

Chapter 58

Community Rights: Language, Culture & Religion

Stu Woolman

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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.

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.

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.

29 Education

(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.

58.1 Introduction*

In the heady days following the fall of the Berlin Wall in 1989, it seemed possible that we might be able to have our cake and eat it too. Velvet revolutions in Eastern Europe and South Africa offered evidence that we were all 'social democrats' now. More amazing still, separatist claims were resolved either through partition — as occurred with the neat cleavage of Czechoslovakia into the Czech Republic and Slovakia — or through public referenda in which minority communities concluded that it would be best if they did not withdraw from the polity of which they were currently members — as occurred in French-speaking Quebec in Canada and in white South Africa. The two great strains of enlightenment thought — the individualism of Locke and the American Revolution and the romanticism of Rousseau and the French Revolution — seemed to have

* I would like to thank Iain Currie for allowing me to make generous use of his previously published material on the international law on minority rights. I am also indebted to Theunis Roux and Solomon Dersso for their editorial interventions.

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finally played themselves out with the end of the Cold War. We suddenly found our selves free to be 'me' and 'we'. That is, each individual could freely be her many selves (in an order of priority largely left to the citizen herself), maintain her affiliations with the associations that made such selves possible, and not have to worry that the state would force her to choose one of her identities over all others.

But within five years, from 1989 to 1994, the cheery, non-postmodernist, optimism with which we (global citizens) greeted placards in Prague and Pretoria bearing the words 'Freedom', 'Truth' and 'Justice' morphed into something decidedly more modest.¹ Yugoslavia disintegrated into a war of all against all. In Rwanda, Hutus only agreed to beat their machetes into ploughshares after they had already beaten a million Tutsis to death. Something had changed. Or more accurately, we had missed something — in this brief epoch — along the way. Today, too many nations still seemed inclined to use the machinery of the state to eliminate alternative and non-dominant ways of being in the world.

Three hundred and fifty years ago, Locke's *Letter on Toleration* suggested that we could end such civil wars by denying the state the right to dictate that its citizens

1 For more on the non-relativist, shared (if necessarily narrow), understanding of such basic political terms as freedom, justice and truth in substantially different contexts, see M Walzer *Thick and Thin: Moral Argument at Home and Abroad* (2002). As a steadfast defender of the politics of difference, Walzer does not suggest that we all share a maximalist account of what morality, justice and truth entail. (We are not all adherents of Rawls' difference principle in politics, nor we do we all subscribe to a correspondence theory in epistemology.) Walzer does, correctly, claim that we (global citizens) share a minimalist account of justice with those persons marching and revolting in Prague and Pretoria. And what is that? Walzer writes: 'What they meant by ... justice ... was simple enough: an end to arbitrary arrests, equal and impartial law enforcement; the abolition of the privileges and prerogatives of the party elite common, garden variety justice.' Ibid at 2.

conform their behaviour to a comprehensive (and totalizing) vision of the good life and by ensuring that the state accorded religious, cultural and linguistic groups sufficient autonomy to pursue their own preferred way of being in the world. Was he wrong? Again, what had we missed? What he missed is the difference between a politics of respect that issues from claims grounded in human dignity and a politics of difference that issues from claims grounded in equal recognition. And that, I suggest below, is exactly the difference between a politics that can accommodate both the right to be 'me' and the right to be 'we' — and one that fails to do both.

It may well be that, in many societies, individual liberty, multicultural recognition and nation building are incompatible. Indeed, for a society in transition, multicultural recognition and national identity formation appear to pull in opposite directions. For even if individual identities are formed in open dialogue, these identities are largely shaped and limited by a pre-determined set of scripts. Collective recognition becomes important, in large part, because the body politic has denied the members of some group the ability to form — on an individual basis — a positive identity. In a perfect world, the elimination of group-based barriers

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to social goods would free individuals to be whatever they wanted to be. But even in a perfect world, claims for group recognition do not dissipate so readily.

What is the basis for the demand for group recognition? In any multicultural society, two different kinds of claims for equal respect and two different senses of identity sit uncomfortably alongside one another. The first emerges from what Charles Taylor calls a politics of equal dignity.² It is based on the idea that each individual human being is equally worthy of respect. The second issues from a politics of difference. This form of politics tends to revolve primarily around the claim that every group of people ought to have the right to form and to maintain its own — equally respected — community. The important distinction between the two is this. The first focuses on what is the same in all of us — that we all have lives and hopes and dreams and that we should all be allowed to pursue these dreams in an equal manner. The second focuses on a specific aspect of our identity — our membership of a group — and says that the purpose of our politics ought to be, ultimately, the nurturing or the fostering of that particularity. The power of this second form of liberal politics springs largely from its involuntary character — the sense that we have no capacity to choose this aspect of our identity. It chooses us.³ One of the problems South Africa faces is that it is difficult, if not impossible, to accommodate both kinds of claim. As Taylor himself notes, while 'it makes sense to demand as a matter of right that we approach ... certain cultures with a presumption of their value ... it can't make sense to demand as a matter of right that we come up with a final concluding judgment that their value is great or equal to others.'⁴ But the demand for political recognition of distinct religious, cultural and linguistic communities often amounts to that second demand. Moreover, such recognition often reinforces a narcissism of minor difference that, in turn, provokes anxiety about the extent to which members of other groups secure access to the most important goods in a polity. Such anxiety about a just distribution of goods — and

2 See C Taylor 'The Politics of Recognition' in A Gutmann (ed) *Multiculturalism* (1996) 1.

3 See M Walzer 'On Involuntary Association' in A Gutmann (ed) *Freedom of Association* (1998) 64, 67.

4 Taylor (supra) at 16.

the manner in which group affiliation distorts that distribution — necessarily interferes with national identity formation. The African National Congress (ANC) has, for both historical reasons and for reasons associated with its vision of transformation, refused to lend significant support to group politics. The Constitutional Court is also predisposed towards claims of equal respect (for individuals and, occasionally, groups) grounded in a politics of equal dignity.⁵

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(a) Exclusion, unfair discrimination and mere differentiation

Should we, like the ANC, the Constitutional Court, and Amartya Sen, be group identity sceptics? Sen contends that:

Our shared humanity gets savagely challenged when the manifold divisions in the world are unified into one allegedly dominant system of classification — in terms of religion, or community, or culture, or nation, or civilization (treating each as uniquely powerful in the context of that particular approach to war and peace.) The uniquely partitioned world is much more divisive than the universe of plural and diverse categories that shape the world in which we live. It goes not only against the old-fashioned belief that 'we human beings are all much the same' ... but also against the less discussed but much more plausible understanding that we are diversely different. The hope of harmony in the contemporary world lies to a great extent in a clearer understanding of the pluralities of human identity, and in the appreciation that they cut across each other and work against a sharp separation along one single hardened line of impenetrable division.⁶

That much seems incontestable. Totalizing views of identity (with their ostensibly comprehensive visions of the good life) have led to a hardening of boundaries between groups. The hardening of boundaries has led, in turn, to a hardening of hearts that enables many nations (and many communities or groups with claims to nationhood) to pillage, bomb and plunder with increasingly greater abandon. The more difficult question for group identity sceptics in South Africa is how to draw down on our constitutive attachments in a manner that both protects the social capital we require to build the many institutions that make us human *and* prevents specific religious, cultural, and linguistic communities from using that social capital to undermine our 'more perfect union'. Here Sen knows he — or we — are in trouble, but can only state the problem thus:

The sense of identity can make an important contribution to the strength and the warmth of our relations with others, such as our neighbours, or members of the same community, or fellow citizens, or followers of the same religion. Our focus on particular identities can enrich our bonds and make us do things for each other and can help us to take us beyond our self-centred lives ... [But] [t]he well-integrated community in which residents do absolutely wonderful things for each other with great immediacy and solidarity can be the very same community in which bricks are thrown through the

5 See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at paras 28-30 ('[I]t is clear that the constitutional protection of dignity requires us to acknowledge the value and the worth of all individuals as members of society.') See also *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41 ('[D]ignity is at the heart of individual rights in a free and democratic society... [E]quality means nothing if it does not represent a commitment to each person's equal worth as a human being, regardless of their differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second class citizens.') See also S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36.

6 A Sen *Identity and Violence: The Illusion of Destiny* (2006) xiv.

windows of immigrants who move into the region from elsewhere. The adversity of exclusion can be made to go hand in hand with the gifts of inclusion.⁷

Sen's last sentence is telling — '*can* be made to go hand in hand'. Not *must*, not *inevitably*, and certainly not *ought*. But again, Sen's invocation of diverse difference (within individuals, as within nations) and his ringing defence of the freedom to

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think critically about our multiple identities does not do the hard work — the line-drawing and the rule-making — that constitutional law requires.⁸

Here, at least, is one place where the Constitutional Court's jurisprudence offers us useful guidance as to how the state ought to engage the religious, cultural and linguistic communities that make up the state and how those communities ought to engage one another. In *Fourie*, the Constitutional Court found that while the state could not continue to enforce common-law rules and statutory provisions that prevented same-sex life partners from entering civilly-sanctioned marriages, the Final Constitution had nothing immediate to say about religious prohibitions on gay and lesbian marriage and could not be read to require religious officials to consecrate a marriage between members of a same-sex life partnership.⁹ The *Fourie* Court wrote:

[The amici's] arguments raise important issues concerning the relationship foreshadowed by the Constitution between the sacred and the secular. They underline the fact that in the open and democratic society contemplated by the Constitution, although the rights of non-believers and minority faiths must be fully respected, the religious beliefs held by the great majority of South Africans must be taken seriously. As this Court pointed out in *Christian Education*, freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awaken concepts of self-worth and human dignity that form the cornerstone of human rights. Such belief affects the believer's view of society and founds a distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries. For believers, then, what is at stake is not

7 Ibid at 2-3.

8 For a substantially more optimistic view about our capacity to recognize diverse difference, and our ability to sustain political institutions, in heterogeneous societies, through rational discourse, see KA Appiah *Cosmopolitanism: Ethics in a World of Strangers* (2006) 113, 144 ('We do not need, have never needed, settled community, a homogenous system of values. The odds are that, culturally speaking, you already live a cosmopolitan life, enriched by literature, art, and film that comes from many places, and that contains influences from many more. And the marks of cosmopolitanism in [my] Asante village soccer, Muhammed Ali, hip-hop entered [our] lives, as they entered yours, not as work, but as pleasure... . One distinctly cosmopolitan commitment is to pluralism. Cosmopolitans [therefore] think that there are many values worth living by and that you cannot live by all of them. So we hope and expect that different people and different societies will embody different values. But they have to be values worth living by.')

9 *Minister of Home Affairs v Fourie (Doctors For Life International & Others, Amici Curiae); Lesbian & Gay Equality Project & Others v Minister of Home Affairs* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) ('*Fourie*') at paras 90-98. See also *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA), 2005 (3) BCLR 241 (SCA) at paras 36-37 (No religious denomination would be compelled to marry gay or lesbian couples.)

merely a question of convenience or comfort, but an intensely held sense about what constitutes the good and proper life and their place in creation. . . . Religious bodies play a large and important part in public life, through schools, hospitals and poverty relief programmes. They command ethical behaviour from their members and bear witness to the

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exercise of power by State and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of a people's temper and culture, and for many believers a significant part of their way of life. . . . In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group, the law will legitimately acknowledge a diversity of strongly-held opinions on matters of great public controversy. I stress the qualification that there must be no prejudice to basic rights. Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom. The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.¹⁰

The *Fourie* Court commits itself to five propositions that are fundamental for associational rights, generally, and for religious, cultural and linguistic community rights, in particular. First, religious, cultural and linguistic communities are a critical source of meaning for the majority of South Africans. Second, religious, cultural and linguistic communities create institutions that support the material, intellectual, ethical and spiritual well-being of many South Africans. Third, religious, cultural and linguistic associations, as part of civil society, play an essential role in mediating the relationship between the state and its citizens. Fourth, while religious, cultural and linguistic associations are entitled to articulate — and make manifest through action — their 'intensely held world views', they may *not* do so in a manner that *unfairly* discriminates against other members of South African society. Fifth, although the 'intensely held world views' and practices of various religious, cultural and linguistic associations must, by necessity, exclude other members of South African society from some forms of membership and of participation, such exclusion does necessarily constitute unfair discrimination. Indeed, the *Fourie* Court's decision makes it patently clear that, to the extent

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that exclusionary practices are designed to further the legitimate constitutional ends of religious, cultural and linguistic associations, and do not have as their aim the denial of access to essential goods, the Final Constitution's express recognition of religious, cultural and linguistic pluralism commits us to a range of practices that the Constitutional Court will deem *fair* discrimination. The refusal of some religious

10 *Fourie* (supra) at paras 90-98.

officials to consecrate same-sex life partnerships as marriages under religious law is but one form of *fair* discrimination.

If we accept the *Fourie* Court's fifth proposition — which goes to the heart of the matter in conflicts between egalitarian concerns and associational rights — then South Africans, as members of a socially democratic, but still liberal constitutional, state, are obliged to ask a number of other questions about the 'effects' of exclusionary practices. The easy question is whether communities possess the power to exclude members who initially agree to follow the rules of the community, but then subsequently refuse to do so. Of course, they do. The *hard* question is whether South African society as a whole would be better off if it eliminated those exclusionary practices that not only remove non-compliant individuals but prevent other individuals — who begin as outsiders — from gaining entrance into the community?

The answer to this *hard* question turns primarily on access to those goods which individuals require in order to flourish. In 21st-century social democratic, but liberal constitutional, states — such as South Africa — there are no hard and fast lines between the public sphere and the private sphere (and the various goods they provide to individuals.) The result is that the Final Constitution affords no easy answers about what remains in the private domain and thus subject to some constitutional pre-commitment to non-interference. (Even questions of sexual intimacy, as the *Jordan* Court made clear, are matters of public interest.) Instead, the Final Constitution — and super-ordinate legislation such as the Promotion of Equality and Prevention of Unfair Discrimination Act¹¹ — is primarily concerned with questions about individual and group access to the kind of goods that enable us to lead lives worth living.

Sen, for his part, is sceptical of the value of many forms of exclusionary and discriminatory behaviour practised by some religious, cultural and linguistic communities. It is the virulence of these practices that leads Sartre to conclude, somewhat rhetorically, that the anti-Semitism of European Christianity and Nazi Germany 'makes the Jew'.¹² (By this, Sartre meant that the dominant and the discriminatory script of Christian Europe denied the Jew the most basic features

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of humanity.¹³) But this critical stance toward the exclusionary practices of many communities does not commit us to the proposition that all of these exclusionary practices are constitutionally infirm. (Nor does it commit us to the proposition, implicit in Sartre's brief against anti-Semitism, that there is nothing of value left in Judaism once one dispenses with the discriminatory script of Christian Europe.¹⁴) As I have argued at length elsewhere¹⁵ — and as Sen recognizes¹⁶ — no form of meaningful human association — marriages, nuclear families, extended families, friendships, burial societies, trade unions, neighbours, neighbourhood security watches, political parties, bowling clubs, political action groups, stokvels,

11 Act 4 of 2000.

12 See Jean-Paul Sartre *Portrait of the Anti-Semite* (trans E de Mauny 1968) 57 ('The Jew is a man whom other men look upon as a Jew; ... it is the anti-Semite who makes the Jew.')

13 Edward Said voices similar sentiments about double consciousness and its dependency on a dominant power's hypocrisy, when he writes:

corporations, non-governmental organizations, professional regulatory bodies, charities, guilds, churches, synagogues, mosques, temples, schools, parent-teacher committees, school governing bodies, co-op boards, landless people's movements, internet forums, foundations, trusts — is possible without some form of discrimination.¹⁷

The critical question — as the *Fourie* Court notes — is whether such discrimination rises to the level of an unjustifiable impairment of the dignity of some of our fellow South Africans.¹⁸ Again, this question turns on access to the kinds of goods that enable us to lead lives that allow us to flourish. It is easy to conclude that golf clubs that have been the bastion of white male Christian privilege must open their doors to persons of all colours, all sexes and all religions. But what of the large

The moment one became a student at VC [Victoria College in Cairo, a public school in effect created to educate those ruling-class Arabs and Levantines who were going to take over after the British left] one was given the school handbook, a series of regulations governing every aspect of school life the kind of uniform we were to wear, what equipment was needed for sports, the dates of school holidays, bus schedules and so on. But the schools first rule, emblazoned on the opening page of the handbook, read: English is the language of the school; students caught speaking any other language will be punished. Yet there were no native English-speakers among the students. Whereas the masters were all British, we were a motley crew of Arabs of various kinds, Armenians, Greeks, Italians, Jews and Turks, each of whom had a native language that the school had explicitly outlawed. Yet all, or nearly all, of us spoke Arabic many spoke Arabic and French and so we were able to take refuge in a common language in defiance of what we perceived as an unjust colonial stricture. British imperial power was nearing its end immediately after World War Two, and this fact was not lost on us, although I cannot recall any student of my generation who would have been able to put anything as definite as that into words.

'Between Worlds' (1999) 9 *London Review of Books* 20.

- 14 While Sartre's views on sincerity and his negative assessment of religion might lead him to this conclusion, few non-practising cultural Jews would endorse this position. Shakespeare offers the fuller account of the Jew as a person with friends, family, community, and employment, and not just the possessor of an identity that constitutes a negative place holder, when he has Shylock say:

He hath disgraced me, and hindered me half a million; laughed at my losses, mocked at my gains, scorned my nation, thwarted my bargains, cooled my friends, heated mine enemies; and what's his reason? I am a Jew. Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions? Fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same summer and winter, as a Christian is? If you prick us do we not bleed? If you tickle us do we not laugh? If you poison us, do we not die? And if you wrong us, shall we not seek revenge? If we are like you in the rest, we will resemble you in that. If a Jew wrong a Christian, what is humility? Revenge. If a Christian wrong a Jew, what should his sufferance be by Christian example? Why, revenge. The villany you teach me, I shall execute and it shall go hard but I will better the instruction.

W Shakespeare *The Merchant of Venice*, Act III, Scene 1.

- 15 See S Woolman *The Selfless Constitution: Experimentalism & Flourishing as the Foundations of South Africa's Basic Law* (2007); S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44; S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36. See also P Lenta 'Religious Liberty and Cultural Accommodation' (2005) 122 *SALJ* 352 (For more on how to resolve the tension between associational and egalitarian imperatives.)
- 16 Sen (*supra*) at 151 ('[S]ometimes a classification that is hard to justify may nevertheless be made important by social arrangements. That is what competitive examinations do (the 300th candidate is still something, the 301st is nothing). In other words, the social world constitutes differences by the mere fact of designating them.')

stores of social (and hard) capital that have been invested in such institutions, and what of that capital which continues to offer the possibility of significant returns to the original members (and future members)? What of stokvels that provide access to capital to members of a community — but not to outsiders? What of religious secondary schools that discriminate on the basis of an applicant's willingness to accept a prescribed religious curriculum and, at the same time, offer a better education than that generally available in our public schools? It would be foolish to dismantle such institutions solely on the grounds that either some form of exclusion takes place or that some re-inscription of privilege occurs. Almost all meaningful human labour occurs within the context of self-perpetuating social networks of various kinds. Taking a sledgehammer to social institutions that create and maintain large stores of real and figurative capital is a recipe for a very impoverished polity. The *hard* question thus turns on the extent to which religious, cultural and linguistic communities can engage in justifiable forms of discrimination in the furtherance of constitutionally legitimate ends *and* the extent to which the state and other social actors can make equally legitimate claims on the kinds of goods made available in these communal formations that cannot be accessed elsewhere.

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(b) Inclusion, unfair discrimination and mere differentiation

This concern about the inegalitarian arrangements found within various religious, cultural and linguistic communities is not limited to exclusionary practices. Quite often, or often enough, members of religious or cultural communities will complain that their own community's 'traditional practices', when married to a constitutionally-recognized claim of group autonomy, perpetuate systemic discrimination and structural disadvantage.¹⁹

Take, for example, the experience of women within the federally and legally autonomous Pueblo tribe in the United States. Under Pueblo law,

17 Why defend the parochial, the partial, the provincial? Why defend any community that excludes others by virtue of genealogy, rules, beliefs, traditions or practices? Edmund Burke wrote: '[T]o love the little platoon we belong to is the first principle, (the germ as it were) of public affections. It is the first link in the series by which we proceed towards love of country and to mankind.' E Burke *Reflections on the Revolution in France* (JCD Clark (ed), 2001) 202. Burke thereby connects the parochial with the universal. K Anthony Appiah comes at the problem from a slightly different direction. K Anthony Appiah defends cosmopolitanism — what he calls universality plus difference — on the grounds that cosmopolitanism is committed to (a) pluralism the notion that there are different values worth living by and (b) fallibilism the notion that our knowledge and our values are imperfect, provisional, subject to revision in the face of new evidence. Appiah (*supra*) at 144. So, for Appiah, religious, cultural and linguistic communities retain their value when they provide us with values worth living by, (as they almost all do to one extent or another), and when the members of those communities do not insist that there is one right way for human beings to live and do not then insist on imposing that one right way on others so as to truly set them free. *Ibid.* The members of religious, cultural and linguistic communities must commit themselves as citizens or a republic, or citizens of the world to some significant degree of value *laissez-faire*.

18 See, further, G Pienaar 'The Effect of Equality and Human Dignity on the Right to Religious Freedom' 2003 (66) *THRHR* 579.

19 See S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44; S Woolman & M Bishop 'Slavery, Servitude and Forced Labour' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 64.

Pueblo women — but not Pueblo men — are denied membership if they intermarry; only women [who intermarry] lose residency rights (for themselves and their children), voting rights, and rights to pass their tribal membership on to their children, along with related welfare benefits that are tied to tribal membership.²⁰

Julia Martinez and other women within the Santa Clara Pueblo community challenged these tribal laws as violations of both the federal equal protection clause and the Indian Civil Rights Act. The latter reads as follows: 'No Indian tribe in exercising powers of self government shall . . . deny to any person within its jurisdiction the equal protection of the laws.'²¹ What is remarkable about the US Supreme Court's judgment in *Santa Clara Pueblo v Martinez* is that although the Court refused to grant tribal authorities absolute sovereignty over affairs within their jurisdiction, the *Martinez* Court was still willing to grant them sufficient autonomy to deny half of their members the equal protection of the law.²²

The South African Constitutional Court has had somewhat greater 'success' in mediating conflicts that pit the interests of the individual against the interests of the religious, cultural or linguistic community. In *Christian Education South Africa*, the Court had to assess the relative virtues of arguments that (a) justified corporal punishment of children in terms of the tenets of a specific religious faith, and that (b) called for bans on such punishment because it turned the children of religious parents into mere instruments for the articulation of a community's beliefs. While the Court skirted the highly charged question of whether a child's dignity was impaired by corporal punishment meted out by religious parents in religious

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homes, it had no difficulty determining that the dignity of children was impaired by corporal punishment meted out by teachers in private religious schools.²³

The Constitutional Court has had even greater success in mediating the individual interests and the community interests at stake in a number of recent challenges to rules of customary law. In *Bhe v Magistrate, Khayelitsha & Others*, the Court found that the customary law rule of male primogeniture — and several statutory provisions that reinforced the rule — impaired the dignity of, and unfairly discriminated against, the deceased's two female children because the rule and the

20 A Gutmann *Identity in Democracy* (2003) 45.

21 *Martinez v Santa Clara Pueblo* 540 F2d 1039, 1042 (10th Cir 1976).

22 436 US 49 (1978). But see *Santa Clara Pueblo v Martinez* 436 US 49, 83 (1978) (Justice White, in dissent, writes: 'The extension of constitutional rights to citizens is *intended* to intrude upon the authority of government.')

23 *Christian Education of South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 51 (CC) ('*Christian Education*') at para 25 ('It might well be that in the envisaged pluralistic society members of large groups can more easily rely on the legislative process than can those belonging to smaller ones, so that the latter might be specially reliant on constitutional protection, particularly if they express their beliefs in a way that the majority regard as unusual, bizarre or even threatening. Nevertheless, the interest protected by section 31 is not a statistical one dependent on a counter-balancing of numbers, but a qualitative one based on respect for diversity.') For criticism of *Christian Education*, see S Woolman 'Dignity' (supra) at § 36.4 (c)(iii). See also S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44, § 44.3(c)(viii); P Lenta 'Religious Liberty and Cultural Accommodation' (2005) 122 *SALJ* 352.

other impugned provisions prevented the children from inheriting part of the deceased's estate.²⁴ However, it is the manner in which the *Bhe* Court negotiates two different kinds of claims for equal respect that is most instructive for our current purposes.

The *Bhe* Court begins with the following bromide. While customary law may provide a comprehensive vision of the good life for many South African communities that warrants some level of constitutional solicitude,²⁵ the new-found constitutional respect for traditional practices does not immunize them from constitutional review.²⁶ Everyone — whether traditional leader or Constitutional Court judge — must locate any putatively valid justification of extant customary law in the provisions of the Final Constitution.

The *Bhe* Court then characterizes the customary law of succession in terms that validate its spirit without necessitating that the Court be beholden to its letter. The customary law of succession is, according to the *Bhe* Court, a set of rules

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... designed to preserve the cohesion and stability of the extended family unit and ultimately the entire community. ... The heir did not merely succeed to the assets of the deceased; succession was not primarily concerned with the distribution of the estate of the deceased, but with the preservation and perpetuation of the family unit. Property was collectively owned and the family head, who was the nominal owner of the property, administered it for the benefit of the family unit as a whole. The heir stepped into the shoes of the family head and acquired all the rights and became subject to all the obligations of the family head. He inherited the property of the deceased only in the sense that he assumed control and administration of the property subject to his rights and obligations as head of the family unit. The rules of the customary law of succession were consequently mainly concerned with succession to the position and status of the deceased family head rather than the distribution of his personal assets.²⁷

Customary law has not, the *Bhe* Court ruefully observes, evolved to meet the changing needs of the community. It fails African widows because: '(a) ... social conditions frequently do not make living with the heir a realistic or even a tolerable proposition; (b) ... the African woman does not have a right of ownership; and (c) the prerequisite of a good working relationship with the heir for the effectiveness of the

24 *Bhe v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) ('*Bhe*').

25 See, eg, FC s 39(3): The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

26 See *Bhe* (supra) at paras 42-46 ('At the level of constitutional validity, the question in this case is not whether a rule or provision of customary law offers similar remedies to the Intestate Succession Act. The issue is whether such rules or provisions are consistent with the Constitution. This status of customary law has been acknowledged and endorsed by this Court.') See also *Alexkor Ltd & Another v Richtersveld Community & Others* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC) (*Richtersveld*) at para 51 ('While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but to the Constitution'); *Mabuza v Mbatha* 2003 (4) SA 218 (C), 2003 (7) BCLR 743 (C) (*Mabuza*) at para 32 ('It bears repeating, however, that as with all law, the constitutional validity of rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights.')

27 *Bhe* (supra) at para 75.

widow's right to maintenance', as a general matter, no longer exists.²⁸ Again the Court takes care to note that the fault for this arrested development lies outside traditional communities. Ruptures within traditional ways of life — caused by apartheid, the hegemony of western culture, and capitalism — have prevented the law's evolution.²⁹ This aside sets the stage for the delivery of the *Bhe* Court's coup de grâce: that 'the official rules of customary law of succession are no longer universally observed.'³⁰ The trend within traditional communities is toward new norms that 'sustain the surviving family unit' rather than those norms that re-inscribe male primogeniture.

By showing that the spirit of succession lies in its commitment to family cohesion, that the traditional family no longer coheres as it once did, and that the 'distorted' rules of customary law are frozen in apartheid-era statute and case law that 'emphasises ... patriarchal features and minimises its communitarian ones,' the *Bhe* Court closes the gap between constitutional imperative and customary obligation.³¹ Had customary law been permitted to develop in an 'active and dynamic manner,' it would have already reflected the *Bhe* Court's conclusion that 'the exclusion of women from inheritance on the grounds of gender is a clear violation of ... [FC s] 9(3).'³² Had customary law not been allowed to ossify, traditional communities would have noted how male primogeniture entrenched

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'past patterns of disadvantage among a vulnerable group' and endorsed the *Bhe* Court's re-working of customary understandings of the competence 'to own and administer property' in a manner that vindicates a woman's right to dignity under FC s 10.³³ In this way, the *Bhe* Court is able to assert that traditional communities have conceptions of dignity worth protecting without being obliged to endorse a rule that quite clearly offends the dignity interests of many women and female children within those communities.³⁴

28 See South African Law Reform Commission *The Harmonisation of the Common Law and the Indigenous Law: Succession in Customary Law* Issue Paper 12, Project 90 (April 1998) 6-9. See also TW Bennett *Human Rights and African Customary Law under the South African Constitution* (1997) 126-127.

29 See, eg, *Richtersveld Community & Others v Alexkor Ltd & Another* 2003 (6) SA 104 (SCA), 2003 (6) BCLR 583 (SCA) at paras 85-105.

30 *Bhe* (supra) at para 84.

31 *Ibid* at para 89.

32 *Ibid* at para 83.

33 *Bhe* (supra) at para 84.

34 Judge Hlophe employs a similar disabling strategy in *Mabuza. Mabuza v Mbatha* 2003 (4) SA 218 (C), 2003 (7) BCLR 743 (C). He recognizes the supremacy of the Final Constitution at the same time as he asserts that the protean nature of customary law should enable it to conform, as necessary, to the dictates of the Bill of Rights. His nuanced assessment of the role of *ukumekeza* reconfigures siSwati marriage conventions in a manner that (a) refuses to allow *ukumekeza* to be used by the grooms family as a means of control over the bride and (b) consciously places the husband and wife on an equal footing with respect to subsequent determinations of whether a valid marriage under siSwati customary law has taken place. See, further, S Woolman & M Bishop

These inquiries into both the physical coercion and the non-physical coercion of children and adults by the practices of traditional religious and cultural communities are united by considerations of exit.³⁵ The Constitutional Court has proved itself quite adept at distinguishing circumstances in which neither child nor adult can meaningfully vote with their feet, from those instances in which adults willingly remain members of traditional communities in which their rights and privileges may well be subordinate to the rights and the privileges of other members of the community. The Court's ability to distinguish the objective conditions of second-class citizenship from the subjective decisions of equal citizens has blunted critics of religious and cultural communities who attribute 'false consciousness' to any individual or group of individuals who remain within their community's traditional confines.

(c) Distinctions between religious, linguistic and cultural communities

One cannot speak of religious, linguistic and cultural communities as if they all took the same form and were therefore subject to identical treatment under the Final Constitution. At a gut level, however, one would like to be able to say that there is a sliding scale of judicial solicitude for these communities: a scale that runs from fairly weak protection in so far as linguistic communities are concerned, to medium strength with respect to cultural communities, to very strong protection with regard to religious communities. This intuition is driven primarily by the varying degrees of permeability of linguistic communities, cultural communities and religious communities. Anyone can learn a language and thereby join a community of fellow speakers. Religious communities, on the other hand, can make admission almost impossible. Cultural communities possess an 'I know it,

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when I see it' character, and thus make any talk about ease of entrance (and potential membership) rather elusive: Is it easier to become American or French? Is it easier to become Zulu or Sotho? The text of the Final Constitution and the decisions handed down by the courts tend to confirm this admittedly limp set of intuitions.³⁶

'Slavery, Servitude and Forced Labour' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 64.

35 See S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

36 As I argue below, FC s 15, when read with FC s 31, would appear to afford religious practices, and thus religious communities, greater protection than linguistic practices and cultural practices, and thus linguistic communities and cultural communities. FC s 15 protects religious belief, and per force religious practice, since the protection of belief alone is utterly empty (until such a time as mind control is literally possible.) FC s 15 protects religious practices, and thus the religious communities that engage in them, without subjecting them, as occurs in FC s 30 and FC s 31, to an internal limitation that requires the latter set of practices to be consistent with the rest of the substantive provisions found in Chapter 2. In *Fourie*, for example, the Constitutional Court goes out of its way to note that no religious order and no religious official will, as a result of the Court's finding that the state must treat the marriage of same-sex life partners in the same manner as it treats opposite-sex life partners, be required to consecrate same-sex life partnerships as marriages under religious law. See *Fourie* (supra) at paras 90-98. The Constitutional Court has, however, shown demonstrably less hesitancy in altering customary law arrangements enforced by traditional leaders, common law and statute. See, eg, *Bhe v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) ('*Bhe*') (Court declares customary law rule of male primogeniture invalid.)

There are two primary difficulties with trying to squeeze any further analytical precision out of the text of FC ss 30 and 31. The first difficulty flows from the lack of consensus as to how terms like 'cultural community' or 'religious community' or 'linguistic community' are to be used. The second, related, difficulty stems from the fact that many of the specific social formations or entities that fall within the protective ambit of FC ss 30 and 31 can often be described in all three terms — religion, language, culture. This descriptive over-determination could complicate our analysis of the constitutional claim being made. Is a Jewish independent school promoting a religion, a culture, a people, a nation, or just the language of Hebrew? Is a single-medium Afrikaans public school promoting a culture, a people, a nation, a language, or a religion?

With respect to the first difficulty, Amy Gutmann notes

When the term culture is loosely used, cultural identity subsumes the entire universe of identity groups, and every social marker around which people identify with one another is called cultural. Culture, so considered, is the universal glue that unites people into identity groups, and the category becomes so broad as to be rather useless for understanding differences.³⁷

Other theorists take a tougher line. For Raz and Margalit, the only legitimate candidates for treatment as cultural communities are those communities which provide an 'all-encompassing' or a 'comprehensive' way of being in the world.³⁸ In

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addition, they write, such communities provide both an 'anchor for self-determination and the safety of effortless, secure belonging.'³⁹ Belonging, in turn, is a function of membership:

Although accomplishments play their role in people's sense of their own identity, it would seem that at the most fundamental level our sense of our own identity depends upon criteria of belonging rather than on those of accomplishment. Secure identification at that level is particularly important to one's well-being.⁴⁰

What Raz and Margalit fail to make fully explicit is the connection between a community that provides a comprehensive way of being in the world and a community that provides a secure sense of belonging. A community that provides a comprehensive way of being in the world generally provides a host of rules that govern most aspects of daily life. The benefits of belonging — of membership — flow to those who follow the rules. Follow the rules and one belongs. Flout the rules and one can find oneself on the outside of the community looking in. (Comprehensiveness then is a feature of communities with very strict codes of

37 A Gutmann *Identity in Democracy* (2003) 38. See also IM Young *Justice and the Politics of Difference* (1990) 22-23, 152-155.

38 J Raz & A Margalit 'National Self-determination' in J Raz (ed) *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994) 119. See also S Benhabib *The Claims of Culture: Equality and Diversity in the Global Era* (2002); A Shachar *Multicultural Jurisdictions: Cultural Differences and Womens Rights* (2001); S Macedo (ed) *Deliberative Politics: Essays on Democracy and Disagreement* (1999); A Gutmann & D Thompson *Democracy and Disagreement* (1996); W Kymlicka *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995).

39 Raz & Margalit (supra) at 118.

40 Ibid at 117.

behaviour and harsh penalties — shunning or ex-communication — for rule non-compliance.)

Although Raz and Margalit's definition of 'cultural community' — properly understood — certainly provides greater traction than looser definitions, it would seem to exclude too many social formations that we would intuitively describe as cultural communities. Amish Americans constitute a community that fits the rule-following, comprehensive vision of the good life model that Raz and Margalit's definition is meant to capture. The strict dictates of the Amish's version of Christianity married to a pastoral existence that eschews almost all forms of modern technology sets the Amish apart. Moreover, continued membership in the community is contingent upon adherence to religious dictates and other non-religious norms. Such communities would, if they could, withdraw entirely from the larger polity within which their community exists. As it stands, they simply draw invisible lines between us and them.

But the Amish community in America, or the Ultra-Orthodox Jewish community in Johannesburg, do not fit commonplace understandings of cultural communities. For example, I would, at one point in my life, have certainly identified myself as part of the Jewish community of the greater New York metropolitan area. But there were no rules to follow — and I followed none. So while I certainly felt a sense of belonging, no penalties could be exacted for non-compliance and my 'membership' could never be threatened.

Thus, Raz and Margalit's definition of 'cultural community' confirms our first difficulty: developing precise definitions for the entities protected by FC ss 30 and 31. But they also tell us something important about our second difficulty — that of descriptive over-determination. ('Descriptive over-determination' means the

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ability to describe the same community in terms of two or more of the following characteristics: religion, culture and/or language.) It would seem that descriptive over-determination — though a fact about many communities — is not a constitutional problem. What matters, for the purposes of constitutional analysis under FC ss 30 and 31, is membership and rule-following.⁴¹ And that holds for linguistic communities, cultural communities and religious communities alike.

In sum, our attention is drawn to FC ss 30 and 31 when we are confronted by questions of membership in the community and the willingness (or the refusal) of individuals both within and without the community to follow those rules that both define membership in the community and determine the ability to participate fully in community life. Issues of membership and rule-following come up much more frequently in religious communities than in cultural communities or linguistic communities because many religious communities offer quite comprehensive visions of the good life. Most religions are defined by reams of ecclesiastical doctrine: a refusal to follow established doctrine can lead to excommunication. Languages, on the other hand, are defined by their grammar and their syntax. People are rarely excommunicated from communities for bad grammar (though they may be shunned in Paris). And so, my initial intuitions about a sliding scale of judicial solicitude are borne out by the comprehensiveness of the tenets and practices of religious

41 For an extended analysis of the relationship between membership and rule-following, see S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44, § 44.1(c).

communities, and the necessary, but hardly comprehensive, role that language plays in linguistic communities.

What then are we to do in cases of descriptive over-determination — where religion, language and culture all serve to define a particular community and the institutions upon which members have built the community? Since community-appropriate rule-following behaviour determines continued membership within the community, the conflict that confronts the court will often be whether a person's behaviour (or state action) conforms to the community's accepted canon of rules. The primary kind of community practice — religious, linguistic, cultural — at issue will reveal itself in the very terms of the dispute: Is a *cherem* — an act of excommunication — about a refusal of a member of the Orthodox Jewish community to follow an edict of the community's ecclesiastical authority, the *Beth Din*? Is the rejection of an admission application to a single-medium Afrikaans public school about the applicant's refusal to accept instruction in Afrikaans? Is the refusal by a traditional leader to consecrate a marriage based upon a couple's rejection of the ritual of *lobolo*? Thus, while members of the Orthodox Jewish religious community may well speak Hebrew, the conflict at issue is clearly over religious doctrine (and not language). When it comes to *lobolo*, the constitutionality of this cultural community's custom is at issue (not

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language or religion.⁴²) When it comes to making Afrikaans the language of public school instruction, the issue is linguistic — less cultural, certainly not religious — and turns on whether the state has the resources necessary to maintain a single-medium public school and whether non-Afrikaans speaking individuals have educational opportunities at other institutions.⁴³

58.2 Historical background: negotiating community rights

The Final Constitution, as a liberal political document, certainly carves out the space within which self-supporting cultural, linguistic and religious formations may flourish. Some commentators take solace in the fact that the Final Constitution contains six different provisions concerned with culture, eight with language and four with

42 Distinctions between religious and cultural practices are not always so easy to make in our context. A person may practice Christianity and still view the animist practise of honouring her ancestors as a form of religious conviction rather than a traditional ritual. Religion and culture constitute a potent mix in many South African communities and are often impossible to disaggregate in the minds of community members.

43 That members of the Afrikaans-speaking community may view the issue through the prism of culture and nationality does not for constitutional purposes make it so. Of course, members of the Afrikaans-speaking community are largely free to create private institutions intended to preserve not only Afrikaans, but very particular views of Afrikaner culture and religion. See *Ex parte Gauteng Provincial Legislature: in re Dispute Concerning the Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill*. 1996 (3) SA 289 (CC), 1996 (4) BCLR 537 (CC)(Interim Constitution and now the Final Constitution provide the requisite space for linguistic communities and cultural communities to create and to sustain institutions private schools that serve the sectarian interests of those communities); *Western Cape Minister of Education v The Governing Body of Mikro Primary School* 2006 (1) SA 1 (SCA), 2005 (10) BCLR 973 (SCA) (*Mikro*) (Single medium public schools that might emphasize Afrikaans culture and history in addition to language have right to exist so long as other learners have meaningful access to public schools that offer instruction in another medium.) See also S Woolman 'Defending Discrimination: On the Constitutionality of Independent Schools that Promote a Particular, if not Comprehensive, Vision of the Good Life' (2007) 22 *Stellenbosch Law Review* 31.

religion.⁴⁴ However, as we shall see, the drafting histories of IC ss 31 and 184 and FC ss 30, 31 and 185 give the lie to the claim that the basic law sets great store in the vindication of specific group claims based upon language, culture and religion.⁴⁵

(a) The Interim Constitution

The problem of accommodating and protecting, ethnic, religious and linguistic communities in a democratic state dominated the political debates and the lengthy constitutional negotiations that preceded the enactment of the Interim Constitution. Between 1986 and 1991, the South African Law Commission investigated various mechanisms for the protection of group rights.⁴⁶ To this end, it solicited submissions from white right-wing intellectuals on the right of minorities to seek recognition as distinct societies and to resist assimilation into a common national culture.⁴⁷ Conservative Party, Afrikaner Volkswag and Boere-Vryheidsbeweging testimony before the Commission reflected deep dissatisfaction with mere 'minority group protection'. These parties favoured 'national group protection'. National group protection meant self-determination 'in its widest form'. This widest of forms was understood by most Afrikaner nationalists to mean a right to secession.⁴⁸

Notwithstanding the contentiousness of white minority concerns, the language and cultural rights provisions of the Interim Constitution's Bill of Rights secured virtually universal consent from Multi-Party Negotiating Forum participants.⁴⁹ IC s 31 attracted near universal assent because, though it echoed art 27 of the International Covenant on Civil and Political Rights, it avoided art 27's protection of discrete sets of rights-holders. Both the ANC and the National Party eschewed more substantial

44 See also F Venter *The Protection of Cultural, Linguistic and Religious Rights: The Framework provided by the Constitution of the Republic of South Africa, 1996*, Konrad Adenauer Stiftung Seminar on Multiculturalism (1999) 19, available at <http://www.kas.org.za> (accessed on 1 April 2004). Provisions of the Final Constitution dealing with culture, language and religion include, but are not limited to: (a) ss 9, 30, 31, 235 (culture); ss 6, 29, 30, 31, 235 (language); and (c) ss 9, 15, 30, 31 (religion). These various provisions were driven by three constitutional principles enshrined in the Interim Constitution. Adherence to these principles as part of the negotiated settlement was the price of peace. Two of the principles required recognition of minority rights and another required the inclusion in the Final Constitution of a provision ensuring a right of self-determination for any community sharing a common cultural and linguistic heritage.

45 The one notable exception with respect to constitutionally mandated group claims would be land. The Constitutional Court and the Supreme Court of Appeal have recognised the legitimacy of such claims against both the state and other private parties. *Alexkor Ltd & Another v Richtersveld Community & Others* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC); *Abrams v Allie* 2004 (4) SA 534 (SCA). However, these claims are grounded largely in dispossession of title based upon racially discriminatory classifications.

46 South Africa Law Commission *Group and Human Rights, Working Paper 25, Project 58* (1989).

47 South Africa Law Commission *Group and Human Rights, Interim Report* (1991).

48 *Ibid* at 39-80.

49 LM Du Plessis 'A Background to Drafting the Chapter on Fundamental Rights' in B de Villiers (ed) *Birth of a Constitution* (1994) 89, 93. By contrast, the economic activity, fair labour practices and property rights provisions of the Chapter were the subject of vociferous debate. See H Corder 'Towards a South African Constitution' (1994) 57 *Modern Law Review* 491, 513.

minority rights protection. However, each party found collective rights for linguistic, religious and cultural minorities politically unpalatable for different reasons.

As noted above, the National Party government had asked the South African Law Commission to investigate mechanisms for the recognition and protection of 'group rights'.⁵⁰ The Commission accepted the existence of what it termed 'numerous groups or communities' and 'strong inter-group conflict and rivalry' in South African society.⁵¹ Nevertheless, such internecine conflict did not constitute a legitimate ground for recognizing the existence of 'statutorily definable groups with statutorily definable 'rights'.⁵² According to the Commission, South

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Africa would be better served if the 'needs of individuals who are members of different linguistic, cultural and religious groups' were adequately protected by 'individual rights in a bill of rights'.⁵³

The Commission's suspicion of community rights — and the concomitant 'special status' they accord to groups — was not surprising considering the National Party's and the Commission's determination to create a 'colour-blind' constitutional order.⁵⁴ The Commission — and the National Party — recognized that community rights or group rights would, inevitably, be tainted by their conceptual correspondence to apartheid 'group' discourse. 'Community', 'minority' or 'group' had worked as code for apartheid's racially defined and racially discriminatory politics.⁵⁵ The Commission therefore recommended that a future Bill of Rights contain individual rights to practise a culture or religion, to use a language and to be protected from religious, cultural or linguistic discrimination.

50 South African Law Commission *Group and Human Rights, Working Paper 25, Project 58* (1989) 1.

51 South African Law Commission *Group and Human Rights, Interim Report* (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. *Ibid* at 39-80.

52 *Ibid* at 35.

53 *Interim Report* (*supra*) at 679-680.

54 *Ibid* 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.')

55 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. *Ibid* 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 are treated with contempt, it will strive constantly to rid itself of the regime. *Ibid* at 113. The sensible solution, the Commission concludes, would therefore be to steer a course between these two dangers. *Ibid*. The Commission's solution can be found in FC s 9's protection from unfair discrimination, FC s 29's right to mother tongue education, and FC s 31's right to be a member of the religious, cultural or linguistic community of one's choice.

However, community rights were not entirely anathema to the Commission or the National Party. The Commission concluded that minority populations could find protection in the form of such constitutional arrangements as federalism or minority representation in an upper house of Parliament or the Cabinet.⁵⁶ These conclusions were largely shared by the National Party. The National Party believed that white minority interests would be better protected at the level of distribution of governmental power, rather than by judicial mechanisms.⁵⁷ The National Party — like the Commission — proposed only non-discrimination guarantees and individual rights to speak a language or to participate in 'cultural life'.⁵⁸

The ANC was similarly ill-disposed towards community, minority, collective or group rights. And for good reason. Before the velvet revolution of 1994, most

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political claims based on culture, language, ethnicity and religion were greeted with suspicion, and, sometimes, outright hostility.⁵⁹ From the passive resistance of Gandhi, through worker movements of the early 20th century, to the Freedom Charter, the preferred language of liberation was that of human rights. The liberation movement's utilization of rights discourse reflected a considered rhetorical response to romantic assertions of white, Christian, English and Afrikaner supremacy.

The liberation movement's universalist turn provides a partial explanation for the failure of group-based rights to secure a foothold within the Interim Constitution.⁶⁰ Much of the white minority political posturing in the 1980s and the early 1990s over alternatives to apartheid focused on the need for a 'broad-based, multi-racial government to contain possibly explosive ethnic or cultural demands'.⁶¹ While representatives of the white minority may have forsaken justiciable 'group' rights, they continued to insist on various forms of constitutional protection of existing privilege in exchange for relinquishing political power.⁶² The ANC rejected every

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

57 P Olivier 'Constitutionalism and the New South African Constitution' in Bertus de Villiers (ed) *Birth of a New Constitution* (1994) 50, 73-74.

58 See Government of the Republic of South Africa *Proposals on a Charter of Fundamental Rights* (2 February 1993) Articles 6 and 34.

59 A Sachs Opening Remarks *Konrad Adenauer Stiftung Seminar on Multiculturalism* (1999) 9 available at <http://www.kas.org.za> (accessed on 1 April 2004); H Giliomee The Majority, Minorities and Ex-Nationalities in South Africa and the Proposed Cultural Commission *Konrad Adenauer Stiftung Seminar on Multiculturalism* (1999) 37, available at <http://www.kas.org.za> (accessed on 6 January 2005).

60 Human rights discourse demands democratic majority rule. Majority rule as manifest in free and fair elections is the generally accepted departure point for most transitions from authoritarian rule to a more just political order. In South Africa, democratic majority rule meant black majority rule. Neither the rhetoric of universal human rights nor the actual demographics of South Africa supported the Swiss-like cantonal arrangements that the more sophisticated apologists for the white right offered up.

61 See J de Waal, I Currie & G Erasmus *The Bill of Rights Handbook* (4th Edition, 2001) 470. See also Giliomee (*supra*) at 37.

attempt to entrench what it termed 'racial group rights'.⁶³ Political power would have to be traded for peace. That peace, and the retention of economic privilege by the white minority, would be vouchsafed by a firm ANC commitment to a justiciable Bill of Rights.⁶⁴ And the most the ANC would concede in such a Bill were rights to form 'cultural bodies', to religious freedom,⁶⁵

and, perhaps, to require that the state act positively to further the development of the eleven South African languages to be treated as official languages.⁶⁶

Political parties that could have been expected to press hard for the inclusion of community rights in the Bill of Rights chose instead to focus on other constitutional strategies. The Inkatha Freedom Party (IFP), which during the negotiations had beaten the drum of ethnic nationalism, sought to shore up minority interests through federal mechanisms. The goal of the white right-wing parties was nothing less than self-determination in a wholly separate constitutional entity.

The result of these different strategies was that the Interim Constitution possessed little by way of specific community rights. Individual members of religious, linguistic and cultural communities were protected by rights to equality, to religious freedom, to association and to the establishment of private schools designed to maintain the integrity of a given community. Only in the provisions for the recognition of official languages did the Interim Constitution go beyond the bare minimum: it required positive action by the state to ensure the maintenance and the development of minority languages.⁶⁷

(b) The Final Constitution

Despite the relative ease of agreement over justiciable community rights in the Interim Constitution, the three Constitutional Principles ('CPs') that engaged

62 De Waal et al (supra) at 470.

63 See I Currie 'Minority Rights' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) Chapter 35.

64 See Giliomee (supra) at 40. The ANC insisted that minority rights qua static, non-demographically representative levels of political representation were unacceptable. The ANC proposed a compromise between two political positions: the demand for unfettered majority rule on the one hand, and the insistence of some whites for structural guarantees that majority rule will not mean domination by blacks on the other. The Bill of Rights is, in large part, the content of that compromise. See, eg, A Sachs *Protecting Human Rights in a New South Africa* (1990) 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.')

65 African National Congress *A Bill of Rights for a New South Africa: Preliminary Revised Version* (1992) Articles 5(3)-(5) ('ANC Bill of Rights')

66 *ANC Bill of Rights* (supra) at arts 5(6)-(7).

67 See I Currie 'Official Languages' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 65.

community rights meant that the previous accord could be revisited and recast. The National Party entered the Constitutional Assembly ('CA') drafting process with the express aim of deepening community rights.⁶⁸ The Freedom Front, though still wedded to CP XXXIV and the ideal of a Volkstaat, also sought 'a way to ensure that there is no oppression over the minority.'⁶⁹ The other ethnically-based political party — the IFP — chose to further the ends of the 'Zulu' kingdom through constitutional mechanisms that would increase the devolution of power to the provincial level of government.⁷⁰ 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 Final Constitution's Bill of Rights contains three provisions with a direct bearing on community interests — FC ss 29, 30 and 31. Only FC s 30 had a smooth passage through the drafting process. The right made an early appearance in the 19 October 1995 draft. The committee with responsibility for the Bill of Rights 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,

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the right remained unchanged in all succeeding drafts. As was the case with its predecessor — IC s 31 — the individualistic phrasing of FC s 30 and its careful avoidance of any mention of 'minority' or 'community' ensured that its inclusion occasioned no controversy.

FC s 31 contains what FC s 30 so delicately avoids. It provides a set of non-discrimination and non-interference guarantees and secures these rights for 'persons belonging to a cultural, religious or linguistic community'. FC s 31 does not appear in any of the five working drafts of the Final Constitution, nor, it must be noted, in the Constitution Bill of 23 April 1996 — less than two weeks before the new text had to be adopted. FC s 31 appears for the first time in the second Constitution Bill of 6 May 1996 — the result of intense, last-minute bargaining.⁷¹ The eleventh-hour inclusion of FC s 31 appears to have been the result of an ANC desire to placate the Freedom Front.⁷² The inclusion of FC s 31 may also have been motivated by fears that FC s 30 and the Bill of Right's non-discrimination guarantees alone might be insufficient to comply with the requirements of CP XII.⁷³

The earliest draft of the education clause — FC s 29 — reveals little that would lead one to anticipate the controversy that it was to evoke in the last weeks of the

68 'Minority Rights Must be Protected NP' (1995) 1 *Constitutional Talk* (13-26 January 1995).

69 'Volkstaat High on FFs Agenda' (1995) 1 *Constitutional Talk* (13-26 January 1995).

70 'IFP Seeks Strong Provincial Government' (1995) 1 *Constitutional Talk* (13-26 January 1995). The IFP was later to boycott the Constitutional Assembly in protest over the refusal of the ANC and the NP to enter international mediation over constitutional recognition of the Zulu monarchy. It played no significant role in the drafting of the Final Constitution.

71 'The Night the Constitution was Settled' (1996) 3 *Constitutional Talk* (22 April-18 May 1996).

72 'NP, ANC Strive for a Package Deal' *Weekly Mail and Guardian* (19 April 1996).

drafting process. Early iterations of FC s 29 guarantee a right to instruction in any language in state institutions where such instruction could be reasonably provided and a right to establish private schools — subject to duties related to non-discrimination and to the maintenance of educational standards.⁷⁴ In the working

draft of 19 October 1995, however, an additional right was proposed by the National Party (NP). The NP contended that FC s 29 must embrace a right 'to educational institutions based on a common culture, language, or religion, provided that there shall be no discrimination on the ground of race and, provided further that the state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it has been established on the basis of a common language, culture, or religion'. According to the NP, this right would ensure the continued existence of state-funded schools with a distinctive linguistic, cultural or religious character (or all three). The ANC viewed this formulation as a neo-Verwoerdian attempt to entrench educational apartheid. It responded by stating that state-aided Afrikaans-only schools were well beyond the political pale.⁷⁵

The NP proposal remained a flashpoint throughout the remainder of the drafting process. By the fifth Working Draft of 15 April 1996, an 'agreement' had been reached by the parties to 'seek ways of accommodating the sentiments embodied' in the NP proposal elsewhere in FC s 29 without adopting the NP's preferred formulation of the right. As a result, the first Constitution Bill of 23 April 1996 contained no mention of the NP clause. In the second Constitution Bill of 6 May 1996, the right to state-funded education in any language was changed to a right to state-funded education in any *official* language. The text bore no sign of the NP's commitment to single-medium public schools. Single-medium public schools — together with the lockout right and the property clause — was one of the three Bill of Rights issues on which the NP dug in its heels. The ANC likewise refused further compromise: 'to compromise would be a betrayal of victims of apartheid.'⁷⁶

The NP — confronted with the spectre of a public referendum to approve the constitutional draft in the event of the requisite majority not being obtained in the Constitutional Assembly — was obliged to capitulate. However, true to the spirit of reconciliation that had made both the Interim Constitution and the Final Constitution possible, FC s 29 contains a diluted version of the original NP proposal. The right to state-sponsored education in an official language, where reasonably practicable, is reinforced by the requirement that the state must consider 'all reasonable educational alternatives' in seeking to implement the right. These alternatives allow for the possibility of 'single-medium' public schools where such institutions are

74 Clause 23 of the draft Bill of Rights of 9 October 1995 read: (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.

75 'Trio of Trouble' *Weekly Mail and Guardian* (1 May 1996).

76 'High Drama in Constitutional Danger Zone' *Weekly Mail & Guardian* (1 May 1996).

equitable, practicable and in accordance with the need to redress past discrimination.⁷⁷

58.3 Community Rights in International Law

The Final Constitution has been carefully crafted to avoid, in most instances, the language of minority rights. Two primary reasons exist for this textual choice.

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First, minority — in the context of the negotiations over the Interim Constitution and the Final Constitution — meant 'white'. The ANC, as we have seen, was steadfastly opposed to rights that would entrench expressly any form of 'white' privilege. Second, the ANC's use of individual rights reflects a considered response to the use of terms like 'group' or 'people' that worked as code for any number of discriminatory policies under apartheid.

That said, at international law, the term 'minority', and not 'community', describes the social units that can claim entitlement to rights to religious freedom and linguistic and cultural autonomy. Indeed, protecting the rights of ethnic, religious and linguistic minorities has become one of the most pressing concerns of international law over the past decade. Yugoslavia, Rwanda, Chechnya, Sri Lanka, Congo, Lebanon, Iraq, Israel, Somalia and Sudan each summon up the spectre of ethnic nationalism and intractable civil war that haunt the contemporary political order. Each reminds us that struggles for self-determination can often lead to the collapse of the nation state.⁷⁸ Where, as in the Middle East, attempts have been made by a dominant population to suppress minority aspirations, the resultant violence has led to the displacement of thousands of people and massive human rights violations.⁷⁹ We tend to think of religion and ethnicity as the primary drivers of internecine strife — but it can also be fuelled by linguistic nationalism. Although the threat has now largely abated, a perception of discrimination against the French-speaking people of Quebec sparked a 'legal' secessionist movement in the century-old Canadian federation. International law attempts to shield minorities from abuses of state power in the hope that the struggles of minorities against persecution, marginalization or assimilation will not degenerate into a baleful cycle of violent resistance and new forms of oppression.

(a) Minority rights and community rights

77 For more on the history and the meaning of FC s 29(3), see B Fleisch & S Woolman 'On the Constitutionality of Single-Medium Public Schools' (2007) 23 *South African Journal on Human Rights* (forthcoming).

78 A list of countries home to the most visible current ethnic conflagrations would encompass the former Soviet Union, India, Sri Lanka, Northern Ireland, the former Yugoslavia, Sudan, Congo, Somalia, Myanmar, Indonesia, Iraq, Cyprus, Nigeria, Lebanon, Israel, Guyana, Trinidad, Liberia, Uganda, Rwanda and Burundi. See N Lerner 'The Evolution of Minority Rights in International Law' in C Brölman (ed) *Peoples and Minorities in International Law* (1993) 77, 78n.

79 A Anghie 'Human Rights and Cultural Identity: New Hope for Ethnic Peace?' (1992) 33 *Harvard International Law Journal* 341. Researchers in 1990 identified 261 groups of non-sovereign peoples regarded as being at risk of future human rights violations because of their differential status and aspirations. See TR Gurr & JR Scarritt 'Minorities Rights at Risk: a Global Survey' (1989) 11 *Human Rights Quarterly* 375, 392-3. Unfortunately, the following decade made Gurr and Scarritt look extraordinarily prescient.

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,⁸⁰ no

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settled definition of 'minority' or 'community' exists at international law.⁸¹ Of all the definitions bandied about, that proposed by Francesco Capotorti, the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, has proved the most influential. 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.⁸²

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80 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. See P Thornberry *International Law and the Rights of Minorities* (1991) 124-132. The Working Group on Indigenous Populations, a subsidiary organ of the Sub-Commission, 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, 657-662.

81 See MN Shaw 'The Definition of Minorities in International Law' in Y Dinstein & M Tabory (eds) *The Protection of Minorities and Human Rights* (1992) 1; P Thornberry *International Law and the Rights of Minorities* (1991) 164-172. As I have already noted, FC s 31 studiously avoids the term minority employed in ICCPR article 27 and instead uses the term community. The choice of terminology is primarily political. Community rights simply do not carry the baggage of minority rights in South African political discourse. In my view, the meaning of minority rights at international law serves this chapter's understanding of community rights under the Final Constitution. The substitution might also be thought a clever trope designed to finesse controversies over the definition of a minority that have bedevilled the analysis of ICCPR article 27. However, defining a community proves no less difficult. Employed at its highest level of most general, community can mean simply an aggregation of people (similar to state or society). However, in contemporary parlance the word denotes an aggregation of people held together by a particular kind of relationship or bond. See R Williams *Keywords: A Vocabulary of Culture and Society* (1976) 75-76. See also A Cohen *The Symbolic Construction of Community* (1985) 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 practice how to be social. At the risk of substituting one indefinable category for another, we could say it is where one acquires culture.') This common bond, this kinship, this dense latticework of relationships determines our willingness to identify a group of persons, that would otherwise be a mere aggregation of individuals, as a community. For example, one would not tend to describe left-handed people as forming a community, although they undoubtedly share something in common. Nor would one think of the shareholders of a large, listed 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. The employees of that same company, on the other hand, might well constitute a community: they might share a culture and even a language (broadly construed). See R Thornton & M Ramphele *The Quest for Community* in E Boonzaaier & J Sharp (eds) *South African Keywords* (1988) 29. What of the speakers of the Afrikaans language? At a minimum, they share an important characteristic: language. But they share more than that. They share a common history, a common culture, and, quite often, a common politics. See J Sharp Introduction: Constructing Social Reality in E Boonzaaier & J Sharp (eds) *South African Keywords* (1988) 1, 14-5. While Afrikaans speakers may be divided in any number of significant ways, such as race and class, 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.

Three elements of this definition warrant emphasis. First, the definition requires an objective demonstration: to constitute a minority, a community must exist as a separate and distinct entity within a state. An ascriptive characteristic — such as race, religion or language — will set the group apart from other groups within the state. Second, a subjective element must be established: the minority must manifest a sense of community and a desire to preserve the identity of that community. The definition tends to exclude groups inclined toward assimilation within the rest of the population.⁸³ The third element is of particular moment in South Africa: the community that seeks recognition should be in a position of non-dominance. Political, economic and social non-dominance — and the discrimination that often attends non-dominance and insularity — makes necessary the guarantee of community rights. Put slightly differently, a minority community often lacks the ability to participate politically in a manner that enables it to retain a coherent identity and to secure defensible boundaries.⁸⁴ Community rights carve out space beyond the hurly burly of majoritarian political institutions in a manner that permits the furtherance of community-specific ways of being in the world.

(b) Structure of international community rights

The work of the UN Sub-Commission on Minorities suggests that the effective protection of minorities requires two kinds of legal guarantee: measures aimed at securing equal treatment for minorities and measures aimed at the protection of minority identity. Both categories require the disaggregation of minority communities from the polity as a whole.

The goal of equality of treatment is furthered by measures that protect individual members of minority groups against discrimination. However, the absence of discrimination will do little more than create the conditions for formal equality. Special treatment of minorities — restitutionary measures or affirmative action — may be required to create conditions of substantive equality.⁸⁵

However, for most minority communities, the goal is not so much equal participation in the affairs of the larger community, but self-governance — in a non-

82 F Capotorti *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* (1991) UN Sales no E.91.XIV.2, 7. While the Capotorti definition cannot claim to be the settled orthodoxy in the field, a slight reformulation of Capotorti's definition is accepted as authoritative by Sachs J in *Ex parte Gauteng Provincial Legislature: in re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill*. 1996 (3) SA 289 (CC), 1996 (4) BCLR 537 (CC) at para 61.

83 The rights of such groups, termed involuntary minorities, need be protected only by a guarantee of non-discrimination. See Thornberry (*supra*) at 10.

84 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 P Thornberry *International Law and the Rights of Minorities* (1991) 8-9, J Dugard 'The Influence of Apartheid on the Development of UN Law Governing the Protection of Minorities' (1989, manuscript on file with author).

85 See *Minority Schools in Albania* 1935 PCIJ (ser A/B) No 64, 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.') See also C Albertyn and B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 35 (Describes the nature of FC s 9(2), the restitutionary justice clause in FC s 9's right to equality.)

political sense — with respect to the manner in which the community is organized. As a result, the communities for whom minority rights really matter are

often not interested in mere assimilation into the dominant national culture.⁸⁶ International law recognizes the legitimacy of the desire of many minority communities to preserve their traditions and to resist the loss of their identity.⁸⁷

This commitment to both 'equality of recognition' and 'equality of respect' means that international law offers two different sets of community rights. First, universal non-discrimination provisions attempt to ensure equality of treatment for all individuals. These guarantees ensure the protection of individual members of minority communities. Second, 'special' guarantees are designed to ensure the continued existence of minority communities. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities explains the difference between the two kinds of guarantee 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.⁸⁸

(i) International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights ('ICCPR') is the primary instrument for the protection of the rights of persons belonging to minority communities. Indeed, ICCPR art 27 remains the only expression of a universal entitlement to community identity in modern human rights conventions.⁸⁹ It reads, in relevant part:

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 practice their own religion, or to use their own language.

When combined with the ICCPR's non-discrimination provision, art 27 ought to enable minorities to preserve their separate identity without turning that separateness into a badge of inferiority.⁹⁰ However, the limitations of the article should not

86 F Capotorti *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* (1991) UN Sales no E.91.XIV.2 at para 98.

87 *Ibid* at para 97.

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

89 P Thornberry *International Law and the Rights of Minorities* (1991)(Thornberry *International Law*) 142.

be overlooked. Article 27 does not recognize minorities as collective entities that possess legal rights. The individual remains the principal juridical unit of the Covenant.⁹¹ Thus, while the ICCPR embraces minority rights, it does so in a manner that denies communities the legal subjectivity necessary for their protection.⁹²

Article 27 has been the subject of a general comment by the UN Human Rights Committee ('UNHRC'). General Comment 23 attempts to answer some of the criticisms levelled above.⁹³ According to the UNHRC, art 27 was intended to ensure the survival and the continued development of the cultural, religious and social identity of minority communities. As a result, the Committee contends that the right granted by art 27 must be distinguished from other personal rights conferred on individuals by the ICCPR.⁹⁴ While the UNHRC 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,⁹⁵ the UNHRC recognizes that any meaningful enjoyment of culture, practice of religion and use of language presupposes a *community* of individuals with similar rights.⁹⁶ This recognition, according to the UNHRC, means that art 27 may require positive measures by states to protect the identity of a minority and to promote the ability of its members to enjoy their culture, religion or language in community.⁹⁷ As long as these measures are aimed solely at correcting conditions that impair the enjoyment of these community rights, these measures will constitute a legitimate ground for

90 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.

91 Anghie (supra) at 343 ('The exception to the individualistic orientation of the Covenant is Article 1 which confers the right of self-determination on all peoples.')

92 Ibid at 346.

93 General Comment 23, Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights UN Doc CCPR/C/21/Rev 1/add 5 (26 April 1994)('GC 23'). On the nature and authoritativeness of general comments of the Committee, see D McGoldrick *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (1991) 92-96 (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.)

94 Section 27 can thus be contrasted with the non-discrimination guarantees under Articles 2 and 26. The latter two articles apply to all individuals within the territory or under the jurisdiction of a state whether or not those persons belong to a minority. See GC 23 (supra) at paras 4 and 9.

95 Ibid at para 2.

96 Thornberry *International Law* (supra) at 173.

97 See GC 23 (supra) at para 6.2. This position 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 (supra) at 109.

differentiation and will comply with the non-discrimination requirements of the ICCPR.⁹⁸

(ii) UN Declaration on Minorities

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities was the product of fourteen years of work by

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a Working Group of the Commission on Human Rights.⁹⁹ This document goes beyond the articulation of individual rights of persons belonging to minority communities and addresses squarely the content of state obligations to respect, to protect and to promote minority communities.

The Declaration sets global minimum standards.¹⁰⁰ First, it contains a principle of non-discrimination of minorities.¹⁰¹ Second, it protects community identity through two discrete mechanisms: (a) one set of mechanisms protect minority 'existence'; and (b) another set of mechanisms promote the 'conditions' under which minority communities might flourish.¹⁰² The right to existence embraces background rights against genocide and forced assimilation.¹⁰³ With respect to the manner in which states encourage the flourishing of minority communities, the Declaration obliges the state: (a) to remove legal obstacles to cultural development; (b) to facilitate the growth of institutions that underpin a vibrant linguistic, religious or cultural community; (c) to respect the distinctive characteristics of minority communities; and (d) to protect the territorial claims of aboriginal groups and to permit aboriginal groups to associate within their traditional territories.¹⁰⁴

(iii) African Charter on Human and People's Rights

The African Charter, also known as the Banjul Charter, entered into force in 1986 and was ratified and acceded to by South Africa in 1996. It contains a large number of provisions that speak to the rights of religious, linguistic and cultural communities.

98 See GC 23 (supra) at para 6.2.

99 General Assembly Resolution 47/135 (18 December 1992).

100 P 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 A Philips & A Rosas (eds) *Universal Minority Rights* (1995) ('Rights of Ethnic, Religious and Linguistic Minorities') 30.

101 See Articles 2(1), 2(5), 3(1), 3(2), 4(1).

102 Article 1(1) reads: 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.

103 Thornberry 'Rights of Ethnic, Religious and Linguistic Minorities' (supra) at 40.

104 Ibid at 41.

Article 2 enshrines the general principle of non-discrimination. It reads: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.' Articles 8 and 11 contain standard rights to freedom of religion and freedom of association.

With Article 12, the African Charter begins to look like something more than a plain vanilla convention. Article 12(5) states: 'The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.'

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Article 19 contemplates somewhat less dire circumstances, but nevertheless recognizes the recent penchant for internecine strife. It reads: 'All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.'

Article 20 offers an even greater challenge to state sovereignty. It commits Charter members to the recognition of some form of self-determination of the various peoples who inhabit a political realm. Article 20 reads, in relevant part:

- (1) All peoples have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
- (2) Colonised or oppressed people shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

Article 17 takes us out of the domain of negative duties into the realm of positive obligations. Article 17(2) and (3) read as follows:

- (2) Every individual may freely take part in the cultural life of his community.
- (3) The promotion and protection of morals and traditional values recognized by the community shall be the duty of the state.

Article 22 amplifies the content of the positive obligations found in Article 17. It reads:

- (1) All people have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
- (2) States shall have the duty, individually and collectively, to ensure the exercise of the right to development.

Article 17(3), read together with Article 22(1), would, finally, appear to make communities themselves the bearers of justiciable rights.

Although the strength of the Charter has yet to be adequately tested by effective enforcement of the African Commission on Human and People's Rights' decisions, a significant body of jurisprudence has developed around the community rights set out

above.¹⁰⁵ The Commission has, over the past decade, issued judgments that speak directly to the meaning of self-determination,¹⁰⁶ religious

freedom,¹⁰⁷ and minority community rights.¹⁰⁸

58.4 FC s 31

(a) Content of FC s 31

(i) Individual right exercised communally

FC s 31 accords rights of participation to members of cultural, linguistic and religious communities 'with other members of that community'. FC s 31 thus echoes ICCPR art 27's phrase 'in community with other members of their group'.

The UNHRC has observed that this phrase turns art 27 into a hybrid individual/collective right. In General Comment 23, the Human Rights Committee notes 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.'¹⁰⁹ In other words, the right of a member of a cultural or linguistic or religious community cannot meaningfully be exercised alone and presupposes the existence of a community of individuals with similar rights.¹¹⁰

105 For more on the how the African Charter and the African Commission work, see C Heyns 'The African Regional Human Rights System: The African Charter' (2004) 108 *Penn State LR* 679; F Viljoen 'A Human Rights Court for Africa, and Africans' (2004) 1 *Brooklyn Journal of International Law* 30; C Heyns & M Killander (eds) *Compendium of Key Human Rights Documents of the African Union* (2nd Edition, 2006).

106 *Katangese Peoples Congress v Zaire* (2000) *African Human Rights Law Reports* 72 (ACHPR 1995) at para 4 (The Commission believes that 'self-determination may be exercised in any of the following ways: independence, self-government, local government, federalism, confederalism, unitarism, or any other form of relations that accords with the wishes of the people, but is fully cognizant of other recognised principles such as sovereignty and territorial integrity.')

107 *Amnesty International & Others v Sudan* (2000) *African Human Rights Law Reports* 72 (ACHPR 1995) at paras 73-76 ('Another matter is application of Sharia law... . [I]t is fundamentally unjust that religious law should be applied against non-adherents of the religion... . It is alleged that non-Muslims were persecuted in order to cause their conversion to Islam... . Christians are subjected to arbitrary arrest, expulsions and denial of access to work and food aid... . Accordingly, the Commission holds a violation of Article 8.')

108 *Prince v South Africa* ACHPR Communication 255/2002 (Commission finds that while the general prohibition of the use of cannabis limits the Rastafarian sacramental use of cannabis, the states prohibition serves a legitimate purpose, is rationally related to that purpose (the health, safety and welfare of the commonweal) and is therefore a justifiable limitation of complainants right to freedom of religion. However, the Commission then made the entirely risible claim that since the prohibition applied to all South Africans, 'it cannot be said [to be] so discriminatory as to curtail the complainants free exercise of his religious rights.' Were that true then all facially neutral laws crafted to suppress the religious, linguistic or cultural practices of any minority community on the continent would be consistent with the Charter. The Charters drafters could not have intended such an outcome.)

109 GC 23 (supra) at para 5.2.

The same reasoning applies to FC s 31. An individual right of enjoyment of culture, language or religion assumes the existence of a community that sustains a particular culture, language or religion. Accordingly, FC s 31 right protects both individual and group interests in a community's cultural, linguistic or religious integrity.¹¹¹ The hybrid scope of the right complicates its application. Individual and group interests in cultural integrity frequently coincide. Where an individual member of a linguistic community challenges, for example, legislation or executive action that restricts the public use of his or her language, the individual interest and the communal interest in the preservation of that language converge. However, they may, just as frequently, diverge.

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The Constitutional Court in *Gauteng School Education Bill* granted communities the right to create *independent* schools based upon a common culture, language or religion — and expressly recognized the importance of such constitutive attachments for individual dignity and group identity.¹¹² The Supreme Court of Appeal in *Mikro* gave this finding teeth by holding that FC s 29(2) — the right to receive education in an official language of choice at a *public* educational institution, where practicable — did not grant learners the right to receive instruction in their preferred language at each and every public educational institution.¹¹³ *Mikro* thereby resists majoritarian pressures that would dilute the integrity of a 'minority' linguistic community that wishes to maintain a single medium public school. In *Gauteng School Education Bill* and *Mikro*, individual rights and group rights dovetail and reinforce one another.

In *Prince v President, Cape Law Society*, a sharply divided Constitutional Court held that although a Rastafarian's right to freedom of religion in terms of FC ss 15 and 31 permitted him to engage in Rastafarian rituals, the state was justified in proscribing the sacramental use of cannabis.¹¹⁴ What is essential for our immediate purposes is the manner in which the case for a religious exemption presented itself to the Court. Prince was concerned with his right(s) to practise professionally as an attorney and to practise religiously as a Rastafarian. So although the Court spills quite a significant amount of ink on the religious practices of the Rastafarian community, the matter ultimately pits Prince's individual interests against the state's interests in effective law enforcement, in domestic narcotics trafficking and in keeping faith with its international obligations. Had the matter been brought to court

110 Thornberry *International Law* (supra) at 173; GC 23 (supra) at para 6.2.

111 SJ Anaya *Indigenous Peoples in International Law* (1996) 101 (Commenting on the hybrid nature of Article 27.)

112 *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)(Court held that IC s 32(c) permitted communities to create independent schools based upon common culture, language and religion. It further held that IC 32(c) provided a defensive right to persons who sought to establish such educational institutions and that it protected that right from invasion by the State. It did not, however, impose upon the State an obligation to establish such educational institutions.)

113 *Western Cape Minister of Education v The Governing Body of Mikro Primary School* 2006 (1) SA 1 (SCA), 2005 (10) BCLR 973 (SCA) ('*Mikro*').

114 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC)('Prince').

on behalf of the Rastafari community as a whole — or at least in concert with Mr Prince — dicta in the majority judgment and the strongly worded dissents suggest that the Court might have interrogated more closely the possibility of creating a meaningful exemption to existing laws proscribing dagga use.¹¹⁵ *Prince* suggests that individuals pressing religious rights claims would do well to have the backing of the community of which they are a part.

The Constitutional Court's decision in *Christian Education South Africa v Minister of Education* reverses the spin in *Prince* on the relationship between individual rights and community rights. The judgment assumes, without argument, that s 10 of the South African Schools Act¹¹⁶ limits FC ss 15 and 31. The Court then explains why the state is justified in barring corporal punishment in all schools and why it need not consider an exemption for such punishment when religious doctrine so dictates.

The manifold problems with the judgment are canvassed at length elsewhere in this work.¹¹⁷ As I have previously argued, it is perfectly reasonable to override religious dictates and to bar corporal punishment that impairs the dignity of children. The problem is with the distinction between the practice of religion in schools and the practice of religion elsewhere (eg, the home.) If children lack the capacity to decide for themselves whether religious practices will prove deleterious to their health — and it therefore becomes incumbent upon the state to intervene on their behalf to protect their dignity — then it would seem reasonable to conclude that barring religion-sanctioned corporal punishment at home should be no different than

115 Justice Ncgobo's judgment offers some solace for those inclined to treat religious belief with greater dignity:

Apart from this, as a general matter, the Court should not be concerned with questions whether, as a matter of religious doctrine, a particular practice is central to the religion. Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may freely believe in what they cannot prove. Yet that their beliefs are bizarre, illogical or irrational to others, or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith. For this reason, it is undesirable for courts to enter into the debate whether a particular practice is central to a religion unless there is a genuine dispute as to the centrality of the practice.

Ibid at 813. Justice Ncgobo recognizes: (1) how associations are constitutive of the beliefs and practices of individuals; and (2) how the fact of their being constitutive entitles them to constitutional protection. The judgment is remarkable in that it does not rely upon a model of rational moral agency to distinguish those beliefs that are entitled to judicial solicitude from those beliefs that are not. For a further discussion of the Constitutional Court's analysis in *Prince*, *Christian Education* and other religion cases, see S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44; P Farlam 'Freedom of Religion, Conscience, Thought and Belief' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 41. For a further discussion of the Constitutional Court's analysis in *Prince*, and Sachs J's dissent in particular, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

116 Act 84 of 1996.

117 See S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36; S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

barring religion-sanctioned corporal punishment at school. But that is not what the Court concludes. Rather, it argues that the parents 'were not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They could do both simultaneously.'¹¹⁸

That is, parents could follow their conscience and religion at home — and beat their children — but still obey the law of the land by having their children attend school free from corporal punishment. The Court cannot have it both ways. Either a child's right to dignity is of such paramount importance that it precludes corporal punishment at home and at school, or the dignity interests of a religious community in practising its faith justify corporal punishment in school and at home. To say, as the Court does, that the crux of the matter is the use of a

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teacher as the instrument of religious discipline is pure sophistry. If the teacher was the parent or the school was at home, then the court's basis for enabling the parents 'to do both simultaneously' would evaporate. In any event, the *Christian Education* Court takes a quintessentially collective right — FC s 31 — and turns it into a predominantly individual right. But, given the presence of FC s 15, FC s 31 is, on the facts of *Christian Education*, largely redundant.

If *Christian Education* and *Prince* represent low-water marks with respect to the Court's treatment of community rights, then the Court's recent ruling in *Fourie* might be judged a marked improvement. In finding that the equality and the dignity interests of same-sex life partners were unjustifiably limited by rules of common law and statutory provisions that prevented them from entering civilly-sanctioned marriages, the *Fourie* Court went out of its way to note that religious prohibitions on gay and lesbian marriage did not constitute unjustifiable infringements of the rights to dignity and to equality and that religious officials could legitimately refuse to consecrate a marriage between same-sex life partners.¹¹⁹ In other words, the Court recognized community rights that had nothing to do with, and which might even be viewed as inimical to, egalitarian concerns.

The inevitable divergence between the individual interests in FC s 31 and the collective interests in FC s 31 are evident in two High Court judgments: *Taylor v Kurtstag*¹²⁰ and *Wittmann v Deutscher Schulverein, Pretoria, & Others*.¹²¹ In *Taylor v Kurtstag*, the Witwatersrand High Court upheld the right of the Beth Din to issue a cherm — an excommunication edict — against a member of the Jewish community

118 *Christian Education* (supra) at para 51.

119 *Fourie* (supra) at paras 90-98. See also *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA), 2005 (3) BCLR 241 (SCA) at paras 36-37 (No religious denomination would be compelled to marry gay or lesbian couples.)

120 2005 (1) SA 362 (W), 2005 (7) BCLR 705 (W), [2004] 4 All SA 317 (W) ('Taylor').

121 1998 (4) SA 423 (T) 451, 1999 (1) BCLR 92 (T) ('Does this mean that private parochial schools which do not receive State aid may not prescribe obligatory attendance at their morning prayers and confessional religious instruction classes? The answer is negative. Section 17 of the [I]nterim Constitution and s 18 of the [Final] Constitution recognise the freedom of association. [IC] Section 14(1) and [FC] s 15(1) respectively recognise the freedom of religion which includes the right to join others in worship, propagation of the faith etc. Freedom of association entails the right with others to exclude non-conformists. It also includes the right to require those who join the association to conform with its principles and rules.')

who had agreed to follow its ruling with regard to an order for child maintenance. Taylor had contended that the cherem violated his right to participate in the affairs and the practices of the Jewish community. The High Court rightly rejected this claim on the ground that the group's right to choose its associates by necessity means the right to require those who wish to join the group to conform their behaviour to certain dictates, and the right to exclude those who refuse to conform.¹²² Taylor's refusal to follow the dictates of

the Beth Din effectively meant that he had forsaken his rights to participate in the affairs of the community. In *Wittmann v Deutsche Schulverein, Pretoria*, the Pretoria High Court upheld the right of a school governing body to expel a student who knew that she was obliged to attend language and religious instruction classes and who subsequently refused to attend these classes. The learner's views on what constituted a 'religious' or 'cultural' education clearly conflicted with the views of the school's broader community. Both cases underscore the relatively unassailable proposition that in order for a religious association or a cultural association to remain committed to specific practices, it must control the voice of, the entrance to and the exit from the association.¹²³

Not every conflict between the individual's right to participate in the affairs of the community will fall before the community's interest in determining the rules for such participation. In *Lovelace v Canada*, the UN Human Rights 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 reserve because of her marriage to a non-Indian violated her ICCPR art 27 right.¹²⁴ According to the UNHRC, '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.'¹²⁵

122 *Taylor* (supra) at para 38 (FC s 18 freedom of association guarantees an individual the right to choose his or her associates and a group of individuals the right to choose their associates citing with approval Woolman 'Association' (supra) at § 44.3 as authority for the proposition that the right to choose entails a right to exclude.) See also AWG Rath & SA de Freitas 'Church Tribunals, Doctrine Sanction and the South African Constitution' 43 (1 & 2) *Deel* (2002) 276 (Doctrinal sanctioning by ecclesiastical courts enjoys protection of FC s 15 and that protection has been recognized by civil courts.)

123 See also *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.)

124 *Lovelace v Canada* Communication No R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) (1981). 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. 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.' *Ibid* at para 13.1.

125 *Ibid* at para 15.

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.¹²⁶ Although the

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UNHRC interpreted art 27 in favour of the individual's rights of participation, it 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. However, such restrictions on rights of residence must be reasonable, justifiable and consistent with the other provisions of the Covenant.¹²⁷

(ii) Membership in and belonging to a 'cultural, religious or linguistic community'

FC s 31's use of the word 'belong' — as in 'belonging to a cultural, religious or linguistic community' — echoes ICCPR art 27's phrase 'persons belonging to ... [ethnic, religious or linguistic] minorities.' The UN Human Rights Committee has stated that 'belonging' 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' and is not, therefore, a right to which everyone is necessarily entitled.¹²⁸ In *Lovelace v Canada*, the UN Human Rights Committee had this to say about Sandra Lovelace's membership in the Maliseet community:

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 Covenant. 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.¹²⁹

126 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.

ibid at para 5. See also GC 23 (supra) at para 5.

127 But see *Kitok v Sweden* Communication No 197/1985 (1985) 96 ILR 637. *Kitok* demonstrates that the UNHRC recognizes that article 27 may protect the interests of the community at the expense of individual interests. In *Kitok*, the Committee found statutory restrictions on individual membership of a Sami village had, as their *raison d'être*, the preservation of the Sami minority. Such objectives were considered to be reasonable, justifiable and consistent with the purpose of article 27.

128 GC 23 (supra) at para 5.1.

129 Ibid at para 14.

The Committee recognized that 'belonging' occurs in a number of different but often overlapping ways. For example, birth or ethnic origin determined, in part, that Lovelace was a Maliseet. However, birth alone would not necessarily be a sufficient condition to tie Lovelace to the Maliseet community. Courts may look for additional evidence of continued affinity with an ethnic group. Indeed, South African courts are likely to consider continued residence or formal identification with the community to be more important than birth. Culture, language and religion are more a matter of shared experience than genetics.

With respect to language, courts may want some proof that the language in question is the individual's mother tongue and that the language constitutes an essential part of the personal, family and communal experience.¹³⁰ With respect to

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religion, a claimant will be obliged to show that they practice a religion and she is actively involved in the religious life of her community. In all cases, the requirement of membership or belonging demands that the individual claimant demonstrates a history of shared experience and continued identification with the community in question.

(iii) May not be denied the right

Some of the phrasing of FC s 31 — 'may not be denied the right' — suggests that FC s 31 is primarily a negative liberty. That is, members of communities may freely engage in the practice of culture, language and religion without interference by the state or from any other source.

However, one might argue that FC s 31 requires more than mere sufferance. The inclusion of FC s 31 indicates a commitment to the maintenance of cultural pluralism. Such a commitment might well require that the state take positive measures to ensure the survival and the development of a variety of non-dominant communities. A state genuinely committed to pluralism cannot simply remain neutral in the face of larger social, political and economic currents that threaten its religious, linguistic and cultural heterogeneity. One need not be committed to pluralism for pluralism's sake to recognize that the centripetal forces of modernity augur an increasingly dull uniformity.

As for FC s 31's avatar, ICCPR art 27, opinion remains divided as to whether the right requires positive measures in support of minority cultures. For some academics, 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'.¹³¹ However, the contrary opinion — that the right necessarily requires positive measures — enjoys the support of UN Human Rights Committee. The Committee writes:

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

130 F de Varenes *Language, Minorities and Human Rights* (1996) 149.

131 Varenes (supra) at 151.

language and to practice their religion, in community with other members of their group.¹³²

Sachs J has offered a similar gloss on community rights — and thus FC s 31 — in *Gauteng School Education Bill, Fourie, Prince and Volks*. In *Gauteng School Education Bill*, Sachs suggests that the minority rights provisions of the Interim Constitution bar the state from interfering with initiatives undertaken by a non-dominant community to preserve its culture, and might, in addition, require the state to provide material assistance to particularly vulnerable, threatened or disadvantaged

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cultures.¹³³ In *Fourie*, Sachs J's opinion — which attracts a majority of the Court — articulates an even more emphatic defence of community rights:

Equality ... does not presuppose ... suppression of difference ... Equality ... does not imply ... homogenisation of behaviour [T]here are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in section 18. Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different'. In each case, space has been found for members of communities to depart from a majoritarian norm.¹³⁴

(iv) Right to enjoyment of culture in community with others

The Final Constitution uses the terms 'culture' or 'cultural' in two distinct senses. FC 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 issue from this activity.¹³⁵ Put simply, 'culture' in Schedule 4 embraces literature, music, painting,

132 GC 23 (supra) at para 6.2.

133 *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) at paras 70 and 90.

134 *Fourie* (supra) at paras 60-61. See *Prince v Law Society* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC) ('*Prince*') (Sachs J dissenting at para 149 ('[W]here there are [religious] practices that might fall within a general legal prohibition, but that do not involve any violation of the Bill of Rights, the Constitution obliges the State to walk the extra mile and to find adequate means perhaps a carefully constructed exemption of accommodating the practice at issue.'). See also *Volks v Robinson* 2005 (5) BCLR 466 (CC) ('*Volks*') (Sachs J dissenting) at paras 154 and 156 (Sachs J rejects the majority's finding that 'the appellant, having chosen cohabitation rather than marriage, ... must bear the consequences and thus could not avail herself of the benefits of the Maintenance of Surviving Spouses Act.' He contends that: 'Respecting autonomy means giving legal credence not only to a decision to marry but to choices that people make about alternative lifestyles. Such choices may be freely undertaken, either expressly or tacitly. Alternatively, they might be imposed by the unwillingness of one of the parties to marry the other. Yet if the resulting relationships involve clearly acknowledged commitments to provide mutual support and to promote respect for stable family life, then the law should not ... penalise or ignore them because they are unconventional. It should certainly not refuse them recognition because of any moral prejudice, whether open or unconscious, against them.')

135 See R Williams *Keywords: A Vocabulary of Culture and Society* (1983) 90.

sculpture and theatre.¹³⁶ As TS Eliot noted, this is culture 'in the reduced sense of the word, ... everything that is picturesque, harmless and separable from politics'.¹³⁷

FC s 31 and FC s 30 deploy a different connotation of the word. In these two sections, culture means a particular way of life for an identifiable group of people: FC s 31 does not refer to 'culture' in general, but to 'their culture'. Culture does the work of a range of synonymous terms: tradition, customs, civilisation, race, nation, way of being in the world, and even comprehensive vision of the good life.¹³⁸ Understood in this way, 'culture' functions as a source of identity and draws distinctions between groups of people based upon such characteristics as belief-sets, practices, mores, language, rules of kinship, modes of education or forms of social relations.¹³⁹ FC s 31's use of the term 'culture' is, of course, broad enough to encompass all that falls within the FC Schedule 4 definition. It goes without saying that the activities of writers, artists and musicians all contribute to the cultural life of a community. But they do not exhaust that community's culture.

What constitutes 'culture' for the purposes of FC s 31? One might begin with the specific practices, customs and traditions of the community and, by logical extension, those institutions responsible for the preservation and the transmission of culture — schools, publications, libraries, publishing houses, museums and religious institutions.¹⁴⁰ (The list may then be extended to the conservation of historical objects and the commemoration of significant dates or events.¹⁴¹) The right grants communities the freedom to establish and to maintain such institutions without interference from any source in order to ensure their survival as a cultural entity. Certain institutional aspects of 'cultural life' are accorded specific protection elsewhere in the Bill of Rights — language use at official and unofficial levels,¹⁴² local

136 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 the development of culture in the fields of the visual, musical and literary arts, the natural and human sciences, and of leisure and recreational activities.

137 TS Eliot *Notes Towards the Definition of Culture* (1962) 93 as quoted in C Kukuthas 'Are There Any Cultural Rights?' in W Kymlicka (ed) *The Rights of Minority Cultures* (1995) 228.

138 See R Thornton 'Culture: A Contemporary Definition' in E Boonzaaier & J Sharp (eds) *South African Keywords* (1988) 17, 26. As I have noted above, we should take great care before we suggest that all cultures provide comprehensive visions of the good life. Most cultures, properly understood, fall far short of doing so.

139 M Leiris *Race and Culture* (1958) 20-21.

140 P Thornberry *International Law and the Rights of Minorities* (1991) 188.

141 F Capotorti *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* (1991) UN Sales no E.91.XIV.263-68.

142 FC s 6 and FC s 30. FC s 35 guarantees accused persons the right to be informed of their rights and to use a language they understand in criminal proceedings. For more on official languages and the right to use the language of one's choice, see I Currie 'Official Languages' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 65.

control by a cultural, linguistic or religious community of the education of its members,¹⁴³ and state support for religious practices.¹⁴⁴ These different forms of protection are dealt with at greater length elsewhere in this work.

(v) Right to practice a religion in community with others

FC s 31 must be read together with FC s 15, the freedom of religion, and FC s 18, the freedom of association. The Constitutional Court has been quite clear about what lies at the core of FC s 15's protection of freedom of religion. In *Prince*, Ngcobo J writes:

This Court has on two occasions considered the contents of the right to freedom of religion. On each occasion, it has accepted that the right to freedom of religion at least comprehends: (a) the right to entertain the religious beliefs that one chooses to entertain; (b) the right to announce one's religious beliefs publicly and without fear of reprisal; and (c) the right to manifest such beliefs by worship and practice, teaching and dissemination. Implicit in the right to freedom of religion is the 'absence of coercion or restraint'. Thus 'freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs'.¹⁴⁵

What then does FC s 31(1) do that FC s 15(1) does not? According to Ngcobo J:

Section 31(1)(a) emphasises and protects the associational nature of cultural, religious and language rights. In the context of religion, it emphasises the protection to be given to members of communities united by religion to practise their religion.¹⁴⁶

In sum, the protection of a right to religious practice in community with others in FC s 31 and the right to freedom of religion in FC s 15 do not so much differ as they do 'complement' one another.¹⁴⁷

143 FC s 29(3). For more on the right to create and to maintain independent educational institutions, see S Woolman, F Verrieva & M Bishop 'Education' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 57.

144 FC s 15. For more on the freedom of religion, see P Farlam 'Freedom of Religion' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 41. See also G Van Der Schyff 'Freedom of Religious Autonomy as an Element of the Right to the Freedom of Expression' (2003) 3 *TSAR* 512 (Describes five distinct elements of freedom of religion autonomy, choice, observance, reaching and propagation.)

145 *Prince v President, Cape Law Society & Others* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC) ('*Prince*') at para 38 quoting *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC), 1997 (2) SACR 540 (CC), 1997 (10) BCLR 1348 (CC) at para 92 and citing, in support, *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC). The *Prince* Court also quoted with approval the following dictum by Dickson J in *R v Big M Drug Mart Ltd* 18 DLR (4th) 321, 353, [1985] 1 SCR 295, 311: 'The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination.' See also Y Dinstein *Freedom of Religion and Religious Minorities* in Y Dinstein & M Tabory (eds) *The Protection of Minorities and Human Rights* (1992) 145, 147.

146 *Prince* (supra) at para 39.

147 *Ibid.*

FC s 31, alone, clearly allows for the establishment and the maintenance of those institutions that make possible the practice of a religion: the creation of houses of worship, schools, seminaries and burial sites, the publication of religious texts and the production of objects required for religious rites.¹⁴⁸ FC s 31, when read with FC s 15 and FC s 18, does substantially more: it grants religious associations the ability to control the entrance into, the voice of, and the expulsion from a community.

Recent constitutional case law supports the contention that religious associations have the right to expel members who agree to follow the rules or the decisions of the association's governing body and subsequently refuse to do so.

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In *Taylor v Kurstag*, the Witwatersrand High Court upheld the right of the Beth Din to issue a cherem — an excommunication edict — against a member of the Jewish community who had agreed to follow its ruling with regard to an order for child maintenance.¹⁴⁹ In *Wittmann v Deutsche Schulverein, Pretoria*, the Pretoria High Court upheld the right of a school governing body to expel a student who knew that she was obliged to attend language and religious instruction classes and who subsequently refused to attend these classes.¹⁵⁰ Both cases underscore the relatively unassailable proposition that in order for a religious association to remain committed to the practice of certain beliefs in a given environment, it must control the voice of, the entrance to and the exit from the association.

The Constitutional Court's recent judgment in *Fourie* further reinforces this conclusion. In finding that the equality rights and the dignity interests of same-sex life partners were unjustifiably limited by rules of common law and statutory provisions that prevented them from entering civilly-sanctioned marriages, the *Fourie* Court went out of its way to note that religious officials could legitimately refuse to consecrate a marriage between members of a same-sex life partnership. It wrote:

In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other... . The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.... It is clear from the above that acknowledgment by the State of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages. The constitutional claims of same-sex couples can accordingly not be negated by

148 Dinstein (supra) at 158.

149 2005 (1) SA 362 (W), 2005 (7) BCLR 705 (W), [2004] 4 All SA 317 (W) at para 38 ('The right of a group to choose their associates of necessity means the right to require those who wish to join the group to conform their behaviour to certain dictates, and the right to exclude those who refuse to conform.')

150 1998 (4) SA 423 (T), 451, 1999 (1) BCLR 92 (T) ('Freedom of association entails the right with others to exclude non-conformists. It also includes the right to require those who join the association to conform with its principles and rules.')

invoking the rights of believers to have their religious freedom respected. The two sets of interests involved do not collide; they co-exist in a constitutional realm based on accommodation of diversity.¹⁵¹

In short, religious groups are still free to exclude gay and lesbian life partners — individually and jointly — from participating in the practices and the rituals of a given community.

Why would the Final Constitution grant religious associations the power to control their own membership requirements, their own internal affairs and their own expulsion procedures at the risk of limiting another person's desire to belong? As I have argued elsewhere, an appropriate appreciation of freedom of association — of which the right to practice a religion in community with others is a subset — turns on the recognition of two arguments. First, freedom of association, rightly understood, forces us to attend to the *arationality* of our most basic attachments and to think twice before we accord *our* arational attachments preferred status to the arational attachments of *others*.¹⁵² This observation regarding our constitutive religious attachments buttresses the contention that religious associations that pursue a particular way of being in the world ought to be able to exclude from a religious association or a religious institution those persons who do not derive meaning from that way of being in the world, and whose presence, in significant numbers, would make the religious association or institution impossible to sustain. Second, religious associations must have the capacity to protect themselves from capture. Without the capacity to police their membership and to enforce expulsion policies, associations would face two related threats. For starters, an association would be at risk of having its aims substantially altered. To the extent that the original *raison d'être* of the religious association matters to the extant members of the association, the association must possess ability to regulate the entrance, voice and exit of members. Without built-in limitations on the process of determining the ends of the religious community, the entrance of new members, and the continued membership

of existing members, outside parties could easily distort the purpose, the character and the function of the association. Moreover, a religious association's very existence could be at risk. Individuals, other groups, or a state inimical to the values of a given association could use ease of entrance into an association to put that same association out of business.

The extant common law on association reinforces more general constitutional jurisprudential considerations in support of the proposition that religious

151 *Fourie* (supra) at paras 94-98.

152 The constitutive nature of our attachments also forces us to attend to another often overlooked feature of associations. We often speak of the associations that make up our lives as if we were largely free to choose them or make them up as we go along. I have suggested why such a notion of choice is not true of us as individual selves. It is also largely not true of associational life generally. As Michael Walzer has convincingly argued, there is also a 'radical givenness' to our associational life. M Walzer 'On Involuntary Association' in A Gutmann (ed) '*Freedom of Association*' (1998) 64, 67. What he means, in short, is that most of the associations that make up our associational life are involuntary associations. A reasonably equal and democratic society must mediate the givenness of our associational life and the aspirations of all of us to have the ability to discriminate (and sometimes choose) between those associational forms which still fit and those which do not. It is often the case that not choosing to leave an association, but to stay, is what we truly cherish as freedom. As Walzer suggests, we ought to call such decisions to reaffirm our commitments 'freedom simply, without qualification'. Ibid at 73.

communities possess a significant degree of latitude with respect to policies that differentiate between adherents and non-adherents. One old and venerable strand of the common law on association tolerates little internal or external interference with the critical purposes — or voice — of a community or an association.¹⁵³ Another, equally important line of cases is designed to prevent insiders and outsiders from altering the fundamental purposes of a religious community. In *Nederduitse Gereformeerde Kerk in Afrika*, the Supreme Court of Appeal held that the attempt of the Dutch Reformed Church in Africa ('NGKA') to merge with the Dutch Reformed Mission Church in South Africa ('NGSK') could not proceed without the unanimous consent of regional synods.¹⁵⁴ The Supreme Court of Appeal's decision in *Nederduitse Gereformeerde Kerk in Afrika* provides exceptionally strong support for the proposition that associations designed to promote a particular religious denomination cannot be changed into another form or denomination of religious community without securing unanimity or special majorities designed to secure near unanimous approval.

What then does FC s 31(1) do that FC s 15(1) does not? The case law suggests that FC s 31(1) protects the religious community from interference — from both public and private sources — with the practice of its rituals and traditions. It is not clear, however, that such protection would not exist in the singular presence of FC s 15 and the total absence of FC s 31. Perhaps, it is safest to say that FC s 31 eliminates any doubt about what kind of protection FC s 15 should be understood to afford South Africans.

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(vi) Right to use a language of choice

Specific protection of an individual right to speak a language is unnecessary — since the individual protection of a right to speak a language is meaningless without express protection for, and the existence of, a community of same-language speakers. And yet, such individual protection is exactly what both FC s 30 and FC s 31 appear to provide.¹⁵⁵

153 A well-established body of common law precedent supports the contention that any proposed alteration of the fundamental objectives of an association requires the unanimous support of the associations members. This body of case law also underwrites the general proposition that courts ought to be loath to disturb associational relations on the basis of general assertions of equity or fairness. See, generally, B Bamford *The Law of Partnership and Voluntary Association in South Africa* (3rd Edition, 1982). *Murray v SA Tattersall's Subscription Rooms* provides support for my thesis that a majority of the members of an association formed for a given purpose cannot simply alter the constitution of that association in order to pursue an entirely unrelated set of ends and still expect the other, dissenting, minority members of the association to accept the change. 1910 TH 35. See also *Mitchell's Plain Town Centre Merchants Association v Mcleod & Another* 1996 (4) SA 159 (A), 166 citing *Total South Africa (Pty) Ltd v Bekker* 1992 (1) SA 617 (A), 624.

154 *Nederduitse Gereformeerde Kerk in Afrika (OVS) en 'n Ander v Verenigende Gereformeerde Kerk in Suider-Afrika* 1999 (2) SA 156 (SCA), 168-175.

155 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. S Roth 'Toward a Minority Convention: Its Need and Content' in Y Dinstein & M Tabory (eds) *The Protection of Minorities and Human Rights* (1992) 83, 113. FC s 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, Article 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.' See H Hannum (ed) *Documents on Autonomy and Minority Rights* (1993) 682.

But assume then, as a logical matter, that the protection afforded by FC s 31 must be communal in nature to have any purchase. One would then conclude that FC s 31 was intended to prevent interference with the use of a particular language in various public fora,¹⁵⁶ in schools or universities,¹⁵⁷ in daily commerce, or in the press or broadcasting media.¹⁵⁸ The same should hold true of similar restrictions imposed by natural or juristic persons. So, for example, FC s 31 could be applied horizontally to an employer who sought to restrict the use of a language by its employees while at work.¹⁵⁹

It is also logical to conclude that FC s 31's silence with regard to any positive state duties with respect to the use of a language is intentional. The Final Constitution already contains a number of provisions designed to promote greater linguistic parity.¹⁶⁰

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(vii) Right to form, join and maintain cultural, religious and linguistic associations

FC s 31(1)(b) borrows 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 recognised and protected.' Given that the subsection adds little to the guarantees contained in FC s 31(1) (a), it seems reasonable to conclude that it was included to ensure compliance with CP XII. The Constitutional Court offers some support for this conclusion when it writes, in the *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.'¹⁶¹

156 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 prohibited the use of the Kurdish language in public places. Similarly, Algerian legislation made it an offence to hold public meetings or conferences or to put up signs or posters in any language other than Arabic. The prohibition effectively prevented the Berber minority from using its mother tongue. See F de Varennes *Language, Minorities and Human Rights* (1996) 164-165.

157 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.)

158 While governmental restrictions on the language of private media (eg by banning publications in a particular language) would violate FC s 31, FC s 31 does not oblige the state to grant unrestricted access to the airwaves to linguistic minorities. FC s 9 would only require that it exercise control over such access in a non-discriminatory manner. See de Varennes (supra) at 164.

159 See *Gutierrez v Municipal Court* 838 F2d 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.)

160 See, eg, FC ss 6, 29(2), 35(3)(k) and 35(4). See also I Currie 'Official Languages' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 65.

161 *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 23-27.

Whatever the intention of the drafters of FC s 31 may have been, the right to form, to join and to maintain cultural, religious and linguistic associations must be understood to be a subset of the right to freedom of association, FC s 18. As I have written elsewhere in this work, FC s 18 has a four-fold purpose. First, associational rights are correlative: they make good the promise of other rights and freedoms. Second, associational rights take our constitutive attachments seriously: they recognize the centrality of associations for the formation and the maintenance of individual identity. Third, associational rights enable us to determine an association's membership policies, internal affairs and expulsion procedures: they thereby prevent the capture — the hostile takeover — of those associations that we deem central to our identity. Fourth, associational rights justify disassociation: compelled or forced association is incompatible with the dictates of an open and democratic society.

The golden thread running through all four justifications for associational freedom is social capital. Social capital is a necessary consequence of our collective efforts to build and to fortify the things that matter to us. It is our collective grit and elbow grease, our relationships and their constantly re-affirmed vows. Social capital consists both of the instrumental networks that flow from collective efforts, and of the intrinsic ethical goods — trust, respect, loyalty, care, empathy and commitment — that also flow from such collective efforts.

Social capital links up the four justifications for the protection of associational life in the following manner. Social capital — qua correlative associational rights — is what keeps our intimate, economic, political, cultural, traditional, linguistic, union and religious associations going. Without it, nothing works. Social capital — qua constitutive attachments — recognizes that we store the better part of our meaning in involuntary associations. Squander that social capital, and nothing that matters *is*. Social capital — qua capture — recognizes that the dominant rationale for ceding control over membership, internal affairs and expulsion to associations

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is the only way to protect the real property and the figurative property that associations create. For if anyone can claim ownership in and of an association, then no one owns it and no one will take care of it. Finally, social capital takes seriously the threat of various kinds of compelled association. Trust, respect, empathy, care and loyalty — the essence of social capital — have no meaning where association is coerced.¹⁶²

The Constitutional Court captures much of what is at stake in associational matters — be they intimate, religious, cultural or linguistic — when it writes:

A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and

162 See S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44, § 44.1(c). For more on social capital, see R Putnam *Bowling Alone: The Collapse and Revival of American Community* (2000); R Putnam *Making Democracy Work: Civic Traditions in Modern Italy* (1993); P Bourdieu 'Forms of Capital' in JC Richards (ed) *Handbook of Theory and Research for the Sociology of Education* (1986) 241.

stigma. At best, it celebrates the vitality that difference brings to any society. The issue goes well beyond assumptions of heterosexual exclusivity, a source of contention in the present case. The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation. Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting. As was said by this Court in *Christian Education*, there are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in s 18. Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different'. In each case, space has been found for members of communities to depart from a majoritarian norm. The point was made in *Christian Education* that these provisions collectively and separately acknowledge the rich tapestry constituted by civil society, indicating in particular that language, culture and religion constitute a strong weave in the overall pattern. For

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present purposes it needs to be added that acknowledgment of the diversity that flows from different forms of sexual orientation will provide an extra and distinctive thread to the national tapestry. The strength of the nation envisaged by the Constitution comes from its capacity to embrace all its members with dignity and respect.¹⁶³

The holding in *Fourie* is equally critical for our understanding of the rights that religious communities possess with respect to the exclusion of non-members or the expulsion of non-rule following members. The *Fourie* Court found that while the state may not enforce laws that patently discriminate against homosexual life partners who wish to marry, religious communities are entitled to refuse to consecrate homosexual unions where homosexual marriage is proscribed by religious law. The holding signals a significant victory for religious communities whose mores might not be on all fours with the values articulated in the Final Constitution.

As I note in greater detail below, the Supreme Court of Appeal recognized that a linguistic community — Afrikaans-speakers — could, under very narrow circumstance, legitimately exclude non-Afrikaans speakers from a public primary school.¹⁶⁴ In *Western Cape Minister of Education & Others v Governing Body of Mikro Primary School*, the Supreme Court of Appeal held that FC s 29(2) could not be 'interpreted to mean that everyone had the right to receive education in the official language of his or her choice at *each and every* public educational institution where this was reasonably practicable.'¹⁶⁵ As a result, the school governing body had the right to exclude non-Afrikaans-speaking learners where another public school in

163 *Fourie* (supra) at paras 60-61.

164 *The Western Cape Minister of Education & Others v The Governing Body of Mikro Primary School* 2006 (1) SA 1 (SCA), 2005 (10) BCLR 973 (SCA) ('*Mikro*'). See also *Governing Body of Mikro Primary School v Western Cape Minister of Education* [2005] 2 All SA 37 (C).

close proximity could cater for the preferred language of instruction of the non-Afrikaans-speaking students.

But *Mikro* and *Fourie*, as important as they may be, do not reflect the extent to which our basic law will favour egalitarian concerns over associational rights. Where an applicant's challenge has been grounded in FC s 31(1) (b), FC s 31(1) (a), FC s 15, FC s 18 or FC s 29, the courts have not, on balance, demonstrated significant solicitude for cultural, religious and linguistic associations. In *Prince*, Rastafarians found that the state's general commitment to the safety of the commonweal trumped their sacramental use of cannabis.¹⁶⁶ In *Christian Education*, parents found that the state's interest in eliminating corporal punishment trumped the right to punish learners in a manner consistent with religious dictates.¹⁶⁷ Both

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cases suggest that religious, cultural or linguistic difference will *only* be tolerated where such differences are not deemed to be a threat to the basic law's commitments to equality, to dignity and to the promotion of the common good.

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(b) Internal Limitations of FC s 31

Internal limitations – as opposed to general limitations – are discussed at length elsewhere in this work.¹⁶⁸ FC s 30 and FC s 31(2) both require that the exercise of the right in question be consistent with the other rights in Chapter 2. In short, the Final Constitution makes it clear that a community's religious, cultural or linguistic practices enjoy constitutional protection only where they do not interfere with – limit – the exercise of other fundamental rights.¹⁶⁹ This formally correct articulation of the relationship between FC s 31 and the rest of the Bill of Rights is often assumed to imply that the other substantive rights – including dignity – trump collective religious, cultural and linguistic concerns because they do not protect such concerns. That, however, is untrue. For example, the Constitutional Court in *Gauteng School Education Bill* recognized the importance for individual dignity, and collective claims for equal respect, of granting communities the right to create schools based upon a common culture, language or religion.¹⁷⁰ Again: FC s 31(2) and FC s 30(2) do not automatically subordinate community rights to equality, dignity or any other freedom rights. Indeed, as I have just suggested, the courts should attempt to take community rights into account when determining the content and the contours of

165 *Mikro* (supra) at para 30.

166 See also *Prince v President of the Law Society of the Cape of Good Hope* 2001 (2) SA 388 (CC), 2001 (2) BCLR 133 (CC) ('*Prince*').

167 2000 (4) SA 757 (CC), 2000 (4) BCLR 1051 (CC) ('*Christian Education*').

168 See S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2005) Chapter 34.

169 FC s 31(2) could be construed to preclude all exclusionary and discriminatory policies. But that assumes that all such practices are inconsistent with various provisions in the Bill of Rights, in particular, equality and dignity. The Constitutional Court has made it quite clear that not all discrimination is unfair discrimination. See, eg, *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC).

other rights. That position is consistent with the Constitutional Court's commitment to the 'harmonization' of all constitutional provisions as first set out in *United Democratic Movement*.¹⁷¹

As a general matter, however, the courts often appear to ignore the internal limitations in FC s 30 and FC s 31(2) entirely. In *Christian Education South Africa v Minister of Education*, the Constitutional Court simply assumed – without needing to do so – that the exercise of FC ss 15 and 31 had been impaired by the South African Schools Act. (It skipped the internal limitation clause of FC s 31(2) entirely.) It then proceeded to FC s 36 and found that, on balance, the mutually reinforcing rights of religion and culture said to sanction corporal punishment in private schools were in conflict with, and ultimately subordinate to, a constellation of rights that included dignity, equality, and freedom and security of the person.¹⁷²

Two things remain to be said about *Christian Education* and the Court's apparent failure to recognize the purpose of FC s 31(2). First, the Court could have made a mistake. It happens. (As US Supreme Court Justice Robert Jackson rather wryly noted: 'The Court does not have the last word because it is infallible. It is infallible because it has the last word.') Second, it is possible that a right to community religious practice can (a) be deemed consistent with the other rights in Chapter 2 and (b) still be impaired by the law in question. If this second reading is correct, then the analysis would proceed to FC s 36, and the party relying upon the law would have the opportunity to demonstrate that another set of interests or values – not expressly manifest in the rights and freedoms of Chapter 2 – justified the infringement of FC s 31(1).

58.5 FC s 30

(a) Content of FC s 30

IC s 31 represented the Interim Constitution's Bill of Rights sole attempt to engage vexed questions of language and culture. It read as follows: 'Every person shall have the right to use the language and to participate in the cultural life of his or her choice.'

IC s 31's grant of an individual right to non-interference in aspects of culture and language accomplished two things. First, it guaranteed a right to participation in cultural life even where that participation might be against the wishes of the

170 *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)(Court held that IC s 32(c) permitted communities to create schools based upon common culture, language and religion.)

171 *United Democratic Movement v President of the Republic of South Africa & Others* (No 2) 2003 (1) SA 495 (CC), 2002 (10) BCLR 1086.

172 2000 (4) SA 757 (CC), 2000 (4) BCLR 1051 (CC)('Christian Education'). See also *Prince v President of the Law Society of the Cape of Good Hope* 2001 (2) SA 388 (CC), 2001 (2) BCLR 133 (CC).

particular community practising that culture.¹⁷³ Second, it protected individual interests in the maintenance of cultural life.¹⁷⁴

The phrasing of IC s 31 left it unclear as to whether the right could ground claims for the protection of cultural communities and linguistic communities *in toto*. FC s 31 constitutes a full-blown right of cultural, linguistic and religious communities to a significant degree of tolerance for the practices of those communities. It has thereby made disputes about the ambit of IC s 31 — and its successor FC s 30 — largely academic.

Indeed, given the work FC s 31 now does with respect to the protection and the promotion of communal interests in culture, religion and language, one might well ask what, if anything, remains for FC s 30 to do. The individual right to maintain membership within a particular cultural community or to use a language of one's choice has been made superfluous by FC s 31's rights to form cultural associations and to use a language in community with others.

However, it is possible (rather easy, in fact) to conceive of an individual interest in using a language or belonging to a cultural community that is *not*, at the same time, an interest shared by other speakers of the language or other members of a cultural community. *Bhe* pits the individual interests of the female members of the Bhe family (and other similarly situated women) in securing an equal share of the deceased's estate against the (alleged) communal interest in maintaining the rule

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of male primogeniture.¹⁷⁵ *Taylor* pits the individual's right to continued participation in community life against the right of the community to determine the rules which govern the community and thus the rules which membership within the community.¹⁷⁶ Both *Martinez*¹⁷⁷ and *Lovelace*¹⁷⁸ pit the rights of female members of a traditional community to equal treatment against the right of a traditional community to maintain customs that discriminate against particular classes of person within the community. Courts here and abroad have recognized the

173 FC s 30 looks to be the equivalent of article 15 of the International Covenant on Economic, Social and Cultural Rights (1966). Article 15 provides that 'The States Parties to the present Covenant recognize the right of everyone: (a) to take part in cultural life.'

174 *Christian Education* (supra) at para 23 ('[L]anguage rights and rights of belief are first spelt out fully as individual rights in ss 15 and 30, even though they have a community dimension and are frequently exercised in a community setting.'). See also *Mhlekwana v Head of The Western Tembuland Regional Authority & Another; Feni v Head of The Western Tembuland Regional Authority And Another* 2001 (1) SA 574 (Tk) (Court found that the right to language and culture in terms of FC s 30 gives individual the right to choose to be part of a culture, and persons could choose to forfeit another entrenched right in the Bill of Rights in exercising that right to culture.)

175 *Bhe v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC).

176 *Taylor v Kurtstag* 2005 (1) SA 362 (W), 2005 (7) BCLR 705 (W), [2004] 4 All SA 317 (W) ('*Taylor*').

177 *Santa Clara Pueblo v Martinez* 436 US 49 (1978), 83 and *Martinez v Santa Clara Pueblo* 540 F2d 1039, 1042 (10th Cir 1976).

178 *Lovelace v Canada* Communication No R.6/24, U.N. Doc. Supp. No. 40 (A/36/40)(1981).

competing claims and split down the middle as to whose claim should be afforded primacy of place.

FC s 30 provides a partial answer to the question as to whether individuals may be excluded, entirely or partially, from participation within the linguistic and the cultural communities of which they are a part. As I have argued above, continued individual membership in a religious denomination, a linguistic group or cultural association is parasitic upon the continued existence of the particular faith, language or culture in question. The converse is not true. The continued existence of a particular faith, language or culture in question is not — as a general matter — contingent upon the continued membership of any given individual. As a result, while FC s 31 protects the interests of the community, FC s 30 ensures that individuals retain the right to participate within the cultural and the linguistic communities to which they belong. So although FC s 30 may look, at first blush, like a free exercise clause for language and culture, the robust role played by FC s 31 makes such an additional guarantee redundant. What is unique about FC s 30 — and what may distinguish it from all other rights in Chapter 2 — is that its primary purpose is to regulate the horizontal relationships between individuals and other members of linguistic and cultural communities. It is, in other words, concerned less with 'state' action, than it is with 'private' action.

In order for religious, cultural and linguistic communities to be able to create and to maintain the institutions that enable them to flourish, they must be able to control the conditions and the rules that govern entrance, membership, voice and exit within the community.¹⁷⁹ However, such rules must, as the courts have been quick to note, conform, to basic conditions of fairness. That is, just as FC s 18 and FC s 31 afford religious, cultural and linguistic communities the right to establish the conditions for inclusion and exclusion, FC s 30 vouchsafes an individual's right to some degree of procedural fairness when a community enforces its membership and expulsion rules.

A significant body of High Court decisions supports the proposition that the right of an association — cultural, linguistic, religious or otherwise — to expel a member who fails to adhere to the rules of the association is subject to two

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provisos. The first proviso is that the community or association in question must make clear what requirements are to be followed by the community member prior to, or sometime during, her admission into the community. The second proviso is that a member of the community facing expulsion must receive a fair hearing from the community in question.¹⁸⁰ Again, FC s 30's emphasis on the right of a member to participate in the affairs of her community is not made redundant by FC s 31 if FC s 30 is understood to stand for the proposition that a person retains a rebuttable presumption of membership within the linguistic or the cultural community to which she has, historically, belonged.

179 See Woolman 'Association' (supra) at § 44.1(c).

180 See *Taylor* (supra); *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T) ('Cronje'); *Ward v Cape Peninsula Ice Skating Club* 1998 (2) SA 487 (C) ('Ward'); *Wittmann v Deutscher Schulverein, Pretoria, & Others* 1998 (4) SA 423 (T), 1999 (1) BCLR 92 (T) ('Wittmann'). As the *Taylor* court notes, the potential for exclusion is part of the consideration that the member offers in return for admittance. See *Taylor* (supra) at para 37 quoting S Woolman 'Association' (supra) at § 44.3(c)(viii).

(b) Internal limitations on FC s 30

The Courts have not, as yet, had an opportunity to consider the purpose of the internal limitation found within FC s 30. However, given that the structure of this internal limitation clause is virtually identical to that found in FC s 31(2), there is no reason to believe that the analysis ought to be different. As noted above, the Final Constitution makes it clear that an individual's cultural or linguistic practices enjoy constitutional protection only where they do not limit the exercise of other fundamental rights. However, this proposition does not mean that the other substantive rights in Chapter 2 cannot be read in a manner that actually supports cultural and linguistic concerns.¹⁸¹ That is, rights to equality, dignity, life, privacy, expression, association and assembly, properly understood, may, in fact, buttress FC s 30 claims rather than undermine them.

58.6 Relationship between internal limitations clauses in FC ss 30 and 31 and the general limitations clause in FC s 36

Two things must be said about the Constitutional Court's general failure to recognize the purpose of the internal limitation clauses found in FC s 30 and FC s 31(2). First, it could simply be attributable to a lack of analytic precision. Second, it really does pay to understand how the internal limitations clauses in FC s 30 and FC s 31 and the general limitations clause in FC s 36 relate to one another should the Court ever decide to engage this troika.

The three clauses relate to one another in the following fashion. A right to community religious, linguistic and cultural practice (and thus the practice itself) could (a) be deemed *consistent* with the other rights in Chapter 2 and (b) still be

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impaired by the law in question. (The existing case law suggests — correctly — that the most likely grounds for a finding that a community practice is inconsistent *and* subordinate to another substantive provision in the Bill of Rights are to be found in FC s 9 — equality¹⁸² — and FC s 10 — dignity.¹⁸³) If the practice is protected by FC s 30 or FC s 31 and impaired by law of general application, then the analysis would proceed to FC s 36. The party relying upon the law challenged in terms of FC s 30 or FC s 31 would have the opportunity to demonstrate that another set of interests or values — not expressly manifest in the specific substantive rights and freedoms of Chapter 2 — justified the infringement of FC s 30 and FC s 31. (Remember: it would have to be 'another set of interests or values' because the cultural, linguistic or religious practice in question has already been deemed consistent with the entire body of substantive rights found in Chapter 2.) In terms of this restricted FC s 36 analysis, the grounds most likely to result in a finding by a court that a limitation of FC s 30 or FC s 31 is warranted are: (a) the protection of the general welfare (and the protection of public order, health or morals);¹⁸⁴ (b) the rights of other religious,

181 For more on the internal limitations clause found in FC 31(2), see § 58.4(b) *supra*.

182 *Bhe v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC).

183 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC).

cultural and linguistic groups to form robust associations and communities;¹⁸⁵ and (c) the promotion of national unity and greater social cohesion.¹⁸⁶

58.7 FC s 29

It should come as no surprise that a good amount of the constitutional litigation surrounding cultural, religious and linguistic communities has taken place in terms

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of the autonomy that the basic law grants to independent schools and public schools. Communities of every kind place the greatest emphasis on such autonomy because schools are, outside of the home, one of the primary places where cultural, religious and linguistic communities can consciously replicate themselves. The basic law takes cognizance of the central role that independent schools and public schools play in advancing the ends of cultural, religious and linguistic communities by expressly describing the degree of autonomy that cultural, religious and linguistic communities will receive with respect to each kind of school: independent schools in FC s 29(3) and public schools in FC s 29(2).

(a) FC s 29(3) and independent schools that further the ends of cultural, religious and linguistic communities

The Final Constitution and apposite statutes ensure that independent schools — along with their learners, parents, educators and school governing bodies (SGBs) — enjoy a substantial degree of autonomy.¹⁸⁷ In *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, Kriegler J wrote, on behalf of a unanimous Constitutional Court, that IC s 32 (c)¹⁸⁸ and then extant national and provincial education legislation and subordinate legislation collectively constituted

184 *Prince v President, Cape Law Society, & Others* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC); *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC), 1997 (2) SACR 540 (CC), 1997 (10) BCLR 1348 (CC). Article 18(3) of the ICCPR provides that '[...]freedom to manifest ones religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.' For example, the practice known as female circumcision, widespread in parts of Africa, is often opposed on the grounds that it constitutes a serious threat to the health of those subjected to it. See K Engle 'Female Subjects of Public International Law: Human Rights and the Exotic Other Female' (1992) 26 *New England LR* 1509, 1513-1515 (Offers an outline and critique of this argument.)

185 Many international documents recognize that community rights may conflict and that the resolution of such conflicts is an essential factor for peace, justice, stability and democracy. See, eg, *The Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe* (CSCE)(June 29 1990) at para 30 reprinted in (1990) 29 *ILM* 1305; *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)('[T]he 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. The UN Human Rights Committee has found that limitations on an individuals right of enjoyment of her culture FC s 30 for our purposes may be permissible where they are designed to protect the existence or identity of a a minority population FC s 31 for our purposes.')

186 Given the depredations of apartheid, the obvious need for the state to pass laws and other measures designed to repair the divisions of the past may ground FC s 36 arguments that justify the limitation of community rights.

a bulwark against the swamping of any minority's common culture, language or religion. For as long as a minority actually guards its common heritage, for so long will it be its inalienable right to establish educational institutions for the preservation of its culture, language or religion ... There are, however, two important qualifications. Firstly, ... there must be no discrimination on the ground of race ... A common culture, language or religion having racism as an essential element has no constitutional claim to the establishment of separate educational institutions. The Constitution protects diversity, not racial discrimination. Secondly, [the Constitution] keeps the door open for those for whom the State's educational institutions are considered inadequate as far as common culture, language or religion is concerned. They are at liberty harmoniously to preserve the heritage of their fathers for their children. But there is a price, namely that such a population group will have to dig into its own pocket.¹⁸⁹

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Kriegler J's gloss on the constitutional protection afforded independent schools grounded in a common culture, language or religion was certainly correct in 1996. Other laws, of more recent vintage, buttress Kriegler J's claims. FC s 29(3) reads:

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.

The language of FC s 29(3) suggests that independent schools possess substantially more latitude than public schools with respect to their admissions requirements and the manner in which they order their internal affairs. FC s 29(3)'s only noteworthy intervention is to bar independent schools from discriminating on the basis of race. Similarly, the South African Schools Act ('SASA') does not make the registration — and the continued accreditation — of independent schools contingent upon the conformation of admissions policies or of curriculum with specific equity requirements. It, too, only bars independent schools from discriminating on the basis of race.¹⁹⁰

That said, the statutory framework that governs admissions to or expulsions from independent schools has quietly shifted in the last ten years. The Promotion of Equality and Prevention of Unfair Discrimination Act applies to private institutions: it expands the prohibited grounds for discrimination and develops a test for unfair

187 See S Woolman 'Defending Discrimination: On the Constitutionality of Independent Schools that Promote a Particular, if not Comprehensive, Vision of the Good Life' (2007) 22 *Stellenbosch Law Review* 31; B Fleisch & S Woolman 'On the Constitutionality of School Fees: A Reply to Roithmayr' (2004) 22 (1) *Perspectives in Education* 111; S Woolman & B Fleisch 'South Africa's Education Legislation, Quasi-Markets and School Choice' (2006) 24 (2) *Perspectives in Education* 1.

188 Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

189 *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) ('Gauteng School Education Bill') at paras 39-42. Section 23 of the Constitution of the Netherlands guarantees the right of all people to establish schools with their own funds and, in practice, has been understood to secure the support of the state for such private initiatives. See C Bakker & I Ter Averst 'School Ethos and its Religious Dimension' (2005) 89 *Scriptura* 350.

190 While no mention of admissions policies is made in these regulations, the enabling provision for these regulations in SASA states that 'a provincial Head of Department must register an independent school if he or she is satisfied that ... the admission policy of the school does not discriminate on the grounds of race'. SASA s 46(3)(b).

discrimination that appears, at least at first blush, to be stricter than the test developed by the Constitutional Court under FC s 9.

According to PEPUDA, no person — public or private — may discriminate in a manner that imposes, directly or indirectly, burdens upon, and withholds, directly or indirectly, benefits from any person on prohibited grounds.¹⁹¹ According to PEPUDA, a prima facie demonstration of discrimination on a prohibited ground shifts the burden to the respondent to show that the discriminatory law, rule or conduct is fair.¹⁹²

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An Equality Court hearing a PEPUDA challenge to admissions policies at an independent school will likely find a school's rejection of a learner, because she refuses to take religion, language or culture classes, to constitute 'discrimination'. That initial finding does not, of course, mean that the Equality Court is obliged to find that the practice constitutes unfair discrimination. PEPUDA anticipates expressly the requisite grounds for justification of discrimination. PEPUDA, s 14(3), states that fair discrimination may occur where the respondent can demonstrate that: '(f) ... the discrimination has a legitimate purpose; [and] (g) ... the ... discrimination achieves its purpose'.

An independent school will first have to show that the set of religious, linguistic or cultural practices that form the basis for its narrow admission's policies offer a coherent account of the religion, language or culture ostensibly being advanced. Most independent schools that have the furtherance of religion, culture or language as an end should be able to meet this test for 'legitimate purpose'.

The next leg of the test is somewhat more onerous. Once a legitimate purpose is established, the question becomes whether the discriminatory admissions policy is necessary to achieve the school's purpose of offering an education grounded in a particular, faith, language or culture. One argument is that an independent school committed to the furtherance of a particular religion, language or culture needs to be able to control its message and that such control requires it to have relatively unfettered control over admissions practices and the management of their internal affairs. How strict can such exclusionary admissions policies or internal policing of curriculum requirements be?

At a minimum, any learner must agree to adhere to the curriculum of the school — at least in so far as it requires specific forms of religious, linguistic or cultural instruction. After all, if the purpose of the school is to further a given religion, language or culture, then the curriculum must be designed to advance that religion, language or culture. If the curriculum is essential for the achievement of the school's legitimate purpose, then the exclusionary rule that justifies a learner's expulsion (or non-admittance) should she refuse to accede to the curriculum's requirements must

191 See PEPUDA, s 1, 'discrimination' means 'any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds. Prohibited grounds are race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'. (Emphasis added).

192 See PEPUDA, s 13, 'if the discrimination did take place on a ground in paragraph (a) of the definition of prohibited grounds, then it is unfair, unless the respondent proves that the discrimination is fair.'

be viewed as a measure that — while discriminatory — is narrowly tailored to meet the legitimate purpose.¹⁹³

In making their PEPUDA arguments, independent schools can draw down on a diverse array of constitutional provisions, constitutional doctrine and common law rules. For starters, FC ss 15, 18, 29, 30 and 31 — read together — underscore the prima facie justifiability of exclusionary admissions policies or of expulsion policies for curriculum non-compliance. As Van Dijkhorst J noted in *Wittmann v Deutsche Schulverein, Pretoria*, the right to education guarantees that members of a religious, linguistic or cultural community may 'establish their own [private or independent] educational institutions based on their own

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values.¹⁹⁴ He then held that the right to create these independent schools is parasitic upon 'the right ... to exclude non-users of that language and non-adherents of that culture or religion, or to require from them conformity.'¹⁹⁵ In sum, recent constitutional case law supports the contention that independent religious, cultural and language specific schools have the right both to expel learners who agree to follow the rules or decisions of the association's governing body and subsequently refuse to do so. More general or communitarian considerations — arguments from capture,¹⁹⁶ constitutive attachment,¹⁹⁷ and pluralism¹⁹⁸— support the argument that members of a given community have an obligation to 'follow

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the rules' should they wish to remain members of the community.¹⁹⁹ As I noted above, the extant common law on associational rights supports the proposition that independent schools designed to support a religion, a culture or a language possess a significant degree of latitude with respect to admissions policies that differentiate between adherents and non-adherents.²⁰⁰ And finally, a decade after *Gauteng School Education Bill*, we have seen the Constitutional Court re-confirm its commitment to the autonomy of religious, linguistic and cultural communities in *Minister of Home Affairs & Another v Fourie & Another; Lesbian and Gay Equality Project v Minister of Home Affairs*.

193 *Fourie* (supra) at paras 90-98.

194 1998 4 SA 423 (T), 454.

195 *Ibid* at 454. See also *Taylor*(supra) at para 38. (The right of a group to choose their associates of necessity means the right to require those who wish to join the group to conform their behaviour to certain dictates, and the right to exclude those who refuse to conform.)

196 Capture is a function of one might even say a necessary and logical consequence of the very structure of associational and community life. In short, capture justifies the ability of associations and communities to control their association or community through selective membership policies, the manner in which they order their internal affairs and the discharge of members or users. Without the capacity to police their membership and expulsion policies, as well as their internal affairs, associations would face two related threats. First, an association would be at risk of having its aims substantially altered. Without built-in limitations on the process of determining the ends of the community or the association, new members, existing members and even outside parties could easily distort the purpose, the character and the function of the association. Second, an associations or a community's very existence could be at risk. Individuals, other groups, or a state inimical to the values of an association or a community could use ease of entrance to put that same association or community out of business. See Woolman 'Association' (supra) at 44.1(c).

These various strands of our law support a couple of fairly straightforward conclusions about the degree of constitutional and statutory autonomy granted independent schools that advance the ends of particular religious, cultural and linguistic communities. Say, for example, that an independent school wishes to provide a Jewish education for Jewish children and employs an admissions policy that discriminates between applicants on the basis of their willingness to adhere to a curriculum that requires both Hebrew and Talmudic instruction. The first reason we can easily defend such discrimination is that it furthers the legitimate religious objectives of the independent school and does so by way of means narrowly tailored to meet those objectives.²⁰¹ The second reason we can easily

defend such discrimination is that neither the school's curriculum nor any exclusion based upon a refusal of the learner to follow the school's curriculum constitutes an

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- 197 Associational freedom is often justified on the ground that it enables individuals to exercise relatively unfettered control over the various relationships and practices deemed critical to their self-understanding. But individual autonomy as the basis for associational freedom overemphasizes dramatically the actual space for self-defining choices. As I have maintained elsewhere, each self is best understood as *just* a centre of narrative gravity that unifies a set of dispositional states that draw down on the practices of the various communities — religious, cultural, linguistic, national, familial, ethnic, economic, sexual, racial, social (and so on) — into which that self is born. This view of the self supports some pretty straightforward conclusions about community rights in the context of independent schools. Freedom of association, freedom of religion and community rights, correctly understood, force us to attend to the *arationality* of our most basic attachments and to think twice before we accord *our* arational attachments preferred status to the arational attachments of *others*. These observations regarding constitutive attachments buttress my contention that independent educational institutions that pursue a particular way of being in the world ought to be able to exclude from the institution those learners who do not derive meaning from that way of being in the world, and whose presence, in significant numbers, would make the institution, *qua* religious, linguistic or cultural school, impossible to sustain. See Woolman 'Association' (supra) at § 44.1(b).
- 198 If we accept that the practice of religion, the use of a language, the participation in cultural life are legitimate, constitutionally-sanctioned objectives, then discrimination narrowly tailored to meet those objectives must be able to pass constitutional muster. The alternative proposition that no educational institution may discriminate on the basis of religion, language and culture makes the possibility of sustaining, in South Africa, a diverse array of religious, linguistic and cultural communities an empirical impossibility.
- 199 South African courts have engaged associational rights, communitarian rights and fair hearings in four relatively recent cases. See *Taylor v Kurtstag* 2005 (1) SA 362 (W), [2004] 4 All SA 317 (W) ('Taylor'), *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T) ('Cronje'), *Ward v Cape Peninsula Ice Skating Club* 1998 (2) SA 487 (C) ('Ward'), *Wittmann v Deutscher Schulverein, Pretoria, & Others* 1998 (4) SA 423 (T), 1999 (1) BCLR 92 (T) ('Wittmann'). All four cases can be read as standing for the proposition that a member has vested interests in the association that, at a minimum, require a fair termination hearing. A non-member, on the other hand, possesses no such rights.
- 200 For more on the common law right of an association to protect its critical purposes from both internal and external interference, see *Mitchell's Plain Town Centre Merchants Association v Mcleod and Another* 1996 4 SA 159 (A), 166 citing *Total South Africa (Pty) Ltd v Bekker* 1992 1 SA 617 (A), 624 (Emphasis added.) For more on the common law right of an association to protect its critical purposes from alteration by internal and external forces, see *Murray v SA Tattersall's Subscription Rooms* 1910 TH 35, 41; *Nederduitse Gereformeerde Kerk in Afrika (Ovs) En 'n Ander v Verenigende Gereformeerde Kerk in Suider-Afrika*. 1999 (2) SA 156 (SCA) (Supreme Court of Appeal held that the decision of the general synod of the NGKA to merge with the NGSK, and the intermediate steps leading up to the merger, conflicted with the clear and unambiguous wording of the constitution and vitiated, without the requisite authority (unanimity of the regional synods), the fundamental objectives of the association.)

impairment of the learner's dignity. Why? The learner can secure access to an adequate independent school education elsewhere. Because most learners in a position to pay for an independent school can receive an adequate independent school education elsewhere, it is difficult to construe the refusal of admission — based upon the learner's own refusal to accept the curriculum as an essential part of her matriculation at the school — as a diminution of the learner's dignity.²⁰²

(b) FC s 29(2) and the right to maintain public schools that further the ends of cultural, religious and linguistic communities

The real action, in so far as religious, linguistic and cultural communities are concerned, revolves around FC s 29(2). FC s 29(2) asks and answers the following question of moment: Does a public school that wishes to provide a single medium education in Afrikaans possess a constitutional right to employ an admissions policy that discriminates between applicants on the basis of their willingness to adhere to a curriculum that requires that all classes be taken in Afrikaans? The answer to that question is, generally, no. As we shall see, however, both the text of the Final Constitution and the case law recognize a very narrow set of conditions within which an entitlement to such a school may be legitimately asserted.

FC s 29(2) is a complex provision. It reads:

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.

It is possible to identify two interpretive poles for this passage. At one end of the spectrum, some commentators contend that FC s 29(2) eliminates any express entitlement for single-medium public schools except where such schools offer redress for communities whose mother tongues were repressed under English and Afrikaaner rule. At the other end of the spectrum, several commentators contend that FC s 29(2) vouchsafes continued state support for all single-medium public schools, and, in particular, single-medium Afrikaans schools.

FC s 29(2) does not support either of these two readings.

201 For a reading of FC s 29 in which religious, linguistic and cultural communities are entitled to significant degrees of autonomy in the context of maintaining *independent* primary and secondary schools, see S Woolman 'Defending Discrimination: On the Constitutionality of Independent Schools that Promote a Partial, if not Comprehensive, Vision of the Good Life' (2007) 22 *Stellenbosch Law Review* 31. See also R Malherbe 'The Constitutional Framework for Pursuing Equal Opportunities in Education' (2004) 22 (3) *Perspectives in Education* 9. For more on the challenges that other ethnically diverse societies face in accommodating religious, cultural and linguistic difference, see J De Groof & G Lauwers 'Education Policy and Law: The Politics of Multiculturalism in Education' (2001) 19(4) *Perspectives in Education* 47.

202 But see *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), 2000 (10) BCLR 1051 (CC) (Court found that while provisions in SASA that barred the use of corporal punishment constituted prima facie infringements of an independent school's FC s 15 and FC s 31 rights, the learners' right to dignity trumped the school's right to freedom of religion and its communal right to practice its religion.)

Let's begin with the uncompromisingly egalitarian position defended by Blade Nzimande.²⁰³ Nzimande construes FC s 29(2)'s second sentence requirements as matters of administration and policy, and not constitutional law. Though FC s 29(2)'s second sentence may provide a rather weak test for justification, it does not turn the choice of medium of instruction into a matter of mere policy preference. Moreover, FC s 29(2) does not, as Matthew Chaskalson has suggested of IC 32, possess the structure of an affirmative action provision.²⁰⁴ FC s 9(2) provides the perfect example of a constitutional norm whose aim is restitutionary justice.²⁰⁵ Whereas FC s 9(2) differentiates between groups that have been historically disadvantaged and those that have not, FC s 29(2) does not do so. Single-medium public schools could be approved for any preferred language of instruction so long as instruction in a preferred language is reasonably practicable, and the single-medium public school, as the *best* means of accommodating such instruction, satisfied the three threshold criteria of equity, practicability and redress. The Final Constitution, as a liberal political document, does not view all social, legal and economic arrangements through the prism of equality and reparations.

Commentators such as Rassie Malherbe, occupying the opposite end of the ideological and interpretative spectrum, contend that FC s 29(2) provides a strong guarantee — a rebuttable presumption — that linguistic communities can create and maintain publicly funded single-medium public schools.²⁰⁶ Malherbe misreads FC s 29(2). In particular, he repeatedly collapses the distinction between the right to instruction in a mother tongue or preferred language (where practicable) with the obligation imposed upon the state to consider a range of options as to how to offer such instruction. Malherbe privileges single-medium public schools.²⁰⁷ FC s 29(2) does not. It mentions single-medium schools as only one in a range of alternatives that the state has an obligation to consider. Moreover, any option considered by the state for delivering mother-tongue instruction — *one* of which is single-medium schooling — must satisfy, to some degree, the three criteria of equity, practicability and historical redress. Malherbe characterizes the three FC s 29(2) criteria as mere factors to be considered in some global proportionality assessment. This characterization of the three criteria seems far too weak. For a single-medium public school to be preferred to another reasonably practicable

203 B Nzimande 'Address to the Constitutional Assembly' 7 May 1996 (1996), available at www.polity.co.za (accessed on 1 December 2006).

204 M Chaskalson 'Constitutional Issues Relevant to School Ownership, Governance and Finance Paper Presented at the Durban Education Conference' (1995) 8-9 (Manuscript on file with author).

205 *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC).

206 See R Malherbe 'The Constitutional Framework for Pursuing Equal Opportunities in Education' (2004) 22(3) *Perspectives in Education* 9 ('Constitutional Framework'); R Malherbe 'A Fresh Start: Education Rights in South Africa' (2000) 4 *European Journal for Education Law and Policy* 49; R Malherbe 'Submission to President Nelson Mandela on Behalf of a Group of Afrikaans Organizations' (15 May 1996).

207 Malherbe 'Constitutional Framework' (supra) at 21.

institutional arrangement — say dual medium instruction or parallel medium instruction — it must demonstrate that it is more likely to advance or to satisfy the three criteria. Malherbe further claims that because the Final Constitution specifically refers to 'single medium institutions' then 'whenever they [single medium institutions] are found to be the most effective way to fulfill the right to education in one's preferred language, single medium institutions should be the first option.'²⁰⁸ Once again, because Malherbe collapses the distinction between mother-tongue instruction and single medium public schools, he fails to recognize that the right to the former — mother-tongue instruction — is subject to 'practicability' and the derivative or secondary 'privilege' of the latter — a single medium public school — can only be a 'first option' for mother-tongue instruction if it meets the three threshold criteria of equity, practicality and redress. Finally, that Malherbe's interest in protecting single medium public schools leads him to misread FC s 29(2) in its entirety is made patently clear from his final claim that the 'right to education in one's preferred language is guaranteed unequivocally in the South African Bill of Rights.'²⁰⁹ This statement is clearly false. As the above language of FC s 29(2) indicates, the right to receive education in the official language or languages of [one's] choice in public educational institutions' is subject to a powerful internal modifier — namely, the right exists only where the provision of 'that education is reasonably practicable.'²¹⁰

208 Malherbe 'Constitutional Framework' (supra) at 22.

209 Ibid.

210 For another reading of FC s 29(2) that falls somewhere between the Nzimande position and the Malherbe position, see G Bekker 'The Right to Education in the South African Constitution' *Centre for Human Rights Socio-Economic Rights Papers*, available at http://www.chr.up.ac.za/centre_projects/socio/compilation2part1.html (accessed 12 December 2006.) Bekker writes:

The Constitution does not guarantee mother-tongue education for minorities, as does for example section 23 the Canadian Charter of Rights and Freedoms. The Constitution, however, guarantees the right in public institutions to education in the language of ones choice. This is limited to education in an official language or languages and is further limited by the proviso - where reasonably practicable.... With regard to what would be reasonably practicable, the Department of Education's Language in Education Policy provides that: it is reasonably practicable to provide education in a particular language of learning and teaching if at least 40 in Grades 1 to 6 or 35 in Grades 7 to 12 learners in a particular grade request it in a particular school... . This is in keeping with the internationally practised sliding scale formula: the larger the number of speakers of a language in a particular area, the greater the obligation to provide mother-tongue education in that area... . Furthermore, the Language in Education Policy provides that where there are fewer than the requisite number of learners that request to be taught in a particular language not already offered by a school in a particular school district, the head of the provincial department of education will determine how the needs of those learners will be met, taking into consideration the duty of the state and the right of the learners as spelled out in the Constitution. ... The second part of section 29(2) provides that the state has to ensure effective access to and implementation of the right to education. In this regard, the State must consider all reasonable alternatives including single medium education, taking into account equity, practicability, and the need to redress the imbalances of the past. This would mean that where, for example, there are equal numbers of students seeking education in two different languages, a dual medium school might be the most equitable. Conversely, the most equitable solution might be a single medium school in cases where the majority of students wish to be educated in one particular language. However, equitability is not the only deciding factor - practicability will also have to be taken into account. Here factors such as resources and numbers of teachers will play a role. Finally, the need to redress the imbalances of the past is emphasised. Thus, anything that will have the effect of denying or impeding the right to education of previously disadvantaged communities will also have to be taken into account.

Given this trenchant analysis, how should FC s 29(2) be parsed? FC s 29(2) should be interpreted as follows.²¹¹

First, FC s 29(2) grants all learners 'the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable.' Note that the right to receive education in the official language or languages of one's choice is not, as the Supreme Court of

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Appeal in *Mikro* noted, an unqualified right. The right is subject to a standard of reasonable practicability. How should this internal limitation of the right be read?²¹² It is suggested that where sufficient numbers of learners request instruction in a preferred language — and South Africa does possess regulations, as well as standards and norms, that make clear what those numbers are — and no *adequate alternative* school exists to provide such instruction, then a public school is under an obligation — with assistance from the state — to provide instruction in the language of choice.²¹³

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Second, before proceeding to the second sentence in FC s 29(2), it is worth taking another look at the meaning of 'reasonably practicable'. As an evidentiary matter, the learner or the learners or the state must be able to show that instruction in the language of choice is 'reasonably practicable' at the institution where the learners have applied for admission. So, for example, a single learner who requests instruction in Sepedi in a single-medium isiZulu school may be hard pressed to demonstrate that it is reasonably practicable to accommodate her at a single-medium isiZulu school. An inability to establish reasonable practicability would be even more pronounced where the learner who preferred instruction in Sepedi had

It is not clear why, on Bekker's account, a majority of learners ought to be able to determine that a single-medium public school remains a single-medium public school. That position is not consistent with the DoEs language policy, international practice or the actual text of FC s 29(2). A single-medium public school is simply one available means to ensure preferred language instruction: it is not a right possessed by all official language speakers.

211 For further analysis of FC s 29(2), see B Fleisch & S Woolman 'On the Constitutionality of Single-Medium Public Schools' (2007) 23 *SAJHR* (forthcoming).

212 For more on how internal limitations clauses function in various substantive provisions in the Bill of Rights, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

213 The lesson of the Supreme Court of Appeal's decision in *Mikro* is that where learners already have easy access to a school that offers them instruction in their preferred medium, then neither the learners nor the state has any business in forcing a single medium Afrikaans public school into becoming a dual medium or a parallel medium institution. But *Mikro* must also be read as creating the very narrowest of spaces for the assertion of sectarian interests in our public schools.

At issue in *The Western Cape Minister of Education & Others v The Governing Body of Mikro Primary School* was the refusal of an Afrikaans medium public school to accede to a request by the Western Cape Department of Education (WCDoE) to change the language policy of the school so as to convert it into a parallel medium school. Acting on behalf of 21 learners, the WCDoE had directed the primary school to offer instruction in their preferred medium: English. The WCDoE had interpreted the Norms and Standards issued by the National Department of Education under SASA as requiring all primary schools with 40 learners who preferred a particular language of learning and teaching to offer instruction in that language.

access to an adequate school that offered Sepedi instruction. The failure to demonstrate that a request for instruction is 'reasonably practicable' ends, as the *Mikro* Court found, the FC s 29(2) inquiry.

Third, assume that the learner has shown that instruction in the language of choice is reasonably practicable at the institution where she has applied for admission. Only then do we consider the import of the second sentence of FC s 29(2).

Fourth, the second sentence of FC s 29(2) states that '[i]n 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.'

Fifth, the second sentence of FC s 29(2) makes it patently clear that single-medium institutions are but one way of accommodating the right of a learner to instruction in the language of choice. Moreover, the mere mention of single-medium schools in no way privileges such institutions over dual-medium schools, parallel-medium schools, or schools that accommodate the multilingualism of the student body in some other way. All that this portion of FC s 29(2) requires is that the state consider 'all reasonable educational alternatives' that would make mother tongue or preferred language instruction possible.

The Supreme Court of Appeal summarily rejected both the WCDoE's reading of the Norms and Standards and its gloss on FC s 29(2). It did so on three primary grounds. First, the Supreme Court of Appeal overturned Bertelsmann J's finding in *Laerskool Middelburg* that the Norms and Standards provided a mechanism for the alteration of the language policy of a public school. At best, the Supreme Court of Appeal said, the Norms and Standards constituted a guideline for members of the department and those parties responsible for the governance of public schools. Second, the Supreme Court of Appeal held that SASA s 6(1) granted neither the national Minister of Education nor the provincial MEC or HoD the authority to determine the language policy of a particular school, nor does SASA authorize any other person or body to do so. The power to determine language policy vests solely with the SGB of a given public school and is subject only to the Final Constitution, SASA and any applicable provincial law. Third, the Supreme Court of Appeal rejected the applicants' contention that FC s 29(2) could be interpreted to mean that everyone had the right to receive education in the official language of his or her choice at each and every public educational institution where this was reasonably practicable. *Mikro* (supra) at para 30. Such a reading, the *Mikro* Court held, would mean that any significant cohort of learners could demand instruction in their preferred language if it was conceivably possible to do so. The *Mikro* Court noted that such a reading 'would lead to the absurd consequence that a group of Afrikaans learners would be entitled to claim [a right] to be taught in Afrikaans at an English medium school immediately adjacent to an Afrikaans medium school which has vacant capacity provided they can prove that it would be reasonably practicable to provide education in Afrikaans at that school'. Ibid. The Supreme Court of Appeal held that the correct reading of FC s 29(2) affords the state significant latitude in deciding how best to implement this right and that FC s 29(2) grants everyone a right to be educated in an official language of his or her choice at a public educational institution if, in the totality of circumstances, it is reasonably practicable to do so. That means, of course, that the right is only to language instruction, generally, and, thus to instruction at some school within an accessible geographical domain, and not, as the applicants had claimed, to language instruction at each and every public educational institution and thus to any school the applicants wished to attend.

The decision is notable in two important respects. First, it diminishes, under current law, the ability of the state to determine admissions policy with regard to language. Such power continues to vest in the SGB. Second, while affirming the rights of learners to instruction in a preferred language, it simultaneously confirmed the power of individual schools to continue to offer instruction in a single medium. The effect of the Supreme Court of Appeals decision in *Mikro* is to reverse the spin of *Laerskool Middelburg*. Not only is parallel medium instruction not the default position, the current language preferences of a single medium public school may trump the policy preferences of national and provincial DoEs. It is impossible to read *Mikro* and not come away with the impression that linguistic associational interests may, on rare occasion trump, equity concerns, and that they may even do so in public schools.

Sixth, even if single-medium schools are found to be one of the reasonable alternatives for preferred language instruction, the single-medium school must be able to satisfy a three factor test. That is, for a single-medium school to be preferred to another reasonably practicable institutional arrangement — say dual-medium instruction or parallel-medium instruction — it must demonstrate that it is more likely to advance or to satisfy the three listed criteria of equity, practicability and historical redress.

Seventh, FC s 29(2)'s concession to single-medium public schools constitutes a very weak right indeed. (It is, perhaps, best described as a right to have reasons or an

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entitlement to justification.) That said, it is not without value for proponents of single-medium public schools. What the second sentence of FC s 29(2) ultimately requires is that the state be able to justify its preference for one form of school over another. Given the Final Constitution's recognition of single-medium schools as a legitimate means of providing preferred language education, the state will find itself under an obligation to demonstrate why another form of instruction — dual-medium, parallel-medium, special tutoring — will better serve the learners in question. Moreover, the Final Constitution's recognition of community rights, associational rights, religious rights, cultural rights and linguistic rights creates a set of background conditions against which claims for single-medium schools must be taken seriously. For where preferred language instruction is reasonably practicable, and where single medium schools satisfy the desiderata of equity, practicability and historical redress, the state cannot simply invoke an overriding commitment to 'equality' or 'transformation' in order to dismantle single medium institutions. The Final Constitution is, ultimately, a post-apartheid constitution. Thus, at the same time as it sets its face against exclusion and discrimination, it also rejects apartheid's totalizing view of the state. Space remains — within both the private realm and the public realm — for the accommodation of multiple ways of being in the world. That public space, as we have seen, is extremely narrow with respect to single medium public schools. But however narrow it may be, it cannot be entirely wished away.

Where does this analysis leave us? Pace Mahlerbe, FC s 29(2) provides no right to single medium public schools. At best, FC s 29(2) recognizes such schools as one option to be considered amongst a range of other institutional arrangements designed to further the instruction of learners. At best, FC s 29(2) places an obligation on the state to justify any refusal to recognize and to support single-medium public schools. Given FC s 29(2)'s commitment to equity and to historical redress, advocates of single-medium Afrikaans public schools are clearly batting on a sticky wicket.

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Extant case law confirms this reading of FC s 29(2). *Matukane*,²¹⁴ *Laerskool Middelburg*,²¹⁵ *Seodin*²¹⁶ and *Ermelo*²¹⁷ also confirm a number of additional critical propositions. First, discrimination on the basis of language cannot be used as a proxy for discrimination on the basis of race. Second, where learners do not have

214 *Matukane & Others v Laerskool Potgietersrus* 1996 (3) SA 223 (T). At issue in *Matukane & Others v Laerskool Potgietersrus* was the attempt by the parent of three learners, Mr Matukane, to enroll his three children (13, 13 and 8) at the Laerskool Potgietersrus. The Laerskool Potgietersrus was then, and remains still, a state-aided parallel medium primary school.

ready access to a public school that offers them adequate instruction in their preferred medium of instruction, then neither a School Governing Body nor a principal can exclude learners in terms of an admissions policy that seeks to privilege a particular language. One lesson of the Supreme Court of Appeal's decision in *Mikro* is that the window for exclusion on the basis of language and culture is rather small indeed: only where the learners in question already have easy access to a school that offers them adequate instruction in their preferred medium of instruction, can the single-public medium school in question claim, with some force, that neither the learners nor the state has any business forcing a single-

Mr Matukane, a black resident of Potgietersrus spoke to the principal on 11 January 1996. The principal informed Mr Matukane that Mr Matukane would have to wait until 25 January 1996 for a determination as whether there was space available at the school. Mr Matukane was not convinced that any such delay was warranted. He approached the provincial Department of Education (DoE). DoE informed Mr Matukane that his children could be enrolled in the school. Mr Matukane arrived at the school on 22 January 1996, completed the necessary application forms and bought the school uniforms as directed. Mr Matukane returned the next day with his children for their first day at school. The entrance of the school was blocked by a group of white parents who refused to allow Mr Matukane or his children to enter the school. Other black parents were similarly rebuffed. On top of these indignities, the school bussed in white children from Zebidiela, a neighboring town, despite the fact that a school catering to Afrikaans-speaking students in Zebidiela had space available.

In the High Court, Laerskool Potgietersrus argued that it was unable to accommodate more children and that it had not rejected the children on racial grounds. At the time of the hearing, Laerskool Potgietersrus had 580 Afrikaans students and 89 English students. The Laerskool Potgietersrus expressed concern that if it admitted these children, it would be swamped by English-speaking children who would destroy the Afrikaans nature of the school. The school contended that IC s 32(c) entitled the school to adopt admissions requirements designed to maintain the existing culture and ethos of the school.

Despite the school's assertion that the refusals were based on overcrowding, not race, the facts clearly painted a different picture. No black children had been admitted to the school. There were no black children on the waiting list. Room existed to accommodate more English-speaking children. Little danger existed of the schools Afrikaans culture and ethos being destroyed even if every black applicant were to be accepted. The ratio of Afrikaans-speaking students to English-speaking students would remain 5:1. The *Matukane* Court was driven to conclude that language and culture were operating as surrogates for race and that that the respondent had failed to discharge its burden of proving the fairness of its (racist) admissions policies.

- 215 2003 (4) SA 160 (T). *Laerskool Middelburg en 'n ander v Departementshoof, Mpumalanga Departement van Onderwys, en andere*, litigated in 2003, extends the holding in *Matukane* from parallel — medium to single-medium schools. However, in *Laerskool Middelburg*, the High Court was clearly more troubled by the conflict between the right to a single-medium school and the right to be educated in the official language of ones choice. The *Laerskool Middelburg* court initially rebuffed the provincial Department of Education's power-play. It held that neither SASA, nor the regulations issued under them, authorised the Head of the Department to instruct a school to change from single-medium to dual-medium tuition and declared that the Head's administrative conduct was prima facie unfair. Ibid at 171-172, 176. The *Laerskool Middelburg* court then rejected the Department's argument that the applicant school's admission policy discriminated unfairly against English learners. The High Court held that in circumstances in which the English learners could be accommodated elsewhere, the Department's actions simultaneously violated the FC s 29(2) entitlement of Afrikaans-speaking students to single medium public schools and the FC s 29(2) right of English-speaking students to an education in the official language of their choice in public institutions. Ibid at 173 and 175. That said, the *Laerskool Middelburg* court noted that the FC s 29(2) entitlement to a single — medium public educational institution was subordinate to the FC s 29(2) right of every South African to a basic education and the proven need to share education facilities with other linguistic and cultural communities. As a result, the *Laerskool Middelburg* court was unwilling to allow the needs of 40 English-speaking learners to be prejudiced by the state's failure to play by the rules and the schools intransigence on the issue of parallel — medium education. The *Laerskool Middelburg* court relied upon FC s 28(2)'s guarantee that the best interest of the child are always of paramount importance to trump the language and cultural rights

medium public school into becoming a parallel-medium or a dual-medium public school.²¹⁸ Third, and most importantly, *the Final Constitution neither provides a*

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guaranteed right to single-medium public schools nor does it prohibit the existence of such institutions. The Final Constitution sets its face against the kind of cultural and linguistic hegemony that marked apartheid and, at the same time, recognises the necessity of a multiplicity of patterns of school language policy. The principal constitutional norms that bracket language policy do not entail some ideological pre-commitment to any particular language practice: say English over Afrikaans, or isiZulu over isiXhosa. Instead these norms require that any language policy meet

of the school's Afrikaans learners. So while the state's actions had been *mala fide*, it was still able to secure a victory for educational equity by getting the proper parties before the court.

In deciding that the minority students must be accommodated, the *Laerskool Middelburg* court correctly concluded that the right to a single medium public educational institution is clearly subordinate to the right every South African has to education in a similar institution and to a clearly proven need to share education facilities with other cultural communities. The *Laerskool Middelburg* court seems to be on far shakier grounds when it suggests that a claim to a single-medium institution is probably best defined as a claim to emotional security. This trivializes the desire to maintain basic, constitutive attachments. It seems clear that the desire to sustain a given culture especially a minority culture, as Afrikaaner culture now is, is best served by single medium institutions that reinforce implicitly and expressly the importance of sustaining the integrity of that community. The *Laerskool Middelburg* court must be wrong — as an empirical matter — when it claims that the conversion of a single-medium school to a parallel — medium school cannot *per se* diminish the force of each ethnic, cultural and linguistic community's claim to a school organized around its language and culture. *Ibid* at 173. That is, with respect, exactly what conversion *per se* does.

- 216 *Seodin Primary School v MEC Education, Northern Cape* 2006 (1) All SA 154 (NC). While *Mikro* might have brought some relief to the SGBs of single-medium Afrikaans-speaking schools, there is every reason to believe that such a respite will be brief. *Seodin* reinforces the holdings in *Matukane* and in *Laerskool Middelburg*. In *Seodin Primary School v MEC Education, Northern Cape*, the High Court held that the SGBs of three Afrikaans medium public schools could not use language preference to exclude black English-speaking students from admittance.
- 217 *Hoërskool Ermelo I* and *Hoërskool Ermelo II* offer perhaps the best set of circumstances under which to assess, in terms of FC s 29(2), the respective rights of learners to choose their preferred language of instruction, the ability of SGBs to determine public school language policy and the power of the state to alter language policy where the needs of learners so warrant. In *Hoërskool Ermelo I*, Judge Prinsloo, of the Pretoria High Court, suspended a decision of the Mpumalanga education department to dissolve the school's governing body to replace it with a departmentally appointed committee. *Hoërskool Ermelo & Others v Departmentschoof van die Mpumalanga* Case Number 3062/07, Pretoria High Court (Unreported, 2 February 2007). The dissolution would have enabled the Mpumalanga education department to alter the schools language policy and allowed 113 English-speaking pupils to receive instruction in English. On appeal, Transvaal Judge President Ngoepe, and Judges Seriti and Ranchod set aside the High Court ruling in *Hoërskool Ermelo I*. The *Hoërskool Ermelo II* court found that the Afrikaans-medium school must admit English-speaking pupils. Of particular moment for the *Hoërskool Ermelo II* court was the under-subscription of Hoërskool Ermelo. Given that Hoërskool Ermelo was operating at only half-capacity, the Full Bench found that it was reasonably practicable, as contemplated by FC s 29(2), for the high school to accommodate the 113 eighth grade learners. The mere fact that all classrooms were being employed and that the existing curriculum turned on the current availability of classrooms did not constitute sufficient grounds for excluding English learners and maintaining Hoërskool Ermelo as a single-medium Afrikaans public school. Equity, practicability and historical redress justified the transformation of Hoërskool Ermelo from a single-medium public school into a parallel-medium public school.
- 218 The wilful misconstruction of the constitutional space that exists for single medium public schools is evident from the following press release by the Federation of Afrikaans Cultural Associations:

such fixed, yet fluid, desiderata as equity, practicability and historical redress. In some instances, this set of constitutional desiderata will allow for the continued existence of single-medium Afrikaans institutions. In other instances, circumstances will dictate that such schools change their language policy. In either case, the state must be in a position to offer a compelling evidentiary basis for its conclusion regarding the change or the maintenance of a single medium schools' language policy. In the absence of such reasons, our courts should view state-sponsored changes in policy as arbitrary exercises of state authority.

For many, the constitutional obligation placed upon the state to justify its actions may not provide sufficient solace. For those learners and their parents for whom the window provided by FC s 29(2) is too small and for whom a single-medium school designed to further a particular linguistic, cultural or religious vision of the world is an absolute necessity, the Final Constitution again has an answer. Under FC s 29(3), they may 'dig into their own pocket' and build the school on their own time and in their own fashion.

58.8 Self-determination

(a) Self-determination in international law

At 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'.²¹⁹ Competing understandings of self-determination indicate differences of emphasis rather than fundamental divergence over the basic content of the right.

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On the one hand, the term is used to underpin the claims of a group of people who have a strong sense of national consciousness and the desire to form their own state and to govern themselves. In the recent past, self-determination often formed

The Federation of Afrikaans Cultural Associations, the FAK, welcomes the Supreme Court of Appeals rejection of an appeal by the Western Cape MEC for Education to try and force Laerskool Mikro to change its language policy. This judgment is a victory for the autonomy of communities and in fact represents a small step closer to the application of the National Departments policy of mother-tongue instruction for all South African children. The FAK hopes that the continuing pressure by provincial education departments on Afrikaans schools to anglicize in the name of greater access will cease. Currently several Afrikaans schools countrywide are subject to such pressure, with possible court action involved. The FAK appeals to provincial education departments to stop playing off the right to access against mother-tongue instruction, and to alleviate the crisis of access to quality education for all by applying themselves to make mother-tongue instruction a reality for all South African children.

Federation of Afrikaans Cultural Associations FAK Welcomes *Mikro* Judgment (June 27, 2005) <http://vryeafrikaan.co.za/lees.php?id=272> (accessed on 24 January 2007).

219 *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 H Hannum (ed) *Documents on Autonomy and Minority Rights* (1993) 36. For formulations of the right in treaty law, see Article 1 of the ICCPR, Article 1 of the International Covenant on Social, Economic and Cultural Rights (1966), and Article 20 of the African Charter of Human and Peoples Rights (1982). For a ringing defence of economic, social and cultural rights on the African continent, see SC Agbakwa 'Reclaiming Humanity: Economic, Social and Cultural Rights as the Cornerstone of African Human Rights' (2002) 5 *Yale Human Rights & Development Law Journal* 177, 177 (Argues that the rights of peoples to economic, social and cultural self-determination is often the only means of self-defense for millions of impoverished and marginalized groups all over the world.) For more on self-determination in Africa, see, generally, C Heyns & K Stefizyn (eds) *Human Rights, Peace and Justice in Africa* (2006).

part of a process of decolonization. With the end of the direct colonial period, self-determination has often taken place through secession from an existing independent state. This first connotation of self-determination may be termed 'external' self-determination, since the exercise of the right entails changes to the international personality of a state.

On the other hand, self-determination may also be understood as having an 'internal' dimension. Internal self-determination concerns the relationship between a people and the government of the state in which that people lives. This right of 'internal' self-determination is a right of groups within an existing sovereign state to a degree of political autonomy and to their 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.²²⁰ Understood in this way, the right of self-determination closely tracks such modern principles as popular participation and representation in government and respect for fundamental human rights and the rule of law.²²¹

(b) Self-determination and the Final Constitution

(i) Interim Constitution, constitutional principles and certification

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. During the transitional 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 these parties, a better refuge from majority rule could be found in the elaboration of the right of external self-determination.

Self-determination claims came to dominate the MPNF 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

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independent Afrikaner state, a Volkstaat.²²² As the Inkatha Freedom party ('IFP') increasingly felt its federalist ambitions frustrated in the course of the negotiations, the language of self-determination and secession became more and more attractive. The party unveiled a 'Constitution of the State of KwaZulu/Natal' in December 1992. While this 'KwaZulu/Natal Constitution' ostensibly set out the IFP's vision of a federal system, and what it termed 'internal regionalisation', commentators observed that

220 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 P 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, 114.

221 A Rosas 'Internal Self-determination' in C Tomuschat (ed) *Modern Law of Self-Determination* (1993) 225, 230.

the document looked more like a charter for an independent state.²²³ This secessionist strain in IFP politics grew louder as the party became more estranged from the Kempton Park process. It culminated in declarations of a sovereign kingdom of KwaZulu-Natal.

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 principle 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 external self-determination: secession of an independent Afrikaner Volkstaat from the remainder of South Africa. The Technical Committee on Constitutional Issues, however, addressed the right of self-determination through a package of guarantees that corresponded to internal 'self-determination'. This package encompassed guarantees of non-discrimination, provisions ensuring meaningful participation in the political process by minority parties, rights of linguistic and cultural diversity, and collective or community rights of linguistic, cultural and religious association.²²⁴

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.²²⁵ This principle, read together

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with Chapter 11A of the Interim Constitution,²²⁶ gives qualified recognition to a right of external self-determination. The principle provided:

222 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 after February 1990 necessitated the abandonment of this strategy in favour of secessionist politics. See J Grobbelaar 'Bittereinders: Dilemmas and Dynamics on the Far Right' in G Moss & I Obery (eds) *South African Review* 6 (1992) 103.

223 S Friedman *The Long Journey: South Africa's Quest for a Negotiated Settlement* (1993) 164; S Ellmann 'Federalism Awry: the Structure of Government in the KwaZulu/Natal Constitution' (1993) 9 *SAJHR* 165. On the litigation over the KZN Constitution and recent failed efforts to revive it, see S Woolman 'Provincial Constitutions' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 21.

224 Technical Committee on Constitutional Issues 'Fourth Supplementary Report on Constitutional Principles' (26 July 1993) 7.

225 The Principle was inserted by the Constitution of the Republic of South Africa Amendment Act 2 of 1994. See, generally, R Humphries, T Rapoo & S Friedman 'The Shape of the Country: Negotiating Local Government' in S Friedman & D Atkinson (eds) (1994) 7 *South African Review* 148, 170.

226 Chapter 11A of the Interim Constitution provided for the establishment of a Volkstaat Council. It was intended to enable proponents of the idea of a Volkstaat to constitutionally pursue the establishment of such a Volkstaat. IC s 184B(1). The now defunct Council was an advisory body, with powers to gather information and make representations on the Volkstaat issue to the Constitutional Assembly. See IC s 184B(1)(a).

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 recognised 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) Volkstaat Council

As I noted above, the problem of accommodating, and protecting, ethnic, religious and linguistic minorities in a democratic state dominated the political debates and the lengthy constitutional negotiations that preceded the enactment of the Interim Constitution. One substantive outcome of these 'debates' was the establishment of a 'Volkstaat Council' under the Interim Constitution.²²⁷ IC ss 184A and 184B gave effect to an informal agreement between the National Party government, the ANC and those Afrikaner groups who wished to pursue the creation of a Volkstaat.²²⁸ Talk of a Volkstaat represented the ambitions of

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some white Afrikaans-speaking South Africans — and the willingness of the ANC to accede to those demands necessary to secure a peaceful election.²²⁹ The Council was charged with gathering the requisite data necessary to make an informed decision about the contours, the powers and the political structures of a Volkstaat. The amendment that created the Council also introduced CP XXXIV. This principle required that the Final Constitution make some provision for the exercise 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 recognised way'.²³⁰

The Volkstaat Council was created by an Act of Parliament in November 1994.²³¹ In March 1999, the Volkstaat Council concluded its activities with a presentation to the State President of its 'Final Report' on the logistics required for the creation of an autonomous Afrikaner state.²³² That report went nowhere.

Express provision for a Volkstaat died with the advent of the Final Constitution.²³³ The desire to protect the cultural, religious and linguistic interests of Afrikaners did not. After discussing the meaning of FC s 235 — and the limits its

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227 See Constitution Amendment Act 2 of 1994, s 9 (Inserts Chapter 11A into Interim Constitution).

228 The exact nature of the bargain is found in the Accord on Afrikaner Self-Determination Between the Freedom Front, the African National Congress and the South African Government/National Party (23 April 1994). This document was signed by General Constand Viljoen, Leader, Freedom Front; Mr Thabo Mbeki, National Chairman, African National Congress; Mr Roelf Meyer, Minister of Constitutional Development and of Communication, Government of the Republic of South Africa and the National Party. The Accord took note of the IC ss 184A and 184B, Constitutional Principle 34 and a previously unsigned memorandum between the ANC, the AVF and the South African government. The Accord read, in relevant part, as follows:

language places on any identification of 'secession' with 'self-determination' — the final subsection of this chapter discusses the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities ('CRLC'). The CRLC was understood by many of the principals in the Constitutional Assembly negotiations to have been the compensation extracted by representatives of white minority parties for the elimination of any textual support in the Final Constitution for a Volkstaat Council or a Volkstaat.²³⁴ The volume of complaints lodged thus far with the CRLC on issues of concern to members of various Afrikaans-speaking communities underwrites this conclusion.

(iii) FC s 235

Agreement on the interpretation and the implementation of CP XXXIV proved elusive during the Constitutional Assembly's two-year effort to draft a Final Constitution. The

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1. The parties agree to address, through a process of negotiations, the idea of Afrikaner self-determination, including the concept of a Volkstaat. The parties further agree that in the consideration of these matters, they shall not exclude the possibility of local and/or regional and other forms of expression of such self-determination. 3. They agree that their negotiations shall be guided by the need to be consistent with and shall be governed by the requirement to pay due consideration to Constitutional Principle XXXIV, other provisions of the Constitution of the Republic of South Africa, Act 200 of 1993 as amended, and that the parties take note of the Memorandum of Agreement, as referred to above. 3.1 Such consideration shall therefore include matters such as: 3.1.1 substantial proven support for the idea of self-determination including the concept of a Volkstaat; 3.1.2 the principles of democracy, non-racialism and fundamental rights; and 3.1.3 the promotion of peace and national reconciliation. 4. The parties further agree that in pursuit of 3.1.1 above, the support for the idea of self-determination in a Volkstaat will be indicated by the electoral support which parties with a specific mandate to pursue the realisation of a Volkstaat will gain in the forthcoming election. 4.1 The parties also agree that, to facilitate the consideration of the idea of a Volkstaat after the elections, such electoral support should be measured not only nationally, but also by counting the provincial votes at the level of: 4.1.1 the electoral district; and 4.1.2 wherever practical the polling stations as indicated by the parties to, and agreed to, by the Independent Electoral Commission. 5. The parties agree that the task of the Volkstaatraad shall be to investigate and report to the Constitutional Assembly and the Commission on the Provincial Government on measures which can give effect to the idea of Afrikaner self-determination, including the concept of the Volkstaat. 6. The parties further agree that the Volkstaatraad shall form such advisory bodies as it may determine. 7. In addition to the issue of self-determination, the parties also undertake to discuss among themselves and reach agreement on matters relating to matters affecting stability in the agricultural sector and the impact of the process of transition on this sector, and also matters of stability including the issue of indemnity inasmuch as the matter has not been resolved. 8. The parties further agree that they will address all matters of concern to them through negotiations and that this shall not exclude the possibility of international mediation to help resolve such matters as may be in dispute and/or difficult to conclude. 8.1 The parties also agree that paragraph 8.0 shall not be read to mean that any of the deliberations of the Constitutional Assembly are subject to international mediation, unless the Constitutional Assembly duly amends the Constitution to enable this to happen. 8.2 The parties also affirm that, where this Accord refers to the South African Government, it refers to the South African Government which rules South Africa until the April 1994 elections.

229 D Basson *South Africa's Interim Constitution: Text and Notes* (1994) 237.

230 See Constitution Amendment Act 2 of 1994, s 13(b)(Inserts Constitutional Principle 34 into Interim Constitution.)

231 The Volkstaat Council Act 30 of 1994. The 20 members of the council provided for in the Interim Constitution were elected from among members of the Freedom Front by a joint session of the National Assembly and the Senate.

232 Volkstaat Council *Final Report: Findings and Recommendations* (31 March 1999).

Freedom Front interpreted the principle as supporting constitutional recognition of its demand for a territorial Volkstaat. The ANC justified its resistance by pointing to the failure of the Volkstaat Council to produce a viable blueprint for an independent Volkstaat. In the end, the Constitutional Assembly did not promulgate a constitutional provision for external self-determination. However, CP XXXIV lived on in FC s 235.²³⁵

When considering objections that the Constitutional Assembly had failed to comply with CP XXXIV, the Constitutional Court, in *First Certification Judgment*, held that the constitutional provision guaranteeing the right to self-determination ensured some degree of political autonomy for any community sharing a common cultural and language heritage within — as CP I required — a unitary sovereign state. CP XXXIV was regarded by the Court as a permissive rather than an obligatory provision.²³⁶ The only mandatory provision in CP XXXIV was that if a territorial entity was established in terms of the Interim Constitution before the adoption of the Final Constitution, then such an entity must be

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entrenched in the Final Constitution. Since no such entity had in fact been established, no obligatory entrenchment had to be made.²³⁷

What then is the import of FC s 235? We have seen that self-determination possesses both a narrow internal dimension and a broader external dimension. Internal self-determination affects only the relationship between an autonomous group and the state. It implies neither a right of secession, nor political rights aimed at entrenching specific levels of representation and participation. But FC s 235 would

233 While a Volkstaat is not mentioned by name in the Final Constitution, FC s 235 still holds out the possibility for self-determination for any community sharing a common cultural and language heritage, within a territorial entity in the Republic. The constitutional basis for the Volkstaat Council disappeared with the certification of the Final Constitution. The Council, as a statutory body, limped on for another two years. The Volkstaat Council Act itself has not been repealed.

234 Dr Mulder claims that the Freedom Front engaged the ANC leadership in a vigorous debate about a Volkstaat. The Freedom Front's aspirations for Afrikaner territorial and political self-determination were rebuffed. The ANC would only go so far as to recognise the Freedom Charters commitment to internal cultural and religious self-determination. Both parties seemed to accept the CRLC as an institution that could satisfy the requirements of internal cultural and religious self-determination. Phone Interview between Dr C Mulder and Dr C Landman, Spokesman of the Freedom Front (5 January 2005). Interview with Dr C Landman, Commissioner, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (5 January 2005). Confirmation of this assessment comes in the form of then Minister of Provincial and Local Government FS Mufamadi's statement that the Volkstaat Council would be phased out and its responsibilities handed over to the CRLC. Interview with Dr C Landman, Commissioner, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (5 January 2005). The brinkmanship of white minority politicians also meant that agreement on official language policy and state-funded education in minority languages eluded the Constitutional Assembly until the very end.

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

236 *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) ('*First Certification Judgment*').

237 *First Certification Judgment* (supra) at para 218.

seem to require that the term 'self-determination' should not be understood to exclude the possibility of external self-determination.

According to FC s 235, a 'community sharing a common cultural and language heritage' (a euphemism for an ethnic minority) may assert the right to self-determination 'in a territorial entity within the Republic or in any other recognised way'. While the phrasing of FC s 235 appears to favour self-determination by internal means, it does not exclude the possibility that secession may be another 'recognised way' of achieving self-determination. The criteria for recognition of a legitimate demand for secession or for internal self-determination are not set out.

When reading FC s 235, it might seem reasonable to conclude that a 'recognised way' is a form of self-determination sanctioned by international law. But no right of secession exists in international law. Moreover, the recognition of the right of self-determination in international law must confront, and overcome, the predisposition to recognize the territorial integrity of states.²³⁸ An act of secession that disrupts existing territorial arrangements — without the approval of the sovereign state from which the new 'nation' secedes — would likely be treated with disfavour at international law. FC s 235 read in light of international law puts something of a damper on claims for external self-determination.²³⁹

International law would appear to be less hostile to strong forms of internal self-determination. So while secession may meet with disapproval, a considerable body of literature supports the proposition that the right of self-determination may require a state to adopt a federal structure of government.²⁴⁰

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(iv) Commission for the Promotion and the Protection of the Rights of Cultural, Religious and Linguistic Communities ('CRLC')²⁴¹

If one is inclined to link the secessionist aspirations that lay behind the promulgation of IC s 184 and the creation of the Volkstaat Council to the subsequent inclusion in the Final Constitution of FC s 185 and FC s 186 and the creation of the Commission

238 See 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, 1665:

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

239 R McCorquodale 'Self-determination: A Human Rights Approach' 10 *SAHR* 4 (1994) 21, 23.

240 See P Thornberry 'The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism' in C Tomuschat (ed) *Modern Law of Self-Determination* (1993) 133-137; Y Dinstein 'The Degree of Self-rule of Minorities in Unitarian and Federal States' in C Brölman (supra) at 221; B de Villiers 'Federalism in South Africa: Implications for Individual and Minority Protection' (1993) 9 *SAHR* 373.

for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities ('CRLC'), then it is easy to see why the CRLC was the last of the Chapter 9 Institutions to be launched and why it remains something of a white elephant.

(aa) Purpose of the CRLC

The Final Constitution is committed to 'healing the divisions of the past', 'establishing a society based on democratic values, social justice and fundamental human rights', and building a South Africa 'united in [its] diversity'.²⁴² The CRLC is similarly tasked. It is responsible for deepening our appreciation for the wide array of distinct and unique South African cultures, languages and religions.²⁴³ At the same time, it is obliged to build bridges between communities in a country riven by racial, ethnic, cultural and linguistic strife.²⁴⁴ The CRLC has used its bridge-building mandate to arrogate to itself a third mandate — national identity formation. At a high enough level of abstraction, multicultural recognition and national identity formation appear compatible. But as the debate at the compulsory launch of the CRLC in November 2004 suggests, persons and groups silenced by years of oppression have a greater interest in being heard than they do in pledging allegiance to a nation still in the early stages of gestation. Whether such a broad brief as national identity formation is coherent — or if coherent, even plausible given the current political environment and the CRLC's fiscal constraints — is discussed at length in my chapter on the CRLC.²⁴⁵

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(bb) The Weakness of the CRLC

Efforts to establish the CRLC did not begin until August 1998 — almost two years after certification of the Final Constitution. Another three years past before

241 For a general overview of the CRLC and its work, see S Woolman & J Soweto-Aullo 'Commission for the Promotion and the Protection of Cultural, Linguistic and Religious Communities' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24F.

242 See FC Preamble.

243 See CRLC Act s 4. Section 4 reads, in relevant part:

- (a) to promote respect for and further the protection of the rights of cultural, religious and linguistic communities;
- (b) to promote and develop peace, friendship, humanity, tolerance and national unity among and within cultural, religious and linguistic communities on the basis of equality, non-discrimination and free association;
- (c) to foster mutual respect among cultural, religious and linguistic communities;
- (d) to promote the right of communities to develop their historically diminished heritage; and
- (e) to recommend the establishment or recognition of community councils

244 See CRLC Act Preamble.

245 See S Woolman & J Soweto-Aullo (supra) at Chapter 24F.

Parliament undertook deliberation regarding the CRLC Act.²⁴⁶ During parliamentary debate, some members of the Provincial and Local Government Select Committees expressed concern over whether the CRLC should, in fact, possess the power to protect the cultural, religious and linguistic rights of communities.²⁴⁷ In the end, the majority of parliamentarians ultimately preferred to see the CRLC as a mediator between communities.²⁴⁸ This role as mediator, rather than litigator, meant that the CRLC was only granted the power to bring matters of concern to the attention of 'appropriate authorities' and to request an appropriate response.²⁴⁹

The apparent weakness of the CRLC also reflects concern about its redundancy — and the ANC government's hostility towards 'independent' institutions not designed to advance its political agenda. The Pan South African Language Board, the Youth

246 Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002 ('CRLC Act'). The Department of Provincial and Local Government (DPLG), which possessed ministerial authority over the CRLC, solicited submissions on the functions and structures of the CRLC. The first pre-commission National Consultative Conference ('NCC') engaged solicited submissions, research by the Human Sciences Research Council ('HSRC'), white papers from government and policy statements from key civil society stakeholders. This process was repeated again, a year later, in September 1999. See Human Sciences Research Council *Final Report: Second National Consultative Conference* (November 1999) (*Report of the 2nd NCC*). The two most hotly debated issues were the role of the cultural councils and representation on the CRLC itself. The councils are intended to elicit, to amplify and to mediate local, geographically bounded concerns of religious, linguistic and cultural communities. They are tools for mobilisation and dispute resolution. Stakeholders articulated strong differences about (a) how such councils would be recognised; and (b) the extent of state support they should receive. Conditions of fiscal austerity have largely resolved the latter problem. Financial support will be limited. The issue of how councils will be recognised and thus who speaks for a particular community still vexes the CRLC. Interview with T Thitanyana, Corporate Affairs Officer, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (11 January 2005). The Second NCC was more decisive with respect to representation. Legitimacy is conferred on the CRLC through an open nomination process for its full-time chairperson and some 17 part-time commissioners.

247 Bill (B62-2002), Government Gazette No 22573 (17 August 2001). Debate on the Bill by the Provincial and Local Government Portfolio and Select Committees: Joint Sitting ('PLGP Committee') (commenced on 25 September 2001).

248 Minutes of the PLGP Committee hearings of 24 October 2001, Appendix 1, available at www.pmg.org.za/docs/2001, (accessed on 04 April 2004).

249 Minutes of the PLGP Committee hearings of 02 October 2001, available at www.pmg.org.za/docs/2001 (accessed on 04 March 2004). The prevailing consensus is made manifest in the CRLC Act. The powers of the Commission enable it to:

(g) facilitate the resolution of friction between and within cultural, religious and linguistic communities or between any such community and an organ of state, and where the cultural, religious or linguistic rights of a community are affected;

(h) receive and deal with requests related to the rights of cultural and linguistic communities;

(i) make recommendations to the appropriate organ of state regarding legislation that impacts, or may impact, on the rights of cultural, religious and linguistic communities.

CRLC Act, ss 5(1)(g)-(i). Passage of the Act did not end debate about its content. Barely a year after the Act came into force, and prior to the actual establishment of the CRLC, a Bill was introduced in Parliament to amend the powers of the Commission under the Act. A van Niekerk (MP), *Private Members Legislative Proposal on Enforcement Powers for the Section 185 Commission* (12 September 2003) available at www.pmg.org.za/docs/2003 (accessed on 4 March 2004).

Commission, the Commission for Gender Equality, the South African Human Rights Commission, the Public Protector, the Judicial Inspectorate, the National House of Traditional Leaders and the Free State Centre for Citizenship, Education and Conflict Resolution have briefs that overlap with that of the CRLC.²⁵⁰ Many MPs have expressed anxiety about the expenditure of limited public funds on an entity that duplicates the briefs of existing institutions.²⁵¹ However, Parliament's stonewalling with respect to budget requests and its refusal to provide little more than token funding in the CRLC's first two years suggests that the motivations for creating a toothless institution lie elsewhere.²⁵² Without putting too fine a point on it, the CRLC's questionable provenance, its lack of meaningful constituencies, and its nominal independence give the government little motivation to take the CRLC seriously.

250 For example, the CRLC is given the power, under FC s 185(3), to investigate any matter that falls within the purview of the South African Human Rights Commission. FC s 185(3) was amended by Constitution of the Republic of South Africa Amendment Act 65 of 1998, s 4.

251 Ibid.

252 Under-funding of the Chapter 9 Institutions is a common problem. Parliament has been put on notice that low levels of funding and overweening executive oversight make effective operation of these institutions difficult, if not impossible. The *Corder Report* is absolutely scathing in this regard. See H Corder, S Jagwanth & F Soltau 'Report on Parliamentary Oversight and Accountability Report to the Speaker of the National Assembly' (1999), available at www.pmg.org.za/docs/2001/viewminute.php?id=811, (accessed 10 January 2005) ('*Corder Report*') at paras 7.2 and 7.2.1 ('In their submissions to us, many constitutional institutions have also pointed out that the present arrangement may result in a very low priority being given to constitutional institutions as government departments may be slow in recognising the interests of an institution which does not form part of the core business of the department. The very direct control by the executive of constitutional institutions can have a devastating effect on the independence and credibility of these offices... . In the first place, to make institutions dependent on budget allocations received through the very departments that they are required to monitor is not desirable. Secondly, these institutions must be seen by the public to be independent and free of the possibility of influence or pressure by the executive branch of the government. Approval by the executive of budgets, or other issues such as staffing, is thus inconsistent with independence, as well as the need to be perceived as independent by the public when dealing with their cases. This executive power could render impotent state institutions supporting constitutional democracy through the potential denial of both financial and human resources. Furthermore, the special constitutional features of these institutions are not recognised as executive priorities are set.') On the specific problems of under-funding faced by each of the Chapter 9 Institutions, see M Bishop & S Woolman 'Public Protector' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & Michael Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24B; S Woolman & Y Schutte 'Auditor-General' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24B; J Klaaren 'South African Human Rights Commission' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24C; C Albertyn 'Commission on Gender Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 24D; J White 'ICASA' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24E; S Woolman & J Soweto-Aullo 'Commission for the Promotion and the Protection of Cultural, Linguistic and Religious Communities' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 24F.