanisms such as official language policies, measures promoting mother-tongue education, and permitting the use of a language of choice in court proceedings.⁵ The Constitution contains provisions dealing specifically with each of these issues.⁶ It appears then that even if the language right in s 31 is interpreted to require positive measures promoting language use, much of the work of the language right will have been done by other provisions of the Constitution.⁷

(e) The right to form, join and maintain cultural, religious and linguistic associations

Section 31(1)(b) uses some of the language of CP XII:

‘Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognized and protected.’

The subsection adds little to the guarantees contained in s 31(1)(a), and it was obviously included with an eye to achieving compliance with CP XII.

¹ See *Meyer v Nebraska* 262 US 390 (1923). (Statute prohibiting the teaching of any language other than English to students who had not passed the eighth grade violates due process.) Frequently states with large populations of immigrants impose an obligation on pupils in state schools to speak only the official language of instruction while on school premises. Arguably, this would be a clear violation of s 31 should it seek to prohibit the use of a language by pupils in their free time or in private communication with their fellows. See De Varennes *Language, Minorities and Human Rights* at 165.

² Clearly, governmental restrictions on the language of private media (e.g. by banning publications in a particular language) would violate s 31. More difficult, however, is the exercise of state control over radio and television frequencies. Since the airwaves are a public good the state is entitled to control access and is not obliged by the requirements of s 31 to allow unrestricted access to the airwaves by linguistic minorities but rather simply to exercise its control over such access in a non-discriminatory manner. See De Varennes *Language, Minorities and Human Rights* at 164.

³ See *Gutierrez v Municipal Court* 838 F 2d 1031 (9th Cir 1988). (Rules prohibiting employees from speaking any language other than English while at work discriminatory against minorities because the cultural identity of certain minority groups is tied to their use of their own language.) A requirement that employees use a particular common language while on duty in order to facilitate communication might be a reasonable limitation of the right. The same is not true of a prohibition on the use of a particular language while on a break or during an employee's free time.

⁴ Thornberry *International Law and the Rights of Minorities* at 200.

⁵ Capotorti *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* at 75–89.

⁶ Sections 6, 29(2), 35(3)(k), 35(4).

⁷ See further below, ‘Official Languages’ ch 37.

The Constitutional Court noted in its second certification judgment that the '[c]ollective rights of self-determination' in CP XII were 'associational individual rights, namely, those rights which cannot be fully or properly exercised by individuals otherwise than in association with others of like disposition'.¹ These rights are specifically conferred in s 31(1)(b) on persons belonging to cultural, religious and linguistic communities. They are conferred universally elsewhere in the Constitution: notably in the individual rights of association in the Bill of Rights, including freedom of association,² freedom to form and participate in the activities of political parties,³ and freedom to form and join a trade union or employers' organization and participate in its activities,⁴ together with the procedural provisions allowing their collective enforcement.⁵

What are 'organs of civil society'? Civil society is generally understood to mean the private and unofficial associations of the citizens of a state.⁶ For purposes of s 31 organs of civil society obviously include such examples of cultural and religious associations as schools, churches, seminaries, publishing houses, theatres, radio and television stations, etc. Also included would be associations for the purpose of promotion of minority cultural, linguistic or religious interests through political means.⁷ Section 31(1)(b) says explicitly what s 31(1)(a) implied: persons may, in community with others, form, join and maintain such associations without interference from the state or any other source. Again, as with s 31(1)(a), the right of an individual to 'join' an association must be balanced against the right of other individuals to 'maintain' the association, sometimes by restricting access to those who fail to meet the association's criteria for membership.⁸

(f) Consistency with the Bill of Rights

The inclusion of the requirement that the exercise of minority rights may not be inconsistent with other fundamental rights is a reminder that the constitutional protection of community identity is not a licence to that community to violate the rights of its members. The Bill of Rights is primarily an individualistic document. While it contains provisions supportive of group solidarity and continuity, it places them in the context of a list of rights aimed at guaranteeing individual freedom and equality. Constitutional protections of communal aspects of culture, religion and language have been phrased in the hope that they will not stray from the field of individual rights. So, on the one hand, the Constitution values membership of collective cultural institutions and concomitantly requires protection of the

¹ *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) at paras 23–7.*

² Section 18.

³ Section 19.

⁴ Section 23.

⁵ Section 38 permits the rights in the Bill of Rights to be enforced by an association acting in the interest of its members, and a person acting in the interest of a group or class of persons.

⁶ *Oxford English Dictionary* 2 ed (1989) s v civil.

⁷ An example of a law that would fall foul of s 31(1)(b) (and the right to use a language in public and private in s 31(1)(a)) is a July 1989 Algerian law on political parties which prohibits the registration as a party of a group based exclusively on a particular religion, language, region, sex or race. The law also states that parties may only use Arabic in their public communications. De Varennes *Language, Minorities and Human Rights* at 159.

⁸ See further above, § 35.4(b).

existence of those institutions. On the other hand, the Constitution values individual rights and freedoms. Where individual rights are prejudiced by the practices of cultural institutions, the protection of those rights may undermine the autonomy and identity of the cultural institution.¹ Nevertheless, to claim any coherence the Constitution must be interpreted as respecting collective cultural institutions and practices only in so far as those institutions and practices are compatible with the Constitution's list of fundamental rights.²

35.5 A RIGHT OF PARTICIPATION IN CULTURAL LIFE: SECTION 30

'30 Language and culture

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.'

Section 30 is the equivalent of s 31 of the interim Constitution, which was the sole expression in the interim Bill of Rights of an individual right to non-interference in aspects of culture and language. The interim Constitution's s 31 did at least one thing, and arguably one more. First, uncontroversially, it was an individual right to participation in cultural life even where that participation might be against the wishes of the particular community practising that culture.³ Secondly, it was a right, on the lines of art 27, to protection of communal interests in the maintenance of cultural life. This second interpretation rested on the realization that while individuals may be the bearers of culture and the speakers of language, the harm that occurs when indigenous cultures and languages are suppressed is not primarily harm to individuals but rather to the group entity. A right of participation in cultural life requires for its exercise the existence of an identifiable community practising a particular culture or speaking a particular language. Therefore, if as a result of state action or inaction that community loses its identity, if it is absorbed without trace into the majority population, the individual right of participation in a cultural or linguistic community will be harmed.

To summarize, the individualistic phrasing of the s 30 right made it unclear whether it could ground claims for the protection of the existence and identity of cultural and linguistic communities. The inclusion of s 31 in the final Bill of Rights — a full-blown right of individual members of cultural, linguistic and religious communities, to tolerance and

¹ For example, it is often argued that assertions of individual equality rights by women subject to indigenous law would threaten the entire edifice of indigenous law, premised as it is on ineluctably patriarchal practices and structures. This argument is explored in greater detail above, chapter 36 'Indigenous Law'.

² In his concurring judgment in the *Gauteng School Education Bill* case (supra) Sachs J pointed out the value placed by the Constitution on equality. The protection of 'diversity' by way of minority rights had, by comparison, 'markedly less constitutional pungency'. This meant that the first obligation of the Constitution was to achieve and protect equality. Minority rights must, where in competition with equality, defer to this obligation: '[T]he dominant theme of the Constitution is the achievement of equality, while considerable importance is also given to cultural diversity and language rights, so that the basic problem is to secure equality in a balanced way which shows maximum regard for diversity' (para 52). Though a balancing process is required, it appears that, for Sachs J at least, the equality right will be accorded more weight when measured against rights to minority protection.

³ On this interpretation s 30 (s 31 of the interim Constitution) is the equivalent of art 15 of the International Covenant on Economic, Social and Cultural Rights (1966), which provides that everyone has the right to take part in cultural life.

support of the practices of those communities — has made this dispute academic. Section 31 now does the work of protecting communal interests in culture, religion and language. All that is left for s 30 to do is to provide an additional ground for protection of an individual's interest in joining or retaining associations with a particular cultural community.¹

The individual right to use a language of choice in s 30 has been made superfluous by the inclusion of the right to use a language in community with others in s 31. It is difficult to conceive of an individual interest in using a language that is not at the same time an interest shared by other speakers of the language.

35.6 EDUCATION RIGHTS: SECTION 29

'29 Education

(1) . . .

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account —

- (a) equity;
- (b) practicability; and
- (c) the need to redress the results of past racially discriminatory laws and practices.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that —

- (a) do not discriminate on the basis of race;
- (b) are registered with the state; and
- (c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions.⁷

(a) Right to instruction in the official language of choice

Education rights are essentially rights to positive action. Education can only be assured by collective action, by society assuming the task of promoting it.² The education right of the Constitution divides this task among the state, on the one hand, and private individuals and institutions, on the other. The state is obliged to provide basic education in an official language of choice where reasonably practicable. It is obliged similarly to provide access to further education in an official language of choice, again where this is reasonably practicable. Space is created for the establishment of privately funded educational institutions by the requirement, in s 29(3), that there may be no interference with the establishment and maintenance of such institutions.

For linguistic minorities public education in the majority language can be particularly burdensome. The academic performance of minority children could be prejudiced by having to be taught in a language that is not their mother tongue. Moreover, in their formative years

¹ See above, § 35.4(b).

² Charles Taylor 'Human Rights: The Legal Culture' in UNESCO *Philosophical Foundations of Human Rights* (1986) at 49.

children of minorities would not be exposed to their language in school, impeding the development of written and spoken fluency in their mother tongue.¹ In spite of this burden it is generally accepted that there is no unqualified right to mother-tongue education in state schools.² Recognition of such a right would clearly be too unwieldy to be realistic, particularly in a multilingual country such as South Africa.³ Instead, the Constitution recognizes a right only to publicly-funded mother-tongue education in an official language. Nevertheless, given that there are eleven official languages, the right imposes potentially onerous positive obligations. The subsection therefore contains an internal limitation. The right may only be claimed where instruction in an official language of choice is reasonably practicable.

The standard of reasonable practicability is objective and justiciable.⁴ The standard of reasonableness means that where mother-tongue education is not provided there must be an objective justification for the denial of the right.⁵ International practice suggests that denial of the right can be justified by reference to a sliding-scale formula.⁶ The larger the numbers of speakers of a language in a particular area, the greater is the obligation to provide mother-tongue education in that language in that area. The higher the level of education, the less pressing is the obligation to provide mother-tongue education in all the languages of a region.⁷

(b) Right to establish private educational institutions

Section 29(3) amplifies the interim Constitution's commitment to respect for cultural life. Participation in cultural life is hardly possible without the right to learn about a particular culture and to teach it.⁸ The subsection envisages the establishment of 'independent' schools (i.e. schools other than those established by the public authorities) catering for the particular needs of cultural, linguistic and religious communities. The section does not place anything more than a negative obligation on the part of the state not to interfere in the establishment of such schools.⁹

¹ De Varennes *Language, Minorities and Human Rights* at 157.

² *Belgian Linguistics Case* 1 EHRR 252 (1965) (the European Charter does not guarantee a child the right to obtain instruction in a language of his or her choice).

³ In addition to recognizing eleven official languages, the Constitution lists eleven further languages commonly used by communities in South Africa (s 6(4)).

⁴ Kriegler J, in a concurring judgment in the *Gauteng School Education Bill* case (supra), expressed the opinion that the standard of reasonable practicability in s 32(b) of the interim Constitution, though necessarily flexible in order to cater for a wide variety of circumstances, is nevertheless objectively justiciable. Government arbitrariness could be kept in check by the courts.

⁵ *Belgian Linguistics Case* 1 EHRR 252 (1965) at 284–5 (the denial of mother-tongue education may not be for arbitrary reasons but must have an objective and reasonable justification).

⁶ De Varennes *Language, Minorities and Human Rights* at 201–6.

⁷ See art 8 of the European Charter for Regional or Minority Languages (1992) (reprinted in Hurst Hannum (ed) *Documents on Autonomy and Minority Rights* (1993) at 86) for an example of such a formula.

⁸ *Minority Schools in Albania Case* 1935 PCIJ (ser A/B) No 64 (minorities desire to preserve their 'racial peculiarities, their traditions and their national characteristics', to which end they are entitled to their own schools and other educational establishments). Cf Roth 'Toward a Minority Convention: Its Need and Content' in Dinstein & Tabory (eds) *The Protection of Minorities and Human Rights* 83 at 102.

⁹ Thus in the *Minority Schools in Albania Case* the Permanent Court found that abolition of all private schools in Albania was a violation of the rights of the Greek minority to equality of treatment. The abolition would deprive the minority of the institutions necessary to transmit its culture from generation to generation. The needs of the

[continued on p 35–27]

In the *Gauteng School Education Bill* case it was argued on behalf of the petitioners that s 29(3)'s predecessor — s 32(c) of the interim Constitution — creates a positive obligation on the state to accord to every person the right to require the state to establish, where practicable, educational institutions based on a common culture, language or religion. On the strength of this interpretation of s 32(c), it was contended that the government was not entitled to prohibit language competence testing as an admission requirement or direct what religious policy should be developed or who should or should not attend religious classes at schools so established.¹ The Constitutional Court held that neither the language of the subsection itself nor the language and historical context of the Constitution as a whole supported the argument that every person can demand from the state the establishment of schools based on a common culture, language or religion. Rather, s 32(c) provides that every person shall have the right to establish such educational institutions and may invoke the protection of the court where that right is threatened. Section 32(c) does not support a claim that educational institutions based on a commonality of culture, language or religion must be established by the state, or a claim that any person is entitled to demand such establishment, notwithstanding the fact that his or her right to basic education and to instruction in the language of his or her choice is, where practicable, otherwise being satisfied by the state.²

The qualification of the right to establish private schools by the requirement that the schools are registered with the state and maintain standards accords with international law. The exemplary formulation of minority educational rights is the 1960 UNESCO Convention against Discrimination in Education.³ Like s 29(3)(a)–(c), arts 2(b), 5(b) and 5(c) of the Convention grant a right to the creation of private educational institutions other than those maintained by the public authorities. The Convention considers in some detail the precise parameters of this right. In the case of minorities, art 5(c) declares that:

'It is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and depending on the educational policy of each State, the use or the teaching of their own language, provided however:

- (i) That the right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty;

majority, by contrast, would continue to be met by public schools. In the *Gauteng School Education Bill* case 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC) Mahomed DP found at para 9 that the protection afforded by s 32(c) of the interim Constitution was particularly important in the light of South African history. From the 1950s onward the government actively discouraged and effectively prohibited private educational institutions from establishing or continuing private schools. Instead, the Bantu Education Act 47 of 1953 subjected the establishment and administration of such schools to state control.

¹ The petitioners contested the validity of ss 19, 21 and 22 of the School Education Bill 1995 of the Gauteng province. Section 19(1) provided that '[l]anguage competence testing shall not be used as an admission requirement to a public school'. Section 21 provided for the formulation of a religious policy by the governing body of a public school within a framework of specified principles, subject to the approval of the provincial MEC for Education and subject to the power of the MEC to direct that a governing body reformulate a religious policy if it failed to comply with the Constitutional Principles or with the Constitution. Section 22 provided generally for freedom of conscience and specifically that pupils at a public school had the right not to attend religious education classes and religious practices at that school.

² Paragraph 9. See also *Matukane & others v Laerskool Potgietersrus* 1996 (3) SA 223 (T) at 233I.

³ 429 UNTS 93. Reprinted in E Patel & C Watters *Human Rights: Fundamental Instruments and Documents* (1994) at 407.

- (ii) That the standard of education is not lower than the general standard laid down or approved by the competent authorities; and
- (iii) That attendance at such schools is optional.’

In effect, the Convention declares the right to be available only where certain minimum standards, including standards laid down as general educational policy by the state, can be met. Thus the state is permitted to set out the conditions for the exercise of the right.

A further internal limitation on the right prohibits the establishment of educational institutions that discriminate on the basis of race.¹ Behind this specific prohibition is the assumption that a measure of discrimination may be necessary in the exercise of the right. A cultural, religious and linguistic community may, for example, wish to set up schools admitting only female pupils,² or pupils practising a particular religion or speaking a particular language.³ While such discrimination may in the circumstance not be unfair or unreasonable, s 29(3)(a) expressly prohibits admissions criteria based solely on race. Should the state wish to regulate or prohibit admissions criteria predicated on grounds other than that of race, its actions will require justification under the general limitation provision.

*Wittmann v Deutscher Schulverein, Pretoria*⁴ involves an application of the right to maintain private educational institutions in the horizontal dimension. A German-medium private school required its pupils to attend religious instruction classes. The classes were academic in nature, and the attendance requirement was motivated by the school’s conviction that ‘knowledge of the cultural background inclusive of religion was vital for the comprehension of the German language, literature and history’.⁵ The applicant, the mother of a pupil at the school, objected to this requirement as a violation of freedom of religion. Van Dijkhorst J held that there was no violation of the right to freedom of religion under IC s 14(2) because the school was not an organ of state and therefore not bound by the interim Bill of Rights.⁶

¹ Article 2(c) of the UNESCO Convention Against Discrimination in Education similarly permits the establishment or maintenance of private educational institutions, ‘if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level.’ See also the discussion of IC s 32(c) in *Matukane & others v Laerskool Potgietersrus* 1996 (3) SA 223 (T) at 231E, where the court stated that ‘[t]he word “unfair” should probably be read into s 32(c)’. *Matukane* ruled against a dual-medium (English and Afrikaans) school refusing to admit black children on grounds of culture.

² Physical separation of the sexes at puberty is part of the Muslim doctrine of purdah. See, on the demand for single-sex schools by the Asian community in Britain, Sebastian Poulter ‘Ethnic Minority Customs, English Law and Human Rights’ (1987) 36 *International and Comparative Law Quarterly* 589 at 602–3. Article 2(a) of the UNESCO Convention Against Discrimination in Education 1960 provides that the establishment or maintenance of separate educational systems or institutions for pupils of the two sexes does not constitute discrimination under the Convention if these systems or institutions provide equivalent access to education, equally qualified staff, premises and equipment of the same quality and afford the opportunity to take the same or equivalent courses of study.

³ Article 2(b) of the UNESCO Convention provides that the establishment or maintenance of separate educational systems or institutions for religious or linguistic reasons shall not constitute discrimination under the Convention if participation in these systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities.

⁴ 1998 (4) SA 423 (T), 1999 (1) BCLR 92 (T).

⁵ At 432F–G.

⁶ See the discussion of the case above, Smith ‘Religion’ § 19.13 and below, Kriel ‘Education’ § 38.8.

In any event, Van Dijkhorst J held, the right to freedom of religion had been waived in this case by the applicant submitting to the school's constitution and rules (which included the religious instruction requirement) when she enrolled her daughter. Support for the waiver argument was found in IC s 32(c) (the equivalent of FC s 29(3)). The right to 'maintain' private educational institutions based on culture, language or religion must include the right to exclude non-adherents or non-participants from those institutions. 'In respect of these educational institutions the fundamental freedom of religion of "outsiders" is limited to the freedom of non-joinder. Outsiders cannot join on their own terms and once they have joined cannot impose their own terms.'¹ This indicated that waiver of the right to religious freedom was constitutionally acceptable in respect of private educational institutions.

35.7 LIMITATION OF MINORITY RIGHTS

(a) **The value of minority rights**

Individual identity and membership or participation in a cultural community are inextricably connected. Individuals' cultural heritage, their sense of belonging to a cultural structure and history, is an essential part of their conception of self, their orientation to reality. The necessity of cultural membership for self-identity explains the tenacity with which people adhere to and defend their cultural associations, even when their membership of those associations entails the imposition of negative costs such as discrimination.² Minority rights are human

¹ At 455A–B.

² Will Kymlicka *Liberalism, Community and Culture* (1989) at 175–6.

rights because the cultures and traditions of minorities are a basic human resource. Affiliation to those cultures and traditions is an essential aspect of what it means to be human.

But whatever humanistic justifications may be found for the recognition of minority rights, there are equally compelling pragmatic grounds for offering legal protection to minority interests. Minority fears of persecution or cultural extinction are a powerful destabilising force in contemporary politics. It is therefore widely recognized that respect for minority rights is an essential factor for peace, justice, stability and democracy.¹

The nascent South African constitutional order is no different. The MPNP and Constitutional Assembly participants recognized the reality (if not, in all cases, the validity) of minority fears of domination. The Constitution therefore contains measures designed to assuage those fears by protecting minority rights. These measures create a zone of freedom in which a minority may pursue the cultural, educational and linguistic practices that give it its distinctive identity. But the Constitution recognizes that the state may at times have legitimate reasons for circumscribing this zone of freedom. Limitations on minority rights are therefore authorized where reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.²

International experience suggests a number of possible grounds on which the state may seek to justify the limitation of minority rights. These can be divided into four categories. First, a state may wish to impose general administrative measures designed to protect public safety, order, health or morals that may have the effect of trespassing on the rights of minorities. Secondly, a state may wish to intrude in a minority's zone of freedom to protect the fundamental rights and freedoms of others. Thirdly, the state may seek to impose assimilatory measures on minorities or invite their participation in integrative projects designed to promote the goal of national unity. Fourthly, the state may wish to take steps to protect a minority's existence or identity that may have the effect of limiting an individual's right of participation in minority life. The second of these concerns is expressly protected by an internal limitation to s 30 and s 31: the exercise of cultural rights may not trespass on the rights of others.³

(b) Limitations to protect the public order, health or morals

Article 27 does not contain any specific provision for the limitation of the rights it entrenches. However, it is clear that none of the human rights protected by the Covenant is absolute and illimitable.⁴ States have argued that limitations of art 27 should be permitted on the same basis as those specifically provided for in the case of the right of religious freedom. Article 18(3) of the Covenant provides that ‘. . . [f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to

¹ Paragraph 30 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (CSCE) (29 June 1990); reprinted in (1990) 29 *ILM* 1305. According to the Preamble to the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (GA Res 47/135, 18 December 1992) ‘the promotion and protection of the rights of persons belonging to . . . minorities contributes to the political and social stability of the States in which they live’.

² Section 36(1).

³ See above, § 35.4(f).

⁴ Thornberry *International Law and the Rights of Minorities* at 203.

protect public safety, order, health, or morals or the fundamental rights and freedoms of others'. Since religious and cultural or linguistic rights are conceptually related, it is argued, the provisions of art 18(3) should be applied by analogy to the limitation of art 27.¹

Such an argument fits the Constitution's limitation test. Limitations of fundamental rights are possible only where the objective behind the limitation is designed to reinforce the values of the constitutional project. Practices that undermine public safety, order, health or morals are unarguably inimical to an open and democratic society based on human dignity, equality and freedom.²

It should be noted, however, that the interpretation of morality should be conducted in the light of the fact that the Constitution protects minority rights. The implication is that the Constitution requires legal morality to be informed by the values of cultural pluralism and tolerance. This requires a more robust and less chauvinistic conception of morality than South African courts have been wont to employ when dealing with, for example, questions of the validity of potentially polygamous marriages.³

(c) Limitations to promote national unity

The urgent necessity to promote national unity in South Africa to correct the divisions of the past may ground arguments for the limitation of minority protections. Measures aimed at repairing the divisions of the past and promoting a common South African identity may appear eminently justifiable even where they trespass on minority autonomy. Such arguments would be fuelled by the tainted record of the discourse of minority rights in South Africa. Segregation and its successor, apartheid, played on the ethnic, cultural and linguistic differences among the South African population. In the view of apartheid's apologists, South Africa was a volatile association of ethnic minorities. People of distinct cultures were irreducibly alien to each other. The amalgamation of distinct cultures was a recipe for conflict. It was insisted that separate development would recognize and protect cultural distinctiveness, granting self-determination to each ethnic fraction in South African society, while maintaining essential economic interdependence. Given this discouraging history, state policy may well turn in the direction of assimilation, de-emphasizing ethnic, cultural and linguistic division in the interests of national unity.

¹ Thornberry *International Law and the Rights of Minorities* at 202 (citing representations by States Representatives during the drafting stage of art 27).

² For example, the practice known as female circumcision, widespread in parts of Africa, is often opposed on the grounds that it is a threat to the health of those subjected to it. See Karen Engle 'Female Subjects of Public International Law: Human Rights and the Exotic Other Female' (1992) 26 *New England LR* 1509 at 1513–15 for an outline and critique of this argument.

³ According to Innes CJ in *Seedat's Executor v The Master (Natal)* 1917 AD 302 at 309, such marriages are 'fundamentally opposed to our principles and institutions' (confirmed in *Ismail v Ismail* 1983 (1) SA 1006 (A) at 1026B–C). The interim Constitution would require a wider conception of the word 'our'. Contrast the approach of the English courts in *Alhaji Mohamed v Knott* [1969] 1 QB 1 in declaring valid the Muslim marriage in Nigeria of a 13-year-old girl '[w]hen . . . [the court a quo says] that "a continuance of such an association notwithstanding the marriage would be repugnant to any decent-minded English man or woman", they are, . . . and can only be, considering the view of an English man or woman in relation to an English girl and our Western way of life' (per Lord Parker CJ at 15F–G). See also the extensive and critical discussion of *Ismail* by Farlam J in *Rylands v Edros* 1997 (2) SA 690 (C) at 701I–711C, 1997 (1) BCLR 77 (C).

But whatever its historical force, an argument that minority identity and institutions should yield to the necessity of national unity should be treated with considerable circumspection. The rationale for the protection of minority rights is to protect minorities from unwanted assimilation and the concomitant extinction of their identity. To authorize state intervention in constitutionally protected aspects of cultural life in the name of nation building would be to discount the value of those protections for the project of an open and democratic society based on human dignity, equality and freedom.

(d) Limitations to protect minority existence or identity

In the opinion of the Human Rights Committee limitations on an individual's right of enjoyment of their culture may be permissible where they are designed to protect the existence or identity of a minority population. The very possibility of such a limitation illustrates neatly the difficult hybrid individual and collective nature of the right protected by art 27 and by s 31.¹

35.8 SELF-DETERMINATION

'235 Self-determination

The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.'

(a) Self-determination in international law

In international law self-determination is a right of all peoples . . . freely to determine, without external interference, their political status and to pursue their economic, social and cultural development.² There are competing understandings of self-determination, indicating differences of emphasis rather than fundamental divergence over the basic content of the right. On the one hand, the term is used to underpin the claims of a group of people who have some degree of national consciousness to form their own state and to govern themselves, usually through a process of decolonization or, more controversially, through secession from an existing independent state. This understanding may be termed external self-determination, since exercise of the right entails changes to the international personality of a state. On the other hand, self-determination can also be understood as having an internal dimension, concerning the relationship between a people and the government of the state in which that people lives. The right is a right of groups within an existing sovereign state to a degree of

¹ See further above, § 35.4(b).

² 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) GA Res 2625 (1970) reprinted in Hurst Hannum (ed) *Documents on Autonomy and Minority Rights* (1993) 36. For formulations of the right in treaty law, see common art 1 of the ICCPR and the International Covenant on Social, Economic and Cultural Rights (1966), and art 20 of the African Charter of Human and Peoples Rights (1982).

political autonomy and to its own economic, social and cultural development. Internal self-determination does not imply a right of any such group to a sovereign state of its own.¹ Understood in this way, the right of self-determination closely tracks principles of democratic governance such as popular participation and representation in government, respect for fundamental human rights (including social and political rights), and the rule of law.²

(b) Self-determination and the Constitution

(i) The interim Constitution and the Constitutional Principles

Given South Africa's long history of ethnic division and political orchestration of minority fears, it could be expected that self-determination claims would find a receptive constituency here. During the negotiations political groupings claiming to represent the interests of ethnic minorities saw little purpose in entrenching minority rights in a Bill of Rights. In the view of those parties, a better refuge from majority rule would be found through elaboration of the right of self-determination, understood in its external or nationalistic sense.

Self-determination claims came to dominate the MPNP negotiations. Two major political groupings insistently pressed the issue, backing their demands with dire threats of violent secession and civil war. White right-wing parties, grouped in a succession of loose alliances, mobilized around the issue of an independent Afrikaner state, a Volkstaat.³ Increasingly, as it felt its federalist ambitions to be frustrated in the course of the negotiations, the language of self-determination and secession was to become more attractive to the IFP. The party unveiled a Constitution of the State of KwaZulu/Natal in December 1992, which set out its vision of a federal system and what it termed internal regionalization. Commentators observed that the document approached being a charter for an independent region.⁴ This secessionist strain in IFP politics grew louder as the party became estranged from the Kempton Park process, culminating in declarations of a sovereign kingdom of KwaZulu/Natal.

¹ Authority for a right of internal self-determination of peoples living within independent states can be found in the penultimate paragraph on rights of peoples in existing states in the Friendly Relations Declaration. The paragraph reads: 'Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.' See Patrick Thornberry 'The Democratic or Internal Aspect of Self-determination with some Remarks on Federalism' in C Tomuschat (ed) *Modern Law of Self-determination* (1993) 101 at 114.

² Allan Rosas 'Internal Self-determination' in C Tomuschat (ed) *Modern Law of Self-determination* (1993) 225 at 230.

³ Once considered the preserve of intellectuals and eccentrics, the Volkstaat strategy entered the mainstream of right-wing politics in the late 1980s. Until then, the right wing had put its faith in parliamentary politics to deliver it from the prospect of majority rule. It was thought that an election victory would enable a right-wing majority in the white Parliament to set about repairing the damage wrought to the Verwoerdian state by two decades of sporadic reform. But stark defeats in the 1989 general election, the 1992 constitutional referendum, and the steady attrition of parliamentary power since February 1990 necessitated the abandoning of this strategy in favour of secessionist politics. See Janis Grobbelaar '“Bittereinders”': Dilemmas and Dynamics on the Far Right' in G Moss & I Obery (eds) *South African Review* 6 (1992) at 103.

⁴ Steven Friedman *The Long Journey: South Africa's Quest for a Negotiated Settlement* (1993) at 164; Stephen Ellman 'Federalism Awry: The Structure of Government in the KwaZulu/Natal Constitution' (1993) 9 *SAJHR* 165.

While attempts were made by the negotiators to accommodate IFP demands by increasing the political power of provincial governments, right-wing fears were addressed by two Constitutional Principles dealing with self-determination: CPs XII and XXXIV. The first emerged from consideration of submissions made by right-wing parties shortly after the recommencement of negotiations in 1993. These submissions argued for a right of self-determination in its external sense: secession of an independent Afrikaner Volkstaat from the remainder of South Africa. In the view of the Technical Committee on Constitutional Issues the right of self-determination would be addressed by a package of guarantees corresponding to the internal dimension of the right. These included guarantees of non-discrimination, provisions ensuring meaningful participation in the political process by minority parties, by the acceptance of linguistic and cultural diversity, and by the recognition, in what became CP XII, of collective rights of internal self-determination in establishing linguistic, cultural and religious associations.¹

CP XXXIV was inserted as a last-minute attempt to entice the right-wing, which had abandoned negotiations and declared its intention to boycott the election, to participate in the transitional process.² Read together with Chapter 11A of the interim Constitution which provided for the establishment of a Volkstaat council,³ it gives qualified recognition to a right of external self-determination, and provided as follows:

- ‘1. This Schedule and the recognition therein of the right of the South African people as a whole to self-determination, shall not be construed as precluding, within the framework of the said right, constitutional provision for a notion of the right to self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other recognized way.
2. The Constitution may give expression to any particular form of self-determination provided there is substantial proven support within the community concerned for such a form of self-determination.
3. If a territorial entity referred to in paragraph 1 is established in terms of this Constitution before the new constitutional text is adopted, the new Constitution shall entrench the continuation of such territorial entity, including its structures, powers and functions.’

(ii) *Section 235*

Agreement on the interpretation and implementation of CP XXXIV proved elusive during the Constitutional Assembly process. It was most urgently pressed by the Freedom Front, which interpreted it as supporting constitutional recognition of its demand for a territorial Volkstaat. This demand was resisted by the ANC, which justified its resistance by pointing

¹ Technical Committee on Constitutional Issues *Fourth Supplementary Report on Constitutional Principles* 26 July 1993 at 7. On the constitutional implementation of CP XII, see further above, § 35.4.

² The principle was inserted by the Constitution of the Republic of South Africa Amendment Act 2 of 1994. See generally Richard Humphries, Thabo Rapoo & Stephen Friedman ‘The Shape of the Country: Negotiating Local Government’ in Stephen Friedman & Doreen Atkinson (eds) *South African Review* 7 (1994) 148 at 170.

³ Chapter 11A of the interim Constitution provided for the establishment of a Volkstaat Council, intended to enable proponents of the idea of a Volkstaat constitutionally to pursue the establishment of such a Volkstaat (s 184B(1)). The Council is an advisory body, with powers to gather information and make representations on the Volkstaat issue to the Constitutional Assembly, including the suggested constitutional relationship with government at national and provincial level of a Volkstaat (s 184B(1)(a)).

to the failure of the Volkstaat Council to produce anything like a viable blueprint for an independent Volkstaat. In the end, no constitutional provision for external self-determination was made, though the life of CP XXXIV was prolonged by its repetition in s 235.¹

Considering objections that CP XXXIV had not been complied with, the Constitutional Court held that the basic thrust of the principle was that constitutional provision for the notion of the right to self-determination by any community sharing a common cultural and language heritage within a territorial entity could not be precluded, notwithstanding the fact that CP I required South Africa to be a unitary sovereign state. This was a permissive rather than an obligatory provision. The only mandatory provision in the Constitutional Principles was that if a territorial entity was in fact established in terms of the interim Constitution before the adoption of the final Constitution, then such an entity must be entrenched in the Constitution. Since no such entity had in fact been established no obligatory entrenchment had to be made.²

What then is the import of s 235? We have seen that self-determination can be viewed as encompassing only a narrowly construed internal dimension or a wider external dimension. Internal self-determination affects only the relationship between a group and the state and implies neither a right of secession, nor even political rights aimed at ensuring representation and participation of groups in the government of the state. But s 235 requires that the phrase 'self-determination' is interpreted so as not to exclude the possibility of vindication of the right of self-determination by external or by internal political means. This wider interpretation of the right of self-determination is intended only to benefit a community sharing a common cultural and language heritage, as opposed to any of the other possible collectivities that may claim self-determination.

A community sharing a common cultural and language heritage (a euphemism for an ethnic minority) may claim legislative provision for self-determination in a territorial entity within the Republic or in any other recognized way. Besides decolonization, there are other possible means of exercising the right of self-determination. The most far-reaching is by means of secession. While the phrasing of the principle appears to favour self-determination by internal means, this does not exclude the possibility that secession may be another recognized way of achieving self-determination. The criteria for recognition are not set out, but may safely be assumed to mean that a recognized way is a form of self-determination sanctioned by international law. While there is no right of secession in international law outside the colonial context, a state may make provision for secession of part of its territory in its constitution.³ However, recognition of the right of self-determination in international law is inevitably connected to the principle of territorial integrity of states.⁴ A secession that disrupts existing territorial arrangements would thus be treated with disfavour and the resulting entity would probably fail to be recognized as a state.

¹ The section appeared for the first time in the second Constitution Bill of 6 May 1996.

² Paragraph 218.

³ R McCorquodale 'Self-determination: A Human Rights Approach' (1994) 10 *SAJHR* 4 at 21-3.

⁴ A point recently affirmed by the Vienna Declaration and Programme of Action of the United Nations World Conference on Human Rights (adopted by acclamation, 25 June 1993) (1993) 32 *ILM* 1661 at 1665:

[continued on p 35-35]

Short of secession, other means of exercising the right of self-determination have been considered in the discussion of internal self-determination above. These include the protection of minority rights and measures designed to ensure the participation and representation of all groups in the political process. Note should be taken of a considerable body of literature arguing that realization of the right of self-determination may require a state to adopt a federal structure of government.¹

'All peoples have the right of self-determination. By virtue of this right they freely determine their political status, and freely pursue their economic, social and cultural development. . . . In accordance with . . . [the Friendly Relations Declaration], this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.'

As to the practice of African states, see John Dugard 'Secession: Is the Case of Yugoslavia a Precedent for Africa?' (1993) 5 *African Journal of International and Comparative Law* 163 at 164: '[T]he principle of territorial integrity and the rejection of secession are firmly entrenched as part of African international law.'

¹ Thornberry 'The Democratic or Internal Aspect of Self-determination with Some Remarks on Federalism' in C Tomuschat (ed) *Modern Law of Self-determination* (1993) at 133-7; R McCorquodale 'Self-determination: A Human Rights Approach' (1994) 10 *SAJHR* 4; Y Dinstein 'The Degree of Self-rule of Minorities in Unitarian and Federal States' in Brölman et al (eds) *Peoples and Minorities in International Law* 221; Bertus de Villiers 'Federalism in South Africa: Implications for Individual and Minority Protection' (1993) 9 *SAJHR* 373.