

# Promoting minority<sup>1</sup> rights in the context of economic, social and cultural rights<sup>2</sup> in South Africa

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*Ukuthuthukisa amalungelo abantu abayidlanzana esimeni samalungelo ezomnotho, awezokuhlalisana kanye nawezamasiko eNingizimu Afrika.*

*Kulo mbhalo, umbhali uxoxa ngokuthuthukiswa kwamalungelo abantu abayidlanzana eNingizimu Afrika mayelana nesimo sezomnotho, ezokuhlalisana kanye nezamasiko. Uthi incazelo eqculisayo ngabay'glanzana isantuleka' futhi nokuntuleka kwencazelo leyo, kunemiphumela ethinta imicabango okusetshenzelwa phezu kwayo ngalokho okwenziwayo. Uthi amalungelo abantu abayiglanzana okungwe ezenkolo, ezolimi nawezamasiko kumele afakwe emingceleni yamalungelo ezokuhlalisana nawezomnotho. Ngokomthethosisekelo waseNingizimu Afrika, isigaba 31, sibheka amalungiselelo okuthi abantu abangamalungu omphakathi othile kwezamasiko, ezenkolo noma ezolimi akumele benqatshelwe ilungelo lokuthokozela amasiko abo, lokulandela inkolo yabo nelokusebenzisa ulimi lwabo. Ngaphezu kwalokho, iSahluko 9 somthetho-*



*sisekelo svumeia ucuverwa kwe iKhomishani yokuGqugquzelwa nokuVikelwa kwamaLungelo eMiphakathi kwezaMasiko, ezenkolo nezolimi.*

Taking economic, social and cultural rights seriously implies at the same time a commitment to

1 Literature on this topic speaks of either *group* or *minority* rights. However, the stigma and connotations attached to the word 'group' in a South African context are one of political distaste as it was the code word for racially defined (apartheid) policies. Hence the term 'minority' is preferred, although this term, too, is problematic. For practical reasons I will, however, be using the word 'group' in this paper, but this should not be seen as an endorsement of the term.

2 Hereafter referred to as socio-economic rights.

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social integration ... and equality. [These] rights include a major concern with the protection of vulnerable groups.<sup>3</sup>

## 1 Introduction

It has been commonly thought that if ethnic, religious and national minorities are allowed to give expression to their respective group attachments, then that should be deemed sufficient protection against discrimination. Equality demands in democracies that all citizens be entitled to similar rights and, therefore, it was deemed unnecessary for the state or anyone else to treat minority groups any differently. They did not have to be provided with specific group-differentiated rights, such as, for example, language rights that would assist them in expressing their ethnicity, religion or nationality. This view is given weight by the fact that even the United Nations, after more than 40 years of international human rights experience, has not been of much help. An adequate definition of a minority is still lacking! However, judging from the recent and vast literature on special minority rights, this view has changed dramatically in the last decade. The new approach criticises the idea that all citizens are entitled to similar rights and is gaining widespread acceptance. Pluralism, multiculturalism, diversity and difference are celebrated rather than denied.

After World War II, the rights of minorities were relegated to past history and the focus was now on equality between human beings in a given country.<sup>4</sup> It is, therefore, not surprising that there are many uncertainties with regard to the status of minority rights. Minority rights as a subject also raises

more questions than for which there are answers. For example, How does one define and classify minorities? Are the rights of minorities group rights or individual human rights? The list goes on.

Socio-economic rights discussed in this article include the rights of minorities to religion, culture and language. Narrowly understood, the relationship between minority rights and socio-economic rights seems somewhat [re]-strained. Aside from having strong economic implications, in South Africa minority rights form an integral part of, and are classified under, socio-economic rights. I will therefore examine relevant United Nations instruments with a view to clarifying (definitional) problems relating to minority rights and how these instruments go about providing protection of these rights. I will then look at the position in South Africa with a view to making certain recommendations.

While the civil and political rights to freedom of religion and equality do interact, conflict and overlap with minority rights, I will not be elaborating on freedom of religion, its broader (implementational) implications or related United Nations 'religious' instruments. Emphasis is, furthermore, on the rights of minorities in the context of socio-economic rights rather than on an analysis or elaboration of the content of the socio-economic rights concerned. Ultimately, minority rights cannot be divorced from their socio-economic context.

## 2 International Bill of Rights

The International Bill of Rights comprises four United Nations documents,

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<sup>3</sup> Eide and Rosas 'Economic, social and cultural rights: A universal challenge' in Eide, Krause and Rosas *Economic, social and cultural rights. A textbook* Dordrecht, Martinus Nijhoff Publishers (1995) 17.

<sup>4</sup> Thornberry *Minorities and human rights law, Report No 73* London The Minority Rights Group (1991a) 6.

namely the Universal Declaration of Human Rights,<sup>5</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>6</sup> the International Covenant on Civil and Political Rights<sup>7</sup> and the Optional Protocol to the International Covenant on Civil and Political Rights.<sup>8</sup> The Universal Declaration of Human Rights, the first part of this Bill, includes both (traditional) civil and political, and socio-economic rights.<sup>9</sup> Both the United Nations Charter of 1945 and the Universal Declaration of Human Rights as such contain no specific provision regarding the rights of minorities. By excluding discrimination on the grounds of race, gender, language or religion<sup>10</sup> the United Nations Charter, by implication, also safeguarded minorities. The Universal Declaration of Human Rights also contains guarantees relating to non-discrimination (Article 2), equality (Article 7) and freedom of religion and expression (Articles 18–19), which all stand in some relationship to Article 27 of the International Covenant on Civil and Political Rights. Hence, much of the protection accorded to minorities is ‘indirect’ because, in many instruments, such as the few mentioned earlier, there is no express mention of minorities.<sup>11</sup> Unlike both covenants, the Universal Declaration of Human Rights is not legally binding on state parties (governments). It merely has the status of a declaration or statement of intent or principle. It does, however, exercise a great deal of moral

and political influence over constitutions, laws and judicial decisions, and can therefore serve to pressurise governments to observe human rights. Its terms can, furthermore, be made binding through covenants such as the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.

International human rights law, by making provision for two sister covenants instead of one, has traditionally made a distinction between the two sets of rights, namely civil and political, and socio-economic rights. The fact that two separate covenants exist has fuelled the notion that civil and political, and socio-economic rights are two different sets of rights. There is, however, growing international consensus that both sets of rights should enjoy equal protection and promotion.<sup>12</sup>

The International Covenant on Economic, Social and Cultural Rights is the primary United Nations human rights instrument dealing with socio-economic rights. The International Covenant on Civil and Political Rights (especially its Article 27) and the 1992 United Nations Resolution and Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities are the main instruments dealing with minority rights.<sup>13</sup> More attention will be paid to the former (International Covenant on Civil and Political Rights), as the latter declaration

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5 GA Res 217 A (III), 10 December 1948.

6 GA Res 2200 A (XXI), 16 December 1966 (came into force:1976).

7 GA Res 2200 A (XXI), 16 December 1966 (came into force:1976).

8 GA Res 2200 A (XXI), 16 December 1966 (came into force:1976).

9 See Arts 22–6.

10 Art 1 paragraphs 3 13 and 55 c.

11 Thornberry *International law and the rights of minorities* Oxford Clarendon Press (1991) 241–385.

12 In 1993, at the World Conference on Human Rights in Vienna, the acceptability and legitimacy of socio-economic rights in legal documents was settled. The Vienna Declaration and Programme of Action of June 1993 affirms an increasing concern with socio-economic rights (UN Doc. A/Conf. 157/24 (Pt.I) at 23 (13 Oct 1993)).

13 GA Res 47/135, 18 December 1992 (hereinafter the United Nations Minority Declaration).

is not a binding instrument on state parties.

## 2.1 Protection of socio-economic, and civil and political rights

Today there is no international instrument specifically aimed at affording protection to minorities.<sup>14</sup> Even the insertion of merely one article relating to minorities, namely Article 27 in the International Covenant on Civil and Political Rights, proved a most difficult task.<sup>15</sup> Article 27 will be elaborated on as it is the most commonly known provision on special rights for minorities and intended for universal application. South Africa has based its constitutional clauses on minority rights on the International Covenant on Civil and Political Rights and has subsequently ratified it. It is therefore an important instrument for minorities in the South African context. The United Nations Declaration on minorities does not have the force of law but is used as a guide.

Article 27 'bears much of the burden of the traditional protection of minorities in the modern system'.<sup>16</sup> Article 27 of the International Covenant on Civil and Political Rights makes provision for minorities as follows: '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'* [emphasis added].

While protection may be a domestic matter, international instruments, to the extent that they declare law, have a role to play in the protection of minorities, and here the force of publicity and politics must not be underestimated.<sup>17</sup> 'Judicial action on behalf of minorities is an important institutional safeguard of minority rights. Nowhere is the judiciary assigned the specific task of protecting minorities but this has been their role in many nations.'<sup>18</sup> The same is true of socio-economic rights.

14 The Draft International Convention on the Protection of National or Ethnic Groups of Minorities, which was drawn up by Professor Felix Ermacora and colleagues and presented to the United Nations Human Rights Commission in 1979, is considered to be an improvement on the International Covenant on Civil and Political Rights and the above-mentioned study by the United Nations Sub-Commission. If ever approved by the United Nations it can become binding on those states which ratify it (C Palley *Constitutional law and minorities, Report no 36* London Minority Rights Group (1978) 6; JES Fawcett *The international protection of minorities, report no 41* London Minority Rights Group (1979) 16). See n 13.

15 Haksar *Minority Protection and International Bill of Human Rights* Bombay Allied Publishers (1974) 83-99.

16 Thornberry *supra* n 4 at 7.

17 Fawcett *supra* n 14 at 14.

18 Sigler *Minority rights. A comparative analysis* Westport Greenwood Press (1983) 180.

## 2.2 Definition of a minority

To date no definition of a minority has been achieved. In the absence of an internationally accepted definition of the term *minority*, this article will not attempt one. The most common definition is that of Capotorti detailed later. However, even his definition is deficient.

In 1967 a study was initiated by the United Nations Sub-commission for the implementation of Article 27 of the International Covenant on Civil and Political Rights. The Economic and Social Council authorised the appointment of Francesco Capotorti as Special Rapporteur in 1971. He submitted his report in 1977. In this report Capotorti proposes a new definition of a minority and, while it may be unofficial, to date it remains the leading example in this area and, although subject to criticism, should be given due consideration. He emphasises, however, that his definition is limited in its objective and that

[i]t is drawn up solely with the application of article 27 of the Covenant in mind. In that context ... "minority" may be taken to refer to: 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.<sup>19</sup>

Groups such as refugees, aliens or migrant workers are not included.<sup>20</sup> Capotorti is of the opinion that Article 27 should be given a restrictive interpretation.<sup>21</sup> Women are also deemed not to be members of a minority group because they do not comprise a group. However, minority status is not always based on number and is sometimes based on inferior social and political position. In South Africa's recent history, a minority controlled a numerical majority.<sup>22</sup>

### 2.2.1 Lack of a definition: implications

The lack of an authoritative definition has both theoretical and practical implications and guidelines in this regard seem to be inadequate.<sup>23</sup> If the International Covenant on Civil and Political Rights, as the main instrument dealing with minority rights, does not provide one with a definition of a minority, one has to ask, to whom does the convention apply? Does its application extend to all minorities within the state or can the state limit its application to just those minorities that it recognises? Should it apply differently in the religious divide between nations? What about people with 'hyphenated' or mixed identity – culturally and socio-economically with factors such as race, language, unemployment and falling standards of education, housing and crime, contributing to this? South Afri-

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19 Capotorti *Study on the rights of persons belonging to ethnic, religious and linguistic minorities*, Human Rights Study Series No 5 New York United Nations (1991) 96. See also Capotorti 'The protection of minorities under multilateral agreements on human rights' in Capotorti, Conforti et al *The Italian yearbook of international law* Napoli Editoriale Scientifica 1976 16 and Thornberry *supra* n 11 at 6.

20 Thornberry *supra* n 4 at 3.

21 Thornberry *supra* n 11 at 8.

22 See 3.2.

23 Sohn 'The rights of minorities' in Henkin *The international Bill of Rights. The covenant on civil and political rights* New York Columbia University Press (1981) 276–280.

can problems must be viewed in the context of the history of the country.

### 2.3 Positive and negative rights

Article 27 is said to be a weak (negative) right as it only establishes the duty on states that they will not prevent individuals belonging to a minority from doing what is stated in Article 27.<sup>24</sup> It is said to be weak in that it lacks specificity and leaves a 'wide discretion to states on the modalities of its application'.<sup>25</sup> By using the word *persons* it avoids giving the *group* an international personality and seems to indicate an intention to deal with individual rights only.<sup>26</sup> However, this is not necessarily so as is indicated in the liberal interpretation given to Article 27 by some authors such as Ermacora, Dinstein and Capotorti.<sup>27</sup>

'Although ... [Article 27 is] formulated in a negative way ['minorities shall not be denied'], it has been argued that the duty of the state is not only one of non-interference in the enjoyment of

minority rights, but also one of supportive action.'<sup>28</sup> The negative formulation of Article 27 of the International Covenant on Civil and Political Rights is deemed not to be limiting and it is generally accepted that a positive right is implicit. This is also confirmed by case law.<sup>29</sup>

Article 27 of the International Covenant on Civil and Political Rights must be viewed in the context of other human rights instruments and United Nations resolutions and declarations which refer to minority problems, even those which preceded it. It should, for example, be read together with Articles 2(1)<sup>30</sup> and 26<sup>31</sup> of the International Covenant on Civil and Political Rights and Articles 2(2)<sup>32</sup> and 3<sup>33</sup> of the International Covenant on Economic, Social and Cultural Rights (also of 1966).<sup>34</sup>

Both Articles 27 and 18 of the International Covenant on Civil and Political Rights guarantee freedom to manifest and practice religion. Article 18 is given practical effect by the guarantee in Article 27 of freedom to practice religion

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24 Eide 'The universal declaration in space and time' in Berting, Baehr and Burgers et al *Human rights in a pluralist world individuals and collectivities* Westport Meckler (1990) 26.

25 Thornberry *supra* n 11 at 387.

26 Sohn *supra* n 23 at 274.

27 Lerner *Group rights and discrimination in international law* Dordrecht Martinus Nijhoff Publishers (1991) 15.

28 Bloch 'Minorities and indigenous peoples' in Eide, Krause and Rosas *Economic, social and cultural rights. A textbook* Dordrecht Martinus Nijhoff Publishers (1995) 314.

29 Rodley 'Conceptual problems in the protection of minorities: International legal developments' 17 *Human Rights Quarterly* (1995) 48-71 at 51

30 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

31 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, 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.'

32 Article 2(2) of the International Covenant on Economic, Social and Cultural Rights requires states to guarantee equal enjoyment of economic rights to all people regardless of, among other categories, gender and religion. In so doing, it reiterates the injustices and inequality suffered by women.

33 Article 3 requires states to ensure that women enjoy their socio-economic rights at levels comparable to men (equal). This must be understood in the light of the standard of equality for women under the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (GA Res 34/180 (1979)).

34 Capotorti (1976) *supra* n 19 at 4-5.

in community with others. Freedom of religion is deemed to be both an individual and group right. Article 27 (as is typical of international law) only refers to 'ethnic, religious or linguistic minorities'. It is not clear whether the elimination of 'impermissible grounds for unfavourable treatment [such as] ... race, colour, sex, and nationality' [can be construed to] mean that national or racial groups have no rights unless they are also ethnic or linguistic minorities ...'<sup>35</sup>

## 2.4 Socio-economic rights

Article 27 has been interpreted to include certain economic and social rights of persons belonging to minorities and therefore it provides some protection for the socio-economic rights of minorities.

It is to be noted, however, that a provision similar to Article 27 of the International Covenant on Civil and Political Rights is lacking in the International Covenant on Economic, Social and Cultural Rights. Although the United Nations Minority Declaration is not a legally binding document, its Article 2 (1) goes one step further than the negative formulation of Article 27 of the International Covenant on Civil and Political Rights by establishing the right of minorities 'to enjoy their own culture, to profess and practice their own religion and to use their own language'. Article 4(2) of the declaration further includes a positive obligation on the part of states as it provides that 'states shall

take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs'. In so doing, it obliges states to encourage certain socio-economic activities of minority groups. Article 4(5) of the declaration further provides that 'states should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development of their country'. While Article 2(2) includes 'the right to participate effectively in cultural, religious, social, economic and public life', the declaration itself does not indicate how this participation is to be implemented. Article 4(3) of the declaration contains a poorly formulated provision on the right to education (learn their mother tongue or to have instruction therein) for minorities and is, furthermore, couched in a United Nations instrument that is not even binding. There is thus no incentive for governments to allocate extra resources to the education of minorities. Article 4 of the Minority Declaration does not list special measures to be taken in relation to minorities, but it does call for special measures to be taken in various fields such as identity, education and economic development.<sup>36</sup> Articles 11,<sup>37</sup> 12,<sup>38</sup> 13<sup>39</sup> and 15<sup>40</sup> of International Covenant on Economic, Social and Cultural Rights can all be of relevance to rights of minorities.<sup>41</sup>

35 Sigler *supra* n 18 at 3. See also Thornberry *supra* n 4 at 3.

36 Bloch *supra* n 28 at 313–318.

37 Particularly the standard of living for different groups.

38 Level of health enjoyment by different groups.

39 Access to education promoting equality but which also allows for preservation of group dignity.

40 Concerning cultural rights, attention to preservation of cultural heritage of different groups and their access to, and participation in, media in the country concerned.

41 Bloch *supra* n 28 at 321.

### 3 Position in South Africa

#### 3.1 Effect of international law in interpreting the South African Constitution

Although South Africa signed and ratified the United Nations Charter in 1945, she has only recently become a fully active member of the United Nations. In 1948 the Union of South Africa abstained from voting in favour of the adoption of the Universal Declaration of Human Rights. Even though customary international law forms part of South African common law, prior to 1993 courts placed little reliance on it in advancing human rights as it conflicted with the apartheid legislative order.<sup>42</sup>

Provisions in both the interim<sup>43</sup> and final<sup>44</sup> South African Constitutions serve both to confirm the common law position and to elevate the status of customary international law. The final constitution formally incorporates international human rights law. In interpreting the Bill of Fundamental Human Rights,<sup>45</sup> courts, tribunals or forums 'must consider international law'<sup>46</sup> and 'may consider foreign law'.<sup>47</sup> Furthermore, the final constitution provides more expansively that '[t]he Human Rights Commission has the ... power –

(a) to investigate and to report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated; (c) to carry out research; and (d) to educate.'<sup>48</sup>

The documents of the International Bill of Rights have influenced the drafting of the South African Bill of Rights and play an important role in the promotion of human rights here. The interim Bill of Rights was 'inspired' by, and draws heavily on, the language and structure of the Universal Declaration of Human Rights, the two covenants (International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights), the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and various other instruments.<sup>49</sup>

Many of the civil and political rights contained in the final South African Constitution are based on the International Covenant on Civil and Political Rights. Likewise, the sections in the Bill of Rights dealing with socio-economic rights were to a great extent based on International Covenant on Economic, Social and Cultural Rights.<sup>50</sup> The existence of these United Nations docu-

42 Dugard 'The role of international law in interpreting the Bill of Rights' 10 *South African Journal on Human Rights* (1994) 208–215 at 208; Keightley 'International human rights norms in a new South Africa' 8 *South African Journal on Human Rights* 1992 171–187 at 171.

43 S 231(4) of the Constitution of the Republic of South Africa Act 200 of 1993 (hereinafter the interim Constitution).

44 S 232 of the Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter 'the final Constitution').

45 Chapter 2.

46 S 39(1)(b). s 39(1) also refers to foreign law in general. See Moosa 'An analysis of the human rights and gender consequences of the new South African Constitution and Bill of Rights with regard to the recognition and implementation of Muslim Personal Law (MPL)' (LLD dissertation University of the Western Cape) 1996 400 n 152.

47 S 39(1)(c)..

48 S 184(2). See n 79.

49 Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* Cape Town Juta (1994) 47; Rautenbach *General provisions of the South African Bill of Rights* Durban Butterworths (1995) 3 7. South Africa signed both CEDAW and the Convention on the Rights of the Child in 1993. They were subsequently ratified in 1995 without reservations. See n 90.

50 See n 80.

ments will serve to pressurise the government to 'deliver' rather than 'default' on its international human rights obligations. So, irrespective of whether or not South Africa has signed or ratified a United Nations instrument, respect can still be had to international law in this regard and South African courts are still obliged to turn to it for guidance.

While the South African Constitutional Court has confirmed that the interim Bill of Rights is predominantly vertical in operation, the final Constitution appears to provide more scope for and a clear leaning towards a horizontal application of the Bill of Rights.<sup>51</sup>

A horizontal operation of the Bill of Rights (albeit limited) would provide a means of extending its ambit to private relationships. A horizontal operation of international instruments also means that the state as well as private bodies and individuals can be held accountable for international human rights violations and infringements. In this way wrongs in the private sphere can be brought within the ambit of human rights protection without abolishing the distinction between public and private.<sup>52</sup> Both the 1966 covenants, for example, contain a [fifth] preambular paragraph that reads as follows: 'Realising that the individual, [having duties to other individuals and to the Commu-

nity] to which he [she] belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant.'<sup>53</sup> Ratification of these instruments, which helped shape our Bill of Rights, could therefore provide weight in favour of a horizontal operation of the Bill of Rights.

South Africa is still in the process of becoming a state party to the International Covenant on Economic, Social and Cultural Rights. Although the International Covenant on Economic, Social and Cultural Rights was signed in 1994, it has yet to be ratified.<sup>54</sup> South Africa has ratified both the International Covenant on Civil and Political Rights and another United Nations instrument protecting socio-economic rights, namely the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>55</sup> at the end of 1998. South Africa also ratified a regional instrument, namely the African Charter of Human and Peoples' Rights<sup>56</sup> in 1996. The African Charter covers both civil and political, and socio-economic rights. Although the Preamble to the Charter emphasises the indivisibility and interdependence of these two sets of rights, practice seems to indicate otherwise. There appears to be greater emphasis on civil and political rights at the expense of socio-economic rights. There

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51 On the horizontal application of socio-economic rights, see Liebenberg 'Socio-economic rights' in Chaskalson, Kentridge, Klaaren et al *Constitutional law of South Africa* Cape Town Juta (1996) (Revision Service 3, (1998), 41-1 to 41-45.

52 Clapham *Human rights in the private sphere* Oxford Clarendon Press (1993) 91-4 134.

53 United Nations, Human Rights. *A compilation of international instruments*, Sales No E 88 XIV.1 New York United Nations 1988 7-8 19.

54 Some 135 states have ratified International Covenant on Economic, Social and Cultural Rights (Liebenberg 'The International Covenant on Economic, Social and Cultural Rights and its implications for South Africa' 11 *South African Journal on Human Rights* (1995) 359-378 at 359).

55 (1966) (60 UNTS 195).

56 1981 (came into force in 1986). As the Carter's supervisory body, an African Commission on Human and Peoples' Rights was established in 1987. South Africa has been a member of the Organisation of African Unity since 1994. Apart from the African Charter, this article will not include regional organisations that have addressed human rights.

is also no reference to minorities in the charter.<sup>57</sup>

### 3.2 Socio-economic, and civil and political rights

A discourse on minority rights is a sensitive issue in South Africa where political life has known ethnic and linguistic division since colonial times. Until 1994, a minority population was at the helm of power for over 300 years. It was the representatives of this minority that insisted on the constitutional protection of group or minority rights.<sup>58</sup>

Under the apartheid social policy of separate development that discriminated on the basis of race, blacks, coloureds and Indians had to abide by discriminatory laws and practices in every sphere of their lives, including employment, housing and health care to name but a few. These violations could not be separated from the violations of civil and political rights. In terms of the 1950 Population Registration Act,<sup>59</sup> apartheid segregationist policies divided the majority non-white population along racial (black, coloured and Indian) and even ethnic (for the black population, which was further subdivided into Zulu, Xhosa, etc) lines into a host of minority groups. Cultural differences were stressed and even created. This was reinforced through segregated housing and education.

Instead of an artificial division between the two 'sets' of rights, post-apartheid South Africa has chosen to

adopt a unique and holistic view in this regard. It recognises that these rights are interlinked. Civil and political rights are not emphasised more than socio-economic rights, nor deemed to be more important than the last mentioned. Minority rights, furthermore, form part of socio-economic and cultural rights.

The Bills of Rights in both the interim and final South African Constitutions obligate the government to 'respect, protect, promote and fulfil'<sup>60</sup> a full range of civil, political and socio-economic rights on an equal footing and with the same intensity. They are all equally justiciable. As evident from the Preamble, some of the reasons for adopting this modern approach was to '*[h]eal the divisions of the past ... [i]mprove the quality of life of all citizens and free the potential of each person*' [emphasis added].

It is not, however, uncommon to find both extremes existing in the constitutions of some countries, where either set of rights is given more weight at the expense of the other. It is also not uncommon to find that the two sets of rights are divided into first- (civil and political) and second- (and third-) generation (socio-economic and (cultural)) rights in other constitutions.<sup>61</sup> Fortunately, the only extremity South Africa is 'guilty' of is having moved from one extreme to another – from being a country that protected very few rights of a minority of its citizens – to one that recognises more (almost too many)

57 Patel and Watters *Human rights. Fundamental Instruments and Documents* Durban Butterworths (1994) 141; Thornberry *supra* n 4 at 10.

58 Currie 'Minority rights: Education, culture, and language' in Chaskalson, Kentridge, Klaaren et al *Constitutional law of South Africa* Cape Town Juta (1996) (Revision Service 5 1999) 35–1 to 35–3.

59 Act 30 of 1950.

60 S 7(2). The International Covenant on Economic, Social and Cultural Rights imposes these three obligations on states: obligations to respect, protect and fulfil.

61 Civil and political have enjoyed recognition since the end of the eighteenth century whilst socio-economic rights were acknowledged later during the mid-nineteenth century. Hence they are often described as first- and second-generation rights respectively (De Wet *The constitutional enforceability of economic and social rights. The meaning of the German constitutional model for South Africa* Durban Butterworths (1996) ix. See also Moosa *supra* n 46 at 143 n 92 for detail on third generation (or collective or people's) rights.

rights for all its citizens than almost any other constitutional democracy. 'South Africa is the only jurisdiction to incorporate an extensive list of directly enforceable socio-economic rights into its Constitution.'<sup>62</sup> This constitution can serve as a role model to other societies in the area of socio-economic rights.

The Bill of Rights further sets out socio-economic rights in such a manner that they are not categorised or grouped together under a specific heading. Instead of being hierarchised, they are interspersed between the other rights on an equal level.<sup>63</sup> These rights range from the right to food and water<sup>64</sup> and educational rights<sup>65</sup> to the use of language and participation in cultural life,<sup>66</sup> and the right to form cultural, religious and linguistic communities (S 31).<sup>67</sup>

Included among the civil and political rights recognised by the final Bill of Rights are equality,<sup>68</sup> freedom of 'religion'<sup>69</sup> and association.<sup>70</sup> These rights

should not be in conflict with the Constitution. The final Constitution makes it clear that equality trumps religious rights and can be construed to be the most important value in the Constitution. The equality clause, in turn, has direct relevance for socio-economic rights. There is a close inter-relationship between socio-economic and other rights in the Bill of Rights, such as the right to equality.<sup>71</sup>

### **3.2.1 Protection of socio-economic and civil and political rights**

The problem of accommodating and protecting ethnic, religious and linguistic minorities in a democratic state also dominated the constitutional negotiations leading up to the final constitution.<sup>72</sup> Calls were made for the inclusion of a clause modelled on Article 27 of the International Covenant on Civil and Political Rights into the South African Constitution. However, as indicated,

62 De Waal, Currie and Erasmus *The Bill of Rights handbook* Cape Town Juta (1999) 2nd ed 420.

63 Heyns and Brand 'Introduction to socio-economic rights in the South African Constitution' 2 *Law democracy and development* (1998) 153-167 at 157.

64 S 27.

65 S 29. The right to education is closely related to the exercise of other civil, political and socio-economic rights in the Constitution. See n 78.

66 S 30. s 31 of the interim Constitution dealt with language and culture as follows: 'Every person shall have the right to use the language and to participate in the cultural life of his or her choice'. Note the use of the word 'person' and the implications/meanings attached to it in international instruments and constitutions. The corresponding s 30 of the final Constitution uses the word 'everyone' instead of 'every person' and adds the following qualification: 'but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.' See also s 6(2) and (5) for protection of minority languages.

67 S 31(1) is a new addition to the final Bill of Rights. It recognises (but does not expressly guarantee) the right of persons belonging to a cultural, religious or linguistic community, with other members of the community, to '(a) enjoy their culture, practise their religion and use their language; and (b) form, join and maintain cultural, religious and linguistic associations and other organs of civil society.' However, 31 (2) makes it clear that the 31 (1) right 'may not be exercised in a manner inconsistent with any provision of the Bill of Rights.'

68 S 9.

69 S 15. s 15(1) extends to religion an individual and associative dimension (Moosa *supra* n 46, at 287). s 15 must also be read together with other provisions in the Bill of Rights which favour the exercise of religious freedom. These include s 16(1) relating to freedom of speech and expression; s 18 freedom of association; s 30 (language and culture); s 29(3) dealing with the right to establish independent educational (not precluding religious) institutions at their own expense and finally s 9(3) which proscribes unfair discrimination on the grounds of, among other things, religion and belief.

70 S 18.

71 Liebenberg *supra* n 51 at 4130.

72 Currie *supra* n 58 at 35-1.

Article 27 is strewn with controversial provisions and lacks an authoritative definition of *minority*.<sup>73</sup> Eventually, agreement was reached on a Commission for the Protection and Promotion of the Rights of Cultural, Religious and Linguistic Communities on the basis of/ analogous to Article 27 of the International Covenant on Civil and Political Rights.<sup>74</sup> The word *community* was substituted for Article 27's 'minority' as the latter had connotations of being attached to apartheid ideology. Nonetheless, it should be envisaged as doing the same work as Article 27's category of a 'minority'.<sup>75</sup>

In the same vein, Article 27's category of 'ethnic' has been replaced with 'cultural'.<sup>76</sup> Provisions protecting minorities are found in ss 30 to 31 of the final Constitution (socio-economic rights). Further provisions in the Bill of Rights aimed at minority protection and which must be viewed with sensitivity include s 29(2) regarding the medium of instruction,<sup>77</sup> section 30 on the right to use the language and participate in the culture of choice<sup>78</sup> and s 15(3) which creates the possibility for the legislator to recognise marriages according to religious rites and traditions as well as the systems of personal and family law that are religiously inspired.

Section 31 of the final Constitution seems to provide adequate protection for

minority rights and in this sense conforms with the provisions in international instruments. This is, furthermore, reinforced by the provision in the final constitution for the establishment of the above-mentioned commission. The Human Rights Commission is also tasked with overseeing the measures taken by the relevant organs of state towards the realisation of socio-economic rights.<sup>79</sup> Parliament is duty-bound to ensure the 'progressive realisation'<sup>80</sup> of these rights by way of, for example, legislation and it also has to give normative content to these rights. Group rights have, for example, been favoured over human rights in the area of affirmative action. There are also other commissions protecting and promoting the rights of communities<sup>81</sup> and women.<sup>82</sup>

### 3.2.2 Positive and negative rights

The Bill of Rights places both negative obligations (prohibitions) on the state to refrain from conduct which infringes these rights and positive obligations to guarantee equal access to these rights. Emphasis is on access rather than that such rights be perceived 'as commodities to be dispensed by the state on demand and free of charge'.<sup>83</sup> In contrast, socio-economic rights are formulated in the International Covenant on Economic, Social and Cultural Rights

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73 Moosa *supra* n 46 at 406–407.

74 S 185–186 of the final Constitution.

75 Currie *supra* n 58 at 35–15. See n 1.

76 Currie *ibid* at 3516.

77 See n 65.

78 While ss 29 and 31 had a rough passage through the constitutional drafting process, s 30 had a relatively easy passage (Currie *supra* n 58, at 35–5).

79 S 184(3). See n 48.

80 Formulations such as 'progressive realisation', taking into account 'available resources' and the adoption of 'legislative and other measures' are all derived from the International Covenant on Economic, Social and Cultural Rights. See, for example, Article 2(1) of the International Covenant on Economic, Social and Cultural Rights and the text to footnote 50.

81 See n 74.

82 The Commission for Gender Equality (S 187).

83 Liebenberg *supra* n 51 at 41–27 41–33.

and other international instruments as direct rights.<sup>84</sup>

Socio-economic rights are meant to give (especially ordinary) people social, economic and cultural security. They are said to be positive rights and therefore require government action. This is a hard act for government to follow. Rather than delivery, emphasis is placed on access. Already before its formal inclusion in the constitution, several arguments of an academic and public nature were put forward both in favour of, and against, its inclusion.<sup>85</sup> As indicated, the same was true as far as the problem of accommodating and protecting ethnic, religious and linguistic minorities was concerned.<sup>86</sup>

Unlike socio-economic rights, civil and political rights are negative in nature, placing negative obligations on the state not to interfere with individual freedom. They therefore do not necessarily require material resources for their implementation. The positive nature of socio-economic rights could be one possible explanation as to why the International Covenant on Economic, Social and Cultural Rights remains unratified. Ratification subject to reservations and restrictions would also make a mockery of a state's commitment to socio-economic rights.

The International Covenant on Economic, Social and Cultural Rights has played an important role over the past 30 years in giving credibility to, and raising the status of, socio-economic rights away from the stigma of 'second generation' attached to it. Ratification of this convention will therefore help South Africa to equalise or balance the two sets of rights.

#### 4 Conclusion

The spectrum of state policies towards minority groups ranges from assimilation, integration, fusion, pluralism to segregation.<sup>87</sup> If the instruments themselves are not able to provide adequate guidance or protection, then countries ought to do so via specific legislation. Constitutions, most of which contain human rights chapters, appear to be freer or more explicit than international law in relation to the treatment of minorities and recognition of their existence.<sup>88</sup>

International instruments themselves have their own share of inconsistencies, and ultimately, the protection offered by these instruments becomes meaningless as they cannot compete with political expediency and cultural ramifications. Factors such as law, politics, religion and culture have influenced the measure and application of human rights (especially in so far as they relate to women and minorities) in states.

Minority rights have their strongest protection in an instrument dealing with civil and political rights. Apart from a declaration, there is no binding United Nations convention on minority rights and this leads to the inference or assumption that these instruments merely have theoretical effect. Even though countries may not necessarily have ratified United Nations instruments in this regard, they can be constitutionally bound to uphold these rights in cases where international law is incorporated into their constitutions.

While it is true that international law recognises minorities as major claimants in the field of rights, and is also very strong on the principle of non-

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84 Heyns and Brand *supra* n 63 at 159.

85 The focus will not be on these debates. For detail, see De Wet *supra* n 61 at 92–93.

86 See 3.2 and 3.2.1.

87 Thornberry *supra* n 4 at 4.

88 Thornberry *ibid* at 9.

discrimination, it is also true that United Nations instruments, by not being able even to define minorities clearly, do not regard the rights of minorities as a serious enough issue and one deserving of adequate protection. Although this has contributed to dividing rather than uniting nations, United Nations instruments must, however, be seen in context. These texts were conceived as responses to perceived needs at a particular time in history. They were drawn up rather quickly and with the best expertise available.

Human rights have moved from being defined as essentially 'negative' in nature to include 'positive' socio-economic and cultural rights. Emphasis has, furthermore, been on the individual rather than the needs and rights of groups. A balance should be struck between the observation of individual rights and the preservation of the identity of minorities. Both individuals and groups can be the victims of violations of socio-economic rights. Groups include women, children and minorities. South Africa has recognised the need for state protection by providing constitutional guarantees for the protection of cultural, linguistic and religious minorities. While socio-economic rights are established in international law, and even in the South African Constitution, they have to be recognised by society in General. Ratification of United Nations instruments is therefore not the only answer or total solution. Declarations must be seen in context. While their normative principles should remain intact, regard must be had to changing needs and circumstances.

The fact that South Africa has to date not ratified the International Covenant on Economic, Social and Cultural Rights does not bode well for minorities. Even though socio-economic and civil and

political rights are interlinked, non-ratification of the main United Nations instrument protecting socio-economic rights forces minorities to rely 'indirectly' on an instrument that is really meant to protect civil and political rights. The fact that minority rights are classified under socio-economic rights means that minorities can essentially only rely on the International Covenant on Civil and Political Rights for international protection as the United Nations Minority Declaration does not have binding status. This, then, should be seen as additional motivation in favour of ratification of the International Covenant on Economic, Social and Cultural Rights.

The fact that there are two separate United Nations international covenants, one on civil and political ('first'-generation) rights and the other on economic, social and cultural ('second'-generation) rights, is deemed to create an unnatural division between rights which clearly overlap and are indivisible. Whilst acknowledging that civil rights require freedom from state interference and socio-economic rights require state protection and assistance, this division has, nonetheless, resulted in the former set of rights being given an elevated status while the latter has been neglected. This view is endorsed by many international authors writing on the subject of socio-economic rights, who also disagree with the unnatural division of rights into first, second and even third generations.<sup>89</sup> The fact that both these groups of rights exist alongside each other in the Bill of Human Rights in South Africa's final Constitution is a clear break from this tradition and will allow for more creative approaches to ensure enforcement of these rights by the various role-players. The convention on

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89 See, for example, Eide and Rosas *supra* n 3 at 15–17, as but one example; See also n 61.

the Rights of the Child (1989)<sup>90</sup> is an example of a recent United Nations instrument where the two sets of rights have been integrated into one text. Sometimes, however, having these rights is meaningless if they cannot be accessed. Even if, hypothetically speaking, South Africa did ratify the International Covenant on Economic, Social and Cultural Rights, this does not necessarily mean that she can adequately protect and give effect to these rights.

Even though United Nations instruments themselves are also problematic, they provide valuable insight with regard to human rights and related issues for South Africa. The elevated status of international instruments in the final South African Constitution is to be commended, although there are still

some instruments that await ratification. Some of these instruments have been interpreted as having a horizontal operation, and hence ratification has added, and could add, more weight to a horizontal operation of the Bill of Rights. International experience indicates that the effect of ratification is minimised by reservations placed on these instruments. However, equality is the most important value in the final South African Constitution and, furthermore, trumps religious rights. This is reinforced by the powers and function of the various commissions. While international law can provide useful guidelines, South Africa needs to draw on her own past experiences and peculiar circumstances to determine the way forward.

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90 As indicated in n 49, South Africa ratified this Convention in 1995.