

Litigating the Rights of Minorities and Indigenous Peoples in Domestic and International Courts

Studies in Territorial and Cultural Diversity Governance

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Litigating the Rights of Minorities and Indigenous Peoples in Domestic and International Courts

Edited by

Bertus de Villiers, Joseph Marko,
Francesco Palermo and Sergiu Constantin



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Abbreviations

ACFC	Advisory Committee on the Framework Convention for the Protection of National Minorities
ACHR	American Convention on Human Rights
CBD	Convention on Biological Diversity
CC	Constitutional Court of South Africa
ECHR	European Convention on Human Rights
ECRML	European Charter for Regional or Minority Languages
FCNM	Framework Convention for the Protection of National Minorities
FSA	Foreshore and Seabed Act 2004 (New Zealand)
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
HCA	High Court of Australia
HCCJ	High Court of Cassation and Justice of Romania
ILO	International Labour Organization
MP	Member of Parliament
NTA	Native Title Act 1993 (Australia)
OAS	Organization of American States
SALRC	South African Law Reform Commission
SCA	Supreme Court of Appeal of South Africa
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDRM	United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities
UNDRIP	United Nations Declaration of the Right of Indigenous Peoples
WLCT	Women's Legal Centre Trust

Case Law

Domestic Jurisprudence

Australia

- Akiba v Queensland (No 3)* [2010] FCA 643, 204 FCR I.
- Akiba v Commonwealth* [2013] HCA 33, 250 CLR 209.
- Aplin on behalf of the Waanyi Peoples v Queensland* [2010] FCA 625.
- Coe v Commonwealth of Australia* [1979] 24 ALR 118.
- Cubillo v Commonwealth* [2000] FCA 1084; 103 FCR 1; 174 ALR 97.
- Desmond Gibbs v Lyle Capewell, Australian Electoral Commission and Minister of Aboriginal and Islander Affairs* [1995] FCA 1048; (1995) 128 ALR 577 (1995) 54 FCR 503 (3 February 1995).
- Gale v Minister of Land and Water Conservation for the State of New South Wales* [2004] FCA 374.
- Gumana v Northern Territory* [2005] 141 FCR 457; [2005] FCAFC 23; (2007) FCAFC 23.
- Harrington-Smith on behalf of the Wongatha People v Western Australia (no. 9)* [2007] FCA 31.
- Lardil Peoples v State of Queensland* [2004] FCA 298.
- Love v Commonwealth of Australia and Thoms v Commonwealth of Australia* [2020] HCA 3.
- Mabo v Queensland (no. 1)* [1988] 166 CLR 186.
- Mabo v Queensland (no. 2)* [1992] 175 CLR 1.
- Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] 77 ALJR 356 (HCA).
- Members of the Yorta Yorta Aboriginal Community v The State of Victoria* [2001] FCR 244
- Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia* [1971] FLR 141.
- R v Cobby* [1883] 4 LR NSW 355.
- R v Murrell* [1836] 1 Legge 92.
- R v Neddy Monkey* [1861] 1 Wand W (L) 40.
- Shaw v Wolf* [1998] 163 ALR 205, 211–212.
- Trevorrow v State of South Australia* [2007] SASC 285.
- Wacando v Commonwealth* [1981] 148 CLR 1.
- Western Australia v Commonwealth* [1995] 183 CLR 373 (HCA).
- Western Australia v Ward* [2002] HCA 28; 213 CLR 1; 191 ALR 1; 76 ALJR 1098.
- Wik Peoples v Queensland* [1996] 187 CLR 1.

Austria

Constitutional Court of Austria. 2001. Decision of 13 December 2001, VfSlg 16.404/2001.

Belize

Aurelio Cal in his own behalf and on behalf of the Maya Village of Santa Cruz and others v The Attorney General of Belize and the Minister of Natural Resources and Environment; Manuel Coy in his own behalf and on behalf of the Maya Village of Conejo and Others v The Attorney General of Belize and the Minister for Natural Resources and Environment. Claim Nos. 171 and 172 of 2007; Judgment of 18 October 2007.

Maya Leaders Alliance and the Toledo Alcaldes Association on behalf of the Maya Villages of Toledo District and Others v Attorney General of Belize and Others. Claim no. 366 of 2008; Judgment of 28 June 2010.

Bosnia and Herzegovina

Constitutional Court. 2000. Partial Decision Part 3 of 1 July 2000, Case no. U 5/98 III (*Constituent Peoples* case).

Botswana

Sesana and Others v Attorney General [2006] BWHC 1.

Canada

Calder v Attorney General of British Columbia [1973] SCR 313.

Delgamuukw v British Columbia [1997] 3 SCR 1010.

Guerin v. The Queen [1984] 2 SCR 335.

Haida Nation v British Columbia (Minister of Forests) [2004] 3 SCR 511, 2004 SCC 73.

Mitchell v M.N.R. [2001] 1 SCR 911, SCC 33.

R v Côté [1996] 3 SCR 139.

R v Van der Peet [1996] SCR 507 SCC.

Roberts v Canada [1989] 1 SCR 322.

Smith v The Queen [1983] 1 SCR 554.

Colombia

Constitutional Court. 2001. Judgment C-169/01 of 14 February 2001.

Croatia

Constitutional Court. 1995. Decision of 2 February 1995 in Case no. U-II-433/1994.

Constitutional Court. 2003. Decision of 23 January 2003 in Case no. U-III-322/1999.

Constitutional Court. 2014. Decision of 12 August 2014 in Case no. U-VIIR-4640/2014

Constitutional Court. 2019. Decision of 2 July 2019 in Case no. U-II-1818/2016.

Finland

Supreme Administrative Court. 1999. Judgment 22.09.1999/3181.

Supreme Administrative Court. 2003. Judgment 19.09.2003/2223.

Supreme Administrative Court. 2011. Judgment 26.09.2011/2710.

Supreme Administrative Court. 2015a. Judgment 30.09.2015/2601.

Supreme Administrative Court. 2015b. Judgment 30.09.2015/2602.

Supreme Administrative Court. 2015c. Judgment 30.09.2015/2603.

Supreme Administrative Court. 2015d. Judgment 30.09.2015/2604.

Supreme Administrative Court. 2016a. Judgment 13.01.2016/61.

Supreme Administrative Court. 2016b. Judgment 13.01.2016/79.

Supreme Administrative Court. 2019. Judgment 05.07.2019/3166.

Indonesia

Constitutional Court of Indonesia. 2017. Decision no. 97/PUU-XIV/2016 of 7 November 2017.

Kenya

William Yatich Sitetalia and Others v Baringo County Council (Civil Case no. 183/2000; Judgment of 19 April 2002).

Latvia

Constitutional Court. 2003. Judgment of 5 June 2003 in Case no. 2003-02-0106.

Constitutional Court. 2005. Judgment of 13 May 2005 in Case no. 2004-18-0106.

Constitutional Court. 2019a. Judgment of 23 April 2019 in Case no. 2018-12-01.

Constitutional Court. 2019b. Judgment of 13 November 2019 in Case no. 2018-22-01.

Lithuania

Constitutional Court. 1999. Decision of 21 October 1999 in Case no. 14/98.

Constitutional Court. 2009. Decision of 6 November 2009 (Interpretation of its Decision in Case no. 14/98 of 21 October 1999).

Constitutional Court. 2014. Decision of 27 February 2014 (Interpretation of its Decision in Case no. 14/98 of 21 October 1999).

Supreme Administration Court. 2009. Decision of 30 January 2009 in Case no. A-756-152/2009.

Supreme Administration Court. 2011. Decision of 8 July 2011 in Case no. A-662-2474/2011.

Supreme Administration Court. 2013. Decision of 30 September 2013 in Case no. A-520-1271/2013.

Supreme Administrative Court. 2017. Decision of 28 February 2017 in Case no. A- 2445-624/2017.

Malaysia

Adong bin Kuwau and Ors v Kerajaan Negeri Johor and Anor [1997] 1 MLJ 418.
Superintendent of Lands & Surveys, Miri Division and Government of Sarawak v Madeli bin Salleh [2007] 6 CLJ 509, 2008 MLJ 677.

Moldova

Constitutional Court. 2013. Decision no. 36/2013 of 5 December 2013.

Constitutional Court. 2017. Opinion no. 3/2017 of 31 October 2017.

Constitutional Court. 2018. Decision no. 17/2018 of 4 June 2018.

New Zealand

Ngati Apa v Attorney General [2003] NZCA 117; [2003] 3 NZLR 643.

Faulkner v Tauranga District Council [1996] 1 NZLR 357.

Re Marlborough Sounds Foreshore and Seabed [2002] 2 NZLR 661.

Re the Ninety Mile Beach [1963] NZLR 461.

R v Symonds [1847] NZHC 1; NZPCC 387.

Te Weehi v Regional Fisheries Officer [1986] 1 NZLR 680 (HC).

Te Runanganui o Te Ika Whenua Inc Society v Attorney General [1994] 2 NZLR 20.

Wi Parata v The Bishop of Wellington [1877] 3 NZ Jur (NS) 72 (SC).

North Macedonia

Constitutional Court. 1998. Decision no. 49/1998-0-0 of 20 May 1998.

Constitutional Court. 2010. Decision no. 70/2010-0-1 of 14 July 2010.

Peru

Constitutional Court. 2010. Judgment 0022-2009-PI/TC of 9 June 2010.

Romania

Constitutional Court. 2001. Decision no. 112/2001 of 9 April 2001.

Constitutional Court. 2011. Decision no. 2/2011 of 4 January 2011.

High Court of Cassation and Justice. 2013. Decision no. 2968/2013 of 7 March 2013.

High Court of Cassation and Justice. 2014. Decision no. 1438/2014 of 20 March 2014.

Russian Federation

Constitutional Court. 1998. Decision no. 12-π of 27 April 1998.

Constitutional Court. 2004. Decision no. 16-π of 16 November 2004.

Slovakia

Constitutional Court. 1997. Judgment no. 260/1997 of 26 August 1997.

South Africa

Alexkor Ltd and Another v The Richtersveld Community and Others [2004] 5 SA 460 (CC).

AM v RM [2010] (2) SA 223 (ECP).

Amod v Multilateral Motor Vehicle Accidents Fund [1997] (12) BCLR 1716 (D).

Amod v Multilateral Motor Vehicle Accidents Fund [1998] (4) SA 753 (CC).

Amod v Multilateral Motor Vehicle Accidents Fund [1999] (4) SA 1319 (SCA).

Arendse v Arendse [2013] (3) SA 347 (WCC).

August v Rens [1836] 1 SC 203.

Bronn v Frits Bronn's Executors [1860] 3 SC 313.

Builders Ltd v Union Government (Minister of Finance) [1928] AD 46.

Cassim v Cassim [2006] TPD (Unreported Case no. 3954/06).

Certification of the Amended Text of the Constitution of the Republic of South Africa [1997] (2) SA 97 (CC).

Daniels v Daniels [1998] CPD (Unreported Case no. 9787/98).

Daniels v Campbell [2003] (9) BCLR 969 (C).

Daniels v Campbell [2004] (7) BCLR 735 (CC).

De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being [2015] JOL 32433 (SCA).

Esop v Union Government (Minister of the Interior) [1913] CPD 133.

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).

Ex Parte Chairperson of the Constitutional Assembly: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, [1997] (2) SA 97 (CC).

Faro v Bingham [2013] ZAWCHC 159.

Gaum v Janse Van Rensburg [2019] JOL 41528 (GP).

Harksen v Lane [1998] (1) SA 300 (CC).

Hassam v Jacobs [2008] 4 All SA 350 (C).

Hassam v Jacobs [2009] (5) SA 572 (CC).

- Hoosain v Dangor* [2010] 2 All SA 55 (WCC).
Ismail v Ismail [1983] (1) SA 1006 (A).
Ismail v Ismail [2007] JOL 19769 (E).
Jajbhay v Cassim [1939] AD 537.
Jamalodeen v Moola [2006] NPD (Unreported Case no. 1835/06).
Kalla v The Master [1995] (1) SA 261 (T).
Khan v Khan [2005] (2) SA 272 (T).
Law Union and Rock Insurance Co Ltd v Carmichael's Executor [1917] AD 593.
Mashia Ebrahim v Mahomed Essop [1905] TS 59.
MM v MM [2019] ZAWCHC 158.
Moosa v Harneker [2017] (6) SA 425 (WCC).
Moosa v Minister of Justice and Correctional Services [2018] (5) SA 13 (CC).
Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa [2000] (2) SA 674 (CC).
R v Sukina [1912] TPD 1079.
Richtersveld Community and Others v Alexkor Ltd and Another [2001] 3 SA 1293 (LCC).
Richtersveld Community and Others v Alexkor Ltd and Another [2003] 6 SA 104 (SCA).
Ryland v Edros [1997] (1) BCLR 77 (C).
S v Johardien [1990] (1) SA 1026 (C).
S v Makwanyane [1995] (3) SA 391 (CC).
Santam Bpk v Henery [1999] (3) SA 421 (SCA).
Seedat's Executors v The Master (Natal) [1917] AD 302.
Solomons v Abrams [1991] (4) SA 437 (W).
Taylor v Kurtstag [2005] (1) SA 362 (W).
Women's Legal Centre Trust v President of the Republic of South Africa [2009] (6) SA 94 (CC).
Women's Legal Centre Trust v President of the Republic of South Africa [2018] (6) SA 598 (WCC).

Ukraine

- Constitutional Court. 1999. Decision no. 10-pn/1999 of 14 December 1999.
 Constitutional Court. 2000. Decision no. 9-pn/2000 of 12 July 2000.
 Constitutional Court. 2007. Decision no. 13-pn/2007 of 20 December 2007.
 Constitutional Court. 2008. Decision no. 8-pn/2008 of 22 April 2008.
 Constitutional Court. 2010. Decision no. 4-pn/2010 of 2 February 2010.
 Constitutional Court. 2018. Decision no. 2-p/2018 of 28 February 2018.
 Constitutional Court. 2019. Decision no. 10-p/2019 of 16 July 2019.

United Kingdom

Adeyinka Oyekan and Others v Musendiku Adele [1957] 2 All ER 785 (PC) 198.

Amodu Tijani v The Secretary, Southern Provinces [1921] 2 AC 399 (PC).

Cooper v Stuart [1889] AC 286.

Nireaha Tamaki v Baker (1901) NZPC 1; [1901] UKPC 18; [1901] AC 561; (1901) NZPCC 371.

Re Southern Rhodesia [1919] AC 211 (PC).

Tamaki v Baker [1901] NZPC 1; [1901] UKPC 18; [1901] AC 561; (1901) NZPCC 371.

United States

Johnson v McIntosh 21 US (8 Wheat) 543 (1823).

International Jurisprudence

African Commission on Human and Peoples' Rights

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya. Communication no. 276/2003, 2 February 2010.

Inter-American Commission of Human Rights

The Kaliña and Lokono Peoples. Report no. 79/13, Case 12.639, 18 July 2013 (Merits).

Mary and Carrie Dann v. United States. Report no. 75/02, Case 11.140. 27 December 2002 (Merits).

Maya Indigenous Communities of the Toledo District v Belize. Report no. 40/04, Case 12.053, 12 October 2004 (Merits).

Inter-American Court of Human Rights

Case of Castillo Páez v. Peru. Judgment of 3 November 1997. Series C no. 34 (Merits).

Case of Lysias Fleury et al. v. Haiti. Judgment of 23 November 2011. Series C no. 236 (Merits and reparations).

Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina. Judgment of 6 February 2020, Series C no. 400 (Merits, reparations and costs).

Case of the Kaliña and Lokono Peoples v. Suriname. Judgment of 25 November 2015. Series C no. 309 (Merits, reparations and costs).

Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Judgment of 27 June 2012. Series C no. 245 (Merits and reparations).

- Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua.* Judgment of 31 August 2001. Series C no. 79 (Merits, reparations and costs).
- Case of the Moiwana Community v. Suriname.* Judgment of 15 June 2005. Series C no. 124 (Preliminary Objections, merits, reparations and costs).
- Case of the Saramaka People v. Suriname.* Judgment of 28 November 2007. Series C no. 172 (Preliminary Objections, merits, reparations, and costs).
- Case of the Sawhoyamaxa Indigenous Community v. Paraguay.* Judgment of 29 March 2006. Series C no. 146 (Merits, reparations and costs).
- Case of Velásquez-Rodríguez v. Honduras.* Judgment of 26 June 1987. Series C no. 1 (Preliminary objections).
- Case of the Xákmok Kásek Indigenous Community v. Paraguay.* Judgment of 24 August 2010. Series C no. 214 (Merits, reparations, and costs).
- Case of the Xucuru Indigenous People and its members v. Brazil.* Judgment of 5 February 2018. Series C no. 346 (Preliminary Objections, merits, reparations and costs).
- Case of the Yakye Axa Indigenous Community v. Paraguay.* Judgment of 17 June 2005. Series C no. 125 (Merits, reparations and costs).
- Rosendo Cantú et al. v. Mexico.* Judgment of 31 August 2010. Series C no. 216 (Preliminary objection, merits, reparations and costs).

International Court of Justice

Western Sahara Advisory Opinion 1975 ICJ Reports, 12.

UN Human Rights Committee

- Äärelä and Näkkäljärvi v Finland.* 2001. Communication no. 779/1997, UN Doc. CCPR/C/73/D/779/1997, Views adopted on 24 October 2001.
- Barzhig v France.* 1991. Communication no. 327/1988, UN Doc. CCPR/C/41/D/327/1988, Views adopted on 11 April 1991.
- Cadoret and Bihan v France.* 1991. Communication nos. 221/1987 and 323/1988, UN Doc. CCPR/C/41/D/323/1988, Views adopted on 11 April 1991.
- Diergaardt et al. v Namibia.* 2000. Communication no. 760/1996, UN Doc. CCPR/C/69/D/760/1996, Views adopted on 25 July 2000.
- Howard v Canada.* 2005. Communication No. 879/1999, UN Doc. CCPR/C/84/D/879/1999, Views adopted on 26 July 2005.
- Kitok v Sweden.* 1988. Communication no. 197/1985, UN Doc. CCPR/C/33/D/197/1985, Views adopted on 27 July 1988.
- Käkkäljärvi et al. v Finland.* 2018. Communication no. 2950/2017, UN Doc. CCPR/C/124/D/2950/2017, Views adopted on 2 November 2018.
- Länsman et al v Finland.* 2005. Communication no. 1023/2001, UN Doc. CCPR/C/83/D/1023/2001, Views adopted on 17 March 2005.

- Lovelace v Canada*. 1981. Communication no. 24/1977, UN Doc. CCPR/C/13/D/24/1977, Views adopted on 30 July 1981.
- Lubicon Lake Band v Canada*. 1990. Communication no. 167/1984, UN Doc. CCPR/C/38/D/167/1984, Views adopted on 26 March 1990.
- Mavlonov and Sa'di v Uzbekistan*. 2009. Communication no. 1334/2004, UN Doc. CCPR/C/95/D/1334/2004, Views adopted on 19 March 2009.
- Poma Poma v Peru*. 2009. Communication no. 1457/2006, UN Doc. CCPR/C/95/D/1457/2006, Views adopted on 27 March 2009.
- Sanila-Aikio v Finland*. 2018. Communication no. 2668/2015, UN Doc. CCPR/C/124/D/2668/2015, Views adopted on 1 November 2018.
- Waldman v Canada*. 1999. Communication no 694/1996, UN Doc. CCPR/C/67/D/694/1996, Views adopted on 3 November 1999.

Introduction

Bertus de Villiers

The protection of the rights of minorities and individuals who belong to minorities and Indigenous peoples remains at the epicentre of contemporary constitutional design and political dynamics. The challenges posed to accommodate diverse populations within the same democratic and political arrangements remain arguably as complex as ever. Flashpoints of political instability can regularly be traced to the demands by marginalised minorities and Indigenous peoples to be more effectively accommodated by the political system. Promising progress has been made in international law and non-binding conventions to crystallise minimum standards to protect the rights of persons who belong to minorities and Indigenous peoples, but the practical application of those standards in the municipal law of states remain an ongoing challenge. To add to the complexity one must note that principles of minority protection in international law are not yet settled or static, but are subject to ongoing debate, developments and adjustments. Similarly, comparative constitutional law and political studies contribute to a wealth of insights into country experiences, albeit that each constitutional case study is unique to its own history and circumstances.

The role of the judiciary in minority-protection arrangements has shown itself to be essential in the multitude of new constitutional arrangements. The judiciary is often the last bastion to protect individuals and the communities to which they belong. In each of the case studies discussed in this book the unique role of the judiciary as a protector of rights is highlighted.

The responsibility of the judiciary to interpret novel and complex constitutional provisions has become more pronounced as unique constitutional settlements and statutory arrangements have become the norm rather than the exception. Constitution drafters often reach settlements that are expedient at the time, but present challenges to those who are required to operationalise and implement the constitution. This may be by design or even oversight. Constitution makers sometimes purposely do not address all issues in order to reach a constitutional settlement and leave it to the judiciary to interpret and implement. The judiciary is not surprisingly frequently called upon not only to interpret constitutional provisions, but to fill in gaps; to balance seemingly competing and even contradictory parts; and to create a symbiosis that would

enable the various organs of government to discharge their functions without the courts becoming *de facto* legislators.

The demands placed on the judiciary to give content to rights and to protect the rights of individuals that belong to minorities and Indigenous peoples are, arguably, more demanding than ever. The *transformative* role of the judiciary, as has been stated by the Constitutional Court of South Africa, inevitably also brings the courts within the realm of public discourse, controversy, debate and criticism in a manner than may not have been experienced previously. It is not unknown for some justices to adopt a socially progressive agenda that informs and influences the manner in which the courts resolve disputes. This is highlighted in the chapter by Barrie where the High Court of Australia after more than two centuries of denial, declared the ongoing existence of native title. On the other hand there are also many examples of justices applying the law in a manner that comforts the majority and thereby causes further frustration to marginalised groups. This element is highlighted by Palermo and Constantin in their criticism of some judgments in Central, Eastern and South-Eastern European countries where courts have not infrequently adhered to majoritarian principles. The respective chapters highlight how the highest courts in different countries have in effect become not mere interpreters of the law, they are law makers albeit in a different form and in a more restricted manner than the functions of a parliament.

This book specifically endeavours to focus on trend-setting judgments that have in different parts of the world impacted on the rights of individuals who belong to minorities and Indigenous peoples. Those judgments are of course not representative of the total spectrum of jurisprudence involving the rights of minorities, but the respective chapters attempt to highlight cases that may bear relevance to international and constitutional law. The cases illustrate how the judiciary has been called upon to fill out the detail of minority protection arrangements and how, in doing so, in many instances the judiciary has taken the respective countries on a course that parliament may not have been able to navigate.

In this book authors from various nationalities and backgrounds in the practical application of minority protection arrangements investigate the role of the judiciary in constitutional arrangements aimed at the protection of the rights of minorities and Indigenous peoples. The book highlights the essential role of the judiciary, ranging on the one hand from interpreting constitutional provisions to on the other hand directing society onto new pathways that had not been considered by the parliament. Two examples discussed in this book can be referred to in order to substantiate this observation: Barrie shows how the High Court of Australia has forced that country into accepting the existence

of native title of Aboriginal peoples regardless of centuries of denial by politicians, whilst Rautenbach highlights how the Constitutional Court of South Africa has obligated the parliament of that country to find ways to address the rights of women within the context of Muslim family arrangements. In both instances the respective parliaments were unlikely to have addressed these issues at their own volition, but the trend-setting role of the courts obliged the legislators into action. Tomaselli and Cittadino expand on Barrie's theme by reference to key judgments within the South American context affecting the rights of Indigenous peoples. That region has now become a reference point for the recognition of Indigenous rights.

In properly discharging their functions, the judiciary will inevitably find itself at odds with the majority. This presents particularly unique challenges to judiciaries in young and emerging democracies. As is highlighted in this book by Palermo and Constantin, the challenge for the judiciary to give practical content to promissory cultural and language rights in Central, Eastern and South-Eastern Europe is daunting. Those challenges are not dissimilar to the attempts by the judiciary in Indonesia to recognise and give effect to the religious rights of Indigenous peoples of that country. Isra and Faiz examine in this regard the attempts to recognise traditional religious beliefs in Indonesia and the role of the Constitutional Court to give recognition to those traditional faiths and beliefs. De Villiers also points to the difficulties experienced by the highest courts in countries such as Australia and Finland to ascertain who belongs to a community – minority or Indigenous people – and potential lessons that can be drawn from case studies in selected jurisprudence. The irony pointed out by De Villiers is that in some instances, such as those of the Sámi, the court, which do not reflect in composition the Sámi, has opted for a wider definition of membership of the Sámi than the Sámi representatives would prefer. This shows how even *within* minority and Indigenous communities there are issues on which guidance may be sought from the judiciary.

The risks of what some would describe as an activist judiciary is obvious. The appointment of justices become more politically motivated; the risk of justices being removed from office increases; the judiciary becoming caught up in the party political arena; and the judiciary becomes the news rather than resolving disputes that are newsworthy. But at the same time courts have always been subject to criticism for not adhering to the will of the majority; of being independent; of being lawmakers to a certain degree; and to influence the direction of society. In essence the role of the judiciary is to look after the non-majority; the individual; the fringe group; the minority; and the marginalised. If the judiciary does not care for the rights of the non-majority, who would?

This book offers an analysis and assessment of a kaleidoscope of judgments of high courts in the area of the rights of minorities and Indigenous peoples. The respective authors focus on issues that are not only of relevance to a specific nation, but issues that may reverberate outside of the jurisdiction to other countries. The book is therefore not merely introspective on a specific country, but also attempts to contribute to a wider jurisprudence debate about the role of the judiciary in the protection of minority rights.

The book originates from a grant that Bertus de Villiers received from the Alexander von Humboldt Stiftung (Germany) for *Innovative Research Networking*. The project entailed a three year series of workshop on contemporary constitutional jurisprudence. One workshop was held in Australia and two in Indonesia. Most of the authors in this book attended some or all of the workshops. The editors finally identified key areas in which major jurisprudential reforms had taken place or are still in the process of evolving to be the focus of this book.

George Barrie explains how the so-called doctrine of discovery which was used by colonial powers to justify control over the Indigenous peoples and their lands within their colonies, had an enduring impact on the lives of Indigenous peoples. Australia was no exception. In *Mabo (No 2) v Queensland* the majority of the High Court of Australia in 1992 overturned the doctrine of discovery holding that the common law of Australia would perpetuate injustice if it were to continue to embrace such a doctrine. The court held that the native title of the Indigenous peoples continued to exist as a sovereign legal system unless explicitly extinguished by the colonial power. Native title therefore exists over vast areas of the Australian landscape and its recognition has fundamentally impacted on the relationship between Aboriginal and white Australians. This judgment was seen to be revolutionary and had a major impact on judgments in fraternal jurisdictions such as New Zealand, Canada, South Africa and other former British colonies. It also influenced the African Commission on Peoples' and Human Rights and the Inter-American Court of Human Rights. *Mabo* set in motion an international reassessment of the rights of Indigenous peoples to their traditional lands, territories and resources.

Bertus de Villiers highlights the complexity to resolve conflicts about membership of a minority or an Indigenous community. He calls this the elephant in the room since much focus is often spent on the generic debate on minority protection, but the practical aspect of who is in fact a member of a specific community is often neglected. He points out that although minority protection arrangements are based on freedom of association, the courts have nevertheless been called upon to resolve disputes about membership. In this regard he refers to several judgments in Finland in regard to the Sámi and in Australia

in regard to Aboriginal peoples. He also notes that in New Zealand registration as a Māori voter is entirely discretionary and the same also applies to Hungary where persons may at their own volition register on the national lists. He concludes by making observation about how international jurisprudence may be relevant to implementation Section 235 of the Constitution of South Africa which foreshadows self-determination of cultural and language communities, but without explaining how those communities would be defined or how membership would be ascertained.

Christa Rautenbach analyses how South African courts have been at the forefront of transforming family law by affording protection to Muslim women involved in relationships that are not legally recognised. Through a series of judgments the courts have shed light on the inadequacies of existing legislation. The case law reads like a jurisprudential chronicle, and the judgments reflect the changing values of a diverse society on the move. South Africa is a typical society in transformation as has been described by the Constitutional Court. This chapter guides readers through the earliest cases of intolerance to the latest ones, which illustrates an unprecedented celebration of difference by accommodating aspects of Muslim family law to protect the vulnerable in unrecognised marriage-like relationships. The chapter also highlights the role of the judiciary to identify shortcomings in the legislative regime, but to leave it to parliament to address gaps and to enact appropriate policy measures.

Saldi Isra and Pan Mohamad Faiz explain how followers of traditional beliefs in Indonesia, whose status was not accommodated in administrative citizenship documents, had often suffered discriminatory policies in the fields of education, employment, banking, births, marriage and funerals. Their chapter discusses a landmark judgment made by the Indonesian Constitutional Court to protect followers of traditional beliefs in matters of population administration, which has implications for the fulfilment of their constitutional rights. This judgment has the potential to create a precedent in other societies where traditional laws and customs have been neglected. This judgment also highlights the role of the judiciary in young and emerging democracies and essentially the importance that legislative and executive arms respect and uphold those judgments.

Alexandra Tomaselli and Federica Cittadino discuss the contribution of the Inter-American Court of Human Rights to the fine-tuning of the content and the exercise of three crucial rights of Indigenous peoples, i.e., to land, participation, and consultation. The chapter explores the Court's self-defined "evolutionary interpretation" of human rights (*Mayagna (Sumo) Awas Tingni Community v. Nicaragua* 2001, para. 148) as well as the content and the legal argumentation techniques in two recent and landmark decisions, namely the

Case of the Kichwa Indigenous People of Sarayaku v. Ecuador (2012) and the *Case of the Kaliña and Lokono Peoples v. Suriname* (2015). The chapter read with the contribution of George Barrie demonstrates how there are norm developing in customary international law about consultation with and recognition of Indigenous peoples.

Francesco Palermo and Sergiu Constantin highlight how since the 1990s, linguistic rights of national minorities underwent an extraordinary development in Central, Eastern, and South-Eastern Europe. However, their implementation has not been straightforward for several reasons, including high politicisation and geopolitical considerations affecting various countries of the region. This chapter discusses the litigation of linguistic rights by examining the relevant domestic case law and, above all, by trying to infer the underlying principles developed by the high courts. It shows that courts are overall quite deferential to the general political climate in their respective country. At the same time, however, some judgments clearly indicate that courts try to emancipate from the mainstream political options. It is submitted that the role of the courts as guarantors of linguistic rights of persons belonging to national minorities will be key to the consolidation of the rule of law in the region.

Hennie Strydom traces the evolution of the interpretation and application of Article 27 of the International Covenant on Civil and Political Rights through select cases of the UN Human Rights Committee. The chapter also covers obstacles faced by individual claimants under the Optional Protocol and issues concerning the obligations of states parties to comply with the findings of the Committee.

In the concluding chapter, Joseph Marko seeks to develop some degree of synergy between the respective preceding chapters. He points to the challenges faced by comparative studies in general and particularly the issues arising when seeking to compare jurisprudence of different jurisdictions. There is, in essence, not something that could be called neutral or objective comparison since legal systems have inherent norms and values that inevitably impact on the outcome of court judgments. The role of the judiciary to set norms also brings into focus the separation of powers doctrine and the concern that courts may become prescriptive and *de facto* legislators. The benefits sought to be achieved by comparative law may therefore in turn give rise to a violation to the separation of powers. Added thereto Marko points out that techniques to protect minorities and Indigenous people are not a one a one-size-fits-all solution. He points to the transformative role of the judiciary which in turn brings new approaches to interpretative techniques. Finally, he highlights that regardless of the progress that has been made in international and constitutional law, basic questions as to

the identity of groups; the content of their rights; and their ability to self-determine their membership remain in flux.

We trust that readers of this book would find the kaleidoscope of jurisprudence informative and of potential relevance to their own jurisdictions and research.

The Mabo-Decision and the “Discovery” of Native Title in Australia and Beyond

George Barrie

1 Introduction

The question related to Aboriginal¹ peoples’ rights to their traditional lands which was raised as far back as the second half of the 19th century in various countries came to roost at the end of the 20th century. This was especially so in the previous English colonies of Canada, Australia and New Zealand. It also became an issue in fraternal jurisdictions which emanated from a similar colonial background. Court decisions on the issue through comparative judicial cross-pollination played a major influential role in all these countries. Although each country developed differently the basic issues remained the same as Aboriginal peoples faced similar institutional and ideological intolerance. These issues included how the land was settled, what use could be made of it and by whom and what rights Aboriginal peoples had at customary and common law. Had their rights to traditional lands been expropriated or extinguished? Who spoke for whom in the ensuing litigation or negotiation processes which were time consuming and expensive? Were the courts adept at dealing with the issues (Knafla and Westra 2010)?

This chapter illustrates how Aboriginal peoples became proactive in regaining their status as distinct peoples and were at the centre of the battleground surrounding the various legal contests. A court-based jurisprudence emerged in which judicial recognition of common law Aboriginal title to traditional lands emanated. This court-based jurisprudence emerged from a post-Second World

1 The term *Aboriginal peoples* has different nomenclatures in English. It is synonymous with the term *Indigenous peoples*. In this chapter I use these terms generically depending on the context. The terms *Aboriginal* and *Indigenous* can refer to the Aborigines of Australia, the First Nations of Canada, the Māori of New Zealand and the Indigenous groups discussed elsewhere. Anaya (2004, 4) states that in modern terms “Indigenous” refers broadly to living descendants of pre-invasion inhabitants now dominated by others. Indigenous peoples, he states, are culturally distinctive groups engulfed by settler societies born of the forces of empire and conquest. It is in this context that the terms *Aboriginal peoples* or *Indigenous peoples* are used in this chapter.

War stalemate in which Anglo-settler communities were confronted with the plight of their Aboriginal communities and predictably proposed reforms and policies which came down to assimilation. The Aboriginal peoples boosted by the Civil Rights movement rejected such policies. The Aboriginal peoples demanded legal protection of extant Aboriginal rights to their traditional lands, their customary practices and restitution of their traditional lands. So-called “Aboriginal title” inexorably developed into a proprietary interest cognisable by law and enforceable against the state. The courts’ eventual acceptance of Aboriginal title to traditional lands changed the hitherto embedded legal scenario whereby many states saw themselves as trustees of Aboriginal interests. Aboriginal claims to their traditional lands accelerated up national agendas with a new-found urgency and had a major influence on national politics and shook national legal systems (McHugh 2011, 1-3).² What follows is a jurisprudential overview to describe above journey.

2 Doctrine of Discovery

The doctrine of discovery³ was used against Indigenous peoples in various parts of the world. It was used by England and its courts, politicians, governments and settlers in relation to Australia, Canada, New Zealand and various other of its colonies. It was utilised to justify Crown and colonial control of the Indigenous peoples and their lands within these colonies and has had an enduring impact on the ownership of the traditional lands of the Indigenous peoples in British colonies. The doctrine was through the years accepted in British colonies and adopted and applied in their legal regimes relative to their Indigenous peoples. The doctrine thus deserves more than passing mention and its constituent elements will consequently be briefly set out.

The United States Supreme Court in *Johnson v McIntosh* (1823)⁴ set a standard against which the doctrine of discovery would be measured against by the governments and courts of Australia, Canada, New Zealand and the United States vis-à-vis their Indigenous peoples. This case became heavily relied on by these four countries in developing their policies and laws towards their Indigenous populations. In a nutshell the *Johnson* case held that under international law when a European Christian nation discovered new lands it

2 This work of McHugh is essential reading on Aboriginal title and proved invaluable to this chapter.

3 For the doctrine in general, see Miller *et al* (2010).

4 For a detailed analysis of *Johnson v McIntosh* (1823), see Kades (2001).

automatically gained sovereignty and property rights over the non-Christian, non-European peoples even though the Indigenous peoples and nations were already using and occupying the lands. Consequently, under this doctrine, a discovering European country gained exclusive property rights that were to be respected by other European countries and which pre-empted other European countries from the same rights. As seen by the *Johnson* decision the doctrine of discovery triumphed over any claim of exclusive real property rights for Native Americans and their tribal governments.

For the United States Supreme Court to have come to above decision in the *Johnson* case it had a vast body of generally accepted legal principles of the day that governed the conduct of nations to rely on, the doctrine of discovery being one of the earliest examples of international law (Dugard 2018, 182). The doctrine was developed by European nations to control potential conflicts over exploration, conflicts over trade and the colonisation of non-Christian and non-European peoples and the confiscation of their lands. As far back as approximately the 5th Century AD the Roman Catholic Church began establishing the idea of an universal papal jurisdiction that placed an obligation on the church to create an universal Christian Commonwealth.⁵ This culminated in the concept of a *justified* holy war led by Christians to enforce the church's vision of truth on infidels. Pope Innocent IV saw crusading Christians invading infidel lands as just wars which were based on the legal authority of Christians to dispossess non-Christians of their sovereignty and property. To be considered civilised a country had to be Christian and Christians refused to recognise the rights of non-Christians to remain free of Christian dominion (Muldoon 1979, 109). Francisco Vitoria, the Spanish kings' adviser, regarded as one of the first international law writers of note, held the view that Spain in defending the faith was waging *lawful* and *just* wars against Indigenous peoples and in such way justified a Christian nation's conquest (Hanke 1949, 17–20).

England initially became heavily involved in the doctrine of discovery at the advent of the 15th Century. When Henry VIII broke with the Catholic Church in 1529 he was compelled to seek alternate grounds to papal authority in his desire to claim Ireland. His daughter, Queen Mary, a Catholic relied on a papal bull to justify her ownership of Ireland and this culminated in Pope Paul IV issuing a bull nominating Mary as monarch of Ireland. Elizabeth I, Mary's successor, who was a Protestant, did not seek to rely on a papal bull to claim Ireland. In 1603 she commenced a war of conquest against Ireland after the English parliament had re-established the Church of England in Ireland and

5 Pagden (1995) explains this idea in detail.

in 1559 named her as the “Supreme Governor” of Ireland (Miller *et al* 2010, 16). For all practical purposes the Irish legal system was eclipsed by the English legal system as the Crown established control over Ireland (Pawlisch 1985, 3–14). This was the precedent that led to English colonies, courts and colonists ignoring Indigenous legal and property rights worldwide and justified imposing the English legal system on Indigenous nations. It can justifiably be submitted that Elizabethan England used its colonizing efforts in Ireland as a precedent to develop its empire and colonisation efforts elsewhere. Upon the successful adventure in Ireland, England became a strong proponent of the doctrine of discovery advocating that international law supported the rights and powers emanating from first discovery and conquest which led to title. England claimed that John Cabot’s explorations and discoveries along the coast of North America (1496–1498) gave it priority over any other European country, even including Spain’s claims under papal bulls and Columbus’ discovery of the New World (Pagden 1995, 90).

England added to the doctrine of discovery the element of actual *occupancy and possession* to establish its claims to title by discovery. This England applied to its dealings with Spain and Portugal arguing that first discovery cannot confer property and that consequently England could colonise any lands where European countries were not in possession. Another important element of the doctrine of discovery introduced by England was the principle of *terra nullius*. In previous centuries, large portions of the globe were either uninhabited or unclaimed, or inhabited by communities characterised as unorganised primitive or uncivilised by European states. Such territory was designated as *terra nullius*, land belonging to no one, which could be acquired by means of discovery in the 15th and 16th centuries, and thereafter by means of occupation. *Terra nullius* was also seen to apply to areas that were populated by inhabitants who were not members of the then family of nations and thus not subject to international law. *Terra nullius* implied that European countries did not recognise the property rights of *non-civilised peoples* to the lands they occupied. Consequently, European countries regarded South and North America (and later Australasia) as vacant land, *vacuum domicilium*, available for taking from the Indigenous peoples even if they were occupying and using the land (Reynolds 1987, 173). This brief but necessary *excursus* on the doctrine of discovery has been undertaken as the doctrine featured prominently in the Australian High Court case *Mabo (no. 2) v Queensland* (1992) and in similar cases in Canada, New Zealand and elsewhere. It will be seen that according to the courts, the doctrine was not just an obscure historical relic that could be easily corrected. The doctrine needed to be addressed and if need be eliminated from modern day life.

In the *Mabo (no. 2)* case, Justice Brennan (together with Chief Justice Mason and Justice McHugh) overturned the doctrine of discovery holding that the common law of Australia would perpetuate injustice if it were to continue to embrace it (*Mabo (no. 2) v Queensland*, paras. 41-42). The majority of the High Court (by a margin of 6-1) found that Australia was occupied at settlement and that the Indigenous inhabitants had, and continued to have, legal rights to their traditional land unless such rights had been validly extinguished.

The *Mabo (no. 2)* decision in Australian context was seen to be revolutionary. No other legal event in Australia since federation had a greater impact and led to so much academic and jurisprudential debate (Marks and McDonell 1996; Fitzpatrick 2002; Loos 1997). Few cases can ever have commanded such sustained national attention in Australia itself and it created sensational responses in fraternal jurisdictions. *Mabo (no. 2)* led to landmark judgments elsewhere. *Mabo (no. 2)*'s views of *terra nullius* and the rights of Indigenous peoples to their traditional land lay at the heart of the legal revisionism that swept through various countries which over the centuries were the products of Anglo colonisation. As *Mabo (no. 2)* is the focus of this chapter it is to this case we now turn after giving a brief insight into the Canadian Supreme Court case *Calder et al. v Attorney-General of British Columbia* (1973) which is recognised to be the prelude to *Mabo (no. 2)*.

3 *Calder et al. v Attorney-General of British Columbia*

Before *Mabo (no. 2)* is dissected it is necessary to turn to the *Calder* case. The relevance of discussing the case, decided 12 years prior to *Mabo (no. 2)* at this stage will soon be evident. The significance of the *Calder* case is what was said regarding the doctrine of discovery and the concept of Aboriginal title.

Justices Hall, Spence and Laskin decried the notion of the erasure of Indian or Aboriginal rights in Canada upon conquest or discovery. They held:

The proposition accepted by the Courts below that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognised by the conqueror or discoverer was wholly wrong. There is a wealth of jurisprudence affirming common law recognition of aboriginal rights to possession and enjoyment to lands of aborigines analogous to the Nishga situation.

Calder et al. v Attorney-General of British Columbia, 315

Justice Judson for the majority, in describing the nature of Aboriginal title, rejected the theoretical tenet of the Indian in the state of nature and replaced it with another tenet:

[T]he fact is that when the settlers came, the Indians were there, organised in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means (...). What they are asserting in this action is that they had the right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished.

Ibid, 328

Justice Hall in the same vein held: “What emerges from the evidence is that the Nishgas in fact are and were from time immemorial a distinctive culture entity with concepts of ownership indigenous to their culture and capable of articulation under the common law” (*Ibid*, 375).

The action by the Nishga was unsuccessful on a procedural ground – the necessity of a fiat to implead the Crown – but six of the seven judges accepted the argument that *Aboriginal title can exist in principle*. Three judges regarded that the title of the Nishga people over their traditional territory had been extinguished, while three believed that their Aboriginal title remained.

The importance of the *Calder* case is the fact that it breathed life into the Aboriginal title debate due to the above quoted comments of some of the judges. *Calder* became a catalyst for the development of Aboriginal rights to traditional lands. The Canadian Supreme Court rejected the notion of the innate superiority of European nations and an ethnocentric perspective that assumed that Aboriginal peoples were too primitive to be recognised as sovereign nations and that consequently North America was *terra nullius*. *Calder* rejected the approach reflecting the centuries-old premise that North America was legally vacant land when the settlers came (Hoehn 2012, 150). *Calder* was the breakthrough decision that introduced the distinct perception that the time had come for a *court-generated* jurisprudential basis for Aboriginal rights which culminated in *Mabo* (*no. 2*).

Despite Aboriginal peoples in Canada, Australia and New Zealand attempting to assert their rights to obtain legal recognition of their customary rights over their traditional lands and natural resources during the second half of the 20th century, the courts were loath to become involved. The courts clearly did not wish to intervene in government – Aboriginal peoples’ disputes. The experience of the Aboriginal peoples regarding possible litigation was that it was

mostly costly and ineffective. This all changed with the *Calder* case in Canada and *Mabo (no. 2)* in Australia with wide ranging effects over many boundaries.⁶

It is important to keep in mind that the *Calder* and *Mabo (no. 2)* cases must be seen against the background of the Civil Rights era. The Civil Rights movement created an instant human rights discourse with the Universal Declaration of Human Rights,⁷ the International Covenant on Civil and Political Rights (ICCPR),⁸ the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁹ and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)¹⁰ being the benchmarks. This resulted in a wider international and national rights-consciousness which filtered into national legal systems in various ways.

4 *Mabo (no. 2) v Queensland*

Before *Mabo (no. 2)* is discussed in detail, *Mabo (no. 1) v Queensland* (1998) must be briefly referred to. The Queensland government faced with the proceedings that were to culminate in *Mabo (no. 2)* attempted to pass the Queensland Coast Islands Declaratory Act (1985) which was designed to pre-empt those proceedings. The Act was designed to extinguish whatever rights Eddie Mabo and his Meriam people might have held under their traditional customary law. This State legislation also purported to operate retrospectively to 1872 when Queensland annexed the Meriam islands without compensation. Mabo and his people submitted that this measure violated the Racial Discrimination Act (1975) and Article 5 of ICERD. They argued that the 1985 Queensland Act denied them equality before the law, the enjoyment of the right to own property and presented the arbitrary deprivation of these rights. The High Court by a narrow 4–3 majority agreed and rendered

6 McHugh (2011) sets out the process in great detail. This chapter draws extensively on this authoritative and deeply insightful work.

7 United Nations General Assembly Resolution 217 A (III) of 10 December 1948. The Declaration is available online at <https://www.un.org/en/universal-declaration-human-rights> (accessed December 1, 2020).

8 United Nations General Assembly Resolution 2200 A (XXI) of 16 December 1966. The ICCPR is available online at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed December 1, 2020).

9 United Nations General Assembly Resolution 2200 A (XXI) of 16 December 1966. The ICESCR is available online at <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> (accessed December 1, 2020).

10 United Nations General Assembly Resolution 2106 (XX) of 21 December 1965. The ICERD is available online at <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx> (accessed December 1, 2020).

the 1985 Queensland Act ineffective. Without this slim majority *Mabo (no. 2)* would not have proceeded (Hunyor 2015, 112).

Mabo (no. 2) was decided by the High Court of Australia (HCA) in 1992 after a decade of litigation. Eddie Koiki Mabo was a Torres Strait Islander who submitted that the Meriam people in the Murray Islands had a system of land ownership *before* European colonisation. Torres Strait is an area of islands situated in the north of Australia between Cape York and Papua New Guinea. It is culturally a distinct geographical area whose inhabitants have close links with Papua New Guinea as well as Australian Aboriginal peoples. It was initially colonised during the 1860s and annexed to Queensland in 1872. European settlers saw the inhabitants as gardeners, fisherman and hunters rather than occupiers. After Australian federation, jurisdiction over the Torres Strait Islands was shared between Queensland and the Australian Commonwealth. In the first half of the 20th century, Queensland established a dual system of local government.¹¹

Mabo (together with David Passi and James Rice) sought a declaration from the HCA that the Crown's dominion over their Murray Island home was subject to (1) their local custom, (2) their original native (Aboriginal) ownership, and (3) their actual possession, use and enjoyment of the islands. Phrased differently one might say they sought common law recognition of their traditional native (Aboriginal) title.

The order of the court by Justice Brennan was that (with exceptions for specific areas)¹² the Meriam people were entitled against the whole world to the *possession, occupation, use and enjoyment* of the Murray Islands. The court recognised *native title* but not Aboriginal sovereignty. This order is a succinct summary of the decision which consists of a 200 plus page judgment. Chief Justice Mason and Justice McHugh agreed. Justice Brennan's judgment represented the minimal position of the majority. Justices Deane, Gaudron and Toohey went further in certain respects. Justice Dawson dissented. *Mabo (no. 2)* was a legal revolution (Bartlett 1993; McRae *et al.* 2003, 231). McHugh (2011, 91) states that *Mabo (no. 2)* made an impact like no legal event since federation. Responses ranged from jubilant to highly critical. Conservatives saw it as an example of judicial legislation. Progressives maintained that it did not go far enough. In essence the High Court's order was based on exclusive

11 In 1980, Calermo Wacando, a Torres Strait Islander, claimed sovereignty over the native Erub (Darnley) Island but his claim was rejected by the High Court of Australia in *Wacando v Commonwealth* (1981).

12 The Court's decision was tempered by holding that although the Meriam people had authority to possess and use the islands, Queensland had the right to extinguish the title as long as the State adhered to the laws of the Australian Commonwealth.

occupation of the lands, albeit in accordance with Meriam law and custom, *at the time* the Crown acquired sovereignty. Justice Brennan's order was a classical formulation of a property right, a right *in rem*.

Much has been written on *Mabo* (no. 2) and it has been meticulously analysed and dissected from every jurisprudential and academic point of view (Webber 1995; Gregory 1992; Keon-Cohen 2000). It is not within the ambit of this chapter to embark on such an endeavour. What will be focussed on is firstly the main thrust of the decision and thereafter it's far reaching influence in Australia and elsewhere.

What was *Mabo* and his fellow islanders confronted with when seeking a declaration that they held traditional Aboriginal or native title to the lands and waters in the Murray Islands of the Torres Straits that had *not been extinguished* by colonisation? In 1889 the Privy Council in *Cooper v Stuart* (1889) held that the colony of New South Wales (which eventually become part of the Commonwealth of Australia) had not being acquired by conquest, but had consisted of a tract of territory, *practically unoccupied*, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British Dominions. Subsequent Australian decisions such as *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia* (1971) and *Coe v Commonwealth of Australia* (1979) confirmed this view. This view in effect was that the doctrine of *terra nullius* ensured a total rejection of Indigenous law by the Australian legal system. Although Australia had been inhabited for some 40,000 years by an Aboriginal population with its own system of laws, cultures and customs, the British colonial office treated Australia in 1778 as uninhabited and without institutions or laws (Reynolds 1996). Early decisions such as *R v Murrell* (1836), *R v Neddy Monkey* (1861) and *R v Cobby* (1883) saw the Aboriginal peoples as having no laws, or laws that were too barbaric to be recognised by a civilised legal system, or unable to survive European contact. This view of *terra nullius* at the time of the *Mabo* (no. 2) litigation was accepted as a legal basis for Australia's colonisation. Notwithstanding 40,000 years habitation by Indigenous peoples, Australian law did not recognise native/Aboriginal land rights unless these rights were created by state or territory legislation. Where did this legal blind spot related to Aboriginal peoples emanate from? Why were any legal rights of Aboriginal peoples ignored by the common law? One explanation relates to the clear lack of guidance from the Colonial Office given to governor Arthur Phillip when he arrived with the First Fleet in 1788. He was simply instructed to "conciliate the aborigines" (Bottomley and Bronitt 2012, 124) but to otherwise leave them alone. That may be one of the reasons why the colonists deemed Australia to be *terra nullius* and legally available for settlement. It could be that this view emanated from William Blackstone's *Commentaries on the Laws of England* who held the view that if "an uninhabited country be discovered

and planted by English subjects all the English laws are immediately there in force" (Blackstone 1765, 105). This view of Blackstone provided the legal blueprint for English colonisation and formed the basis of the *Milirrpum v Nabalco* (1971) decision.

From the early 1800s it became clear that the *terra nullius* doctrine would be invoked by Australian courts to deny Aboriginal title to the land with the courts seizing on the fact that Aboriginal peoples lacked any recognisable system of land tenure and did not engage in the cultivation of land. Whatever the status of *terra nullius* at the time of first contact, it is clear that over the course of the 19th century the designation of Australia as *terra nullius* became conventional wisdom. It was only in 1980 when Mabo and his fellow claimants commenced proceedings against the State of Queensland and the Commonwealth, that Australian courts were required to determine whether customs and traditions *incorporating rights to, and interest in, land delivered enforceable property rights under the common law*. The *Mabo* litigation lasted for 10 years and resulted in two separate decisions of the Full Court of the High Court. In *Mabo (no. 2)* which was handed down on 3 June 1992, the court held by a six to one majority that the Australian common law did recognise the *pre-existing* rights of the Indigenous peoples.¹³

The High Court in *Mabo (no. 2)*, in a nutshell, held that native (Aboriginal) title to land *survived* the Crown's acquisition of sovereignty and radical title. That the rights and privileges conferred by native title were unaffected by the Crown's acquisition of radical title but the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power. Native title to particular land (whether classified by the common law as proprietary, usufructuary or otherwise), its incidents and the persons entitled thereto are ascertained according to the laws and customs of the Indigenous peoples who, by those laws and customs, have a *connection* with the land. It is immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty provided the general nature of the connection between the Indigenous peoples and the land remains. Native title to an area of land which a clan or group is entitled to enjoy under the laws and customs of an Indigenous people is extinguished if the clan or group ceases to acknowledge those laws and (as far as practicable) to observe those customs or loses its connection with the land or on the death of the last of the members of the group or clan. Native title can be surrendered to the Crown voluntarily. If native title to any parcel of land is extinguished, the Crown becomes the absolute beneficial owner.

13 The terms *Aboriginal* and *Indigenous* as used in *Mabo (no. 2)* are synonymous with the terms *Aboriginal* and *Indigenous* as used in the *Calder* case.

The separate and concurring judgments all indicate the realisation by the majority of the High Court of the momentousness of the case. Justice Brennan held:

According to [the line of cases which denied the existence of native title] (...) the common law itself took from indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic substance which the land provides, vested the land [in the Crown] (...) without any right to compensation and made the indigenous inhabitants intruders in their own homes (...). Judged by any civilised standard, such a law is unjust (...).

Mabo (no. 2) v Queensland, para. 28

Justice Brennan's approach was that the theory that the Indigenous inhabitants of a settled colony had no proprietary interest in the land depended on a discriminatory denigration of Indigenous inhabitants, their social organisation and customs. He stated that it was imperative in the modern world that the Australian common law should not be frozen in an age of racial discrimination. He saw the doctrine of *terra nullius* by which the rights and interests of Indigenous inhabitants were treated as non-existent was based on a policy which had no place in the contemporary Australian legal system.

Importantly he held that in order for an Indigenous group to succeed in its claim for native title it must demonstrate that the *connection* with the land in its customs and laws had *continued* to the present day.

[W]hen the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.¹⁴

Ibid., para.60

He emphasised that native title had its origin in and was given content by the traditional laws *acknowledged* by and the traditional customs *observed* by the Indigenous inhabitants of a territory.

Justices Dean and Gaudron held:

¹⁴ This was quoted in the Canadian case of *R v Van der Peet* (1996, para. 63).

Far from being ordinary, however, the circumstances of the present case make it unique. [The doctrine of *terra nullius* together with the denial of native title] provided the legal basis for the dispossession of the Aboriginal peoples of most of their traditional lands. The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgement of, and retreat from, those past injustices (...). The lands of this continent were not *terra nullius* (...).

Ibid., para.56

In a veiled criticism of the lack of a political will by the government they held further:

[W]e are conscious of the fact that, in those parts of the judgment which deal with the dispossession of Australian Aborigines, we have used language and expressed conclusions which some may think to be unusually emotive for a judgment in this Court. We have not done that in order to trespass into the area of assessment or attribution of moral guilt. (...) [T]he reason which has led us to [use] unrestrained language is that the full facts of that dispossession are of critical importance to [the legal propositions].

Ibid., para.78

They strongly rejected the propositions that the continent was for legal purposes unoccupied and that the unqualified legal and beneficial ownerships of all the lands of the continent vested in the Crown (*Ibid.*, para.53).

Justice Brennan – Justices Mason and Mc Hugh concurring – was of the view that Australian common law would perpetuate an injustice if it were to continue to embrace the enlarged notion of *terra nullius* and to persist in characterizing the Indigenous inhabitants of Australia as people too low in the scale of social organisation to be acknowledged as possessing rights and interest in land (*Ibid.*, para. 63). He held further that the dispossession of the Indigenous inhabitants of Australia was the result of the recurrent exercise of a paramount power to exclude the Indigenous inhabitants from their traditional lands as a colonial settlement expanded and land was granted to the colonists.

Justice Dawson, the sole dissenting judge, was of the view that it was the prerogative of parliament to overthrow a long-accepted principle. He held that despite the fact that the previous legal regime was insensitive, a new policy is a matter for the government and not the courts (*Ibid.*, para. 48). That it would

be wrong to attempt to revise history however unpalatable it may seem. Should this be done it would be impugning the foundations of the very legal system under which *Mabo (no. 2)* was being decided.

Justices Brennan, Dean and Gaudron and Toohey approved the approach adopted by the International Court of Justice in its *Western Sahara Advisory Opinion* (1975) where it was held:

Whatever differences of opinion there have been among jurists, the state practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organisation were not regarded as *terra nullius*.

Western Sahara Advisory Opinion, 39

They thereby repudiated the Privy Council decision of *Cooper v Stuart* (1889) and the subsequent Australian decisions *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia* (1971) and *Coe v Commonwealth of Australia* (1979) to the effect that Indigenous laws were incapable of recognition because they lacked the essential elements which define a proprietary interest known to the Australian legal system – a view which held sway until it was rejected by *Mabo (no. 2)*.

The same Justice Dawson who dissented in *Mabo (no. 2)*, stated in *Western Australia v Commonwealth* (1995), decided three years after *Mabo (no. 2)*, that no good purpose would be achieved if he continued the same line of reasoning as he followed in his *Mabo (no. 2)* dissent (*Western Australia v Commonwealth*, 493). That he would consequently now follow the reasoning of the majority in *Mabo (no. 2)*.

5 The Native Title Act

Some five months after *Mabo (no. 2)* the prime minister Michael Keating announced his intention to seek Commonwealth legislation to give effect to the judgment. The process followed was complicated.¹⁵ Legislation was deemed essential for three reasons: to validate titles issued since 1975 which were probably invalid under the Racial Discrimination Act (1975); to create a legislative process that would allow mining and other developments on native title land and to identify with certainty which land was subject to native title. To Aboriginal leaders,

¹⁵ Rowse (1993) sets out the process followed in some detail.

native title was primarily a *human rights* issue concerned with socio-economic equality and self-determination. To State premiers and business leaders from the mining and pastoral industries *Mabo (no. 2)* created a *real estate* problem.

The eventual passage of the Native Title Act (NTA) which was passed by the federal parliament in December 1993 was the result of intense consultation, conflict and compromise. An important event in this process was the so-called “Redfern Address” by prime minister Keating where he reiterated forcefully the court’s sense of injustice by specifically arguing that *Mabo (no. 2)* is an historic decision: “[W]e can make it an historic turning point, the basis of a new relationship between indigenous and non-Aboriginal Australians (...) there is nothing to fear or to lose in the recognition of historical truth” (Keating 1992).

Another important event in the build-up towards the NTA was the “Aboriginal Peace Plan”¹⁶ wherein Aboriginal representatives presented the prime minister with their own proposal for a just settlement relating to Aboriginal rights in return for the acceptance of certain principles outlined in the plan. This magnanimous gesture got the negotiations, which were getting bogged down, on track again and opened the path towards what became the NTA.

The NTA consists of many features and similar to the process leading up to it is complicated. The focus of this chapter is more on the revolutionary findings of *Mabo (no. 2)* and the impact of these findings in Australia and elsewhere. The gist of the NTA will however be set out as it is the product of *Mabo (no. 2)* and the Act does resonate in other jurisdictions.

The NTA codified the common law definition of native title as established in *Mabo (no. 2)*. Section 223 of the NTA reads:

- (1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
 - (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Straits Islanders; and
 - (b) the Aboriginal peoples or Torres Straits Islanders, by those laws and customs, have a connection with the land or waters; and
 - (c) the rights and interests are recognised by the common law of Australia.
- (2) Without limiting subsection (1), rights and interests in that subsection includes hunting, gathering, or fishing rights and interests.

16 See McRae *et al.* (2003, 249) for details of the Aboriginal Peace Plan.

The NTA provided for validation of past acts in relation to land subject to native title, it provided for future acts, it conferred a right to negotiate on holders of native title and provided for mechanisms to extinguish native title. It allowed for agreement making Indigenous Land Use Agreements to bypass the right to negotiate procedures. It validated any past grants of freehold or leasehold interests that were thrown into doubt by *Mabo (no. 2)* and raised the possibility that non-Aboriginal rights could co-exist with native title. It created a Native Title Tribunal to administer land claims by Aboriginal peoples. In *Wik Peoples v Queensland* (1996) the High Court controversially ruled that native title rights could co-exist subject to the terms of a pastoral lease, but where there was a conflict of rights, those arising from the pastoral lease would *extinguish* the remaining native title rights. The controversy raised by the *Wik* case led to the Native Title Act Amendment Act (1998) which ensured that native title would be a subordinate rather than a coordinate right. This 1998 legislation statutorily and unilaterally extinguished and diminished Aboriginal rights vested in the common law (as recognised in High Court judgments) and the right to negotiate. Despite considerable protests, the legislation was passed amidst local and international opprobrium. The 1998 Native Title Amendment Act has smothered the potential for further positive expansion of native title as has emerged in subsequent restrictive interpretations of Section 223 of the NTA by the courts. The courts have unfortunately not amplified the definition of native title in Section 223 of the NTA as they could have done under their inherent jurisdiction. By the time of *Members of the Yorta Yorta Aboriginal Community, v Victoria* (2002), the High Court was treating Section 223 of the NTA as an exhaustive definition of native title and stressing the issue of proof (*Yorta Yorta*, para 75; Bartlett 2003). The High Court was also stressing paragraph (a)'s reference to "the rights and interests that are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders". This emphasis supported the requirement in paragraph (b) that the claimants must by those laws and customs, have a connection with the land or waters. This brought to the fore the view that there must be a *continuity* of the *acknowledgement* and *observance* of the *traditional law and customs*, but also *in the community* exercising them.

A meaningful exposition of the *Yorta Yorta* case would entail a lengthy discussion and this has adequately been done elsewhere (McIntyre 2003; Young 2008). Put succinctly, the court held that under Australian law native title requires both a *present possession* and a *present connection*. There should be a present day entitlement under the *traditional* law and custom related to the particular land holding the historical association. "Traditional" refers to that body of law and customs *acknowledged* and *observed* by the ancestors of the

claimants at the time of sovereignty. These traditional laws and customs could have a modern form but they should have been substantially uninterrupted. These modern forms should have a foundation in *pre-sovereignty* Aboriginal custom. The laws and customs must not have lost their traditional character and must be, if not identical, then at least recognisably the same as that present at the time of sovereignty. The Aboriginal law and custom must demonstrate a continuous existence and validity since sovereignty. Interruptions to such continuity due to colonisation would be permissible and depend on the subjective view of a court's scrutiny of the evidence. There must also be a *continuity* in the community observing the traditional laws and customs. The tide of history must not have washed away any real acknowledgement of traditional laws and any real observance of traditional customs. The foundation of native title rights and interests, if lost and disappeared, are incapable of revival.

Although the High Court judgment in *Yorta Yorta* emphasised the necessity of establishing a narrative of *continuous connection at all points of time* from sovereignty to the present, contrary views have been expressed. Earlier in *Members of the Yorta Yorta Aboriginal Community v The State of Victoria* (2001), Chief Justice Black of the Full Court of the Federal Court recognised that there is an alternative approach which does not require such a comprehensive continuous correspondence between the past and the present. He favoured a more general inquiry starting from the present that emphasised oral traditions. From this vantage point he suggested that the inquiry into continuity was likely to involve a consideration of events over a lengthy period of time. This view of Chief Justice Black found favour in the minority judgments of Justices Kirby and Gaudon in the High Court *Yorta Yorta* case of 2002 where they held that as a matter of ordinary usage, the word "traditional" does not necessarily signify a rigid adherence to past practices. Rather, they held, it ordinarily signifies that that which it describes has been handed down from generation to generation often by word of mouth.

The interpretations of "continuity" and "traditional" have become a problem with much riding on the view of the trial judge. Justice Kirby in *Yorta Yorta* (2002) presented a broad interpretation where he stressed the ongoing continuity aspects rather than the vestigial presence of pre-sovereignty features:

What is necessary for laws and customs to be identified as traditional is that they should have their origins in the past and, to the extent that they differ from past practices, the differences should constitute adaptations, alterations, modifications or extensions made in accordance with the shared values or the customs and practices of the people who acknowledged and observe those laws and customs.

Yorta Yorta, para. 114

This view is contrary to the approach in *Gale v Minister Land and Water Conservation for the State of New South Wales* (2004) which concerned the application of the Darug people for a native title determination over a small piece of land on the outskirts of Sydney. Due to their close proximity to white civilisation, the Darug people had experienced immense cultural changes. Judge Madgwick held that these changes had put them beyond a claim to native title. His view was that there was insufficient evidence to provide that they continued to constitute a society observing their traditional laws and customs.

Akiba v Queensland (no 3) (2010) however crystallised a move towards greater moderation in the treatment of native title (Brennan 2015). The *Akiba* decision of the Federal Court restored some optimism about achieving some of *Mabo (no. 2)*'s potential, following on decisions that frustrated the *Mabo (no. 2)* decision. After the *Yorta Yorta* High Court decision, the test for *continuity* was in many instances applied literally and lacked realism. There were also variations as to the meaning of the maintenance of a *traditional connection* with the land.

The *Akiba* claim concerned several claimant groups living in the Torres Strait. The claim encapsulated the geographical reach of native title at sea. Queensland maintained that the claim was by 13 separate societies, one for each island. The Commonwealth submitted there were four claimant societies emanating from regional cluster groups. The applicants argued that the claim was by a *single* society which existed before sovereignty was claimed by the coloniser. Justice Finn agreed with the latter submission. He held that island by island the society observed and acknowledged a single body of traditional laws and customs. If there were local differences, he held, these were not for purposes of the case relevant. It was to be expected, he held, that over time some variance in practices and understandings would have developed. He also found that there were enduring symbols of the recognition of the bodies of law and customs of a *single* society. On the facts he found that the “*Yorta Yorta* connection” test was satisfied. He held the claimant islanders’

[k]nowledge of the areas when coupled with the deep and transmitted sea knowledge that many of them possess, is itself a potent indication of connection, and continuing connection at that, to their marine estates – the more so because under their laws and customs they have, and do exercise, traditional rights to use and forage there (...).

Akiba v Queensland (no 3), para. 649

The High Court in *Akiba v Commonwealth* (2013) agreed with Justice Finn's broad approach to native title including the islander community's native title right to take marine resources for commercial purposes¹⁷ as part of their non-exclusive rights over sea country.

The *Akiba* saga is important in the development of native title in that it recognised the right to access, remain in and use the relevant *marine* areas and the right to access those areas' resources and take them for any purpose. Hereby native title rights with a commercial character were recognised. The *Akiba* litigation should encourage courts to approach the characterisation of native title rights and the definition of their content in a less restrictive manner and move away from the over-specification so evident in the earlier decisions. The *Akiba* decisions have modernised native title and by emphasising the notion of its commercial use they should unlock greater economic potential for native title holders.

6 *Mabo (no. 2)*'s Impact on Australia: A Brief Overview

Mabo (no. 2) has been embraced on many fronts and has been an important source of support for legislatures and policy makers – in Australia and elsewhere. The impact of the decision is not only due to the decision in favour of the Aboriginal peoples, it is also traceable to the historical narratives articulated in the reasoning of the majority of the court. The decision unarguably advanced justice for Aboriginal Australians by providing a compelling moral case which not only emphasised but led to meaningful steps to remedy the many past wrongs inflicted by the denial of native title over two centuries. As seen above not long after Keating's "Redfern Address" the federal parliament enacted the NTA which specifically incorporated the basic principles of *Mabo (no. 2)*. The NTA came into effect 18 months after *Mabo (no. 2)* and has been pivotal in facilitating the formal legal recognition of native title claims. It was fortunate that the federal government was supportive of the *Mabo (no. 2)* decision. *Mabo (no. 2)* was a clear example of a court using a rare opportunity to do justice on a large scale following on a history of profound injustice. Aboriginal peoples have been transformed into meaningful legal actors who have become

¹⁷ See also *Gumana v Northern Territory* (2005). In *Gumana v Northern Territory of Australia* (2007), the Full Court of the Federal Court held that exclusive right to the territorial sea could not be recognised by Australian law. This decision appears to be in contrast to the *Akiba* (2013) decision.

holders of *proprietary rights* (Brennan 2003). This is directly traceable to and unimaginable without *Mabo (no. 2)*.

Mabo (no. 2) introduced a new post-colonial and uniquely Australian narrative into the understanding of property law. This new narrative decoupled the concept of sovereignty from land ownership. It brought into being the notion of the Crown's radical title burdened by pre-existing native title. *Mabo (no. 2)* affirmed traditional law and custom as a *source* of property rights.

There can be no doubt that native title registration and related land rights legislation have delivered "title", or legally enforceable rights, to substantial areas of land and waters throughout Australia. It would be remiss however not to acknowledge that native title is *not* "title" in the same sense as freehold title. Determinations of native title recognise the rights and interests that the relevant Aboriginal peoples have *under their traditional laws and customs*. Those rights and interest need not be the same as, or analogous to, the indices of real property tenures. As Justice Toohey pointed out in *Mabo (no. 2)* the use of the term "title" is artificial and capable of misleading although it is a convenient expression to use particularly as recognised by the law of Australia (*Mabo (no. 2)*, para. 9). From a demographic point of view most Aboriginal Australians will not benefit directly from native title legislation. The reason being that most Aboriginal peoples live in the cities and regional areas where little, if any, land is available to claim under native title or land rights legislation. This fact led to much criticism of *Mabo (no. 2)* immediately after the decision amongst the Aboriginal communities who had expected more. As far as Aboriginal communities were concerned no more than a third of them lived in rural areas, and of these very few lived in the isolated areas so necessary to attract the cover of *Mabo (no. 2)*. Many in the Aboriginal community saw *Mabo (no. 2)* merely recognising a meagre form of rights over land. It is clear from some judgments of the High Court such as *Western Australia v Ward* (2002) and the *Yorta Yorta* decisions that some Aboriginal groups will find it difficult to demonstrate that their relationship with their traditional lands meets the standard of proof required for a determination that native title exists.¹⁸ This was envisaged by the preamble to the NTA which states *inter alia* that "[i]t is important to recognise that many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests".

A way of measuring the extent to which *Mabo (no. 2)* has been embraced is to compare current attitudes towards native title with highly critical and

¹⁸ For shortcomings of native title see Neate (1995).

intemperate comments that were raised immediately after the original decision. State governments and mining and pastoral interests in Australia now appreciate that native title has not been the proverbial Trojan Horse. Insistence upon onerous requirements of proof have been slowly displaced by a claim environment conducive to goodwill and reasonable accommodations. This is directly traceable to and unimaginable without *Mabo (no 2)*. The chorus of dissident voices (Hughes 1993) that appeared after *Mabo (no. 2)* to the effect that it created a legal crisis due to its naïve adventurism and perverse politically driven logic, have virtually become silent and have been overtaken by a broader consensus recognising the recognition of native title as a major advance in national reconciliation displacing racism and the denial of justice for Aboriginal peoples.

The reconciliatory effect of *Mabo (no. 2)* was decidedly strengthened due to Justice Brennan holding that Queensland's initial efforts to argue that the common law could rely on Crown sovereignty and the doctrine of *terra nullius* to deny Mabo's Aboriginal rights was unjust. Further that Queensland's approach would destroy the equality of all Australians before the law (*Mabo no. (2)*, para. 63). The success of *Mabo (no. 2)* has alerted Aboriginal peoples to the possibility of redress through legal means. This is illustrated by various cases which came before the courts in the late 1990s and early 2000s, notably the *Cubillo v Commonwealth* (2000)¹⁹ case seeking compensation for Aboriginal peoples removed from their families as children (Clark 2001). *Cubillo* is decidedly a product of the discourse generated by *Mabo (no. 2)* which has also become a platform for dramatic changes in the late 20th century national histories of Canada and New Zealand where similar shockwaves as these created by *Mabo (no. 2)* in Australia were experienced (McHugh 2011, 95).

7 Canada

Judicial recognition of native title in Australia was a massive legal and political event which had major consequences in fraternal jurisdictions which had all emanated from British colonialism. Canada in the latter part of the 20th century acknowledged the initial discriminatory mobilisation of colonial governmental power against their Aboriginal peoples. Canada accepted that the colonial structure of government led to a widespread belief in the collective inferiority of Aboriginal peoples and was inconsistent with equal protection of

19 See also *Trevorrow v State of South Australia* (2007).

the law. It was accepted that the negative prejudices and systematic discrimination against Aboriginal peoples was based on racism which had its roots in colonialism. It was accepted that the colonial ideology that Europeans discovered a vacant North American continent was a fallacy. Similarly to *Mabo* (no. 2), it was accepted that it was a fallacy that Aboriginal peoples did not have any legal organisation or rights to their lands or any form of jurisprudence. There are excellent scholarly writings on the rights of Aboriginal peoples in Canada which space does not allow us to fully pursue.²⁰ This contribution will hopefully initiate a rigorous exploration of Aboriginal title and rights in Canada and point to the influence of *Mabo* (no. 2).

A brief historical overview shows that when the Canadian government assumed responsibility for the welfare of the Aboriginal population in 1876, the policy was that of “civilizing the Indians”. Canadian legislation concerning its Aboriginal peoples between 1876 and 1982 showed virtually no variation in this policy. The provisions of the Indian Act of 1951 were dramatically similar to the above policy. This 1951 Act besides removing the excess of government control of local affairs on the reserves and certain cultural prohibitions, continued to encourage citizenship – which implied assimilation. In 1969 the federal government declared that total assimilation must occur within a short period of time. The First Nations’ chiefs of Alberta rejected the whole concept of assimilation and declared that the only way to maintain their Aboriginal culture was to preserve their *status, rights, lands and traditions*. This led to conflict between the federal government and Aboriginal organisations. The conflict led to extensive consultations concerning the future approach towards the Aboriginal peoples. This process culminated in the inclusion of Section 35 in the 1982 Canadian Constitution Act which states

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.
- (2) In the Act “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provisions in the Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

²⁰ Examples are Henderson (2006), Isaac (2004), Wilkins (2004).

Section 35 acknowledged the distinct Aboriginal jurisprudences as fundamental parts of the constitutional order. It created a legitimate expectation of constitutional change and allowed Aboriginal peoples to anticipate an end to the aftermath of a colonial legal regime that failed to protect Aboriginal rights and maintained an inherently unjust order. However, Section 35 is an entrenchment only of Aboriginal and treaty rights “existing” in 1982. Section 35 did not restore those rights, such as their traditional lands, which had been denied to and stripped from the Aboriginal peoples during the previous centuries. The Constitution Act required that three more constitutional conferences be held between 1982 and 1987 to consider, more particularly which rights of the Aboriginal peoples were included in the Constitution. These conferences did not produce anything of substance. Aboriginal peoples in Canada have thus come to rely on the courts to recognise and affirm their rights in the lands that they traditionally used and occupied. No explicit language in Section 35(1) embellished on Indigenous title or Indigenous rights. These manifestations arose through judicial interpretations of the underlying principles of Indigenous or Aboriginal rights. Section 35(1) became a protective framework implying pre-existing systems of Indigenous law, Aboriginal rights and Aboriginal title.

We return to the *Calder* case to indicate that its influence extended much further than criticizing the doctrine of *terra nullius* but forced the courts to confront the fact that when the settlers came, the Aboriginal peoples were already there. As pointed out above, Justice Judson of the Supreme Court of Canada stated “the fact is that when the settlers came, the Indians were there, organised in societies and occupying the land as their forefathers had done for centuries” (*Calder*, 328). This was confirmed in *R v Van der Peet* (1996) where it was held:

[T]he doctrine of aboriginal rights exists, and is recognised and affirmed by [Section] 35(1) because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.

R v Van der Peet, para. 30

In the *Van der Peet* case, the Supreme Court of Canada also clarified the relationship between *Aboriginal title* and *Aboriginal rights*. Chief Justice Lamer for the majority affirmed that “aboriginal *title* is a sub-category of aboriginal rights which deals solely with claims of *rights to land*” (*Ibid.*, para. 74; emphasis added). As noted by Thomas Isaac (2006, 2), Aboriginal rights are the legal

embodiment of Aboriginal peoples' claims to their traditional lands and the ability to engage in traditional activities and customs. *Aboriginal rights* relate to activities that are an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming that right. The European settlement of Canada did not terminate Aboriginal peoples' customary laws or interest in the land. This interest and customary laws are *presumed* to have *survived* the assertion of Crown sovereignty and were incorporated into the common law (as held in the 2001 case *Mitchell v M.N.R.*, para. 10).

The general meaning of the concept *Aboriginal title* was expounded on by Chief Justice Lamer in *Delgamuukw v British Columbia* (1997) where he stated

Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies.

Delgamuukw v British Columbia, para. 111

He continued to state that *Aboriginal title* is the special legal interest that Aboriginal peoples possess in *lands* based on their historic occupation and relationship to those lands. It is a right to the land itself. Aboriginal title is also a burden on the Crown's underlying title to the land. Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes and those purposes may not be irreconcilable with the nature of the Aboriginal group's attachment to that land (*Ibid.*, para. 117).²¹

Van der Peet and *Delgamuukw* affirmed the jurisprudential framework of *Aboriginal rights* and *Aboriginal title* underlying Section 35(1), a framework empowered by Section 52(1) of the Constitution Act 1982.²² Seen holistically, the Supreme Court of Canada affirmed the existence of Aboriginal title in *Calder*, reaffirmed it in *Guerin v The Queen* (1984) where it held that the interest of Aboriginal peoples in land was a *pre-existing* legal right (*Guerin*, 379) and expanded the understanding of the concept in the *Van der Peet* and *Delgamuukw* cases. This brief overview (Henderson 2006, 228) of decisions

21 Here Justice Judson's words in the *Calder* case come to mind: "the fact is that when the settlers came, the Indians were there (...)".

22 Section 52(1) binds the political institutions of Canada and the courts empowered to enforce these Aboriginal rights.

in Canada relating to Aboriginal title can be augmented by *Roberts v Canada* (1989), *R v Côté* (1996) and *Smith v The Queen* (1983).

The influence of the *Calder* case, decided in 1973, on *Mabo (no. 2)* can not be underestimated. Lawyers from the two countries exchanged views and arguments. *Calder* became a catalyst for *Mabo (no. 2)* which in turn became a catalyst for the *Van der Peet* and *Delgamuukw* cases. It is thus not inopportune to return to *Calder* to get a fuller appreciation of its immense influence.

Calder vs Attorney-General (1973) was a landmark in a long struggle of the Nishga of British Columbia for recognition of their rights to the Nass Valley. The Nishga applied for a declaration that Aboriginal title to their asserted traditional lands continued to exist and had in no way been extinguished. In *Calder* the plaintiffs for the first time presented to the Canadian courts the theory that they had the right to continue to live on their lands as their forefathers had lived and this right had never been extinguished. Their action was unsuccessful on a procedural ground but the case breathed life into the Aboriginal title debate due to the comments of the various judges. Justice Judson concluded that “the fact is that when the settlers came, the Indians were there, organised in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a ‘personal or usufructuary right’” (*Calder*, 328). This characterisation of Aboriginal title became of lasting significance because it placed the source of Aboriginal title in the common law and framed it as an *interest in land* and not merely as a personal interest. Justice Hall (together with Justices Spence and Lasking) held that the Aboriginal title of the Nishga had not been extinguished and that in common law, possession itself was proof of ownership and unchallenged possession is admitted (*Ibid.*, 368). He described Aboriginal title as a claim for an “equitable title” (*Ibid.*, 352). Justice Hall held that the Crown bore the onus of proving that it had extinguished the title of the Nishga – which it had not done (*Ibid.*, 401).

The court’s view in *Calder* that Aboriginal title had a *collective dimension* in the sense that it was communal in nature implies that there was prior occupancy by the Aboriginal society and that there initially was some form of government regulating the communal Aboriginal title. After the *Calder* case the federal government reversed its stance on Indigenous title towards which it had previously been dismissive of.²³

23 In 1969 prime minister Pierre Trudeau said: “[W]e can’t recognise aboriginal rights because no society can be built on historical ‘might have beens’” (Allen 2013, 16).

After *Calder* it became clear that the ethno-historical information about Aboriginal culture history, particularly land use and Aboriginal livelihood issues, would be central. After *Calder* the judiciary reacted to Justice Hall's urging to re-examine their notions of Aboriginal societies and their laws and to view Aboriginal societies in the face of a more sophisticated understanding. The *Calder* court's view that Aboriginal title was derived from the simple fact of Aboriginal occupancy before the settlers arrived, made a lasting impression.

Calder and *Mabo (no. 2)*'s distinct influence on the *Van der Peet* and *Delgamuukw* cases will be briefly set out. Not to be bogged down in the details the latter two cases will be reviewed using a broad brush as there were no minority decisions in *Van der Peet* or in *Delgamuukw*. *Van der Peet* was confronted with the issue of how to define "aboriginal rights" affirmed by Section 35(1) of the Canadian Constitution Act, 1982. The court saw its task to define Aboriginal rights in a manner which recognises that Aboriginal rights are *rights* but which does so without losing sight of the fact that they are rights held by Aboriginal peoples because they are *Aboriginal*. As seen by the court in *Van der Peet*, in assessing a claim for the existence of an Aboriginal right, a court must take into account the perspective of the Aboriginal peoples claiming the right. That perspective however must be framed in terms *cognisable* to the Canadian legal and constitutional structure. This is the same approach followed by Justice Brennan where he held in *Mabo (no. 2)*.

In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.

Mabo (no. 2), para. 29

In the *Van der Peet* case, the Supreme Court of Canada held that an Aboriginal claimant to an Aboriginal right must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the Aboriginal society of which he or she is part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. It must be demonstrated that the practice, custom or tradition was one of the things which made the culture of the society *distinctive* – that it was one of the things that truly *made the society what it was*. A practical way of looking at this problem, the court held, is to ask whether, without this practice, custom or tradition, the culture in question would be fundamentally altered or other than that what it was. To put the question affirmatively, one

must ask whether or not a practice, custom or tradition is a defining feature of the culture in question.

Regarding the time that a court should consider in identifying whether the right claimed meets the standard of being integral to the Aboriginal community claiming the right, the court in *Van der Peet* held the period prior to contact between Aboriginal and European societies was the vital time. Not wanting to place a too heavy evidentiary burden on the applicants in proving this, the court held that the evidence relied on simply needs to be directed at demonstrating which aspects of the Aboriginal community and society have their origins pre-contact. The court in making this point referred to the position adopted by Justice Brennan in *Mabo (no. 2)* where he held that in order for an Aboriginal group to succeed in its claim for Aboriginal title it must demonstrate that the connection with the land in its customs and laws has continued to the present day:

[W]hen the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.

Ibid., para. 66

The *Van der Peet* court held that the phrase “existing aboriginal rights” in Section 35(1) of the Canadian Constitution must be interpreted flexibly so as to permit their evolution over time.

In the *Delgamuukw* case, the Supreme Court of Canada was once again confronted with applying and interpreting the guarantee of existing Aboriginal rights found in Section 35(1) of the Canadian Constitution. The court accepted that conclusive evidence of pre-sovereignty occupation may be difficult to come by. Instead, the court held, an Aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to Aboriginal title. What was required in addition, however, is continuity between present and pre-sovereignty occupation, because the relevant time for determination of Aboriginal title was at the time of sovereignty. There was no need, the court held, to establish an unbroken chain of continuity between present and prior occupation. The occupation and use of lands may have been disrupted for a time, perhaps as a result of the unwillingness of European colonisers to recognise Aboriginal title. To impose the requirement of continuity too strictly, the court held, would risk undermining the very purposes of Section 35(1) by perpetuating the historical injustice suffered by

Aboriginal peoples at the hands of colonisers who failed to respect Aboriginal rights in land. The court concurred with *Mabo (no. 2)* which set down the requirement that there must be a substantial maintenance of the connection between the people and the land and held that this test should be equally applicable to proof in Canada (*Delgamuukw*, para. 153).²⁴ Chief Justice Lamer emphasised that Aboriginal title is held communally. That it cannot be held by individual Aboriginal persons and that is a collective right to land held by all members of an Aboriginal nation. Decisions with respect to the land are made by the community. This feature of Aboriginal title, he held, made it *sui generis* and distinguished it from normal property interest in Canada (*Ibid.*, para. 115).

The nature and content of Aboriginal title in Canada can be summed up as follows: (i) The source and content of Aboriginal title is the *occupation* of the relevant land *prior* to colonisation; (ii) Aboriginal title is *proprietary* in nature and stands on equal footing with other proprietary rights; (iii) it enjoys constitutional *protection*; (iv) the content of Aboriginal title includes the right to exclusive *use* and *occupation* of land; (v) use of the land that is irreconcilable with the nature of the original attachment to land that is the basis of the Aboriginal title is prohibited and this gives Aboriginal title a *sui generis* nature; (vi) Aboriginal title is a *communal right* and is not vested in individuals; (vii) Aboriginal title is defined at the time when the coloniser asserted jurisdiction over the territory and (viii) the test for identifying the Aboriginal rights recognised and affirmed by Section 35(1) of the Constitution must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must aim at identifying the practices, traditions and customs central to the Aboriginal societies that existed in North America *prior to contact* with the colonisers.

The jurisprudential cross-pollination between Australia and Canada²⁵ is aptly described by Knafla as follows:

It is interesting to note that the *Mabo* case was influenced by Canada's *Calder* case of 1973. Lawyers from the two countries exchanged views and arguments. Justice Blackburn cited the Court of Appeal decision in the

²⁴ For a more extensive view of the influence of *Mabo (no. 2)* on Canada, see Russell (2005).

²⁵ The jurisprudential cross-pollination between Canada and Australia is illustrated by Justice Brennan in *Mabo (no. 2)* relying on *Calder* in holding that the recognition provided by native title is not absolute (*Mabo (no. 2)*, 64). That while the courts have recognised that Aboriginal peoples' right to land survived colonisation, the state has power to divest those rights. *Mabo (no. 2)* also held that the *Calder* case offered strong support for the existence of native title at common law. (*Ibid.*, 104–09) See also Arthur (2005, 15).

Calder case in denying title in *Milirrpum v Nabalco Pty Ltd*, but the [High Court of Australia] cited the [Supreme Court of Canada] in overruling Blackburn's judgment as 'wholly wrong' in *Mabo (no. 2)*. Conversely, when the [Supreme Court of Canada] decided the *Delgamuukw* case on appeal, it cited *Mabo (no. 2)*.

KNAFLA 2000, 3

8 New Zealand

Since colonisation the ability of the Indigenous people of New Zealand (i.e. Māori) to maintain their relationship with their environment has been under threat. To the Māori, the environment is personified with a life force that views all things, including human beings, as interrelated. It is the environment that gives the Māori their spiritual, cultural and political and economic identity. Extensive traditional laws exist that centre on ensuring this natural balance. The Māori see their survival as being, *inter alia*, dependent on the sea. The sea is a source of food; it links past generations with future generations through the passing of knowledge and traditions and it provides a geographical link to the world order. The indivisible entity of land and water makes the Māori who they are (Ruru 2010, 185–201). The British settlers who colonised New Zealand, however, had a different way of seeing the world. They saw human beings as being separate from nature and having dominion over it. According to them, nature could be exclusively owned and relied on for economic ends. To the Māori the beach, foreshore and seabed are special. Land *under* or *bordering* the sea should be freely accessible and not subject to exclusive private ownership.

These two worldviews were bound to clash especially the views on the ownership relating to the landscape separating the high water mark from tidal land and the seabed. These two worldviews encapsulate the controversy relating to customary ownership of the foreshore and seabed which dominated the native title debate in New Zealand for many years. This controversy culminated in the New Zealand Court of Appeal's decision *Ngati Apa v Attorney General* (2003). To the great surprise of the government and the majority of public opinion, *Ngati Apa* unanimously held that the Māori should be allowed the *opportunity to prove*, in the courts, *customary ownership* of the foreshore and seabed. The judicial recognition of possible Māori aboriginal title property rights around the coastline caused similar shockwaves in New Zealand as *Mabo (no. 2)* had in Australia 10 years earlier. This set in motion a classic legal battle between common law and statute laws; between the courts and the legislature. The

government was determined not to allow the Māori's this opportunity and in 2004 introduced legislation that clearly intended to extinguish possible Māori or native title in the foreshore and seabed. It will be attempted to briefly set out the ensuing controversy and put it into an historical and comparative legal context.²⁶

All land in New Zealand was initially customary land. This was held by Chief Justice Elias in *Ngati Apa* who stated that customary land was *property in existence* when the colonial government was established by the Crown in 1840 (*Ngati Apa*, 651). The Treaty of Waitangi of 1840 between British and Māori representatives did not create, alter or extinguish this situation (McHugh 1997). The treaty merely gave the British Crown the right to govern and Māori chiefs retained control over their own affairs and were seen to be British citizens. The Crown was granted the right of pre-emption to purchase Māori land. The Treaty of Waitangi introduced English common law into New Zealand and ensured the continuation of Māori property rights in their customary lands despite a change of sovereignty. This was reiterated in *R v Symonds* (1847) where it was held that Māori customary interests were to be respected and not to be extinguished in times of peace without their consent.

In the 1860s, the government, in an attempt to convert property owned by the Māori to settler-owned property, established a Native Land Court (now named the Māori Land Court). Māori were now entitled to apply to this court for a fee simple title that would effectively alter the status of Māori customary land to Māori freehold land. Once freehold title was issued the Māori were encouraged to alienate their land to the settlers. The intention of the Native Lands Acts of 1862 and 1865, which introduced *inter alia* the above Native Land Court, was to assimilate as closely as possible ownership of land in New Zealand to that in British law. However, in 1887 Chief Justice Prendergast in *Wi Parata v the Bishop of Wellington* (1877) held that the doctrine of native title had no application in New Zealand because there were no laws or rights in property existing before 1840 because the Māori were “primitive barbarians” (*Wi Parata*, 72–78). That, consequently, the government must acquit itself as best it may regarding native property rights and be the sole arbiter of its own justice. The Privy Council in 1901 disapproved of the *Wi Parata* case in *Nireaha Tamaki v Baker* (1901) on the basis that it was too late in the day for an argument to be made that native title had no application. *Wi Parata*, however, resonated in New Zealand's courts for many years and particularly came to the fore in 1963 in *Re the Ninety Mile Beach*

26 I am heavily indebted to McHugh (2011, 202–10) and Ruru (2010, 185–201) for the historical context referred to.

(1963). Here the Court of Appeal held that all foreshore in New Zealand that lies between the high and low water marks, and in respect of which contiguous landward title has been investigated by the Māori Land Court, is *land in which Māori customary property has been extinguished*. The court reasoned that on the assumption of British sovereignty the rights of the Māori to their tribal lands depended solely on the grace and favour of Her Majesty Queen Victoria who had an absolute right to disregard native title to any lands in New Zealand, whether above the high water mark or below the high water mark. Decisions after *Re the Ninety Mile Beach* case have effectively repudiated it and returned to the 1847 *R v Symonds* precedent which held that Māori customary interests were to be respected and not to be extinguished without their consent. In 1986, the High Court in *Te Weehi v Regional Fisheries Officer* (1986) held the view that the treatment of Indigenous peoples under English common law confirmed that the local rights and property of Indigenous peoples in ceded or settled colonies were *not set aside* by the establishment of British sovereignty. This view was similarly held in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* (1994) by the Court of Appeal and in *Faulkner v Tauranga District Council* (1996) where the High Court stressed that native title “does not disappear by a side wind” (*Faulkner*, 363).

Above laid the table for *Ngati Apa*. The *Re the Ninety Mile Beach* decision reasoned that the transmutation into Māori freehold land of customary land bordering the sea extinguished any customary Aboriginal interest over the foreshore or seabed. The court accepted a general supposition that once landward Aboriginal title disappeared, so did that below the high water mark. This reasoning was augmented by a general belief that the title to the foreshore and seabed vested in the Crown under its prerogative with no qualifications.

The various legal implications raised in *Re the Ninety Mile Beach* landed up in the High Court in *Re Marlborough Sounds Foreshore and Seabed* (2002) where it held that the foreshore and seabed are *not* Māori customary land but Crown land. This was not an unanimous decision and led to *Ngati Apa* where the full bench of the Court of Appeal came to an unanimous decision that the Māori Land Court, if the evidence warrants it, has the jurisdiction to *investigate* and *determine* whether the foreshore and seabed are Māori *customary land* and protected by *native title*. In *Ngati Apa* the Court of Appeal reiterated the 1901 Privy Council *Nireaha Tamaki* decision that the *Wi Parata* decision was wrong in law and overruled the *Re the Ninety Mile Beach* case. The Court of Appeal defined the foreshore and seabed as “land” and held that simply stating that the foreshore and seabed are, and always have been, vested in the Crown is not sufficient to constitute plain intent to extinguish native title in the foreshore and seabed.

Regarding *native title*, the Court of Appeal in *Ngati Apa* held as common law doctrine that any property interest of the Crown in land over which it acquired sovereignty depends on pre-existing customary interests (*Ngati Apa*, 655–666). That such interests are preserved by the common law until extinguished in accordance with the law. In coming to these conclusions, *Ngati Apa* relied on the Australian *Mabo (no. 2)* and the Canadian *Delgamuukw* judgments. As stated, *Mabo (no. 2)* held that native title to land whether classified as proprietary, usufructuary or otherwise is ascertained according to the laws and customs of Aboriginal peoples. *Delgamuukw* similarly referred to Aboriginal title as a right in land which includes practices, custom and traditions integral to the distinctive cultures of Aboriginal societies. It will be recollected that *Delgamuukw* relied heavily on *Mabo (no.2)*. The Court of Appeal in *Ngati Apa* concurred with the reasoning in *Delgamuukw* in stating:

The Supreme Court of Canada has had occasion recently to consider the content of customary property interests in that country. It has recognised that, according to the custom on which such rights are based, they may extend from usufructuary rights to exclusive ownership with incidents equivalent to those recognised by fee simple title.

Ibid., 656

The New Zealand Court of Appeal in *Ngati Apa* extended this reasoning to land under water. Native title, the Court of Appeal held, can exist in regard to land under water and can exist to the extent of exclusive ownership akin to a fee simple title. Not wishing to declare that such land does in reality exist in New Zealand, the Court of Appeal held that the Māori should not be prevented from bringing an application of this nature to the Māori Land Court. The presumption of Crown ownership of the beach, foreshore and seabed was effectively displaced by the presumption in favour of the common law doctrine of native title.

Public and political reaction to *Ngati Apa* was unprecedented leading to legislation such as the 2004 Foreshore and Seabed Act (FSA) which attempted to ameliorate the effects of the *Ngati Apa* decision. This in turn led to heavy Māori hostility and attempts to repeal the FSA which again were almost as controversial as the FSA itself. Developments after the FSA have been incisively discussed elsewhere (Brookfield 2005; Charters and Erueti 2007; Ruru 2004; McHugh 2004) and for our purposes need not be repeated here.

9 From *Mabo (no. 2)* to the African Commission on Human and Peoples' Rights and Beyond

The courts in Australia, Canada and New Zealand in recognising Aboriginal title of the Indigenous inhabitants gave a legal basis to their Indigenous peoples' claims to the use and occupation of lands they occupied since pre-colonisation. The court decisions represented vital moments in the history of the relations between these states and their Indigenous peoples. The courts took legal cognisance of Indigenous peoples' customary rights over lands and natural resources. The major breakthrough was *Mabo (no. 2)*. Its imprint was clearly illustrated in Malaysia, South Africa, Botswana, Belize and in a decision of the African Commission on Human and Peoples' Rights regarding land rights of an Indigenous community in Kenya. *Mabo (no. 2)* found resonance in these jurisdictions due to specific concurring references to it by the courts. Due to space constraints these jurisdictions will not be discussed in any depth but merely to indicate the lasting influence of *Mabo (no. 2)*. It is important to note that all the following jurisdictions come from a similar colonial background as Australia.

9.1 Malaysia

In Sarawak, a state of the Federation of Malaysia, the Indigenous Orang Asli of the Malay Peninsula have no specific constitutional protection of their property rights besides Article 13 of the Constitution which declares that no person shall be deprived of property save in accordance with the law and adequate compensation must be paid for compulsory acquisition. The courts have however attempted to recognise the land rights of the Orang Asli through balancing common law, statutory law and the provisions of the Constitution. The Malaysian Federal Court in *Superintendent of Lands & Surveys, Miri Division and Government of Sarawak v Madeli bin Salleh* (2007) explicitly endorsed the doctrine of the customary property rights of Orang Asli in Sarawak in holding that the common law doctrine of customary property rights as enunciated in *Mabo (no. 2)* and the *Calder* case reflected the legal position with regard to *native title* throughout the British Commonwealth (*Superintendent of Lands & Surveys*, para 19).²⁷ This case recognising the common law foundation of Indigenous customary rights relating to land is extremely important in Malaysian context

²⁷ In *Adong bin Kuwau and Ors v Kerajaan Negeri Johor and Anor* (1997) the Johor High Court held that the Indigenous Jakun tribe had common law Aboriginal rights citing the *Calder* case as well as *Mabo (no. 2)*.

if the controversial plans of the logging and palm plantation industries in that country are taken into account.

9.2 *South Africa*

The concept of Aboriginal title has a strong appeal to Indigenous peoples in the southern portion of Africa who were displaced by colonialism. A classic example in South Africa is that of the Richtersveld community where the litigation developed into David versus Goliath proportions.

To understand the importance of the case, a brief background must be set out. The Richtersveld forms part of a larger area known as Namaqualand, and is situated south of the Garib (Orange) River in the Northern Cape Province. Two groups of Indigenous peoples originally inhabited the area long before the Dutch colonisation of the Cape from 1652 onwards. The (pastoralist) Khoi Khoi and the (hunter-gatherer) San peoples moved about in nomadic fashion according to the seasons and the rainfall. By the 19th century, the groups had merged. Others who came to the area, in particular some white *trekboere* (itinerant farmers) and the so-called *basters* (people of mixed descent, mainly from white fathers and San or Khoi mothers), were also incorporated into the group. The people of this new formation are sometimes referred to as Khoisan or Nama.

An important development was that southern Namaqualand in its entirety (including the Richtersveld) was placed under British rule through annexation in 1847 which followed on an Annexation Proclamation. From this point, the area was considered to be Crown land. Seventy years later (between 1925 and 1927), a rich deposit of diamonds was discovered in the area. By that time, the British colonial government had been replaced by a South African government. The South African government considered the land upon which the diamonds were discovered to be unalienated "Crown land" due to the annexation thereof. Hence, they proclaimed alluvial diggings and awarded mining rights to various stakeholders. From this time on, the Richtersveld people were progressively denied access to the land they previously occupied. The ousting of these people was, for instance, effected by the erection of a fence in 1957; the creation of farms to act as buffers between the diamond-rich area and the rest of the territory occupied by the Richtersveld community; the creation of a reserve for the community and the establishment of the Alexander Bay Development Corporation which would hold most of the prospecting and mining rights. This corporation was state-owned. When it was eventually converted into a private stock company (Alexkor) the state remained the largest shareholder.

Section 2(d) of the Restitution of Land Rights Act 22 of 1994 states that a community or part of a community shall be entitled to restitution of a "right

in land” if “dispossessed” of a “right in land” after June 1913 as a result of past *racially discriminatory* laws or practices. The Richtersveld community in initially going to the Land Claims Court averred a number of “dispossessions”. These included the failure of previous governments to recognise their rights after the British annexation, coupled with the proclamation of the area in terms of the Precious Stones Act 44 of 1927 and the granting of prospecting and mining leases to Alexkor (*Richtersveld Community and Others v Alexkor Ltd and Another* 2001). A restitution of the *dispossessed land rights* was claimed. The community was unsuccessful in the Land Claims Court but successful in the Supreme Court of Appeal (SCA) and thereafter in the Constitutional Court (CC).

The courts had to decide (i) whether the Richtersveld community was a *community*, (ii) did they have any *rights* to the land, (iii) had they been *dispossessed* in their *rights in land* due to *past racially discriminatory* laws or practices.

The SCA, on appeal, disagreed with the Land Claims Court holding that the *customary practices* of the community did disclose a “right in land” for purposes of the Restitution of Land Rights Act 22 of 1994. The nature of this “right in land”, the SCA held, was that it was a *customary law interest* which had been present at the time of British annexation and had continued until the community were dispossessed in the 1920’s due to the discovery of diamonds. The substantive content of the interest, the SCA held, “was a *right to exclusive beneficial occupation and use, akin to that held under common-law ownership*” (*Richtersveld Community and Others v Alexkor Ltd and Another* 2003, para. 29; emphasis added). The SCA defined the community’s right to land as a right inhered in an Indigenous community which happened to be in exclusive occupation of land at a time when foreign settlers acquired sovereignty. This *right in land*, the SCA held, rested on three factors: an origin in a *pre-colonial system of Indigenous law*; a *communal nature* which implies that the right vested in a group and not an individual; and the *inalienability* of the right to anyone except to the state. This right, the SCA emphasised, must have existed at the time of colonisation and must have been maintained until the date of the claim action by the community under the Restitution of Land Rights Act 22 of 1994.

By examining the community’s *customs*, the CC found in *Alexkor Ltd* (2004) that *rights to land* had been exercised to the exclusion of outsiders, and as a result that the community had in the subject land a right of *communal ownership* under *Indigenous law*. Further that

[t]he content of the right included the right to exclusive *occupation and use* of the subject land by members of the Community. The Community had the right to use its water, to use its land for grazing and hunting and

to exploit its natural resources, above and beneath the surface. It follows therefore that *prior to annexation* the Richtersveld Community had a *right of ownership* in the subject land *under indigenous law*.

Alexkor Ltd and Another v The Richtersveld Community and Others, para. 62; emphasis added²⁸

Because of the undisputed evidence on the mining activities of the community in the past such as working in copper and iron, the CC held that the communal ownership of the subject land included the communal ownership of the minerals and precious stones which vested in the community under “Indigenous law”. Regarding the question whether the dispossession was a result of past racially discriminatory laws or practices, the CC found that this was so and fell squarely within the scope of the Restitution of Land Rights Act 22 of 1994.

The CC took cognisance of the *Calder, Mabo (no. 2)*, *R van der Peet*, *Delgamuukw* and *Yorta Yorta* cases referring to these cases as having similarly dealt, after the event, with injustices caused by dispossessions of land, or rights in land, from Indigenous inhabitants by later occupiers of the land in question (*Alexkor Ltd and Another v The Richtersveld Community and Others*, footnote 21). The CC saw nothing in the 1847 Annexation Proclamation or in the events preceding the annexation which suggested the extinguishment of the land rights of the Richtersveld community. The CC found that the change of sovereignty in 1847 did not disturb the property rights of the inhabitants. The CC concurred with the Privy Council in *Adeyinka Oyekan* (1957) where it held that native title to land need not be that of an individual, as in Britain, but may be that of a community (*Adeyinka Oyekan and Others v Musendiku Adele*, para. 402). The CC thus agreed with the SCA that Indigenous rights in a conquered territory were recognised and protected after the acquisition of sovereignty. Consequently, the Richtersveld community were, as at 1847, in *bona fide* and beneficial occupation of the land without title deed. This all changed, held the CC, with the Precious Stones Act 44 of 1927 which referred to the land in question as state land which had not been alienated and was thus state owned. This Act however did not recognise the rights of the Richtersveld community who were at the time the owners of the land under Indigenous law. These rights were simply ignored, held the CC, as if the Richtersveld community had no rights in the land.

28 For a more extensive discussion of the Constitutional Court case, see Mostert, 2002. 160–167; Patterson (2004).

The CC ordered that the Richtersveld community were entitled to restitution of the right to ownership of the land in question and the exclusive beneficial use and occupation thereof.

9.3 *Botswana*

Botswana, which became independent in 1966, was initially known as the Bechuanaland Protectorate which was established by Britain in 1885. In *Sesana and Others v Attorney General* (2006), the Basarwa, a group of San hunter-gatherers, commenced litigation protesting against their relocation in 2002 from the Central Kgalagadi Game Reserve which in 1961 had been proclaimed a game reserve. The game reserve was carved out of what in 1910 had been proclaimed as Crown land. The Basarwa sought to retain the right to remain on their traditional territory which was inside the proclaimed game reserve.

The court found that some of the Basarwa were descendants of people who had been resident in the Kgalagadi region before the game reserve was established in 1961. That they were by operation of the customary law in the area, in *lawful occupation* of the land prior to the creation of the Bechuanaland Protectorate by Britain in 1885. The High Court held that neither the 1910 proclamation nor the 1961 proclamation displaced the presumption of the *legal continuity* of the land rights of the Basarwa community.²⁹ Justice Phumaphi acknowledged *Mabo (no. 2)* as a landmark case that set the trend for the application of the doctrine of Aboriginal title. Whilst not binding on the Botswana High Court, he held, *Mabo (no. 2)* offered a comparative perspective to a situation not much different from that before the court. He consequently found *Mabo (no. 2)* “quite persuasive” and held that the Basarwa had always possessed native title to the game reserve and that this title had not been extinguished. The Basarwa were thus in lawful occupation of their settlements (*Sesana*, para 92).³⁰

The *Sesana* decision in effect reaffirmed the doctrine of Aboriginal (native) title in Botswana and arguably to similarly situated Indigenous peoples on the African continent. The court in effect acknowledged the applicability of the customary laws of Indigenous peoples in giving recognition and

29 Regarding the presumption of the legal continuity of the land rights of Indigenous peoples the court cited *Re Southern Rhodesia* (1910) and *Amodu Tijani v The Secretary, Southern Provinces* (1921). See Saugestad (2011).

30 The court held further that the Botswana government's policy of refusing the Basarwa to enter the game reserve unless they were issued with permits amounted to an unlawful curtailment of their constitutional right to freedom of movement (*Sesana*, para. 162).

protection to their lands as did the South African Constitutional Court in the *Richtersveld* case.

9.4 *Belize*

Belize is a former British colony known as British Honduras. In *Aurelio Cal et al. v The Attorney General of Belize and the Minister of Natural Resources and Environment* (2007),³¹ Chief Justice Abdulai Conteh held that the Belize government had failed to protect and recognise the property rights of the Indigenous Maya in the lands they and their ancestors had traditionally used and occupied. This failure, the court held, was discriminatory and a violation of the Belize Constitution and indicative of a refusal to recognise the rights of the Maya people to their lands and resources in southern Belize based on longstanding use and occupancy. The Chief Justice relied on above Malaysian and South African authorities and emphasised Justice Brennan's judgment in *Mabo (no. 2)*. The matter returned to the courts as *Maya Leaders Alliance and the Toledo Alcaldes Association on behalf of the Maya Villages of Toledo District and Others v Attorney General of Belize and Others* (2010).³² Chief Justice Conteh reiterated the authorities he had earlier relied on relating to Aboriginal title and held that the doctrine of Aboriginal title had as an underlying presumption the legal continuity of tribal property rights. Further that change or acquisition of sovereignty does not displace the rights of the inhabitants to their lands (*Maya Leaders Alliance*, para. 118).

9.5 *Kenya and the African Commission on Human and Peoples' Rights*

In Kenya, a former British colony, there are approximately 42 ethnic groups. The history of land policies in Kenya has been one of exclusion, dispossession and pressure on the use and access to land. The High Court case *William Yatich Sitetalia and Others v Baringo County Council* (2002) concerned the removal of the pastoralist Endorois community from the environs of Lake Bogoria, their traditional territory, by the Kenya Wildlife Service to create a game reserve. The High Court held that the gazetting of the game reserve and compensations paid was conclusive against any claim. The High Court refused to recognise any Endorois communal title or right to their traditional lands. The High Court was of the view that there was no proper identity of the people affected by the setting aside of the land and was not prepared to see the Endorois as a community.

31 Unreported. I am indebted to McHugh (2011, 211). for the particulars of the case.

32 Unreported. I am indebted to McHugh (2011, 212) for the particulars of the case.

The issue eventually gravitated to the African Commission on Human and Peoples' Rights (Commission), which is the supervisory organ of the African Charter on Human and Peoples' Rights (African Charter).³³ This Commission promotes, protects and interprets the African Charter and promotes human rights in Africa. The case *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009),³⁴ as seen above, concerned the displacement of the Endorois from their ancestral lands and the alleged violation of *inter alia* article 14 of the African Charter which states: "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws".

The Endorois submitted that they were a community of 60,000 people who had lived in the environs of Lake Bogoria for centuries and consequently had a right to property with regard to their ancestral land. They argued that for centuries they had constructed their homes, cultivated the land, enjoyed unchallenged rights to pasture, grazing and forest land and relied on the land to sustain their livelihoods around Lake Bogoria. In so doing, they argued, they had exercised an Indigenous form of land tenure. They argued further that even under colonial rule when the British claimed formal possession of their land, the colonial authorities recognised their right to occupy and use the land and its resources.

They relied on national court cases such as those of the Canadian Supreme Court in *Calder*, the High Court of Australia in *Mabo (no. 2)* and the South African Constitutional Court decision in *Alexkor Ltd* discussed above (*Endorois Welfare Council*, para. 94).

The Endorois further submitted that the protection accorded by Article 14 of the African Charter to the right of property includes *Indigenous property rights*. The Commission agreed with this approach holding that "the first step in the protection of traditional African Communities is the acknowledgement that the rights, interests and benefits of such communities in their traditional lands constitute 'property' under the Charter". This "right to property" of members of the Endorois community, the Commission held further, is held "within the framework of a communal property system" (*Ibid.*, paras. 187 and 196).

In conclusion, the Commission held: (1) traditional possession of land by Indigenous peoples has the equivalent effect as that of a state-granted

33 Organisation of African Unity, Resolution of the 18th Assembly of Heads of State and Government, 1 June 1981. The African Charter is available online at <https://www.achpr.org/legalinstruments/detail?id=49> (accessed December 1, 2020).

34 This case is discussed in greater depth by Beukes (2010) and Barrie (2011).

full property title; (2) traditional possession entitles Indigenous peoples to demand official recognition and registration of property title; (3) the members of Indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality (*Ibid.*, para. 209). The Commission recommended that Kenya recognises the rights of ownership to the Endorois and restores Endorois ancestral land.³⁵

10 Conclusions

The chapter has attempted to set out a comparative jurisprudential history of a phenomenon called Aboriginal/Indigenous/native title generated in the Australian High Court case *Mabo (no. 2)* which also had a dramatic impact in previous Anglo colonised countries such as Canada, New Zealand, Malaysia, South Africa, Botswana, Belize and Kenya. It decidedly influenced the Inter-American Court of Human rights which evolved a version of Aboriginal title which, although based on international law, had clear and distinct echoes of the common law approach expanded on above (McHugh 2011, 234). National courts gave legal basis to Aboriginal peoples' claims to the use and occupation of lands they had occupied since pre-colonisation. Aboriginal peoples through landmark decisions of the courts were jolted out of the old paradigm of juridical exclusion into a new paradigm of juridical inclusion. Aboriginal peoples also found entry to negotiation rooms. Land claims suddenly became systemic. Aboriginal title, referred to as "native title" in *Mabo (no. 2)*, developed fresh offshoots in fraternal jurisdictions. Aboriginal peoples overnight became rights-bearing members of their respective legal systems. As seen by McHugh (2011, 1–24), there was a distinct feeling that the time had come for a court-generated jurisprudence of Aboriginal rights. Common law Aboriginal

35 In coming to its conclusion the Commission also approvingly referred to related decisions of the Inter-American Court of Human Rights such as *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001), *Moiwana Community v. Suriname* (2005) and *Yakye Axa Indigenous Community v. Paraguay* (2005). *Mayagna (Sumo) Awas Tingni Community* was the first major recognition of Aboriginal land rights by an international adjudicative tribunal. The case is discussed extensively by Anaya and Grossman (2007). In the case of *Yakye Axa Indigenous Community* it was held that "granting legal status makes operative previously existing rights of the indigenous communities who have exercised them historically (...) and the right to claim their traditional lands are recognised (...) to the community itself" (*Yakye Axa Indigenous Community*, para. 82).

title was the proverbial idea whose time had come. *Mabo (no. 2)* led to a reassessment of governments' relations with their Indigenous peoples and forced governments towards a more active dialogue. *Mabo (no. 2)*'s legacy has also led to the realisation of Indigenous peoples' rights to consultation (Newman 2014),³⁶ participation and consent to proposed development measures in their traditional lands (De Villiers 2000; Barrie 2018, 171–84). With hindsight, the developments generated by *Mabo (no. 2)* in Australia and elsewhere leads one to agree with Peter Russell (2005, iv) where he memorialised Eddi Koiki Mabo as being a “shit-disturber par excellence”.

Would it be too far-fetched to state that the seed planted by *Mabo (no. 2)* and the roots it generated eventually led to the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)³⁷ which makes extensive provision for the land rights of Indigenous peoples. Article 26(1) declares that “[i]ndigenous peoples have the rights to the lands, territories and resources which they have traditionally owned”. Article 26(2) states that Indigenous peoples have the right to own, develop and control the lands, territories and resources that they possess by reason of *traditional* ownership or other *traditional* occupation and use. Article 26(3) declares that states shall give *legal recognition* and protection to these lands, territories and resources with due respect to the customs, traditions and land tenure systems of the Indigenous peoples concerned. A study of *Mabo (no. 2)*, and the courts it influenced inside and outside of Australia, dramatically brings to the fore the political, cultural and historical contexts in which the courts had to function when coming to their decisions. When Lorna Cubillo came away from her failed *Cubillo v Commonwealth* (2000) case and was asked whether she thought that the lawyers, historians and judges understood her feelings, she replied:

No, I mean they couldn't possibly understand. They are knowledgeable people in their areas and about some things but they have no knowledge

36 In *Haida Nation v British Columbia* (2004), Chief Justice McLachlin held: “The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process (...) flowing from rights guaranteed by [Section] 35(1) of the Constitution Act, 1982” (*Haida Nation v British Columbia*, para. 32).

37 United Nations General Assembly Resolution A/Res/61/295 of 13 September 2007. UNDRIP is extensively discussed in Hartley, Joffe and Preston (2010), and Barrie (2013). When UNDRIP was passed, it was supported by 143 states. Four states (i.e. Australia, Canada, New Zealand and the United States) voted against it. These four states have subsequently endorsed UNDRIP. The United Nations Declaration on the Rights of Indigenous Peoples is available online at <https://www.ohchr.org/en/issues/ipeoples/pages/declaration.aspx> (accessed December 1, 2020).

about the Aboriginal way of life. They try to understand but they won't ever really or fully understand who we are, you can't if you haven't lived it...It is very hard to bridge that gap of understanding.

quoted in CURTHOYS, GENOVESE AND REILLY 2008, 221

Chief Justice Lamer in the *Van der Peet* case acknowledged the fact that cultures change and called upon his colleagues to be flexible in determining what is genuinely Aboriginal (*Van der Peet*, para. 113). This request is more difficult than what it seems. Culture depends on many factors. Aboriginal culture depends on distinctive practices, customs and traditions seen holistically and considered apart from the practices, customs or traditions of any other culture. It is a claim that "this tradition or custom makes the culture what it is" (*Ibid.*, para. 71). It would appear that this was precisely the approach adopted by Justice Brennan in *Mabo (no. 2)* where he observed that "[n]ative title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory" (*Mabo (no. 2)*, para. 64).

Bibliography

- Allen, Edward. 2013. "Reflections on the 40th anniversary of the Calder decision". *Northern Public Affairs* 2(1): 14–21.
- Anaya, S. James. 2004. *Indigenous Peoples in International Law*. Oxford: Oxford University Press.
- Anaya, S. James and Claudio Grossman. 2007. "The Case of *Awas Tingni v. Nicaragua*: A New Step in the International Law of Indigenous Peoples". *Arizona Journal of International and Comparative Law* 19(1): 1–15.
- Arthur, Ray. 2005. "Constructing and reconstructing Native history: a comparative look at the impact of Aboriginal and treaty rights claims in North America and Australia". *Native Studies Review* 16(1): 15–39.
- Barrie, George. 2011. "The Quest for Indigenous Land Rights intensifies: *Mabo (No 2)*, *Delgamuukw*, *Richtersveld* and now the Endorois of Kenya". *Southern African Public Law* 26(2): 497–509.
- Barrie, George. 2013. "The United Nations Declaration on the Rights of Indigenous Peoples: Implications for Land Rights and Self-Determination". *Tydskrif vir die Suid-Afrikaanse Reg*, Issue 2: 292–305.
- Barrie, George. 2018. "International Law and Indigenous People: Self-Determination, Development, Consent and Co-Management". *Comparative and International Law Journal of Southern Africa* 51(2): 171–84.

- Bartlett, Richard. 1993. "Mabo: Another Triumph for the Common Law". *Sydney Law Review* 15(2): 178–86.
- Bartlett, Richard. 2003. "An Obsession with Traditional Law and Customs Creates Difficulties Establishing Native Title Claims in the South: *Yorta Yorta*". *The University of Western Australia Law Review* 31(1): 35–46.
- Beukes, Margaret. 2010. "The Recognition of Indigenous Peoples and their Rights as a People: An African First". *South African Yearbook of International Law* 35(1): 216–38.
- Blackstone, William. 1765. *Commentaries on the Laws of England*. Oxford: Clarendon Press.
- Bottomley, Stephen and Simon Bronniti. 2012. *Law in Context*. Sydney: The Federation Press.
- Brennan, Sean. 2015. "The Significance of the Akiba Torres Strait Regional Sea Claim Case". In *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?*, edited by Sean Brennan, Megan Davis, Brendan Edgeworth, Leon Terrill, 29–43. Sydney: The Federation Press.
- Brennan, Sean, Megan Davis, Brendan Edgeworth and Leon Terrill (eds). 2015. *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?*. Sydney: The Federation Press.
- Brennan, Sean. 2003. "Native Title in the High Court of Australia a decade after Mabo". *Public Law Review* 14: 209–218.
- Brookfield, F. 2005. "Maori Claims and the 'Special' Juridical Nature of the Foreshore and Seabed". *New Zealand Law Review* 2: 179–188.
- Charters, Claire and Andrew Erueti (eds). 2007. *Māori Property Rights and the Foreshore and Seabed: The Last Frontier*. Wellington: Victoria University Press.
- Clarke, Jennifer. 2001. "*Cubillo v The Commonwealth*". *Melbourne University Law Review* 25: 218–294.
- Curthoys, Ann, Ann Genovese and Alexander Reilly. 2008. *Rights and Redemption: History, Law and Indigenous People*. Sydney: University of New South Wales Press.
- De Villiers, Bertus. 2000. "Democratisation of conservation: community involvement in the management of national parks". *Southern African Public Law* 15(1): 176–96.
- Dugard, John. 2018. *Dugard's International Law*. Claremont: Juta and Company Ltd.
- Fitzpatrick, Peter. 2002. "No Higher Duty. Mabo and the Failure of Legal Foundation". *Law and Critique* 13: 233–52.
- Gregory, Mark. 1992. "Rewriting History: Mabo v Queensland: the decision". *Alternative Law Journal* 17(4): 157–61.
- Hanke, Lewis. 1949. *The Spanish Struggle for Justice in the Conquest of America*. Philadelphia: University of Philadelphia Press.

- Hartley, Jackie, Paul Joffe and Jennifer Preston (eds). 2010. *Realizing the UN Declaration on the Rights of Indigenous Peoples. Triumph, Hope, and Action*. Saskatoon: Purich Publishing Ltd.
- Henderson, James. 2006. *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society*. Saskatoon: Native Law Centre – University of Saskatchewan.
- Hoehn, Felix. 2012. *Reconciling Sovereignties: Aboriginal Nations and Canada*. Saskatoon: Native Law Centre – University of Saskatchewan.
- Hughes, G. 1993. "The High Court failed Nation with Mabo, Says Mining Chief". *The Australian*: July 1, 1993, 1–2.
- Hunyor, Jonathon. 2015. "Dancing with Strangers: Native Title and Australian Understandings of Race Discrimination". In *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?*, edited by Sean Brennan, Megan Davis, Brendan Edgeworth, Leon Terrill, 99–124. Sydney: The Federation Press.
- Isaac, Thomas. 2004. *Aboriginal Law: Commentary, Cases and Materials*. Saskatoon: Purich Publishing Ltd.
- Isaac, Thomas. 2006. *Aboriginal Title*. Saskatoon: Native Law Centre – University of Saskatchewan.
- Kades, Eric. 2001. "History and Interpretation of the Great Case of Johnson v M'Intosh". *Law and History Review* 19(1): 67–116.
- Keating, Paul. 1992. "Redfern Address". *Land Rights News*, December 2, 1.
- Keon-Cohen, Bryan. 2000. "The Mabo Litigation: A Personal and Procedural Account". *Melbourne University Law Review* 24(3): 893–951.
- Knafla Louis. 2000. "'This Is Our Land': Aboriginal Title at Customary and Common Law in Comparative Contexts". In *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand*, edited by Louis Knafla and Haijo Westra, 1–34. Vancouver: University of British Columbia Press.
- Knafla, Louis and Haijo Westra (eds). 2010. *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand*. Vancouver: University of British Columbia Press.
- Loos, Noel. 1997. "Edward Koiki Mabo: The Journey to Native Title". *Journal of Australian Studies* 21(54–55): 108–19.
- Marks, Gary and Paula McDonnell. 1996. "Debate and Public Opinion on Native Title in Australia". *International Journal of Public Opinion Research* 8(1): 31–50.
- McHugh, Paul. 1997. "Law, History and the Treaty of Waitangi". *New Zealand Journal of History* 31(1): 38–57.
- McHugh, Paul. 2004. "Aboriginal Title in New Zealand: A Retrospect and Prospect". *New Zealand Journal of Public International Law* 2(2): 139–202.
- McHugh, Paul. 2011. *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights*. Oxford: Oxford University Press.

- McIntyre, Greg. 2003. "Native Title Rights after *Yorta Yorta*". *James Cook University Law Review* 9: 268–330.
- McRae, Heather, Garth Nettheim, Laura Beacroft and Luke McNamara (eds). 2003. *Indigenous Legal Issues: Commentary and Materials*. Pyrmont NSW: Lawbook Co.
- Miller, Robert, Larissa Behrendt, Tracey Lindberg and Jacinta Ruru (eds). 2010. *Discovering Indigenous Lands*. Oxford: Oxford University Press.
- Mostert, Hanri. 2002. "The Decision of the Land Claims Court in the Case of the Richtersveld Community: Promoting Reconciliation or Effecting Division?". *Tydskrif vir die Suid-Afrikaanse Reg*, Issue 1: 160–67.
- Muldoon, James. 1979. *Popes, Lawyers and Infidels*. Philadelphia: University of Philadelphia Press.
- Neate, Graeme. 1995. "Determining Native Title Claims – Learning from Experience in Queensland and the Northern Territory". *The Australian Law Journal* 69: 510–39.
- Newman, Dwight. 2014. *Revisiting the Duty to Consult Aboriginal Peoples*. Saskatoon: Purich Publishing Ltd.
- Pagden, Anthony. 1995. *Lords of all the World: Ideologies of Empire in Spain, Britain and France c. 1500 – c. 1880*. New Haven: Yale University Press.
- Patterson, Stephanie. 2004. "The Foundations of Aboriginal Title in South Africa? The Richtersveld Community v Alexkor Ltd Decisions". *Indigenous Law Bulletin* 18.
- Pawlish, Hans. 1985. *Sir John Davies and the Conquest of Ireland: A Study in Legal Imperialism*. Cambridge: Cambridge University Press.
- Reynolds, Henry. 1987. *The Law of the Land*. Ringwood, Victoria: Penguin.
- Reynolds, Henry. 1996. *Aboriginal Sovereignty*. Crows Nest, NSW: Allen and Unwin.
- Rowse, Tim. 1993. "How We Got a Native Title Act". *The Australian Quarterly* 65(4): 110–32.
- Ruru Jacinta. 2004. "A Politically Fuelled Tsunami: The Foreshore/Seabed Controversy in Aotearoa me te Wai Pounamu/New Zealand". *The Journal of the Polynesian Society* 113(1): 57–72.
- Ruru, Jacinta. 2010. "Claiming Native Title in the Foreshore and Seabed". In *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand*, edited by Louis Knafla and Haijo Westra, 185–201. Vancouver: University of British Columbia Press.
- Russell, Peter. 2005. *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English – Settler Colonialism*. Toronto: University of Toronto Press.
- Saugestad, Sidsel. 2011. "Impact of International Mechanisms on Indigenous Rights in Botswana". *The International Journal of Human Rights* 15(1): 37–61.
- Webber, Jeremy. 1995. "The Jurisprudence of Regret: The Search for Standards of Justice in Mabo". *Sydney Law Review* 17(1): 5–28.

- Wilkins, Kerry (ed). 2004. *Advancing Aboriginal Claims: Visions/Strategies/Directions*.
Saskatoon: Purich Publishing Ltd.
- Young, Simon. 2008. *The Trouble with Tradition: Native Title and Cultural Change*.
Sydney: The Federation Press.

Case Law

Please refer to the list on pages viii–xvi.

The Elephant in the Room – Resolving Disputes about Membership of a Minority or Indigenous Community

Bertus de Villiers

1 Introduction

The preverbal elephant in the room of minority and Indigenous-protection arrangements is how to determine who in fact belongs to the protected community. On the one hand the principle of freedom of association implies that no encumbrance should be placed on the right of association, on the other hand practical reality requires that a group claims the right pursuant to their self-determination to ascertain whether a purported claim to membership is factually correct.¹

A plethora of literature have been published in an attempt to secure a universally applicable definition for the term *minority*.² There is as of yet no internationally agreed definition of minority or any of the other terms that refer to minority communities (De Villiers 2012, 67).³ In practice the meaning

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- 1 See for example how in Brussels candidates for community elections must demonstrate acceptance of the community whom they seek to represent; in Hungary individuals must register on a nationality register for purposes of elections of community institutions; in Australia a person's claim of aboriginality for purposes of Aboriginal and Torres Strait Islander Commission elections or native title proceedings can be challenged; and in New Zealand a separate electoral roll is kept for those voters claiming to be Māori.
 - 2 The term *minority* generally refers to a community of individuals who share a common language, cultural, ethnic and/or religious identity and who, within the context of a specific state or a region within the state, are in a position of non-dominance and require special measures in support and protection of their identity. Terms also used to describe minorities are community; nationality; or peoples, but for sake of consistency *minority* is used in this chapter unless a specific case study is referred to, e.g. community in South Africa, Aboriginal peoples in Australia, Sámi in Finland and Māori in New Zealand.
 - 3 See the working definition proposed by Capotorti (1979, para. 38) which, although widely quoted, is not accepted in international law as definitive. The definition proposed by Capotorti has not been endorsed by the United Nations and as a result the United Nations continues to refer to minority without having exhaustively or conclusively defined it. The best solution currently is to assume there is no generally agreed definition of minority (United Nations 2014, 14).

of the term minority is usually determined by the circumstances of a specific country wherein legal and policy arrangements may be put in place to give special rights to a particular language or cultural community. Attempting to define a minority is in some respect counter-productive since association with a minority is based on freedom to associate or not associate. The inherent nature of a minority is therefore situational, social and historic. The challenge from a constitutional law perspective is however what to do if a Constitution refers to a *minority*, a *community*, or *Indigenous people* without defining or describing those. Litigation may then arise or legislation may be needed to fill the gap about what is a minority and who is a member thereof. The Constitution of South Africa, for example, presents such a challenge since it refers in Section 235 to the right to self-determination of a *language and cultural community* without defining what is meant by it or how disputes about membership are settled (De Villiers 2021).

Whereas international and constitutional law recognise the right of individuals to associate with other individuals with the common objective to speak and promote their language and practice their culture, there is no collective group-right in international law upon which a community can rely to promote and protect their interests as a legal entity.⁴ Since an individual is regarded by international law as a legal subject by birth with justiciable rights and interests, a group is not regarded as a legal entity since it is in effect a sociological, fluid concept. Individuals may, of course, pursuant to their right to free association establish a legal entity in the form of a club, association or other non-governmental association to promote their linguistic, cultural and religious interests.

The challenge faced by minority and Indigenous protection arrangements is not necessarily the definition of the minority or Indigenous group the subject of the protection.⁵ The challenge, for purposes of this chapter, is to determine who belongs to a minority or Indigenous community and how disputes about

4 The only binding international legal instrument that deals with the rights of minorities is the European Framework Convention for the Protection of National Minorities. The *Convention* was adopted by the Committee of Ministers of the Council of Europe on 10 November 1994 and entered into force on 1 February 1998. It is however binding only on signatory states. Whereas the Convention is arguably the most advanced international legal instrument to protect the rights of minorities, the actual rights conferred by the Convention are applicable to “persons and not on minorities as entities” (Marsal and Palermo 2018, 105).

5 Many countries side-step the definitional challenge by simply naming the minorities the subject of the protection, e.g. see how in countries such as Hungary; Belgium and South Tyrol the community the subject of protection is specifically named. The naming of the minority does not however resolve the challenge about how to settle disputes about membership.

claims of membership can be resolved. Some useful insight may be gained from the manner in which some Indigenous communities such as the Sámi, Māori and Aboriginal have been able to resolve questions about membership for community-elections and other purposes.⁶

In this chapter consideration is given to those three Indigenous communities, the Sámi, Māori and Aboriginal peoples, and the way in which disputes about membership are resolved. In doing so the chapter attempts to develop general principles for dispute resolution about membership of a community and to provide practical proposals for a country such as South Africa where Section 235 of the Constitution speaks about the right to self-determination of cultural and linguistic communities *without* defining those communities and failing to give guidance how disputes about membership would be resolved.

It is noted in the outset that a distinction is drawn in international law between the protection of the rights of minorities and the protection of the rights of Indigenous peoples. This distinction in international law is also applied in practice in many states where special arrangements may exist for Indigenous peoples without similar arrangements for other minorities. When it comes to questions of membership of their community, minorities and Indigenous peoples share a common challenge namely how to ascertain if someone who claims to belong to the community, is indeed a member of that community? Is it solely at the discretion of the individual to elect to be part of the community pursuant to the right of free association or does the community have some discretion to consider purported membership and make a ruling thereon?⁷

Contemporary international law and state constitutional law are, generally speaking, receptive to different legal and practical arrangements in states to accommodate the rights and aspirations of communities, be it minorities or Indigenous peoples. The post-Berlin Wall phase of constitutional design has witnessed the emergence of a plethora of unique constitutional arrangements and practices to grant special protections, programmes, policies, legal measures and initiatives to language and cultural minorities (Malloy, Osipov and Vizi 2015). In similar vein the protection of the rights of Indigenous peoples

6 In this chapter the term *Aboriginal peoples* is used as a collective noun to describe the traditional owners of the land of Australia, including the islands to the north of Australia of which the traditional owners are the Torres Strait Islander peoples.

7 As is highlighted in this chapter, Indigenous peoples can often rely on criteria such as descent; adherence to laws and customs; and community acceptance to ascertain membership, whereas other minority communities are principally formed solely on the basis of free association.

has advanced to the extent that the United Nations has adopted the Universal Declaration on the Rights of Indigenous Peoples. Although international law sets minimum standards to protect individual rights, scope is also left in international law for countries to develop unique arrangements to accommodate the diversity of their populations, be it for Indigenous peoples or for ethnic minorities.

This chapter draws specifically on the experiences of the three Indigenous communities to seek answers to the question under consideration, namely how does one ascertain whether an individual's claim to be part of a community, be it a minority or an Indigenous community, is correct? The findings are then applied to the possible operationalisation of Section 235 of the Constitution of South Africa and specifically to the potential it may offer to the Afrikaans-speaking community.

2 The Birth of Section 235 of the Constitution of South Africa

Section 235 of the Constitution of South Africa can only be assessed in its proper historical context if account is taken of the manner in which it found its way into the Constitution and the nature of the political settlement that gave rise to its birth.

Section 235 is clouded in mystery. On the one hand it represents an essential compromise that enabled the first democratic election in 1994 to take place without right-wing violence. On the other hand it has been dormant since the enactment of the Constitution and it may never be activated by legislation. Section 235 did what seemed at the time unthinkable in the political philosophy of parties such as the African National Congress and the Communist Party. It inserted into the new Constitution the promise of self-determination for any community that share a common language and cultural heritage.⁸ In light of the *apartheid* background of South Africa, the concept of community self-determination of any sort was counter-revolutionary, but the circumstances at the time and the spirit of reconciliation opened the door for the section to be inserted into the Constitution.

Section 235 provides as follows:

⁸ Section 235 must be read with Section 185 which refers to the possible establishment of cultural councils for communities.

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.

Section 235 does not in itself contain any specifics about how the promise of community self-determination would become operational (De Villiers 2014, 458). The section is at best promissory in nature or at worst placating with no intention for it to be given practical or legal effect. Time will tell if it will become operational (Van der Vyver 2011).

An essential question at the heart of Section 235 is however how will the membership of a community be determined?

The transition from *apartheid* to democracy took place in two phases. The first phase concluded with the enactment of the 1993 (interim) Constitution. The second phase concluded with the enactment of the 1996 (current) Constitution. These two Constitutions were linked by 34 Constitutional Principles. The Constitutional Principles were contained in the 1993 Constitution and the 1996 Constitution had to comply with those Principles. One of those Principles gave rise to Section 235 in the 1996 Constitution (Henrard 2002, 72). The two-step Constitution drafting process was arguably the most significant contribution the South African transition had made to international democratisation theory and practice.⁹

The two-step process meant that the leaders of the political parties and political movements negotiated the 1993 Constitution under which the first democratic election took place in 1994. Those leaders who negotiated the 1993 Constitution were not elected by the general population, but it was accepted that they collectively had adequate legitimacy and credibility to negotiate an interim Constitution. The parliament, elected pursuant to the 1993 Constitution, had a dual obligation, namely to make general laws for the country and at the same time to act as the Constitutional Assembly to draw up the 1996 Constitution.¹⁰ The Constitutional Court had to certify that the

9 The two-step process has been described as “legal revolution” (Klug 2010, 8).

10 The Constitutional Principles were in effect a political and legal guarantee that an elected Constitutional Assembly would be bound by core democratic, power-sharing and power-distribution principles. The impact of majority rule within the Constitutional Assembly was therefore in effect attenuated by the Constitutional Principles.

1996 Constitution complied with the Constitutional Principles contained in the 1993 Constitution (De Villiers 1994, 37).

A few days prior to the first democratic election in 1994, concerns were acute that disgruntled right-wing Afrikaner leaders, amongst whom retired General Constand Viljoen, may attempt a *coup* with the support of the military or that right-wing violence may erupt. A last minute Constitutional Principle, number 34, was added to the 33 Constitutional Principles that had been previously agreed. Constitutional Principle 34 provided as follows:

1. This Schedule and the recognition therein of the right of the South African people as a whole to self-determination, shall not be construed as precluding, within the framework of the said right, constitutional provision for a notion of the right to self-determination by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or in any other 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. 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.

The Constitutional Assembly hence negotiated and drafted the 1996 Constitution. In order to give effect to Constitutional Principle 34, the Constitutional Assembly adopted Section 235 in the 1996 Constitution. The Constitutional Court, as part of the process of ratification, considered Section 235 and concluded that the section complied with Constitutional Principle 34. The Court found that Constitutional Principle 34 did not oblige the Constitutional Assembly to create institutions of self-determination, but that the recognition of the principle of self-determination as espoused by Section 235 was adequate to comply with Constitutional Principle 34 (*Ex Parte Chairperson* 1996, paras. 218–91).

Section 235 does not specify a timeframe for parliament to enact legislation to give effect to the self-determination of communities. There has to date not been any demonstrable demand by any political party or by non-governmental organisations, in the Afrikaans community or otherwise, for Section 235 to be given greater detail by law.¹¹

11 The question can be asked if there is a political or a legal obligation on Parliament to enact legislation pursuant to Section 235 or at least for Parliament to commence a

3 The Afrikaans Community – A Single Identity or Multiple Identities?

Section 235 was inserted into the Constitution in response to demands by the Afrikaans community and more particularly by conservative White Afrikaners who were insisting on a form of *Volkstaat* (Afrikaner homeland).¹² The Afrikaans community is of course not regarded as Indigenous pursuant to the United Nations Declaration on the Rights of Indigenous Peoples, however, the experiences of the three case studies in how to deal with membership disputes may assist if legislation is enacted in South Africa to give effect to the promise of self-determination of communities.¹³

Self-determination pursuant to Section 235 is available to all communities in South Africa that share a common language and culture background. If Section 235 is ever put into operation, it would likely be at the request of the Afrikaans community or a part of the community.¹⁴ As mentioned above, there has however not been, up to the time of writing, any coherent or representative proposal or demand by the Afrikaans community or part of it or by any other political party or non-governmental organisation, for legislation to be enacted to give practical content to Section 235 (or Section 185) (Geldenhuis 2021).¹⁵

policy discussion in a parliamentary committee about the possible operationalisation of Section 235.

- 12 The percentage of white Afrikaners who support a *volkstaat*-idea has consistently been around 20%, but of those, very few (around 2000) have been willing to physically relocate to the Afrikaner *Orania* self-styled homeland in the Northern Cape.
- 13 Note in this regard that the Constitution drafters in South Africa deliberately chose not to use the words *minority* or *Indigenous* but rather the more neutral expression of *language and cultural community*. Whereas some might argue that Afrikaans speakers are not a minority in international law due to their economic power, the use of the word *community* circumvents the question whether the Afrikaans speakers is a *minority* under international law.
- 14 No other community has been so persistent in their demands for a form of self-government and no other community has developed such elaborate non-governmental language and cultural services and networks, as the Afrikaans community. Section 235 does not specify that community self-determination *must* be at a national level. It may be possible, for example, for regionally or locally concentrated Afrikaans communities to pursue self-determination as has happened in Brussels, Kosovo, Russia, Hungary and South Tyrol.
- 15 It is not within the scope of this chapter to explore the reasons why Section 235 has remained dormant, but it may be for a variety of reasons such as the political atmosphere in South Africa that is not conducive to the implementation of Section 235; many of the leaders who had agreed on Section 235 have moved into retirement; there is no agreement within the Afrikaans community about viable options to operationalise Section 235; conservative Afrikaners prefer to utilise non-governmental organisations such as *Solidariteit*

The Afrikaans community share a common language, but this is where the common denominators within the community end. Afrikaans speakers are in reality of multi- rather than singular identity. The users of the language are spread relatively thinly across South Africa; they comprise different racial groups; they adhere to different faiths and beliefs; they have different histories; they have strong regional linkages and peculiarities; and they are divided along ideological lines.

As *spoken language of choice* Afrikaans is used by around 6.8 million persons of a population of 57 million. This means that Afrikaans (12%) is the third largest spoken language in South Africa after Zulu (25%) and Xhosa (15%). (Most spoken languages, 2019) Afrikaans is spoken by all racial groups in roughly the following percentages: White (61%); Coloured (77%); Asian (1.5 %); and Black (1%) (Population Estimates 2020).¹⁶

As a *territorially distributed language* Afrikaans users are scattered throughout the country which makes any territorial self-determination option unviable. This explains why Sections 185 and 235 had been included into the Constitution since those sections recognise the possibility of non-territorial forms of self-determination. The territorial distribution of the Afrikaans community is roughly as follows with Afrikaans indicated as a percentage of the population: Western Cape (49.7%); Eastern Cape (10.6%); Northern Cape (83.8%); Free State (12.7%); KwaZulu-Natal (1.6%); North West (9%); Gauteng (12.4%); Limpopo (2.6%); and Mpumalanga (7.2%).

As a *political force* the Afrikaans community in the 2019 general election principally supported two political parties at a national level, the centrist Democratic Alliance and the conservative Freedom Front Plus (Saba 2019). In the election the Freedom Front Plus nearly doubled its support to 2.4 % of the total turn-out – principally from white Afrikaners (Fihlani 2019).¹⁷

and *AfriForum* for a type of informal self-determination; and the Afrikaans community is deeply divided along racial, religious, regional and ideological lines about what has to be done to secure the future of the Afrikaans language and culture (De Villiers 2018a, 47).

- 16 Anecdotal information suggests that Afrikaans as a language of first choice amongst Coloured, Black and Indian voters is in decline due to various factors such as the emphasis on English as a language of education and commerce; the lack of Afrikaans teaching as a second language in schools; the official language status of Afrikaans alongside English has diminished; the status value of English; and due to the historical and ongoing political baggage associated with Afrikaans (Jansen 2019).
- 17 This may seem a relatively low percentage of the total vote, but given that it is exclusively from conservative, white Afrikaners, it suggests possible polarisation of the electorate. The trend within Afrikaans voting away from the Democratic Alliance towards the Freedom Front Plus has continued in by-elections since the general election in 2019.

The Afrikaans speaking support for the African National Congress is predominantly from persons of colour, with few white Afrikaans speakers supporting the governing party.

As a *cultural community* the Afrikaans speakers represent a smorgasbord of identities. Some conservative Afrikaans leaders emphasise the importance of the *Afrikaner* identity whereby elements of race; Christianity; European origin; and certain traditional customs and practices are included. On the other hand there are Afrikaans leaders who emphasise Afrikaans as an African language with many internal cultural and religious characteristics within the single language community. Some in the Afrikaans community emphasise the status of Afrikaners as a distinct community within the Afrikaans community, whereas others are of the view that the broadest common denominator of language should be used to promote the interests of the Afrikaans language. To add to this complexity there are distinct differences of opinions between the leadership of Afrikaans speakers in the Western Cape and those in the northern parts of South Africa about how the language and culture should in future be safeguarded and promoted.

There is, in short, no broad agreement within the Afrikaans community about (a) what should or could be done to safeguard and promote the future of the Afrikaans language and culture; (b) whether self-determination under Section 235 should be pursued; and (c) who would qualify for membership of a to be established cultural council.

The strength and the weakness of Afrikaans lay in the richness of identities of its users. Compared to many other internationally minority communities who often live concentrated in small numbers and seek some form of territorial self-determination, Afrikaans-speakers are large in numbers; but spread over a massive territory; they do not share the same religion, heritage or customs; they have divergent political interests; and they have distinct regional characteristics, albeit that they speak Afrikaans. It is ironic that the challenge facing the Afrikaans community is not the numerical size of the community, but rather the internal diversity of the Afrikaans community and the geographical distribution of Afrikaans speakers.

The essential question arising from this chapter for the Afrikaans community is how disputes about membership of the community would be dealt with if Section 235 is ever operationalised?

4 Resolving Disputes about Membership – Reflections on Jurisprudence Relating to Indigenous Peoples in Australia, New Zealand and Finland

Whereas international law endorses the principle of individual freedom of association, the ability of a community to exercise some form of control over its membership is also recognised in international and constitutional law. In some stances, like Hungary, self-identification is absolute which means a decision by a person to register on the electoral roll of any of the 13 nationalities cannot be challenged. In other instances, like Finland, a combination of a subjective and objective test is applied to ascertain if a person is indeed Sámi. Whereas in New Zealand the registration of a person on the Māori list is only open to very limited challenge. In Australia Aboriginal peoples self-regulate but disputes about membership are ultimately resolved by the Federal Court.

The experiences of the courts in Australia, New Zealand and Finland in dealing with disputes about claims by individuals to be part of the local Indigenous communities, may be instructive to give content to Section 235 in South Africa and to other international minority-protection arrangements where disputes may arise about claims of membership.

4.1 *Australia: When Is a Person “Aboriginal”?*

The question how to ascertain whether a person is Aboriginal has always been intriguing and controversial in Australia. Aboriginality remains relevant in contemporary Australia in various contexts, for example whether a person forms part of a native title (land) claim group; whether a person is entitled to a member of an Aboriginal corporation;¹⁸ whether a person could vote in the (now disbanded) Aboriginal and Torres Strait Islander Commission elections and for the proposed advisory Voice;¹⁹ whether a person may qualify for a position reserved for Aboriginal persons; or whether a person may share in benefits that are only available to Aboriginal persons under government grants or

18 Aboriginal persons may register a corporation pursuant to the Corporations (Aboriginal and Torres Strait Islander) Act 2006. This Act aims to address the needs for simple, easy to run legal structures for Aboriginal communities. Non-aboriginal persons cannot register a corporation under the Act.

19 The Aboriginal and Torres Strait Islander Commission was an elected, self-administration and advisory body for Aboriginal peoples, but it was abolished in 2005. Proposals are now on foot to enact a so called Voice for Aboriginal peoples to give advices to the federal government. Since it is proposed that the Voice would be elected, disputes about who would qualify as an Aboriginal voter are likely to arise (De Villiers 2018b).

pursuant to a native title agreement.²⁰ Although an Aboriginal corporation; an Aboriginal community; or native title grouping can informally make decisions about membership disputes, a dispute about membership is ultimately within the jurisdiction of the Federal Court.

Finding a consistent manner to ascertain aboriginality that complies with Australian law and international human rights law has always been contentious.²¹ In order to settle a workable approach the Report on a Review of the Administration of the Working Definition of Aboriginal and Torres Strait Islanders proposed the following definition of Aboriginal which was accepted by the Federal Government:

An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he (she) lives.

Department of Aboriginal Affairs 1981

This working definition rests on three criteria, namely descent; self-identification; and acceptance by the community. The question is, of course, what weight is given to these respective criteria?

The courts have been reluctant to adopt a rigid stance to weighting the respective criteria, with pragmatism rather than a formulaic approach having been adopted. It has been argued that the application of descent as a criterion has over time become “diffused” with a greater emphasis by the courts of self-regulation of membership by communities (De Costa 2014, 64).

In the ground-breaking *Mabo (no. 2)* judgment (1992), in which native title had for the first time been recognised in Australia, the court considered the question of membership of the claimant community. The court endorsed the three-pronged approach whereby the individual’s claim of aboriginality was weighted against the community’s response and the descent of the person. The court emphasised that it had to consider all evidence of association and then make a finding of fact whether a person is indeed of Aboriginal descent and whether the person is accepted by the community or parts of the community

²⁰ The Australian Law Reform Commission recommended that greater regard be had to Indigenous laws and customs in the legal process. The Commission expressed the view that there was no need to develop an exact definition for the term *Aboriginal* since “there are distinct advantages in leaving the application of the definition to be worked out, so far as is necessary, on a case by case basis” (Law Reform Commission 1986, para. 95).

²¹ See Gardiner-Garden (2002) for an overview of the complex history of Australia in regard to classification of Aboriginal peoples.

as Aboriginal and part of the claim group. Important is that the court observed that evidence of acceptance by the community is not restricted to a specific checklist, but rather includes all relevant information of association. The Court summarised its approach as follows:

Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people.

Mabo (no. 2) v Queensland 1992, para. 70

In the *Gibbs* judgment (1995), Justice Drummond provided greater clarity to the relevance of a person's descent. Drummond observed as follows:

In my opinion, in order for someone to be described as an 'Aboriginal person' within the meaning of that term in the Act, some degree of Aboriginal descent is essential, although by itself a small degree of such descent is not sufficient. (...) The less the degree of Aboriginal descent, the more important cultural circumstances become in determining whether a person is 'Aboriginal'. A person with a small degree of descent who genuinely identifies as an Aboriginal and who has Aboriginal communal recognition as such would I think be described in current ordinary usage as an 'Aboriginal person' and would be so regarded for the purposes of the Act. But where a person has only a small degree of Aboriginal descent, either genuine self-identification as Aboriginal alone or Aboriginal communal recognition as such by itself may suffice, according to the circumstances.

Desmond Gibbs v Lyle Capewell 1995, para. 238

This declaration by Justice Drummond highlights the challenges presented by descent, particularly to an Indigenous community where records of descent may be poor and where persons may come from mixed forebears or children may have been removed from their parents at a young age. Although the Court did not abandon the criterion of descent, the emphasis seems to have shifted to contemporary evidence of claims of membership, association, acceptance, and the community's response thereto.

In the *Shaw judgment* (1998) Justice Merkel endorsed the approach adopted in the *Gibbs* judgment that some degree of Aboriginal descent is necessary, but that descent is in itself not conclusive to determine the question of aboriginality. Justice Merkel emphasised the importance of the social element of identity and interaction with other persons as an indicator whether a person is part of

a community (*Shaw v Wolf* 1998, para. 213). There was no strict legal standard to be applied in regard to membership, but rather a contemporary standard that acknowledges the social interaction between individuals based on free association rather than a rigid genetic construct of community and membership thereof.

This approach adopted by the Federal Court highlights the practicality, of lack thereof, of descent to ascertain if a person is Aboriginal. The closer in time the descent from Aboriginal forebears the less the person needs to rely on other circumstantial evidence of acceptance; whereas the more remote the degree of descent, the more important becomes circumstantial evidence of acceptance by an Aboriginal community of the person as being Aboriginal. The requirement of descent therefore presents potential challenges since a person may not be able to prove their precise line of descent.²² Justice Merkel concluded as follows:

The development of identity as an Aboriginal person cannot be attributed to any one determinative factor. It is the interplay of social responses and interactions, on different levels and from different sources, both positive and negative, which create self-perception and identity. (...) These quotations [of witnesses] reinforce the view that Aboriginal identity cannot be assessed according to inflexible notions of what characterises an Australian (or Tasmanian) Aboriginal person. In my view the current Australian community accepts that the widely divergent and differing histories and experiences of the process by which an Aboriginal person acquires and develops an Aboriginal identity is, inherently, *a process personal to and discrete for each individual*.

Shaw v Wolf 1998, para. 223; emphasis added

Justice Merkel acknowledged however that each of the three criteria of membership utilised by the courts is potentially problematic. In essence the three-pronged test is a product of Western dispute resolution and not necessarily reflective of Aboriginal laws and customs. For example, to ascertain *descent*, historical data may not be available about a person's forebears; persons may

²² This may be for various reasons, one such reason being that in Australia many Aboriginal children of light (fair) skin were removed from their parents by government agencies to be raised in Christian missions or by white adoptive parents. This is generally referred to as the *stolen generations*. For such persons to prove their genealogical link to an Aboriginal ancestor may be daunting or even impossible (Australian Human Rights Commission 1997).

have been adopted by law or by custom; and descent in itself is not necessarily reflective of a person's desire as an adult to associate with a particular community. In regard to *self-identification* a person may have been discouraged to identify as Aboriginal; a person may hold multiple identities; a person may identify as Aboriginal due to expected benefits to be received;²³ and the association may be of a private rather than a publically demonstrated nature. As far as *community acceptance* is concerned account must be taken that a community is a social and dynamic construct without a legal persona to make decisions; acceptance of membership may be displayed by some in the community and not by others; a person's adherence to or knowledge or traditional laws and customs may have been interrupted; and internal community conflict may impact on the level, if any, of acceptance.

In the *Aplin* matter (2010) the question arose how disputes about the assertion of a person that they form part of an Aboriginal native title claim group ought to be resolved (*Aplin* 2010, para. 256). The court observed that it is primarily the responsibility of the claim group to determine whether a person is a member of the group, but the court noted that such a decision cannot be made arbitrarily. The decision of the community must be informed by fact and in accordance with the standards and processes of traditional laws and customs that apply to that community. The court acknowledged that acceptance of membership by a community is "inherent in the nature of a society", but that the subjective assertion of membership may be adequate for a community to accept a person.

In the *Harrington-Smith* matter (2007) the Federal Court highlighted that ultimately the Court decides who comprises the native title group. The Court may, for example, find that persons who had been excluded by the claim group, ought to be included in the community that holds the native title. The Court must of course given consideration to the opinions of the community, but those opinions about membership do not restrict the discretion of the Court (*Harrington-Smith* 2007, para. 296).²⁴

23 See below the discussion of disputes in the Sámi where it was alleged by the Sámi parliament that individuals attempted to register as Sámi in order to influence policy discussions of the Sámi. Membership of the Sámi has therefore become highly political. This is not dissimilar to Hungary where non-members of nationalities have registered as being of a specific nationality and in Australia where purported membership of specific native title communities is often claimed due to the perceived benefits that may be gained in the form of royalty payments or other benefits.

24 Note in this regard how the jurisdiction of the Federal Court in Australia to determine disputes about aboriginality is generally accepted by Aboriginal peoples, whereas in Finland the role of the Supreme Administrative Court to determine questions about Sámi membership remains in dispute.

In the *Love* judgment (2020) the High Court of Australia had to consider whether a person who was born from an Aboriginal family but who did not have citizenship of Australia was an "alien" for purposes of the Migration Act, 1958 (*Love v Commonwealth of Australia* 2020, para. 262). The Court by majority accepted the tripartite test of the *Mabo* (no. 2) judgment namely that a person who "identifies as a member of an Aboriginal society and is accepted as such by the elders or other persons enjoying traditional authority among those people under laws and customs deriving from before the Crown acquired sovereignty over the territory of Australia", complies with the test of aboriginality. Justice Nettle, who was part of the majority, succinctly summarised the requirement for aboriginality as follows: being of Aboriginal descent; identifying as a member of an Aboriginal community; and being recognised as a member of an Aboriginal community (*Love v Commonwealth of Australia* 2020, para. 286).

The approach adopted by the Australian courts in regard to native title proceedings is not without criticism since the question remains who makes a decision on behalf of a community; what level of support is required for acceptance of an individual claim of membership; what evidence is relied upon; what weight is to be attached to the opinion of expert witnesses; and what factors are to be conclusive to determine membership?²⁵ The emphasis on the criterion of acceptance by the community may cause an imbalance in the weighting of the three criteria to the detriment of the weight accorded to descent since as far as native title groups are concerned their claims are inevitably linked to the community that had rights to the land under common law and therefore descent is an important consideration.²⁶

The methodology generally adopted by the Federal Court of Australia to resolve disputes about membership affecting Aboriginal peoples can be summarised as follows: (a) in general a tripartite test is applied whereby descent; subjective choice of the individual; and community acceptance of the

25 For an analysis and discussion to define membership of native title claim groups in a manner that satisfies traditional laws and customs as well as the native title statutory scheme under which claims can be lodged, see Duff (2014).

26 According to Section 61(1) of the Native Title Act 1993, the native title holders are the community "who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed". Refer in this regard to the recently concluded Noongar native title settlement in the south west of Western Australia of which one of the characteristics for purposes of this chapter is that a person who wishes to register to become a member of the Noongar Corporation must be linked to an apical ancestor to the area. The test in this case is therefore not only of being Aboriginal, but more restricted to a specific set of Aboriginal ancestors (Hobbs and Williams 2018; De Villiers 2019).

individual are considered; (b) the criteria are not necessarily weighted equally and it depends on the circumstances of each dispute what weight is attached to each respective criterion; (c) whereas in some instances, such as native title proceedings, descent is given greater weight since the native title holding group is defined by apical ancestors, in other proceedings such as whether a person is part of the Aboriginal community greater emphasis may be given to community acceptance within a contemporary setting; (d) community membership is a social construct that is flexible; community membership is not determined by fixed rules, but nevertheless give effect to the laws and customs of the community concerned; and (e) disputes about membership is ultimately determined by the court based on all the evidence available to it.

4.2 *Finland: When Is a Person a “Sámi”?*

The Sámi are Indigenous people that traditionally live in parts of Finland, Sweden, Russia, and Norway. Each of these countries have enacted special measures of different degree to address the demands by the Sámi for self-determination.

In Finland, which is the subject of this chapter, the Sámi can elect their own parliament.²⁷ The term *parliament* is arguably not entirely appropriate since the body has principally advisory and administrative powers rather than legislative sovereignty (Josefsen 2010). Relevantly for purposes of this chapter is however that the Sámi parliament makes decisions about membership of the Sámi and in doing so it decides who can vote in elections of the Sámi parliament.²⁸

In order to register as a voter for the Sámi parliament a person must prove they are Sámi (Aikio-Puoskari and Pentikainen 2001, Annex 1) The test to prove Sámi identity is not simple: A person must consider themselves as Sámi and give evidence that they speak the Sámi language; or prove that their parents or grandparents speak or have spoken Sámi at home, or that a parent is or has been on the Sámi electoral register.²⁹ The registration requirement has been described as an “ambiguous legal regulation” (Riekkinen and Suksi 2019).

27 Constitution of Finland, Section 121(4). The self-government applies to the Sámi Homeland in the areas of language and culture.

28 It must be noted that whereas in Finland the Sámi can vote for the Sámi parliament as well as for the national parliament, in New Zealand the Māori only votes for the national parliament since there is no other advisory or administrative elected body for the Māori that can be compared to the Sámi parliament.

29 Act on the Sámi Parliament 974/1995, Section 3. The question is of course how far one goes back to forebears to ascertain the identity of an ancestor. See for example Supreme Administrative Court (2003) and Supreme Administrative Court (1999) in which the Court had to consider evidence of Sámi-connection by forebears. In the 2003 judgment

These criteria are very restrictive and may have the effect of excluding persons who in a contemporary setting may identify as Sámi albeit that they do not speak the Sámi language well.³⁰ The language requirement is not as simple as it may seem. For example, the language that appeared on the birth certificate of a mother was accepted by the Supreme Administrative Court as adequate to establish that she met the language requirement for her child to be registered (Supreme Administrative Court 2015d). In similar vein it has been held that the registration of a parent is an adequate basis for a child's registration to be accepted (Supreme Administrative Court 2015b). An interesting element of voter registration is that a Sámi need not be resident in Finland to register and vote for the Sámi parliament.³¹

A Sámi must apply to have their name entered onto the Sámi electoral roll and can request at any time to have their name removed from the roll.³² Any person who is eligible to vote as a Sámi may also stand as candidate to be elected for the Sámi parliament.³³ In regard to disputes about being a Sámi, the Sámi parliament is authorised to make a determination. Any decision by the Sámi parliament is subject to review by the Supreme Administrative Court of Finland.³⁴ The review process by the Supreme Administrative Court is, however, not without criticism since the Sámi parliament sees itself as the sovereign voice for the Sámi community and yet its decisions about membership can be set aside by the court.³⁵ Riekkinen and Suksi criticises the review procedure of the following basis:

the question arose from the scenario where a person's father had been enrolled on the basis of the person's grandfathers' proficiency in one of the Sámi languages. The Sámi parliament refused registration but the court granted it (Supreme Administrative Court 2003). In 1999 it was held that the qualification to vote via property rights had gone too far back and was no longer a basis for registration (Supreme Administrative Court 1999).

30 All the languages and dialects spoken by the Sámi are regarded as "threatened" or "extremely threatened", which in itself highlights the potential that persons who regard themselves culturally as Sámi, may not be able to speak the language fluently (United Nations 2016, para. 17).

31 This is contentious since up to 60% of Sámi live outside of Finland and up to 70% Sámi children are born outside their traditional lands. A non-Finish Sámi who reside in another country can therefore register as voter for the Sámi parliament in Finland, whereas a Finish Sámi-resident may not qualify due to the strictness of the language test.

32 Act on the Sámi Parliament 974/1995, Section 23a.

33 *Ibid.*, Section 22.

34 *Ibid.*, Section 26b.

35 The United Nations recently criticised these review powers of the Supreme Administrative Court as unduly interfering with the self-management of the Sámi parliament (Yle Uutiset 2019).

[T]his [review mechanism] is probably the most significant ambivalent aspect of indigenous autonomy in Finland: the fact that the judicial authorities have a final saying in matters related to the self-governance and self-determination of the indigenous peoples. In a system following the rule of law, this is necessary, but at the same time, the final say is not with the representative body of the indigenous people.

RIEKKINEN AND SUKSI 2019

The test of being able to speak the Sámi language is potentially arbitrary and discretionary in its application.³⁶ Whereas the ability to speak the language of a community is an important indicator of association, it is potentially a problematic criterion particularly in the case of a traditional language which may not be widely taught or spoken. The level of competency demanded by the Sámi parliament for an individual to speak a language may also give rise to discretions and abuse (Joonas 2016, 155). The Sámi parliament is inevitably placed in a position of potential conflict, where as an elected body it also approves the voters for the next election.³⁷ The majority party may therefore favour the registration of persons who support that party.

In similar vein as the Federal Court of Australia, the Supreme Administrative Court of Finland has gone through various phases in assessing whether a claim of Sámi membership is sound. The Supreme Administrative Court at first applied a rather rigid test, whereas in recent years the Court has adopted adopting a more holistic approach by reflecting on all relevant information of association and acceptance. The approach adopted by the Supreme Administrative Court is akin to the Federal Court of Australia, albeit that the jurisdiction of the court in Australia to determine membership disputes is not as contentious as the jurisdiction of the Supreme Administrative Court in Finland.

Whereas initially descent was treated as an objective criterion with high reliability, the Supreme Administrative Court now tends to place more weight on an individual's total interaction and engagement with the Sámi community

36 See Council of Europe (2015) about the challenges that face the Sámi languages in an age of modernisation. There are about 10 dialects that make up the Sámi languages. An added complexity is that Sámi who do not reside in traditional areas are often very slow to take up teaching the language to their children. This raises the obvious question: is it reasonable to make language proficiency an absolute test for registration as a Sámi voter? (Magga and Skutnabb-Kangas, 2001).

37 Pettersen highlights that the actual size of the Sámi community is much greater than those who have been accepted for registration as voters for the Sámi parliament (Pettersen 2011, 23).

and evidence of acceptance (Supreme Administrative Court 2011).³⁸ This is a more nuanced and flexible approach which on the one hand reflects the reality of community dynamics, but on the other hand frustrate those who seek a firm definition and rigid test. The so called “all things considered” doctrine is now the prevailing approach whereby all relevant information is taken into account to determine disputes about membership (Riekkinen and Suksi 2019).³⁹ The Court has emphasised that the acceptance or rejection by the Sámi parliament of the candidacy of a person is not conclusive and that ultimately the statutory criteria must be applied by the Court (Supreme Administrative Court 2016b).⁴⁰

In a recent decision wherein the Court allowed 93 persons to be registered as Sámi, the Court emphasised that it placed much reliance on self-identification and the recognition of fundamental human rights to free association, but it also acknowledged the right of the community to define themselves separately from the rest of the society (Supreme Administrative Court 2016a). The Court concluded that in disputes where the outcome of the language test is ambivalent, subjective association by the individual and objective acceptance by the community ought to determine the outcome.⁴¹ The discretion of the Court rather than a rigid application of an objective test were therefore preferred.

38 In this judgment the Court looked at all circumstances related to identity, including where the person live; with whom the person associate; and his lifestyle, to conclude that he was indeed Sámi albeit that he did not meet any of the other objective sub-categories. The Sámi parliament has been concerned that persons who are not generally accepted as Sámi, have attempted to register as Sámi in order to influence policy issues on which the Sámi parliament deliberate (United Nations 2016, 57). Also see in this regard how in nationality elections in Hungary, non-community interests have made attempts to influence the outcome of elections – so called “ethno-businesses” (Deets and Stroschein 2005, 293). The potential abuse of registration by non-community members has been identified by the Sámi parliament, Australia and in Hungary, but any restriction of freedom of association is approached by courts with scepticism.

39 See in this regards judgments of the Supreme Administrative Court (2015a and 2015c).

40 The Court did however acknowledge that the greater a person’s claim to membership relies on historic material, the more diligently the court must consider contemporary material to ascertain the strength of the claimed connection to the Sámi.

41 The judgment was criticised by the United Nations Human Rights Committee on the basis that it eroded the sovereignty of the Sámi parliament to make final decisions about matters of membership of the Sámi. The Committee was particularly critical of the court’s “overall consideration”-approach whereby regardless of the failure to fulfil an objective criterion such as language, a person could be registered as a Sámi on the basis of self-identification and acceptance by the community (Yle Uutiset 2019). The Human Rights Committee noted that “the Committee accordingly considers that the Sami Parliament constitutes the institution by which the State party ensures the effective participation of the members of the Sami people as an indigenous community in the decisions that affect them” and that the parliament should determine the eligibility of members (Human

The Court emphasised that once it has made a determination about the membership of a person or groups of persons, the Sámi parliament may not circumvent the ruling.

The Sámi parliament has also over time tended to adopt an expanded approach to registration as voter. The expanded approach does not rely solely on the ability to speak the Sámi language, but for the individual to also demonstrate interaction with the land and knowledge and practice of traditional livelihoods and the Sámi lifestyle (Suksi 2015, 108). There are clearly two philosophical approaches to registration as Sámi – a restricted approach and an integrative approach. The restricted approach emphasises objective criteria of language capacity and customary knowledge, whereas the integrative approach emphasises societal acceptance and integration.⁴² The dispute about who should finally determine questions of membership of the Sámi – be it the Sámi parliament or the Supreme Administrative Court – remains controversial (Riekkinen and Suksi 2019).⁴³

The test to register as a Sámi is onerous. Whereas the requirement of descent is consistent with the approach adopted in Australia, the evidence of ability to speak the language; knowledge of lands and adherence to traditions do not apply to Aboriginal peoples. These stringent requirements seem to favour older and rural-based Sámi.⁴⁴ These requirements are substantially more arduous than those that apply to Aboriginal peoples in Australia and the Māori in New Zealand. Whereas the discretion of the Federal Court in Australia is unrestricted to take into account any relevant information to consider evidence of community acceptance since there is no statutory definition

Rights Committee 2019, para. 6.10) and that the reasoning of the Court “was not based on reasonable and objective criteria” (*Ibid.*, para. 6.11).

42 This is not dissimilar to the debate amongst the Afrikaans community in South Africa, whereby some prefer an integrative approach whereby speaking Afrikaans is the only criterion, whereas others prefer a restrictive approach whereby Afrikaans is linked to specific cultural, historic and religious traits.

43 The following comment by the Human Rights Committee summarises the unresolved issue: “Moreover, the Court, in these decisions, failed to properly apply national legislation, which nevertheless clearly established an objective criterion of membership, as desired by the Sámi themselves. By not applying this criterion and replacing it with a self-identification criterion, which the Court itself interpreted on a case-by-case basis, the Court restricted the right of the Sámi people to participate in public affairs in the context of institutions designed to uphold their rights as members of an indigenous people, as set out in article 27 of the Covenant”. (Human Rights Committee 2019, Annex 1, para. 3).

44 The focus of the election committee of the Sámi parliament on the objective criterion of language capability, inevitable reduces the potential scope of persons who may qualify to register as Sámi (Sarivaara 2016, 203).

regulating membership, the Supreme Administrative Court in Finland is more constrained by the criteria contained in the 1995 Act on the Sámi Parliament to consider claims of membership.⁴⁵

4.3 *New Zealand: When Is a Person a “Māori”?*

In New Zealand a quota applies whereby seven seats in the national parliament are reserved for persons who identify themselves as Māori.⁴⁶ Māori means “person of the Maori race of New Zealand; and includes any descendant of such a person”.⁴⁷ All persons of a Māori descent, regardless of the degree of descent, can choose every five years to have their names registered on the General or Māori electoral roll.⁴⁸ Prior to 1974 various attempts had been made to introduce some form of objective measure to ascertain whether a person qualifies as a Māori. Initially, some form of proven descent was required, for example, those persons with more than half Māori descent were not allowed to vote in a European electorate, whereas those with less than half Māori descent did not qualify to vote in a Māori electorate. Between 1893 and 1975, only those of exactly half of Māori descent were able to choose whether to vote in a Māori or European electorate. Since 1974 the option of self-identification has been adopted.

Self-identification means that no Māori person is obligated to be registered on the Māori roll and a Māori person may change their preference on which roll they want to be registered after each census. A four month period is given prior to each election for persons to record their names on the Māori list.⁴⁹

45 The United Nations rapporteur had expressed concern that whereas the Court has final jurisdiction in regard to membership disputes, the composition of the Court does not include justices from the Sámi and there is no requirement for justices to have any knowledge of the Sámi culture (United Nations 2016, para. 57). The rapporteur concluded that the review power of the Supreme Administrative Court in regard to Sámi membership breaches the inalienable right of Indigenous peoples to determine their political status in general and their membership in particular. The rapporteur did not however explain why the decision-making of Indigenous persons should not be subject to judicial oversight and the rule of law. The Court has refused to overturn its previous judgments (Supreme Administrative Court 2011; 2015a; and 2015c) and by doing so affirmed that it is the final arbiter when membership disputes arise about who is a Sámi (Supreme Administrative Court 2019).

46 New Zealand Electoral Act 1993, Section 45.

47 New Zealand Electoral Act 1993, Section 3. One of the major political parties, the Nationals, has previously expressed themselves in favour of abolishing the reserved seats but have undertaken not to do so unless the Māori agree (Mutu 2011, 196).

48 New Zealand Electoral Act 1993, Section 76(1). The delineation is therefore by way of cultural association, rather than hereditary acceptance (McLeay 1980, 47).

49 New Zealand Electoral Act 1993, Section 77(1), (2).

Once the time for registration has expired, the number of seats is distributed to the respective Māori electorates.⁵⁰

The decision to register on the Māori roll is entirely by personal choice, no documentation is required and the assertion cannot be legally challenged unless the Registrar questions a registration. In such an event the person is given an opportunity to respond to any query about registration on the Māori roll. This is dissimilar to the approach adopted in Hungary where there can be no legal challenge to registration on a nationality list. No Māori person can be obliged to register on the separate roll (New Zealand Royal Commission 1986). If a Māori person does not change their registration from a previous election, the registration remains the same for the next election.⁵¹ There is no statutory requirement that the candidates for the Māori seats must be Māori of origin.⁵² The freedom to nominate for an election for the Māori seats rests on the assumption that a non-Māori person can also promote the interests of the Māori.

This means that the decision of a person to register on the Māori roll and the decision of a candidate to put their name for election on the Māori list are entirely personal. The Māori arrangement contrasts with that of the Sámi, where a person can be registered on the Sámi list for elections of the Sámi parliament *and* on the general list for elections of the national parliament. The same applies in Australia where Aboriginal persons could participate in Aboriginal and Torres Strait Islander Commission elections *and* in elections for national parliament.

5 Essential Considerations to Resolve Disputes about Membership

The elephant in the room for constitutional arrangements aimed at special protection for minority and Indigenous communities is firstly how to ascertain who belongs to the community and secondly who should resolve disputes about membership. Whereas in international law the principle of free association is applied to any scheme endeavouring to create special rights or privileges for a community, in state practice membership disputes are not uncommon. This is apparent in the formulation of Section 235 of the Constitution of

⁵⁰ Refer to the explanation given by the electoral commission to persons who may want to register on the Māori list (Electoral Commission 2020).

⁵¹ New Zealand Electoral Act 1993, Section 78(4), (9).

⁵² Until 1967 only Māori candidates were eligible for election to the reserved Māori seats, but that limitation was removed by the Electoral Amendment Act of 1967.

South Africa which offers no guidance as to what is meant by a language and cultural community or how disputes about membership are to be resolved. A major hurdle to be crossed by any community who desires to pursue self-determination, not only in South Africa but also in other jurisdictions, is to develop a sound methodology to deal with membership disputes.⁵³

The insights gained from the Sámi, Aboriginal peoples and Māori in dealing with membership disputes are potentially relevant not only to other Indigenous peoples but also to minority communities who seek special rights or privileges under public law.

Any minority community or Indigenous people who wishes to be the beneficiary of special collective rights would have to meet the following considerations:

First, clarity is required about who constitutes the minority or the Indigenous people. In Australia, New Zealand and Finland there is no serious dispute about the general description of the Aboriginal, Māori and Sámi identities, but there is no statutory definition of Aboriginal peoples in Australia or Māori persons in New Zealand, whereas in Finland the Sámi are statutorily defined. In addition to defining the community, mechanisms are required to resolve disputes about purported membership. There has been extensive litigation in Australia and Finland to resolve membership disputes. The approach adopted by the Sámi parliament is in effect to restrict membership of the Sámi pursuant to the statutory definition of Sámi, whereas the approach followed by the Federal Court in Australia is based on a more inclusive definition of Aboriginal based on societal acceptance, while in the case of the Māori it is solely based on self-identification. In the case of South Africa there is no agreement about who constitutes the Afrikaans community. Defining the Afrikaans community is further complicated by the fact that within the Afrikaans community some prefer a restricted definition based on race, religion and descent; whereas others prefer an inclusive definition solely based on the Afrikaans language.

Second, in order to resolve disputes about membership a legal entity of some sort or other customary laws or traditional practices are required to deal with membership issues. In Australia Aboriginal peoples often have local family and clan-like processes to deal with disputes such as membership. The Federal Court of Australia also plays an active role to ascertain on the basis of local, social and local linkages whether a person is accepted as part of the Aboriginal

53 This will be particularly challenging to the Afrikaans community in light of the multi-identities of Afrikaans speakers; the lack of an agreed definition of who constitutes the Afrikaans community; the racial undertones of many who promote Afrikaans; and the lack of a decision-making structure to consider and determine claims of membership.

community or not. In Finland the Sámi parliament plays an essential role to determine membership issues, albeit that those decisions are subject to judicial review. Whereas the Sámi parliament has adopted a very strict test, the Supreme Administrative Court take a more holistic, integrative approach. The effect of the Sámi parliament's approach is that relatively few persons who regard themselves as Sámi, actually qualify as Sámi voters. In New Zealand the registration on the Māori list is for all practical purposes not reviewable. In South Africa the Afrikaans community does not have any informal or formal mechanism that can deal with disputes about membership.

Third, whatever membership-review procedures are adopted by a minority group or an Indigenous community, any decision ought to be open to judicial review. Ultimately legislation enacted to grant collective rights to a community in public law must comply with principles of international law as well as the equality and free association rights. Any attempt to unduly restrict membership of a community should be the subject of legal scrutiny and judicial oversight.⁵⁴ If Section 235 is to become operational in South Africa, clarity is first required about the definition of language and cultural communities and secondly a mechanism would have to be devised to deal with membership disputes.

Fourth, the tripartite test to resolve membership disputes adopted by the Federal Court of Australia and the Supreme Administrative Court of Finland may bear relevance to other communities whereby descent; subjective assertion of membership; and objective community acceptance of membership are weighted. The weight attached to the respective criteria may differ depending on the country in which the criteria are employed. The Federal Court and the Supreme Administrative Court have in effect adopted an inclusive approach whereby all relevant information is considered pursuant to the right to freedom of association. Indigenous peoples can often rely more readily on criteria such as descent; adherence to laws and customs; and community acceptance to ascertain membership, whereas other minority communities are principally formed solely on the basis of free association.

54 The complexity to operationalise Section 235 is reflected by Suksi when he observes on the basis of the Sámi experience that "considerable definitional problems" may be encountered by any institution that is set up to control the membership of a community (Suksi 2015, 108). On the one hand unlimited free association may lead to *inflation of membership* of a community, whereas on the other hand if persons are excluded on subjective or objective criteria it may give rise to concerns of elitism; discrimination and self-interest.

Fifth, a pertinent question is what level, if any, of language speaking proficiency a person is required need to demonstrate to be accepted as a part of the community. In Australia few Aboriginal people speak their language fluently; in Finland some language competency is a requirement for the Sámi; whereas in New Zealand registration is entirely by way of self-identification. In South Africa Afrikaans is widely spoken but there is otherwise little if any communality within the Afrikaans-speakers as a whole. Whereas language knowledge and competency is a reasonable requirement, note must also be taken that international law would be slow to endorse some form of language testing to determine actual competency.

Sixth, the question of residence is potentially important and even controversial. Must a member of a minority be resident in the country or a traditional area to be accepted as a member of the community? In the case of Aboriginal peoples in Australia residence is not a pertinent issue provided the person can prove descent and association, whereas in the case of the Sámi parliament residence in Finland is not a requirement. In New Zealand a person can register as a Māori voter even if they do not reside in New Zealand. Since many Afrikaans speakers live abroad, the Afrikaans community in South Africa would need to establish whether for purposes of any institutions created pursuant to Section 235, residence in South Africa is required.

Seventh, any dispute about membership of minority and Indigenous institutions should be in the final instance within the jurisdiction of the highest court of the land to ensure that the principles contained in the Constitution as well as obligations under international law are respected. The criticism expressed by the United Nations against judicial oversight of the decisions by the Sámi parliament is noted, but account must also be taken that whereas courts may be required to take into account Indigenous laws and customs, the supremacy of the Constitution and highest court must apply to all citizens.

6 Conclusions

This chapter considered the complexity to resolve disputes about membership of a minority community or Indigenous people. Useful insights are gained by reflecting on the way in which Indigenous communities in Finland, Australia and New Zealand deal with questions of membership. Other Indigenous communities in the world as well as minority groups that aspire to some special rights and privileges may benefit from the experiences of those three case studies.

The chapter also reflected on the case of South Africa where Section 235 found its way into the Constitution of South Africa due to two forces: firstly international practices of community protection prevailed at the time of negotiations, and secondly an historic political settlement was entered into during the Constitution drafting process. It is shown that although no demands of substance have yet been made to enact legislation to give effect to Section 235, any demand if it is ever made, is likely to be from the Afrikaans community. The multiple identities of Afrikaans speakers would however present a challenge to those who seek to activate self-determination pursuant to Section 235.

The chapter highlights that whereas demands for special rights for minority groups or Indigenous peoples are common, the elephant in the room is how to deal with disputes about membership of such a community or Indigenous people. Whereas strict membership criteria may be justified to retain the unique identity of a community, those very exclusions to define a community may be inconsistent with the principles of a liberal democracy and the fundamental rights contained in the Constitution. The experiences of Australia, New Zealand and Finland make for potential useful application to other case studies. But it must be noted that whereas Indigenous peoples can often rely on criteria such as descent; adherence to laws and customs; and community acceptance to ascertain membership, other minority communities are principally formed on the basis of free association.

Finally it is concluded that if and unless membership of a minority can be dealt with in a manner consistent with international law, any effort to pursue self-determination by way of a form of group right would be legally and politically doomed. This is likely to be the outcome of any attempt by the Afrikaans community to operationalise Section 235.

Bibliography

- Aikio-Puoskari, Ulla, and Merja Pentikainen. 2001. *The Language Rights of the Indigenous Sami in Finland – Under Domestic and International Law*. Rovaniemi: University of Lapland.
- Australian Human Rights Commission. 1997. "Bringing Them Home: Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families". Canberra: Australian Human Rights Commission.
- Capotorti, Francesco. 1979. "Study of the Rights of Persons Belonging to Ethnic, Racial and Linguistic Minorities". *UNO* 1.
- Council of Europe. 2015. "The Sami, Their People, Their Culture and Their Languages". Strasbourg: Council of Europe.

- De Costa, Ravi. 2014. "Descent, Culture and Self-Determination: States and the Definition of Indigenous Peoples". *Aboriginal Policy Studies* 3: 55–85.
- De Villiers, Bertus. 1994. "The Content and Significance of the Constitutional Principles". In *Birth of a Constitution*, edited by Bertus De Villiers, 37–49. Cape Town: Juta.
- De Villiers, Bertus. 2012. "Language, Cultural and Religious Minorities: What and Who Are They?". *University of Western Australia Law Review* 36: 67–89.
- De Villiers, Bertus. 2014. "Section 235 of the Constitution: Too Early or Too Late for Cultural Self-Determination in South Africa?". *South African Journal on Human Rights* 30: 458–83.
- De Villiers, Bertus. 2018a. "Managing Diversity in Deeply Divided Societies: The Quest for Self-Determination by the Afrikaans Speaking Community in South Africa". *Journal on Ethnopolitics and Minority Issues in Europe* 17: 47–76.
- De Villiers, Bertus. 2018b. "The Recognition Conundrum – Is an Advisory Body for Aboriginal People Progress to Rectify Past Injustices or Just Another 'Toy Telephone' ". *Journal on Ethnopolitics and Minority Issues in Europe* 17: 24–28.
- De Villiers, Bertus. 2019. "An Ancient People Struggling to Find a Modern Voice – Experiences of Australia's Indigenous People with Advisory Bodies". *International Journal on Minority and Group Rights* 26: 1–21.
- De Villiers, Bertus. 2021. "Striking a Balance Between Free Association and Regulating Membership of a "Community": Exploring s 235 of the Constitution of South Africa". *International Journal on Minority and Group Rights* 28: 1–26.
- Deets, Stephen, and Sherrill Stroschein. 2005. "Dilemmas of Autonomy and Liberal Pluralism: Examples Involving Hungarians in Europe". *Nations and Nationalism* 11: 293–315.
- Department of Aboriginal Affairs. 1981. "Report on a Review of the Administration of the Working Definition of Aboriginal and Torres Strait Islanders". Canberra: Government Printer.
- Duff, Nick. 2014. *What's Needed to Prove Native Title? Finding Flexibility within the Law on Connection*. Canberra: AIATSIS.
- Electoral Commission. 2020. "Enrolment by Maori Electorate". *Electoral Commission*. <https://www.elections.nz/stats-and-research/enrolment-statistics/enrolment-by-maori-electorate/?name=all> (accessed December 1, 2020).
- Fihlani, Pumza. 2019. "South Africa's Election: Five Things We've Learnt". *BBC News*, May 11, 2019.
- Gardiner-Garden, John. 2002. "Defining Aboriginality in Australia". *Current Issues* 10. https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0203/03Cib10 (accessed December 1, 2020).

- Geldenhuys, Deon. 2021. "Autonomy Initiatives of the Afrikaner Community in South Africa". In *Non-Territorial Autonomy and Decentralization: Ethno-Cultural Diversity*, edited by Tove H. Malloy and Levente Salat. New York: Routledge.
- Henrard, Kristin. 2002. *Minority Protection in Post-Apartheid South Africa*. Kenwyn: Juta.
- Hobbs, Harry, and George Williams. 2018. "The Noongar Settlement: Australia's First Treaty". *Sydney Law Review* 40: 1–24.
- Human Rights Committee. 2019. "Right to Vote in Elections to the Sami Parliament". CCPR/C/124/D/2668/2015. Geneva: United Nations Human Rights Committee.
- Jansen, Julian. 2019. "Afrikaans Kwyn in Kaapse Moskees". *Rapport*, June 30, 2019.
- Joona, Tanja. 2016. "The Definition of Sami Person in Finland and Its Application". In *Indigenous Rights in Scandinavia: Autonomous Sami Law*, edited by Christina Allard and Susann Skogvang, 155–72. London: Routledge.
- Josefsen, Eva. 2010. *The Saami and the National Parliaments: Channels for Political Influence*. Geneva: UNDP.
- Klug, Heinz. 2010. *The Constitution of South Africa: A Contextual Analysis*. Oxford: Hart Publishing.
- Law Reform Commission. 1986. *Recognition of Aboriginal Customary Laws*. Canberra: Government Printer.
- Magga, Henrik Ole, and Tove Skutnabb-Kangas. 2001. "The Sami Language: The Present and the Future". *Cultural Survival* June: 1–19.
- Malloy, Tove, Alexander Osipov, and Balázs Vizi. eds. 2015. *Managing Diversity through Non-Territorial Autonomy: Assessing Advantages, Deficiencies, and Risks*. Oxford: Oxford University Press.
- Marsal, Stéphanie, and Francesco Palermo. 2018. "Commentary on Article 3 of the Framework Convention for the Protection of National Minorities". In *The Framework Convention for the Protection of National Minorities: A Commentary*, edited by Rainer Hofmann, Tove Malloy and Detlev Rein. 92–110. Leiden: Brill.
- McLeay, Elizabeth M. 1980. "Political Argument About Representation: The Case of the Maori Seats". *Political Studies* 28: 43–62.
- Mutu, Margaret. 2011. *The State of Maori Rights*. Wellington: Huia Publishers.
- New Zealand Royal Commission. 1986. *Report of the Royal Commission on the Electoral System: Towards a Better Democracy*, Wellington: Government Printers.
- Pettersen, Torunn. 2011. "The Electoral Register of the Samediggi in Norway 1989–2009: Basis, Growth and Geographical Shifts". Paper Read at the European Consortium for Political Research. St Gallen, Switzerland.
- Population Estimates. 2020. "Midyear Population Estimates". Pretoria: Department of Statistics. <http://www.statssa.gov.za/publications/P0302/P03022020.pdf> (accessed December 1, 2020).

- Riekkinen, Mariya, and Markku Suksi. 2019. "The Sámi Assembly in Finland". *Online Compendium Autonomy Arrangements in the World*, at <http://www.world-autonomies.info> (accessed December 1, 2020).
- Saba, Athandiwe. 2019. "Election's Biggest Little Winners – FF+". *Mail and Guardian*, May 10, 2019.
- Sarivaara, Erika. 2016. "Emergent Sami Identities: From Assimilation towards Revitalisation". In *Linguistic Genocide or Superdiversity? New and Old Language Diversities*, edited by Reetta Toivonen and Janne Saarikivi, 203–16. Multicultural Matters.
- Suksi, Markku. 2015. "Non-Territorial Autonomy: The Meaning of (Non) Territoriality". In *Minority Accommodation Through Territorial and Non-Territorial Autonomy*, edited by Tove Malloy and Francesco Palermo. 83–118. Oxford: Oxford University Press.
- United Nations. 2014. "Global Human Rights Law Collection: The Rights of National Minorities in International Law". New York: United Nations.
- United Nations. 2016. *Report of the Special Rapporteur on the Rights of Indigenous Peoples on the Human Rights Situation of the Sami People in the Sápmi Region of Norway, Sweden and Finland*. Geneva: United Nations.
- Van der Vyver, Johan David. 2011. "The Right to Self-Determination of Cultural, Religious and Linguistic Communities in South Africa". *Potchefstroom Electronic Law Journal* 14: 1–29.
- Yle Uutiset. 2019. "UN Committee Slams Finland over Sami Electoral Ruling". *Yle*, February 1, 2019.

Case Law

Please refer to the list on pages viii–xvi.

Key Judgments on the Accommodation of Muslim Family Law in South Africa

Christa Rautenbach

One of the central issues that will have to be addressed in the process of refashioning our legal institutions is how best to accommodate the plurality of personal-law regimes South Africans are accustomed to live by with a national regime of common citizenship rights.

CACHALIA 2019, 68



1 Introduction

Historical events have seen South Africa developing into a culturally diverse society made up of different ethnicities, religions, languages, customs, and traditions.¹ These events have also had a profound effect on the making of the South African legal system.² The South African legal system gradually

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- 1 The term *culture* has contested meanings. In this context, however, it is used as a “modality that identifies and binds a specific group of people.” For a general discussion of some of the meanings of culture proposed by scholars and the judiciary, see Rautenbach, Jansen van Rensburg, and Pienaar (2003, 4–8) and Rautenbach (2018b, 6–11). Culture is employed to denote a source of identity that draws distinctions between people based on specific characteristics such as ethnicity, religion, language, custom, and tradition. One must accept the fact that it is not always possible to draw exact cultural borders based on identifiable characteristics. Migration and industrialisation have created multiple sources of identity with people continually moving in and between those identities, which contradicts the idea that culture is fixed and immutable. According to Fishbayn (1999, 148–51), most judges see culture as a “closed, integrated and static system” which must be preserved. She pleads, however, for the adoption of a post-modern notion of culture that acknowledges that culture is on the move together with society; a movement that should also be recognised and endorsed by the judiciary.
 - 2 The traditional way to explain the birth of the South African legal system is to do it from the moment European settlers set foot on South African soil in 1652 (Hahlo and Kahn 1968, 567).

developed into a mostly uncodified amalgam of laws to be found in various sources from the inception of Roman-Dutch law in 1652, followed by a period of British rule more than two centuries later, and eventually independence in the 1990s. The sources of law include the Constitution,³ legislation, judicial precedent, customary law (traditional laws) and common law (a mixture of Roman-Dutch law and English common law).⁴ To date, the legal norms of religious communities are not officially included. One example includes Muslims, who practice their norms in the private sphere under the auspices of Muslim religious authorities (Moosa and Dangor 2019, 3–4). Despite being a tiny minority in South Africa,⁵ Muslims have been quite vocal about being either for or against the inclusion of Muslim family law in the South African legal system (Dadoo and Cassim 2019, 56–57; Cachalia 2019, 73). Calls for the official recognition of Muslim family law are intensifying, and there is a Muslim Marriages Bill on the table that has not been transformed into a statute despite

This viewpoint ignores the fact that early inhabitants also had customary legal systems that regulated their everyday lives. However, since this chapter deals with the accommodation of Muslim family law in South Africa the traditional viewpoint will suffice, because the arrival of Muslims in the Cape followed soon after the arrival of the Dutch settlers (Mahida 1993, 1; Allie 2019, 26–30; Cachalia 2019, 74). A few watershed periods stand out. From 1652–1795 the Cape colony was under the control of the Dutch East India Company, which administered Roman-Dutch law – the law that applied in the province of Holland at the time. The next period (1795–1910) marked the influx of English law, which influenced public law quite considerably. Before the transformation into English law could be completed the British relinquished control over South Africa, and Roman-Dutch law, especially in the area of private law, continued to survive in South Africa to date (Hahlo and Kahn 1968, 567–96). Later customary law was added to this melting pot, transforming South African state law into a truly pluralistic system. It was officially recognised in 1994 in the Constitution of the Republic of South Africa Act 200 of 1993 (transitional Constitution) and then again in the Constitution of the Republic of South Africa, 1996 (Constitution) (Rautenbach 2003a, 107–08; Rautenbach 2018a, 39–42; Rautenbach 2019a, 158–159).

- 3 The Constitution has a higher status than any act and did not go through the normal enactment processes but was approved by the constitutional assembly and eventually endorsed by the Constitutional Court in *Certification* (1997).
- 4 The South African legal system is essentially an uncodified one because the primary sources of law have not been systematically recorded but are scattered across many different written and unwritten sources. See Du Plessis (1999, 75). Zimmermann and Visser (1996, 9–10) point out that it is not so easy to characterise the South African legal system as either Roman-Dutch or English law, and argue that both fulfil the role of “common law” in South Africa. In general see Rautenbach (2019b, 482–519).
- 5 Currently, reliable statistics about individuals adhering to Islam do not exist. Indications are that about 1,9% of South Africans identify themselves as Muslim, with most adherents residing in the Western Cape (5,3%), Gauteng (2,4%) and KwaZulu-Natal (3,3%). See Statistics South Africa (2016, 3, 27).

a recent decision of the High Court ordering the government to enact legislation before the end of 2020.⁶ In the meantime, it is the function of the courts to adjudicate Muslim family law issues despite Muslim law falling outside the domain of state law.

This chapter aims to provide an overview of some judgments on Muslim family law. The part that follows provides an overview of the former unaccommodating approach of the judiciary, followed by a brief discussion of the legal and political context within which judges currently manoeuvre to accommodate Muslim family law. After this, an analysis of a few of the judgments follows to illustrate how the judicial turnabout has been possible even though Muslim family law is not part of the South African legal system. It would be impossible to deal with all the case law in a discussion such as this. The focus is on a few ground-breaking cases that illustrate the judiciary's change of heart regarding public policy and good morals, and its power to develop the law.

2 Earlier Judicial Responses to Muslim Law

Adjudication in Muslim family law is not a new phenomenon. The non-recognition of Muslim family law has been incredibly unfair to women,⁷ and they often must take their family disputes out into the open by litigating for protection in the South African courts. However, earlier judicial responses to Muslim family law were inconsistent.⁸ Some judges showed a willingness to accommodate Muslim marriages, but others not. One of the first published cases of the Supreme Court of the Cape of Good Hope that acknowledged the existence of a Muslim marriage was *August v Rens* (1836). In this case, the applicant was married in terms of Muslim law. He wanted to call his wife as a witness to testify, but the defendant argued that the law prevented spouses from testifying on one another's behalf. The applicant argued that their marriage was not valid in terms of Roman-Dutch law and that his wife should, therefore, be allowed to testify. The Court, however, took the side of the defendant, and refused her testimony. Although the Court did not make a pronouncement on

6 See the discussion of *Women's Legal Centre Trust* 2018 at 4.8 below.

7 Numerous essays on the challenges Muslim women face have been published. For example, see Goolam and Rautenbach (2004, 369); Amien (2020); Amien (2019b, 94); Cachalia (2019, 76–77); Abrahams-Fayker (2019, 252); Manjoo (2019, 273–97); Samaai, May, and Gihwala (2019, 298–308); Domingo (2019, 309–28); Moosa (2019, 396); Rautenbach (2000, 36); Rautenbach (2003b, 121).

8 Christian-Muslim marriages existed in the Cape from early on, see Malherbe (2008, 5–24).

the legal status of the marriage, it implicitly accepted its validity to apply the rule that prevents spouses from testifying on one another's behalf.⁹

The first hint that public policy based on Christian values was to play a significant role as a motivation for the rejection of Muslim marriages came from Chief Judge Hodges in *Bronn* (1860).¹⁰ He held that only "an ordained clergyman or minister of the gospel" could perform a valid marriage in the former Cape colony, which excluded the possibility for Muslims to conclude valid marriages (*Bronn* 1860, 320–321). Interestingly, the unrecognised status of Muslim marriages did not bother him but rather the fact that they did not comply with the Christian view of the institution of marriage that required a "chaste life with one wife". He hoped that this situation, which he referred to as "a defective state of law" could be rectified to bring Muslim marriages within the realm of the "sacred institution of marriage" because that would bring Muslims,

(...) who have not yet embraced the greater blessings which they would obtain by Christian marriage, by which I mean of course marriage to one wife, which, among the heathen ought to be sanctioned and encouraged by law. It is, even amongst them, an institution of a divine character – a glimmer of the light once shining in Paradise, which is still vouchsafed to them. By embracing marriage, polygamy and incest among them will be checked and discontinued; their wives will be placed under the protection of the law, and a step will thus be taken in the right direction to prepare them for the legitimate blessings accompanying Christian marriage.

Ibid.

9 In 1990, in *S v Johardien* (1990, 1035), the court was not convinced, however, that this judgment was authority inferring that a Muslim wife could claim spousal privilege in a criminal case against her husband. Even if it were so, it was overruled by *Bronn* (1860, 313) and *Seedat's Executors* (1917, 1036).

10 The deceased had married his first wife in terms of Muslim law. The deceased had not provided for one of his children in his will, and the question was whether the child could receive a legitimate portion of his father's estate. The legitimacy of the children born of this union depended on the validity of the marriage. Although the court agreed that the marriage was invalid, it differed on the reasons why. Chief Judge Hodges concluded that the marriage was invalid because it had not been entered into in accordance with the applicable proclamation in operation at the time of the marriage. Judge Watermeyer, on the other hand, was of the opinion that the proclamation was wide enough to allow for Muslim marriages but that the validity of a marriage contract between the parties had not been proved, resulting in a state of concubinage. Judge Bell also agreed that the only state of concubinage had been proved, not a marriage.

The public policy principle was later extended to foreign Muslim marriages in *Seedat's Executors* (1917). The Appellate Division dealt with the question of the validity of a polygynous Muslim marriage. Both marriages having been concluded in India.¹¹ At the time of the second marriage, the deceased was domiciled in South Africa and the Court, therefore, found it to be invalid in terms of South African law. Concerning the first marriage concluded in India, the Court applied the repugnancy principle of international private law to defend its non-recognition of the union in South Africa. Chief Judge Innes explained that there were exceptions to the rule that foreign courts should recognise the validity of a foreign marriage. One of the exceptions was based on the principle that a country was under no obligation to recognise a marriage which is "repugnant to the moral principle of its people" (*Seedat's Executors* 1917, 307–08). Seeing that polygyny was "reprobated by the majority of civilized peoples, on the grounds of morality and religion", it was justified not to recognise a Muslim marriage as valid (*Ibid.*).

Being a decision of the highest Court, the outcome of the judgment became the norm in all cases concerning the validity of Muslim marriages.¹² More than a century later, it was confirmed in *Ismail* (1983), which was also a decision of the Appellate Division. Chief Judge Innes held that the marriage was invalid on the following grounds (*Ismail* 1983, 1024–1026): Muslim marriages were against the public policy and good morals;¹³ there was no justification to deviate from the long line of decisions that refused recognition to Muslim marriages; endorsing polygyny would undermine the monogamous status of civil marriages and would also create practical problems in a system designed for monogamy; recognition of Muslim marriages would undermine equality between marriage partners; and Muslims had the right to convert their actual monogamous marriages into *de jure* marriages in terms of the Marriage Act 25 of 1961. Considering the question regarding the validity of the marriage contract, the Court held that the marriage and the contract were interlinked and, if the one was invalid, so was the other (*Ismail* 1983, 1025D-F).¹⁴

11 The question was whether the children born of these two marriages could be regarded as "lineal descendants" and the wives as "surviving spouses", which would result in certain estate tax deductions that existed at the time.

12 The doctrine of precedent (*stare decisis*) was introduced into South Africa during British rule (Zimmermann and Visser 1996, 15).

13 According to the Court, Muslim marriages were "contrary to the accepted customs and usages that were regarded as morally binding upon all members of society." See *Ismail* (1983, 1026B).

14 In *Mashia Ebrahim* (1905) the Court accepted the validity of a monogamous Muslim marriage but remarked that a polygynous marriage will not be regarded as valid, regardless of its recognition as valid elsewhere. In *R v Sukina* (1912) the court accepted this rule to find

Seven years later, in *S v Johardien* (1990), the Court again refused to recognise a Muslim marriage. Contra to the approach taken in *August v Rens* (1836), it declined to extend the spousal privilege rule to a spouse married in terms of Muslim law because such a marriage could not be valid due to its polygynous nature.¹⁵

In a few decisions, the courts have tried to alleviate the plight of Muslim women by declaring their marriages as putative ones. In *Solomons* (1991) the High Court brought an end to this practice by deciding that only marriages duly solemnised in terms of the Marriage Act could be regarded as putative marriages (Carnelley 2007, 343).

Another seven years passed after *Johardien* (1990) before the winds of change made possible by South Africa's first democratic Constitution¹⁶ led to a different view in *Ryland* (1997).¹⁷ Since this judgment was handed down, the grounds advanced in *Ismail* (1983) have been negated one by one by a judiciary eager to accommodate aspects of Muslim family law in the spirit of cultural diversity and human rights. This chapter introduces and considers some of those cases. Compared with other similar legal systems, judicial accommodation of Muslim family law in South Africa might still be in its infancy. Nevertheless, the judiciary has over a short period made commendable strides towards coming to the aid of women involved in unrecognised Muslim marriages.

3 The Winds of Change: Constitutional, Legal and Political Context

Judges adjudicate within a particular legal and political context. As Forsyth (1985, 13) puts it, "Judges, like all human beings, are, to a greater or lesser extent, the product of their past lives. They remain unique." Therefore, all the judgments delivered before South Africa's first democratic Constitution took effect need to be understood in context. Judges did not have the authority to test the

that a woman married according to Muslim law cannot be regarded as a "wife" in terms of the immigration laws of the former Transvaal province. The same principle was adopted in *Esop* (1913).

15 Section 198(1) of the Criminal Procedure Act 51 of 1977 that reads: "A husband shall not at criminal proceedings be compelled to disclose any communication which his wife made to him during the marriage, and a wife shall not at criminal proceedings be compelled to disclose any communication which her husband made to her during the marriage."

16 The transitional Constitution, which commenced on 27 April 1994. It was replaced by the final Constitution on 4 February 1997.

17 The judgment also received attention from international scholars. See Henrard (2001, 63–65).

common law or legislation against a higher norm of some sort (Rautenbach and Du Plessis 2017, 561).¹⁸ South African law was informed mainly by a commitment to parliamentary sovereignty and public policy that prevented judicial activism to a great extent (Rautenbach 2019c, 152). As a result, it would be unfair to point the finger at judges for past decisions taken in a political climate dictated by public policy and good morals that was informed by the values of only one group of society.¹⁹

The one-sidedness of these values is evident in expressions such as that of Chief Judge Innes in *Seedat's Executors* (1917, 309): “the [Muslim] union was (...) fundamentally opposed to *our* principles and institutions” (emphasis added). Also, Judge Trengove in *Ismail* (1983, 1024) emphasised that the concept of monogamous marriage was “firmly entrenched in *our society*” (emphasis added); a statement that implicitly denies the existence of other groups in South African society.²⁰

To move away from the conventional approach that regards legislation highly and centres on public policy and good morals informed by only one part of society required a definite change of mind-set. Post-1994 the South African judiciary's outlook has changed dramatically. It has been facilitating the accommodation of Muslim family law to cater for the cultural diversity of South African society. The two sequential democratic Constitutions with their foundational norms and values have proved helpful in facilitating those

18 Judges were not allowed to question a statute's validity or reasonableness. See *Builders Ltd* (1928, 56): “(...) if the provisions of a law are clear, we, as a Court, are not concerned with the propriety of the legislation or policy of the Legislature, our duty is to administer and interpret it as we find it.” This is not to say that they were not involved in some form of law-making during the interpretation process. Van Staden (2013, 475) refers to this process as the “creative role” of the judiciary. The common law, on the other hand, was more susceptible to judicial interference because it is a “living system capable of growth and development” that could be adapted to changing circumstances. See *Jajbhay* (1939, 542).

19 A perusal of the case law before 1994 reveals that judges were mostly white males of the Christian faith, a fact which probably made it “highly improbable that the interests and needs of the non-élite and non-white citizens of the country would have been foremost in the judges minds” (Corder 1984, 15). As pointed out by Chanock (1989, 287) there was not a shortage of material when he did his research on the historical development of South African law, but what he found reflected “the white, official world”. In 1962 Nelson Mandela applied for the recusal of the magistrate presiding over his case because he was white and he was being tried under laws made by a white parliament in which Africans did not have representation (Albertyn 2014, 245).

20 *Kalla* (1995) was handed down after the transitional Constitution came into operation, but the Court held that it did not apply retroactively. Therefore, it was still bound to *Ismail* (1983), which meant that the Muslim marriage was invalid.

changes. How useful they have been was illustrated in the very first decision that dealt with Muslim family law post-1994.

The first case that dealt with aspects of Muslim family law was *Ryland* (1997). The parties had entered into an actual monogamous Muslim marriage in 1976. One of the questions before Court was whether the previous judgments that refused, on the grounds of public policy, to give effect to the consequences of a Muslim marriage, such as *Ismail* (1983), prevented the parties from relying on the marriage contract that formed the basis of their union. Counsel for the wife argued that the Court should no longer follow *Ismail* (1983) because it had been handed down in 1982, and since then public policy, as manifested in public opinion, had changed (*Ryland* 1997, 702). In the alternative, counsel argued that the Constitution – the transitional one – required from the Court to have “due regard to the spirit, purport and objects” of constitutional rights and values when interpreting and developing the law.²¹ Judge Farlam agreed “that public policy is indeed a question of fact” and not one of law (*Ryland* 1997, 702), which could change if the facts change. He held that in the present case, the “facts” were amended by a Constitution that altered the “basic values on which our civil policy is based” (*Ryland* 1997, 704). In other words, the transitional Constitution was the higher norm against which all law had to be tested. In considering whether the new constitutional values were indeed in conflict with the Court’s idea of public policy in *Ismail* (1983), Judge Farlam said that it was “inimical to all the values of the new South Africa for one group to impose its values on another” (*Ryland* 1997, 707–709). The group the Court was referring to, was indeed the Christian viewpoint embraced in *Bronn* (1860), *Seedat’s Executors* (1917) and *Ismail* (1983). According to Judge Farlam, the *Ismail* case, and by implication, the other two cases too, did not take the plurality of the South African society into account. The shared values of the “new South Africa”

21 The judgment was handed down when the transitional Constitution was still in operation. The transitional Constitution had a limited lifespan. It introduced South Africa’s first justiciable Bill of Rights and it was transitional in the sense that a final Constitution had to be drawn up by a constitutional assembly that had to be certified by the Constitutional Court, which finally happened in *Ex Parte Chairperson of the Constitutional Assembly: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (1997). Section 35(3) read as follows: “In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this chapter.” Interpretations in terms of the transitional Constitution remain relevant in the context of the final Constitution. See Venter (1998, 32). The equivalent of Section 35(3) in the final Constitution, is Section 39(2). It reads: “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

must be found by looking at the broader community and not only a section of it. According to the Court, two values stood out: “[T]he values of equality and tolerance of diversity and the recognition of the plural nature of our society are among the values of our Constitution” (*Ryland* 1997, 707–709). These two values inspire the concepts of public policy and good morals that the courts must apply. Considering that the transitional Constitution introduced a new ethos of tolerance for cultural diversity and plurality, the Court was satisfied that *Ismail* (1983), even if it was a decision of the Appellate Division, no longer applied and was no longer enforceable (*Ryland* 1997, 711).

The effect of *Ryland* (1997) was limited. It did not recognise the “validity” of Muslim marriages in general, and it was precedent only in the Cape Provincial Division.²² This is what happened in *Amod* (1997), where the Durban and Coast Local Division of the High Court (renamed to the Kwazulu-Natal Local Division, Durban) held that *Ismail* (1983), a decision of the Appellate Division, was precedent and that it could not deviate from it. The wife then applied for leave to appeal directly to the Constitutional Court in *Amod* (1998), which was denied. The Constitutional Court held that the Supreme Court of Appeal was the correct forum to decide whether it should develop the common law to give a Muslim wife damages for loss of support arising out of the death of her husband. Although she finally received respite in the Supreme Court of Appeal in *Amod* (1999) (see discussion at 4.2), the litigation process was eventually quite lengthy and costly. However, *Ryland* (1997) was the first judgment post-1994 that accommodated Muslim family law by acknowledging the validity of the Muslim marriage contract. It has been followed by other judges numerous times since then, which ensued in a steady flow of cases following more or less the same constitutional reasoning.

The Constitution has removed most boundaries preventing the judiciary from developing the law. It expressly states that a court may inquire into or rule

22 Since 1994, the superior courts of South Africa consists of the Constitutional Court (final court of appeals for all matters); the Supreme Court of Appeal (court of appeals from High Courts); and several High Courts (provincial divisions with general jurisdiction over defined geographical areas). The names of the High Courts changed in 2009 with the commencement of the Renaming of High Courts Act 30 of 2008. The Act was repealed by the Superior Courts Act 10 of 2013, which once again renamed the High Courts. Presently, there are nine high court divisions with 17 seats in different geographical areas. They hear appeals from the lower courts and acts as courts of first instance in matters that falls within their jurisdiction. For more information on the superior courts in South Africa, see <https://www.judiciary.org.za/index.php/judiciary/superior-courts/superior-courts-divisions> (accessed November 18, 2020).

on the constitutionality of any legislation.²³ Courts have been transformed from law-interpreters into law-makers by several constitutional provisions that permit them to develop the common law and legislation to give effect to the rights in the Bill of Rights.²⁴ Additionally, the interpretive role of the courts has evolved from one that gives effect to clear and unambiguous legal texts, irrespective of their injustice consequences, to one that “involves making constitutional choices by balancing conflicting fundamental rights and freedoms”. One can do this balancing act only “by reference to a system of values extraneous to the constitutional text itself, where these principles constitute the historical context in which the text was adopted, and that helps to explain the meaning of the text” (*S v Makwanyane* 1995, para. 302). Section 39(2) of the Constitution instructs the courts to promote the values of the Bill of Rights when interpreting any legislation or when developing the common law. This promotion-process is the “radiating effect” of the Constitution that the Court acknowledged in *Ryland* (1997, 704).

Quite a large number of provisions in the final Constitution are dedicated to the protection of cultural diversity. Considering South Africa’s segregational past, it is no surprise that the Constitution promises in its preamble that “(...) South Africa belongs to all who live in it, united in our diversity.” Bakker (2009, 394) points out that this statement is a contradiction in terms because “[h]ow can a society be united and diverse at the same time?” However, because a preamble is “a key” to determine the “mischief which [acts] intend to redress” (cited in *Law Union and Rock Insurance Co Ltd* 1917, 59), the words “united in our diversity” acknowledge diversity on the one hand but also that this diversity should not bring division. Bearing in mind that a preamble is also a useful tool during the interpretation process when the provisions are unclear, this could mean that one should follow an interpretation of cultural diversity that produces unification instead of division.

In addition to the preamble, the constitutional framework for the accommodation of aspects of Muslim family law includes but is not limited to Sections 9 (equality), 10 (human dignity), 15 (religion), 30 (culture) and 31 (cultural communities). Two opposing central forces may well be irreconcilable in

23 See Section 172(2) of the Constitution. It is imperative, however, that the Constitutional Court confirm the order of invalidity.

24 Section 8(3) of the Constitution reads: “When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court – (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).”

the context of the Constitution. These conflicting interests have the potential of causing a constitutional tug-of-war between the self-same constitutional values provided for in the Constitution, namely the right to equality on the one hand and culture- and religion-based rights on the other hand. Woolman reminds us of two divergent but relevant worldviews; a politics of equal dignity and a politics of difference (Woolman 2014, 58.2–3).²⁵ These two views are often at loggerheads when a Muslim woman demand equal dignity but the community she belongs to practices a religion that dictates otherwise. Any attempt by a court to resolve disputes of this nature could involve the court in doctrinal issues, which it usually avoids at all costs.

The Court in *Ryland* (1997, 703) mentioned in passing that Section 14(3) of the transitional Constitution “might have changed the position and that the doctrine of doctrinal entanglement may now be part of our law.”²⁶ In the end, the parties agreed that even though there is “no clear barrier between the religious and secular spheres” in Muslim law the case did not involve doctrinal issues to be interpreted, and the Court could dispense with the matter without deciding the issue. Although the question of doctrinal entanglement is far from settled, it seems that issues of religion remain a topic too sacred for

25 The politics of equal dignity is based on the idea that each person is equally worthy of respect, as against the politics of difference, which Woolman (2014, 58.3) explains as follows: “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 first focusses on the idea of what is the same in all of us and the latter on what is good for that part of our identity that places us in a certain cultural group, and which requires accommodation. The discussion of the recognition of Muslim law family pertains to the latter, and it could be argued that social justice will be achievable for Muslims only once they have achieved full participation and inclusion in the state’s major institutions, such as the courts. Also see Rautenbach (2010, 123) for a discussion of the politics of difference and its role in the recognition of Muslim family law.

26 This provision allowed for the statutory recognition of other religious systems of personal and family law, as well as religious marriages. It read: “Nothing in this Chapter shall preclude legislation recognising – (a) a system of personal and family law adhered to by persons professing a particular religion; and (b) the validity of marriages concluded under a system of religious law subject to specified procedures.” Section 14(3)’s equivalent in the final Constitution, is Section 15(3). It reads: “(a) This section does not prevent legislation recognising – (i) marriages concluded under any tradition, or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion. (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.” Although the words of the Court is somewhat confusing, it seems the Court held the view that courts could previously not “adjudicate upon a doctrinal dispute” but that the Constitution endorsed them to become involved in doctrinal issues in future.

the judiciary to involve itself in (*Taylor* 2005, para. 39; *De Lange* 2015, para. 39; *Gaum* 2019, paras. 26–28, *Women's Legal Centre Trust* 2018, paras. 5, 72, 80–116 and 237).

Such a hands-off approach to religious dogma could predict challenging times for Muslim women's rights. Take again, for example, the facts in *Ryland* (1997). Although it is commendable for being the first judgment to hold that a Muslim marriage contract is no longer contrary to public policy and good morals in South Africa, it is somewhat disappointing that Judge Farlam did not evince the same open-mindedness when he made his choice between two opposing interpretations of South African Muslim law. He picked the interpretation that denied the wife a fair share in her husband's estate because, according to him, there was not enough evidence to find that Muslim law had evolved to recognise a woman's new role in society (*Ryland* 1997, 714–17). I agree with Fishbayn (1999, 162–63) that the Court's refusal to accept that Muslim family law can or should adapt to constitutional values effectively excludes Muslim law from being a legitimate part of South African law. By following this approach, the Court "limits the cultural context in which the terms of the South African Islamic law contract are to be interpreted to the parameters of orthodox Islamic law" (Fishbayn 1999, 162). The recognition of Muslim family law will be hollow if it leads to discrimination against women. The constitutional provisions are explicit; legislation recognising religious marriages and systems of family law must be consistent with the requirements of the Constitution (Section 15(3)(b)). However, a similar caveat did not apply to the recognition of marriages and family law systems under the transitional Constitution. If it had, Judge Farlam in *Ryland* (1997) might have reached a different conclusion concerning the rule that excludes a Muslim wife from a fair share in the growth of the husband's estate.

With new powers endowed upon them by the highest law in South Africa, the two successive Constitutions, the judiciary began to either develop the common law or to adapt legislation to accommodate certain aspects of Muslim family law.²⁷ The next section deals with some of those judgments. Considering that the courts must deal with a whole new situation, it is not surprising that almost all of them can be earmarked as key judgments for the accommodation of aspects of Muslim family law.

27 Muslim law is not an official legal system in South Africa and doubt exists whether it is subject to the Constitution. However, there are many textual and other arguments in favour of an interpretation that it does indeed apply to Muslim conduct. See Rautenbach (1999, 50–70).

4 Key Judgments: From Intolerance to Accommodation

As already mentioned, *Ryland* (1997) was just the first of many judgments post 1994 that recognised some of the consequences of Muslim marriages to provide relief to women. The golden thread that runs through these judgments is not only the constitutional rights and values of dignity, equality, and freedom but also the right to culture. The Court's jurisprudence provides useful guidance as to how one should accommodate Muslim family law until recognition is given to Muslim marriages to bring them sufficiently under the protection and regulation of the law. There are many points of entry to discuss relevant judgments. I have decided to classify them under the applicable relief they provided in the context of Muslim family law, even though they overlap in some areas.

4.1 *Recognition of the Validity of a Muslim Marriage Contract*

In terms of South African law, a contract is an agreement between two or more people that gives rise to rights and obligations binding upon the parties (Hutchison and Du Bois 2007, 736). South African contract law is based on common law rules and is rooted firmly in Roman-Dutch law. A fundamental principle is that the contract should not be against public policy or good morals (*Ibid.*, 767–68). In terms of Muslim law, a marriage is a civil contract from which specific responsibilities such as procreation and maintenance flow (Mofokeng 2009, 140–42). In *Ismail* (1983, 1025), the Court held that the marriage contract was linked to the marriage rendering it contrary to public policy and thus unenforceable. Counsel for the wife argued that the validity of the marriage contract was independent of that of the marriage. The Court disagreed with this approach and held that it could not view the two claims in isolation because Muslim law governed all aspects of the marriage (*Ismail* 1983, 1020 and 1025). The “conjugal union” between the two parties linked her claims for arrear maintenance, deferred dowry, and the return of marital gifts. Thus, “if the polygamous relationship is regarded as void on the grounds of public policy, the custom or the contract which flows from this relationship is also vitiated” (*Ibid.*, 1025). The result was that both the marriage and the marriage contract were contrary to public policy and, therefore, invalid.

It will be recalled that in *Ryland* (1997, 701–02) the Court faced a similar dilemma. The ex-wife claimed the enforcement of the marriage contract, that included a claim for *nafaqah*²⁸ and *mut'ah*.²⁹ She also had a third claim for an

28 Based on the responsibility of a Muslim husband to pay his wife reasonable maintenance during the marriage and the *iddah* period.

29 A consolatory gift for unjustifiably terminating the marriage.

equitable share in the growth of her husband's estate, which was not based on the contract but, according to her expert's evidence, on a Malaysian custom (*Ryland* 1997, 696). The Court had to decide whether it was precluded from enforcing the contractual agreement between the parties if the Muslim marriage was invalid. Judge Farlam held, as pointed out in the previous section, that *Ismail* (1983) no longer precluded it from enforcing the contractual terms of the marriage agreement because of the "acceptance by our society of the values underlying" the Constitution (*Ryland* 1997, 711). These values, according to him, are the values of equality, the tolerance of diversity and the recognition of the plural nature of our society and are values that the courts have to apply (*Ryland* 1997, 708–09). It appears from Court's reasoning that it was not concerned with the validity of the marriage, but only with the validity of the contractual agreement. According to Judge Farlam, the Muslim marriage contract was similar to any other valid cohabitation agreement. A couple would be allowed to regulate the terms of their cohabitation even though South African law would not regard it as a marriage in terms of South African law (*Ibid.*, 710). The Court used the radiating effect of the transitional Constitution to develop the common law of contract by holding that a Muslim marriage contract can no longer be invalid for being contrary to public policy and morals.³⁰ However, regarding the third claim – for an equitable share in the husband's estate – the Court was not convinced that the Malaysian custom also applied in South Africa, and therefore her claim had to fail.

As already indicated, the judgment is progressive in the sense that it deviated from the long line of decisions that refused to protect vulnerable women involved in unrecognised monogamous Muslim marriages. However, one could object to the paternalistic approach the Court took in applying traditional Muslim law to decide the ex-wife's third claim. Fishbayn's argument that Muslim women are not better off than during *apartheid* holds some truth. She expresses the opinion that:

The effect of the denial of recognition to Muslim marriages was to leave women married under Muslim law with no access to civil remedies and no opportunities to challenge their rights under Muslim law before civil courts. Having been denied all rights to maintenance and property division under apartheid, they are now denied these same rights by a constitutional State which fails to interrogate the notion of culture.

FISHBAYN 1999, 163

30 As pointed out by Hutchison and Du Bois (2007, 768), there is a fine line between the principles of public policy and good morals, and in many cases they have been treated as being the same.

In another case, *Arendse* (2013), the Western Cape High Court recognised the significance of *mahr* (dowry), which is a vital component of a Muslim marriage contract. In this case, the parties had a dual marriage, a civil and a Muslim one. They dissolved their civil marriage after a few years and later also the Muslim one but continued to live together as husband and wife. Their relationship kept on deteriorating, and another few years after the wife obtained a letter from the Muslim Judicial Council to confirm that her ex-husband owed her a house as a dowry, which she claimed was the one where they lived. The case dealt mainly with the legality of the conviction order claimed by the ex-husband. Still, the Court held that the “question of the dowry” was “a relevant circumstance which ought to have been taken into account (...) in determining whether it was just and equitable to evict” the ex-wife and her children from the house which she claimed as dowry (*Arendse* 2013, para. 44).³¹

4.2 *Extension of the Common Law’s Action for Loss of Support for the Killing or Injury of a Breadwinner to a Muslim Wife*

The South African common law of delict (“tort” in English law) provides an action to a dependant who suffers a loss of income when the breadwinner is killed or injured by the wrongful act of someone else. To succeed with this action, a claimant has to meet three requirements: there must have been a duty on the deceased to support the surviving spouse; the duty must have been legally enforceable; and the surviving spouse’s right to the support must be worthy of legal protection (*Santam Bpk* 1999, 427–30; *Amod* 1998, 1326–27). The latter requirement has to be determined by the principle of public policy or morality (*Visser* 2007, 1112–13). Following the precedent in *Ismail* (1983), where the Court held that a Muslim marriage was invalid for being against the public policy, this would mean that a Muslim widow’s right to support would also be invalid. Her right to support would thus not be regarded as worthy of protection.

In the 1990s, the question of whether a Muslim widow could claim loss of support was considered in the *Amod* trilogy (1997, 1998 and 1999).³² Ms *Amod* was married to the deceased in terms of Muslim law when he was killed in a motor collision wrongfully caused by another driver. She instituted a claim

31 The Court held that a conviction order would infringe upon the wife’s property rights and the eviction order given by the court *a quo* was set aside (*Arendse* 2013, para. 50).

32 For a detailed discussion of the *Amod* cases, see Rautenbach and Du Plessis (2000, 302–13).

again the Multilateral Motor Vehicle Accidents Fund for damages for loss of support. The fund refused to compensate her and argued that the common law did not recognise her marriage and, therefore, there was no legally enforceable duty of support between her and the deceased. After two failed attempts, first in the High Court (Durban and Coast Local Division) (1997)³³ and later in the Constitutional Court (1998),³⁴ her persistence finally paid off when she succeeded with her claim in the Supreme Court of Appeal (1999). Chief Judge Mahomed held that the question was not whether the marriage was lawful but whether the deceased was “under a legal duty to support” his widow. If the answer was yes, the next question was whether her right for support deserved legal recognition and protection (*Amod* 1998, paras. 20 and 25). He held that the legal duty to support arose out of the marriage contract. To determine whether the Court should recognise and protect her right to claim loss of support, one had to consider public policy, which – according to Chief Judge Mahomed – had changed with the new constitutional dispensation. To this end, the Court acknowledged the change in public policy and morals towards polygynous marriages and observed:

The insistence that the duty of support which such a serious *de facto* [actual] monogamous marriage imposes on the husband is not worthy of protection can only be justified on the basis that the only duty of support which the law will protect in such circumstances is a duty flowing from a marriage solemnised and recognised by one faith or philosophy to the exclusion of others. This is an untenable basis for the determination of the public morals of society. It is inconsistent with the new ethos of tolerance, pluralism and religious freedom which had consolidated itself in the community even before the formal adoption of the interim Constitution on 22 December 1993.

Ibid., paras. 20–22

33 The Court has been renamed the KwaZulu-Natal Local Division, Durban. It considered itself bound by *Ismail* (1983) and took the view that the marriage was not legally valid and, therefore, a legal duty to support was not present, and the fund was not liable to compensate the widow.

34 After her failure in the High Court (Durban and Coast Local Division), the widow applied for leave to appeal directly to the Constitutional Court. The Constitutional Court held that the question whether the common law should be developed to allow the Muslim widow to claim for loss of support fell primarily within the jurisdiction of the Supreme Court of Appeal, and her application was dismissed. She then approached the Supreme Court of Appeal in *Amod* 1999.

The Court did not doubt that a duty of support followed the actual monogamous Muslim marriage. This duty required the same recognition and protection at common law as any other monogamous marriage in terms of the Christian faith. What is interesting about Chief Judge Mahomed's approach is the fact that he employed neither Section 35(3) of the transitional Constitution nor Section 39(2) of the final Constitution to develop the common law. Instead, he developed it because he regarded it to be the responsibility of a court to "interpret and develop the common law" to protect Muslim widows "if it was consistent with the relevant common-law principles" (*Ibid.*, para. 28).

The approach to developing the common law on its own and not because of a higher constitutional norm that requires it to do so is quite contrary to the one taken in *Ryland* (1997). According to Chief Judge Mahomed in *Amod* (1998), there has been an "important shift in the *boni mores* of the community" which "must manifest itself in a corresponding evolution" in the common law. As explained by him:

'The common law is not to be trapped within the limitations of its past.' If it does not do this it would risk losing the virility, relevance and creativity which it needs to retain its legitimacy and effectiveness in the resolution of conflict between and in the pursuit of justice among the citizens of a democratic society. For this reason the common law constantly evolves to accommodate changing values and new needs.

Ibid., para 23; footnotes omitted

The approach of the Supreme Court of Appeal to avoid the application of the Constitution values in matters concerning the common law did not sit well with the Constitutional Court. As explained in *Pharmaceutical Manufacturers Association of SA* (2000) it is no longer possible to distinguish between a common-law matter and a constitutional matter, because:³⁵

There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

Pharmaceutical Manufacturers Association of SA 2000, para. 44

35 Also see the discussion of Rautenbach and Du Plessis (2017, 568).

As in *Ryland* (1997) the Court in *Amod* (1998) sidestepped the question whether the widows of a polygynous marriage would all have claims for support against the wrongdoer. The existence of a polygynous union is no longer seen as problematic when an ex-wife wants to claim maintenance from her husband. The issue came to the fore in *Khan* (2005), where the Court held that a husband in an actual polygynous marriage has a legal duty to support his wife after divorcing her.³⁶ The logical conclusion is thus that a polygynous wife would also be allowed to claim loss of support when her husband is unlawfully killed.

4.3 *The Extension of Maintenance Rights and Orders to Muslim Spouses*

In *Amod* (1999, para. 26), the Supreme Court of Appeal recognised a Muslim husband's "legally enforceable contractual duty to support" his wife in terms of Muslim law to allow her an action based on the death of her husband who was the breadwinner. The outcome of the judgment demonstrates how one could apply an official legal system's common law rules to protect a Muslim wife by accommodating the husband's contractual obligation to maintain prescribed by a non-official legal system.

In terms of South African law, there are several situations where maintenance becomes relevant.³⁷ The first situation deals with the common law duty of spouses to support each other during the existence of their marriage according to their means (*Himonga* 2007, 258–259; *Skelton et al.* 2010, 348). If one spouse fails to fulfil his or her duty, this duty may be enforced using legal proceedings (*Himonga* 2007, 260). In general, the aggrieved spouse would use the Maintenance Act 99 of 1998 to apply for a maintenance order made by a maintenance court. The reciprocal duty of support comes to an end at the dissolution of the marriage through death or divorce. The second situation is where a divorce court dissolves the marriage and then grants a maintenance order to one of the spouses in terms of the Divorce Act 70 of 1979.³⁸ The third situation is where a spouse involved in a divorce dispute applies for an interim maintenance order (*maintenance pendente lite*) in terms of Rule 43 of the

36 Although the judgment concerned the legal duty of a person to "maintain any other person" in terms of Section 2(1) of the Maintenance Act 99 of 1998, and not a common law duty to maintain, it is likely that another court would take the same approach in cases where the duty to support is also relevant in the case of the claim for loss of support of the breadwinner.

37 The discussion on maintenance deals only with maintenance between spouses and does not include children or other family members.

38 Section 7(1) of the Act empowers the court to make a maintenance agreement between the divorcing parties an order of the court, while Section 7(2) allows the court to make a maintenance order in the absence of an agreement.

Uniform Rules of the Court.³⁹ The final situation is where the death of one of the spouses dissolves the marriage, and the surviving spouse claims maintenance from the deceased estate in terms of the Maintenance of Surviving Spouses Act 27 of 1990.

The narrow interpretation of the common-law duty of support and the legislation regulating maintenance has been the cause of frustration for many Muslim wives, as will be illustrated in the discussion of the jurisprudence that follows.

The first scenario deals with the situation where a Muslim husband refuses to pay his wife or wives maintenance during the marriage. In *Amod* (1999), discussed above, the Court held that the duty to support was a contractual one. However, this case was about the right of the Muslim wife to claim loss of support from a third person and not her husband, and the marriage was an actual monogamous one.

The question if a Muslim husband should pay maintenance to his wife in a polygynous marriage came to the fore in *Khan* (2005). Ms Khan instituted a claim for maintenance in the maintenance court in terms of the Maintenance Act 99 of 1998. Section 2(1) of the Act states that “[t]he provisions of this Act shall apply in respect of the legal duty of any person to maintain any other person, irrespective of the nature of the relationship between those persons giving rise to that duty.” She succeeded with her claim, but her husband appealed the decision of the magistrate. One month before the Court handed down a ruling, the husband gave his wife a *talaq* (Muslim divorce). He then argued, amongst other matters, that he was not liable to maintain his ex-wife longer than the *iddat* period, which was three menstrual cycles after *talaq* (*Khan* 2005, para. 6). The Court held otherwise. Firstly, it found that the common law duty of support is a flexible concept that has been developed over time to include other types of relationships than just civil marriages (*Ibid.*, para. 9). Secondly, it confirmed that polygyny is an acceptable form of religious marriage that should also be protected by South African family law (*Ibid.*, para. 10). Lastly, the Court pointed out that the South African Constitution influenced public policy considerations significantly, and one should no longer entertain an aversion against polygynous unions. There was no convincing reason to refuse maintenance to a Muslim wife involved a polygynous marriage, and the Court awarded a maintenance order to Ms Khan in terms of the Maintenance Act (*Ibid.*, para. 11).

39 The Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court South Africa published in Government Notice R315 of Government Gazette 19834 of 12 March 1999.

Another scenario involves the question of whether Rule 43 of the Uniform Rules of the Court entitles a Muslim spouse to claim interim maintenance. Rule 43(1) reads:

- (1) This rule shall apply whenever a spouse seeks relief from the Court in respect of one or more of the following matters:
 - (a) maintenance *pendente lite* [interim];
 - (b) a contribution towards the costs of a pending matrimonial action;
 - (c) interim custody of any child;
 - (d) interim access to any child.

This question if a Muslim wife is also entitled to interim maintenance came to the fore in several cases. In *AM v RM* (2010), the husband argued that they were married in terms of Muslim law and that their monogamous marriage was thus invalid. Alternatively, he claimed that he had already divorced his wife in terms of Muslim law, which meant that Rule 43 was not applicable. The Court was not convinced, however. It pointed out that

(...) an increasing tendency has developed to enforce maintenance and other rights on spouses married in terms of Islamic law, even though both the courts and the legislature do not legally recognise an Islamic marriage (*nikkah*) as a ‘marriage’ in terms of the Marriage Act.

AM v RM 2010, para. 5

Judge Revelas referred to two unreported cases where the courts ordered the husbands to pay interim maintenance even though they challenged the validity of their Muslim marriages (*Ibid.*, para. 5).⁴⁰ In *Jamalodeen* (2006),⁴¹ the wife was married and later divorced in terms of Muslim law. In this case, the Court held that the wife was entitled to interim maintenance, pending the outcome of her constitutional challenge and divorce action, even though the marriage was one celebrated in terms of Muslim law. However, if she lost her case, she would have to pay back all the maintenance that she had received. The Court in *AM v RM* (2010, para. 10) found this condition to be quite harsh on the wife. She and her children would need maintenance pending the outcome of her case, regardless of its result.

The second unreported case was *Cassim* (2006).⁴² In this case, the Court held that a Muslim husband anyway has to maintain his wife in “accordance

⁴⁰ Also see, Carnelley (2007, 340); Amien and Rautenbach (2018, 356–57).

⁴¹ Discussed in *AM v RM* (2010, paras. 7, 9).

⁴² Discussed in *AM v RM* (2010, paras. 7, 8).

with a general standard of living” during the monogamous Muslim marriage, which entitled her to interim maintenance.

The Court also awarded interim maintenance in *Hoosain* (2010). The wife claimed interim maintenance based on their unrecognised Muslim marriage. As often happens, the husband argued that he was not responsible for interim maintenance because their marriage was invalid in terms of South African law. He averred that the wife’s action was not a “matrimonial action” as contemplated in Rule 43, and she was therefore not entitled to interim maintenance. The Court disagreed and ordered him to pay his wife interim maintenance. In doing so, the judge referred to the policy change concerning Muslim marriages. This change was made possible by following a human rights approach based on numerous constitutional provisions (*Hoosain* 2010, paras. 14–15). This new approach does not mean that “Muslim marriages should be recognised for all purposes” but merely that the “*boni mores* of our society” requires the accommodation of marital consequences of a Muslim marriage (*Ibid.*, para. 16). Judge Yekiso expressed the opinion that courts have been forced to extend piecemeal recognition to Muslim marriages because “the legal position currently in South Africa only affords limited recognition to Muslim marriages because of what is perceived to be their polygamous nature and not solemnised in accordance with the Marriage Act 25 of 1961” (*Ibid.*, paras. 18–19).⁴³ They have been using the provisions of the Constitution to “ameliorate the onerous consequences resulting from non-recognition” (*Ibid.*).

Although the facts of the interim maintenance cases referred to above differ quite considerably, the issue for determination in all of them was whether one could classify the action as a “pending matrimonial action” (*AM v RM* 2010, para. 4).⁴⁴ The courts agreed that a constitutional challenge to the status of a Muslim marriage or the status of a Muslim divorce could be classified as pending matrimonial actions as required in terms of Rule 43 (*Ibid.*, para. 10). Thus, these challenges bring the action for interim maintenance within the ambit of Rule 43, and a Muslim wife could, therefore, proceed with her claim for interim maintenance.

The final question to be discussed under this heading is if a Muslim wife whose marriage has been dissolved by the death of her husband would be able to claim maintenance from his deceased estate in terms of the Maintenance of Surviving Spouses Act 27 of 1990. The Act provides a claim for maintenance

43 Customary marriages are recognised in terms of the Recognition of Customary Marriages Act 120 of 1998.

44 The differences are discussed by Amien and Rautenbach (2018, 357–58).

against the estate of a deceased spouse in certain circumstances. Section 2(1) reads:

If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings.

The non-application of the Act to Muslim “survivors” has led to the frustration of Muslim wives in at least two judgments, *Daniels* (2004) and *Hassam* (2009).⁴⁵ They also dealt with the meaning of “spouse” in the Intestate Succession Act 81 of 1987 and the question of whether it can be interpreted to include a Muslim spouse. For this section, the focus will be the Maintenance of Surviving Spouses Act 27 of 1990. Although the courts’ reasoning regarding both Acts interconnects in many respects, their reason in the context of intestate succession will briefly be dealt with in the section that follows.

Mr and Ms Daniels had an actual monogamous Muslim marriage. When the husband died without a valid will, his wife’s struggle for legal recognition began in all earnest. The facts came before the court three times.⁴⁶ The first unreported case, *Daniels* (1998), was heard in the Cape High Court (renamed the Western Cape High Court). Ms Daniels applied for an order declaring that she was entitled to the common house as the wife of the deceased, but the Court dismissed her claim on the basis that the marriage was invalid. It held that Ms Daniels could be helped only by legislative amendments and not by the courts (*Daniels* 1998, 5–6). In the second attempt, also in the Cape High Court in *Daniels* (2003, 1005), she applied for an order declaring first that she was a “spouse” in terms of the Intestate Succession Act, and thus an intestate heir. Secondly, she applied for an order declaring that she was a “survivor” under the Maintenance of Surviving Spouses Act and therefore entitled to claim maintenance in terms of the Act (*Ibid.*, 972). The Court interpreted both Acts and held that the words “spouse” and “survivor” could not be construed to include Muslim spouses (*Ibid.*, 988). Their exclusion amounted to unfair

45 There was an attempt to stop the proceedings by arguing that the matter was *res judicate*, but the Court rejected it. Judge van Heerden pointed out that the cause of action in *Daniels* (1998) was for a right in title of the property of the deceased while the current one was for inheritance and maintenance rights. See *Daniels* (2003, 974–78).

46 For a discussion of the facts of the case, see Goolam and Rautenbach (2004, 369–80); Rautenbach (2019c, 162–65).

discrimination on the grounds of religion, belief, and culture. It was thus in breach of the constitutional guarantee of equality, which could not be justified (*Ibid.*, 970). According to Judge Van Heerden this omission could be rectified only by a reading-in order that included Muslim spouses in the definitions of “spouse” and “survivor” in the two Acts (*Ibid.*, 1005). The ruling of unconstitutionality of statutory provisions had to be confirmed by the Constitutional Court,⁴⁷ which was the third time her case was heard (*Daniels* 2004).

In *Daniels* (2004), the Constitutional Court did not agree with the constitutional approach taken by the *Daniels* (2003). It held that the question was not whether a wife’s marriage was valid or not but whether the words “spouse” and “survivor” contained in the Acts included in the ordinary sense of the words parties involved in actual monogamous Muslim marriages. The Constitutional Court held that they were broad enough to include Muslim spouses and that she was entitled to the benefits provided by the Acts. According to Justice Sachs the word “spouse” in its ordinary meaning included any spouse, also Muslim spouses. According to him any other interpretation that excludes certain spouses would be discriminatory, which would be “deeply injurious to those negatively affected” and is “no longer sustainable in light of our Constitution” (*Daniels* 2004, paras. 19–20).⁴⁸

Interpreted this way, the question of discrimination no longer arises, and there was no need for a reading-in of revised definitions of the words “spouse” and “survivor” (*Ibid.* paras. 19–40). Strictly speaking, the case is not about developing existing legislation to include monogamous couples married in terms of Muslim law, but about interpreting existing legislation to accommodate cultural diversity. It is quite remarkable that Justice Sachs reached his conclusion without using the constitutional injunction on the interpretation of legislation that requires courts to interpret it with due regard to the “spirit, purport and objects of the Bill of Rights”.⁴⁹

In *Hassam* (2008) the primary issue before the Western Cape High Court was whether a Muslim widow in a polygynous Muslim marriage could be regarded as a “survivor” in terms of the Maintenance of Surviving Spouses Act 27 of 1990,

47 See Section 172(2) of the Constitution.

48 The Court thus focused on the linguistic meaning of the word “spouse” and not previous narrow interpretations based on limited worldviews that only accepted monogamous marriages concluded in terms of the Marriage Act 25 of 1961.

49 Justice Ngcobo, who agreed with the order of the majority referred to the Section 39(2)-approach as the “proper approach to legislative interpretation” that requires the courts when interpreting legislation “to promote the spirit, purport and objects of the Bill of Rights.” See *Daniels* (2004, paras. 43–58).

and as a “spouse” in terms of the Intestate Succession Act 81 of 1987.⁵⁰ The Court referred to Section 39(2) of the Constitution that required it to “promote the spirit, purport and objects of the Bill of Rights” when interpreting the common law and legislation. It is also a constitutional principle to construe a statute in such a manner that inconsistency with the Constitution is avoided by giving it an interpretation that prevents such a contradiction (*Hassam* 2008, para. 14). Against this background, Judge van Heerden found that the exclusion of Muslim widows from the words “spouse” and “survivor” would boil down to discrimination based solely on the decision of their husbands to marry more than one woman as allowed by their faith:

Such discrimination would not only amount to a violation of their rights to equality on the basis of marital status, religion (it being an aspect of a system of religious personal law) and culture but would also infringe their right to dignity.

Ibid., para. 16

He found that this type of discrimination is unfair because it falls under the grounds listed in the equality clause,⁵¹ and no justification existed to make it fair (*Ibid.*, paras. 17–18).⁵² The Court considered whether the words “survivor” in the Maintenance of Surviving Spouses Act and “spouse” in the Intestate Succession Act were broad enough to include the widows of a polygynous Muslim marriage. Concerning the Maintenance of Surviving Spouses Act, the Court took no pains in finding that the singular form of the term includes the plural⁵³ and held that the word “survivor” included a surviving partner to a

50 For a detailed discussion of the facts of the case, see Moosa and Abduroaf (2019, 334–35).

51 Section 9(3) of the Constitution reads: “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

52 Limitations of rights are made possible through Section 36(1) of the Constitution, which reads: “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.”

53 Three reasons were advanced for this conclusion. The Interpretation Act 33 of 1957 provides that singular also includes plural unless a contrary intention is clear. Secondly, the Maintenance of Surviving Spouses Act 27 of 1990 contains mechanisms to deal with competing claims of wives and children and, lastly, the Act already applies to polygynous customary marriages. See *Hassam* (2008, para. 21).

polygynous Muslim marriage (*Ibid.*, para. 23). About her inclusion in the word “spouse” in terms of the Intestate Succession Act, the situation was more complicated, as will be revealed in the next section.

4.4 *The Inclusion of Muslim Spouses in the Intestate Succession Act*

The Intestate Succession Act 81 of 1987 provided that if a spouse and descendants survived a deceased, such a spouse was entitled to the greater of a child’s portion or R125,000.⁵⁴ The child’s share is calculated by dividing the deceased’s estate by the number of surviving children plus the surviving spouse.⁵⁵ In *Daniels* (2004) the Constitutional Court held that the word “spouse” in the Act should be construed in a manner consistent with the foundational values of equality, human dignity and freedom to include the widows of monogamous Muslim marriages. In *Hassam* (2008), where the Muslim marriage was a polygynous one, the High Court agreed that the widow was also a “spouse” in terms of the Intestate Succession Act. However, “from a linguistic perspective”, it would be difficult to interpret the provision on the calculation of the child’s portion generously to include more than one wife. The only way this omission could be rectified was to order a reading-in of words (*Hassam* 2008, para. 20). Thus, the Court declared that Section 1(4)(f) that regulated the child’s portion was unconstitutional “to the extent that it makes provision for only one spouse in a Muslim marriage to be an heir in the intestate estate of their deceased husband” (*Ibid.*, para. 23). To rectify the declaration of unconstitutionality, the Court did a reading-in of words into Section 1(4)(f) to provide for a different calculation of the child’s portion where there was more than one wife. Since the order of the Court involved a declaration of unconstitutionality of a legislative provision, it had to be referred to the Constitutional Court for confirmation.

In the Constitutional Court in *Hassam* (2009), Justice Nkabinde agreed with the human rights approach followed in the court *a quo*, though he came to a slightly different conclusion. He found that the word “spouse” in the Act could not be interpreted to include more than one spouse. Therefore, it was necessary to add the words “or spouses” after each use of the word “spouse” (*Hassam*

54 Section 1(1)(c). With effect from 20 September 2010, the Reform of Customary Law of Succession and Regulation of Regulated Matters Act 11 of 2009 has extended this provision to all the wives of a deceased. However, the statutory amendment does not apply to polygynous Muslim marriages. In 2014 the child’s portion was increased to R250,000. See Government Notice R920 published in Government Gazette 38238 of 24 November 2014.

55 Section 1(4)(f) of the Intestate Succession Act 81 of 1987. For an explanation of how it is calculated, see Paleker (2017, 36–39).

2009, para. 53). The reading-in order regarding the calculation of the child's portion remained the same, however (*Ibid.*, para. 57).

The outcomes of *Daniels* (2004) and *Hassam* (2009) were to be expected, though the judges in the two cases followed quite different approaches. In *Daniels* (2004), the Constitutional Court gave a generous interpretation of the provisions of a statute to include Muslim women within the parameters of the Act. In *Hassam* (2009), the Constitutional Court declared provisions of an Act unconstitutional and replaced them with new provisions to protect Muslim women in polygynous unions. Both clearly illustrate, however, the shift in judicial policy made possible by a transformative Constitution and a judiciary willing to embrace change to make South Africa a better place.⁵⁶

4.5 *The Recognition of a Second Wife's Right to Lifelong Occupation*

South African law follows the common law principle of *huur gaat voor koop*, which means that an existing lease will bind a lessor's successor in title. The effect is that the lessee of immovable property acquires a real right in the property, provided that he or she occupies the property, or the parties have registered the lease against the title deed (Du Bois 2007, 908–09). In respect of leases of land, additional formalities are prescribed in terms of the Formalities in Respect of Leases of Land Act 18 of 1969. A lease of fewer than 10 years needs not to be in writing but one longer than 10 years will be binding on third parties only if it has been registered against the title deed of the property.⁵⁷ If it was not registered, but the lessee was in occupation of the property, and the third party was unaware of the long lease, he or she would be bound to the lease for only up to 10 years, which date begins to run from the time the lease was entered into (Du Bois 2007, 909).

In *Ismail* (2007), the applicant was the second wife of the first respondent. They were married in terms of Muslim law. He also had a first wife, the second respondent, whom he married in terms of civil law. After their marriage, the husband gave his second wife a flat in which she and their children lived initially. After a while, the husband and his first wife bought a house, and they entered into a long lease agreement with the second wife. The lease, however, was not registered in terms of the Formalities in Respect of Leases of Land Act. The second wife occupied the property and a few years later opened a nursery to sustain herself and the children. About 12 years after she became

56 A transformative Constitution is one that envisages transformation from the old, and everything bad associated with it, to the new and idealistically good. In general, see Rautenbach (2016, 158).

57 See Section 1 of the Formalities in Respect of Leases of Land Act 18 of 1969.

aware that the property was on the market for sale, she instituted an action for an interdict to prevent the sale until she had been provided with “an alternative place of abode” (*Ismail* 2007, para. 10). To succeed with the action, she had to prove that she had a “clear right to the property, which entitles her to an interdict prohibiting the sale” (*Ibid.*, para. 7). During the proceedings, the husband served a *talaq* on her. Because her action was based on an interdict, the Court could sidestep difficult questions such as the maintenance rights of a second wife married in terms of Muslim law, and the constitutionality of the *talaq* (*Ibid.*, para. 6). Based on the facts before it, such as the Muslim marriage between the parties, the existence of the lease agreement, and the second wife’s being part of the household; the Court concluded that she had a right to lifelong occupation of the property. As pointed out by Judge Jones:

The terms of the lease and the *background* to its conclusion lead irresistibly to the inference that the intention of the parties was to give the applicant [the second wife] the *right to live* in that particular house for the rest of her life.

Ibid., para. 7; emphasis added

The looming sale of the property threatened this right, and the second wife was entitled to protect it by using an interdict (*Ibid.*, paras. 7–9). The interdict prohibited the sale of the property until the husband and the first wife provided her with an alternative home “with the same rights which she currently enjoys in terms of the lease” (*Ibid.*, para. 10). As already alluded to, the Court was at pains to explain that it was not necessary to form an opinion on the constitutionality of certain Muslim practices such as marriage and divorce. However, it used the existence of an unrecognised Muslim marriage as a “background” to establish the right to occupation of the second wife.

The fact that courts have gone to such lengths to protect Muslim spouses is another example of how far they are willing to go to accommodate cultural diversity. However, this accommodation comes at a cost. South African law makes provision for various types of marriages,⁵⁸ but polygyny is allowed only in the case of customary marriages and under strict circumstances. (Skelton *et al.* 2010, 187–90). It would, for example, not be possible to conclude a civil marriage and a customary marriage or *vice versa* (Müller-Van der Westhuizen 2018, 112–15). As the husband’s first marriage was a civil one, he was strictly

58 Civil marriage (Marriage Act 25 of 1961), civil unions (Civil Union Act 17 of 2006) and customary marriages (Recognition of Customary Marriages Act 120 of 1998).

speaking not allowed to conclude a second marriage.⁵⁹ The entering into of a second marriage under Muslim law seems to be a deliberate disregard for marriage laws. But as Muslim marriages are not valid, he would probably not be prosecuted for the criminal offence of bigamy. Some scholars argue that someone who concludes a second “invalid” marriage should at least be guilty of attempted bigamy (Hoctor 2017, para. 251 note 5). The challenges accompanying the issue of polygyny in a country where the law treats it as crime remains one of the areas where clarity is needed, especially in the light of the constitutional imperative to treat everyone as being equal before the law.⁶⁰

4.6 *Extension of the Wills Act to Spouses Involved in Polygynous Muslim Marriages*

After the judgments on intestate succession and the maintenance of surviving spouses extended protection in terms of the two statutes to Muslim spouses, it was just a matter of time before the Wills Act 7 of 1953 would also come under the magnifying glass. Section 2C(1) of the Wills Act allows a surviving spouse to take a benefit that a descendant of a deceased (excluding a minor or mentally ill person) repudiated or renounced, provided that the surviving spouse and the descendant were both entitled to the benefit. In other words, if a descendant was nominated with a surviving spouse to receive a benefit, but repudiates or renounces it, it will succeed to the surviving spouse (Van der Linde 2017, 166–67). Despite the judicial acknowledgement of a Muslim wife as a spouse and survivor in the context of the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990, she was not so recognised in terms of the Wills Act (*Moosa* 2017, paras. 28, 31–35, 39).

Moosa (2017) dealt with the question of whether the Wills Act could be applied to spouses married in terms of Muslim law. The deceased had married two wives by Muslim rites, one in 1957 and the other in 1964. In 1982 he formalised his first marriage in terms of the Marriage Act 25 of 1961 with the permission of his second wife. He needed to prove that he was married in terms of the Act to obtain a bank loan to purchase a home where all of them could live. The deceased and his first wife then entered into a civil marriage in terms of the Marriage Act (*Moosa* 2017, paras. 2 and 6). The dispute was not about the existence of the second marriage, but the question whether the second wife could be regarded as a “surviving spouse” in terms of the Wills Act. The deceased had a will in terms of which he referred to his marriages

59 Bigamy is a punishable offence in South Africa. See Skelton *et al.* (2010, 35).

60 See Section 9(1) of the Constitution.

to both women (*Ibid.*, para. 7). He directed in his will that his estate had to devolve under the Muslim law of succession, which had to be set out by the Muslim Judicial Council of South Africa. After his death, the Council issued a certificate setting out the distribution of the estate, which included the allotted shares of the nine children of both wives. The children, however, repudiated the shares allotted to them. They requested that their repudiated shares be divided equally between the two wives. The executor regarded both wives as “surviving spouses” in terms of Section 2C(1) of the Wills Act, and divided the repudiated benefits equally between them. The Master of the High Court approved the division, but the Registrar of Deeds recognised only the first wife as the surviving spouse and refused to register the property in the name of the second wife as well (*Ibid.*, para. 12).

The Court agreed with the contention that Section 2C(1) of the Wills Act probably did not provide for two wives because it is a pre-constitutional Act (*Ibid.*, paras. 22–24), which commenced when polygynous Muslim marriages were deemed to be immoral. To determine whether the exclusion of both wives was unconstitutional, the Court followed a human rights approach based on the equality jurisprudence of the courts. It concluded that their exclusion was unconstitutional because it unfairly discriminated between spouses married in terms of the Marriage Act and those married in terms of Muslim law, and between monogamous and polygynous marriages (*Ibid.*, paras. 28–30). The discrimination could not be justified, and the only way to rectify it would be a reading-in of words that included all the surviving spouses of polygynous Muslim marriages (*Ibid.*, paras. 36–39). The final order was referred to the Constitutional Court for confirmation.⁶¹

The Constitutional Court in *Moosa* (2018) had no difficulties in endorsing the approach of the court *a quo* and in confirming its order. It agreed with its finding that Section 2C(1) violated the second wife’s right to equality (*Moosa* 2018, para. 12). It went even further and found that a further ground for unconstitutionality was the infringement of her right to dignity:

The non-recognition of her right to be treated as a ‘surviving spouse’ for the purposes of the Wills Act, and its concomitant denial of her right to inherit from her deceased husband’s will, strikes at the very heart of her marriage of 50 years, her position in her family and her standing in her community. It tells her that her marriage was, and is, not worthy of legal protection. Its effect is to stigmatise her marriage, diminish her

61 For a detailed analysis of both cases, see Amien (2019a, 115–30).

self-worth and increase her feeling of vulnerability as a Muslim woman. Furthermore, as the WLC [Women's Legal Centre] correctly submitted, this vulnerability is compounded because there is currently no legislation that recognises Muslim marriages or regulates their consequences. In short, the non-recognition of the third applicant's right to be treated as a 'surviving spouse' infringes her right to dignity in a most fundamental way, and is a further ground for declaring section 2C(1) constitutionally invalid.

Ibid., para. 16

As in *Ismail* (2007), the second marriage, strictly speaking, also amounts to bigamy or attempted bigamy. Neither the High Court nor the Constitutional Court engaged with this problem. It is also an example of the great lengths Muslim couples must go through to receive equal benefits of the law. In *Moosa* (2017), they had to solemnise the first marriage years later as a civil one just to obtain a loan because the financial institution did not recognise their marriage.

4.7 *The Recognition of a Universal Partnership between Muslim Spouses*

A universal partnership is an explicit or implicit agreement between two people who choose to live together without being married but with specific patrimonial consequences when the partnership terminates (Skelton *et al.* 2010, 217–18). It applies to all types of marriages. The requirements for a universal partnership is as follows: each of the partners must contribute something to the partnership, such as labour or money; the partnership must be for the mutual benefit of both parties; the object of the partnership should be to make a profit; and the contract between the parties must be legitimate (*Ibid.*, 218).

In *MM v MM* (2019), the Court had to consider whether a universal relationship existed between a Muslim couple. Initially, the parties concluded a dual marriage in 1986; a civil one and a Muslim one. Similar to the facts in *Arendse* (2013) the civil marriage ended up in divorce four years later, but the Muslim marriage continued until the husband ended it 26 years later using the *talaq*. The wife instituted an action for a declaratory order to confirm that a universal partnership had existed and that she was entitled to 50% interest in the partnership. The husband disagreed and pleaded that the proprietary consequences of their marriage should be governed by Muslim law, which excluded community of property and universal partnership (*MM v MM* 2019, paras. 6, 44–45, 58). Despite this, the Court held that it was not aware of any authority that precludes Muslim couples from claiming that a universal partnership existed. According to the Court,

(...) one must bear in mind that up until the present, marriages under Sharia law do not enjoy full legal recognition in our law and that even the existence of an established proprietary regime in respect of a marriage does not preclude the parties thereto from entering into an agreement that a different proprietary regime will operate, such as a universal partnership.

Ibid., para. 45

To decide if a universal partnership came into being after the parties reconciled, the Court compared the conduct of the parties with the usual proprietary consequences of a Muslim marriage. The wife had done much more than is typically expected from a Muslim wife. Their behaviour during their marriage supported the inference that a tacit universal partnership existed. After analysing the evidence, the Court was satisfied that their relationship complied with the requirements of a universal partnership (*Ibid.*, paras. 49–68). It declared that a universal partnership existed with each party holding 50% in the partnership property (*Ibid.*, para. 70).⁶²

What strikes me most about this case is the fact that the Court engaged itself in matters of Muslim law to decide if universal partnerships were allowed in Muslim law, which seems to be contra the doctrine of doctrinal entanglement mentioned earlier. The Court referred to the viewpoint of a Muslim scholar that avers the incompatibility of such partnerships with Muslim law. Still, it concluded that there is no authority in South African law for the contention that Muslim law precludes a universal partnership (*Ibid.*, paras. 44–45). Thinking about Muslim law in a non-Muslim judicial context would almost always raise questions of doctrinal entanglement, and there is no way of escaping it. Difficult issues come to the fore. Moosa (1996, 142) hits the nail on the head when he compares the difference in approach between a religious and secular state by saying:

Contrast this to the application of MPL [Muslim Personal Law] in a secular state, where the state provides the enforcement of personal law as a matter of policy. For if MPL is enforced as a matter of religion then it raises questions of doctrinal entanglement and the permissible limits of state enforcement of religious policy. As a matter of policy, on the other hand, it raises questions as to how MPL fits into a constitutional

62 How the partnership had to be liquidated and distributed was set out in detail in the order, see *MM v MM* (2019, para. 70).

framework and a secular judicial administration. This invariably leads to a paradox where communities expect and demand the recognition of MPL from the modern state in a multicultural and secular context; but at the same time they may express reservations about a secular authority implementing and interpreting religious law!

Therefore, as said in *Ryland* (1997, 701), the accommodation of the Muslim family system might inexorably lead to situations where the courts have to “make determinations that call for [an] investigation into matters of religious belief, even if such decisions are required” for typical legal issues.

4.8 *The Future Statutory Recognition of Muslim Family Law*

Muslim efforts to achieve recognition dates far back, but the discussions and efforts did not amount to much (Moosa 2019, 113–17). In the early 1990s, a Project Committee of the South African Law Commission (renamed the South African Law Reform Commission – hereafter the SALRC) met to consider issues on the recognition of Muslim marriages. For reasons unknown, the investigation never got out of the starting blocks, and in 1999 the investigation was revived with a new Committee (SALRC 2003, 1 note 2; Rautenbach 2019c, 168). The newly established Committee published a report in 2003 containing a proposal for a draft bill titled the “Islamic Marriages Act” (SALRC 2003, 134).⁶³

Nothing much happened between this date and 2009 when the Women’s Legal Centre Trust (hereafter the WLCT) applied for direct access to the Constitutional Court to force the government to enact legislation that recognises the validity of Muslim marriages (*Women’s Legal Centre Trust* 2009). However, the application failed. The Court held that the obligation to enact legislation is not the responsibility of the president and parliament alone, and it would not be in the interest of justice to allow the WLCT direct access. In these particular circumstances, it was thought best to have the benefit of other courts’ insights and to engage in a multistage process where all the issues could be resolved before the legislation was enacted (*Women’s Legal Centre Trust* 2009, 21, 27–28). The WLCT had not achieved what it had set out to do, but at least it had spurred the government into action. Two years later it published a draft Muslim Marriages Bill (2011) for comments.⁶⁴ The Bill elicited diverse

63 The proposal became known as the 2003 Draft Bill. For comments on and a discussion of the provisions of the Draft Bill, see Domingo (2011, 382–85); Navsa (2019, 43–48); Dadoo and Cassim (2019, 57–60); Tayob (2019, 137–43); May and Samaai (2019, 172).

64 Because it was tabled in December 2010, some authors refer to it as the 2010 Muslim Marriages Bill, but it is numbered the 2011 Draft Muslim Marriages Bill. See <https://pmg.org.za/bill/235/> (accessed November 17, 2020).

responses from various groups in the Muslim community and scholars (Motala 2004, 327; Domingo 2011, 378; Denson and Carnelly 2009, 693–96; Dadoo and Cassim 2019, 61–62; Amien 2019b, 96–105; Navsa 2019, 43–48; Moosa 2019, 118–20; Toffar 2019, 401; Dangor 2019, 245–50), but it did not go forward.⁶⁵

Again, the assistance of the courts had to be called in to force the government's hand. This time the WLCT approached the Western Cape High Court in *Women's Legal Centre Trust* (2018).⁶⁶ Three consolidated applications were before Court, but they fundamentally wanted the same relief, namely to compel the government to enact legislation that recognises the validity of Muslim marriages (*Women's Legal Centre Trust* 2018, para. 33). The judgment makes for good reading. It provides a detailed account of historical events on judicial recognition of aspects of Muslim family law pre- and post-constitutional democracy (*Ibid.*, paras. 6–17). It also sets out the actions government has been taking in addressing the issues, including drafting legislation (*Ibid.*, paras. 18–26).

The Court followed a human rights approach to determine whether the constitutional rights of equality (Section 9), dignity (Section 10), freedom of religion (Section 15), the best interest of the child (Section 28), and access to the courts (Section 34) were being violated. If this determination revealed that there was a violation of the rights mentioned, the next question would be if there were any obligations on the state to fulfil, protect and promote those rights (*Women's Legal Centre Trust* 2018, paras. 117–40). The reasoning of the Court is quite lengthy and detailed, but in essence, it followed the previous precedent that considered similar issues (*Ibid.*, paras. 118–40). The trend to protect Muslim women involved in unrecognised Muslim marriage was now firmly set. The focus of the Court was on equality, dignity, access to the courts and children's rights. In pursuit of the well-known equality analysis applied in *Harksen* (1998), and the purposive-*cum*-contextual interpretive approach endorsed by Section 39(2) of the Constitution, the Court agreed with the findings in *Hassam* (2009) and found:

65 According to Moosa (2019, 398–400) the disagreements between the moderate and radical Muslim groups are responsible for its not moving forward. Toffar (2019, 401–04) proposes an interim solution while the Bill is on hold, namely to encourage Muslim spouses to conclude Muslim type antenuptial contracts. Amien (2020, 83) points out that the Department of Justice and Constitutional Development unilaterally made changes to the proposed bill in the SALRC's Report, which immediately elicited negative responses from the Muslim community when it was published. According to the Minister of Justice it received more comments opposing the Bill than supporting it, see *Women's Legal Centre Trust* (2018, para. 19).

66 For a detailed analysis of the case, see Amien (2020, 90–114).

Whilst the disadvantageous position of Muslim women, particularly those in monogamous marriages, has been ameliorated in many respects, there is still a gap with regards to non-recognition that affects women, not only in polygynous marriages.

Women's Legal Centre Trust 2018, para. 128

The Court held that the defence that Muslim women can choose to register their marriages in terms of the Marriage Act 25 of 1961 was not a proper one for not recognising Muslim marriages. Therefore, the applicants proved that there was discrimination. Discrimination is one of the listed grounds in Section 9(5) of the Constitution. It is, consequently, unfair unless the state could prove a legitimate government purpose, which they could not (*Ibid.*, paras. 129–35). It followed a similar approach to that adopted in the dignity inquiry. Analogous to *Moosa* (2018), it held that lack of recognition of Muslim marriages infringes upon the dignity of Muslim women (*Women's Legal Centre Trust* 2018, para. 136). Lastly, the Court pointed out that Muslim women and children are particularly vulnerable in cases of the dissolution of marriages, compared with their counterparts who are validly married. The latter have access to the benefits of mediation and the oversight role of the courts, while Muslim women do not.⁶⁷ The fact that a “fair public hearing” cannot be used to resolve Muslim divorces was an ongoing infringement of the rights of women and children (*Ibid.*, paras. 137–40).

Following the finding that there was a rights infringement, the next question that had to be answered was whether “the State failed to fulfil its obligations.” The Court held that there was a “systemic violation of rights to equality, human dignity, access to courts, and children rights” over the years. The question was whether the state had a responsibility to intervene, and if so, what should that intervention be (*Ibid.*, para. 144). As a starting point, the Court referred to Section 7(2) of the Constitution that places an obligation on the state to “respect, protect, promote and fulfil the rights in the Bill of Rights”, and Section 237, which provides that “[a]ll constitutional obligations must be performed diligently and without delay” (*Ibid.*, para. 147). In sum, the Court held that Section 7(2) places an obligation on the state to respect, protect, promote and fulfil the rights in the Bill of Rights and “this duty may be invoked where there is an alleged violation of rights” by the state. Courts have the power to determine whether the state has fulfilled its obligations, and the state has the power to decide what reasonable and effective steps it is going to take to fulfil

67 Mediation is in terms of the Mediation in Certain Divorce Matters Act 24 of 1987.

its obligations. (*Ibid.*, para. 178). The question of what is reasonable and effective might be answered in part by examining the nature of the rights violations and in part by international law, which courts are enjoined to consider when interpreting the Bill of Rights.

According to the Court the only reasonable way the state could fulfil its Section 7(2)-duty, in such circumstances where historical and persistent discrimination against Muslim women persist, was to order the state to enact legislation (*Ibid.*, paras. 180–84). In Judge Boqwana's opinion, it was no longer a viable option to allow for case-by-case development of the law as has been happening since 1994. The only way to ensure adequate protection for Muslim women was to require comprehensive legislation in this regard (*Ibid.*, paras. 184–85). The Court ordered, amongst other things, that the state had to prepare, initiate, introduce, enact and bring into operation legislation to recognise Muslim marriages as valid marriages and to regulate their consequences within 24 months of the date of the order.⁶⁸ If however, the state failed to fulfil this obligation within the allotted time, interim relief would be provided by the application of the Divorce Act 70 of 1979 to parties who wanted to dissolve their marriages (*Ibid.*, para. 252). The state appealed the decision to the Supreme Court of Appeal, but the Court reserved judgment on 30 September 2020 after hearing arguments from the parties.⁶⁹ For now, the whole process remains in limbo, and there is no indication when, if at all, Muslim marriages will be recognised in the near future.

5 Conclusions

South African courts have been at the forefront of accommodating aspects of Muslim family law post-1994. The new constitutional dispensation is based on constitutionalism rather than parliamentary sovereignty, the latter which prevented the judiciary from questioning the constitutionality of statutes and changes in public policy. Courts may now enquire into the constitutionality of any legislation (Section 172 of the Constitution). They may also develop the common law if necessary to give effect to the right in the Bill of Rights (Section 8(3)(b)), and they must promote the values of the Bill of Rights when they interpret legislation or when they develop the common law (Section 39(2)).

68 The order was delivered on 31 August 2018.

69 For more information, see the media statement of the WLCT available at <https://wlce.co.za/the-recognition-of-muslim-marriages-in-south-africa/> (accessed November 20, 2020).

Also, they have the “inherent power to develop the common law, taking into account the interests of justice” (Section 173). The interpretive function of the courts has evolved from one that gives effect to clear and unambiguous legal texts to one that involves “making constitutional choices by balancing competing fundamental rights and freedoms” (*Makwanyane* 1995, 302).

However, the judiciary remains careful not to infringe on the powers of the legislative authority. Justice Moseneke explained in *Daniels* (2004, para. 108) that legislation on Muslim law is “[a] matter so complex and replete with contending policy, personal law and pluralistic considerations [that it] is better suited for legislative rather than judicial intervention.” Judge Yekiso in *Hoosain* (2010 para. 18) thought that the recognition of religious marriages “was best left to Parliament (...) in consultation with the affected communities, to enact into law as and when circumstances would warrant such an enactment.” Because such legislation does not yet exist in South Africa, “it has been left to the courts in this country, relying on the provisions of the Constitution, to extend piecemeal recognition to Muslim marriages.”

However, as Judge Rogers reiterates, “[t]here may come a time (...) owing to continued lethargy or paralysis on the part of the executive promoters of legislation” when intervention is needed, and the courts will then not be afraid to intervene (*Faro* 2013, para. 44). The time to force the government to adopt legislation that accommodates aspects of Muslim family law has come, considering the approach taken in *Women’s Legal Centre Trust* (2018). As explained by the Court, Section 15(3) of the Constitution does not oblige the state to enact legislation in respect of religious marriages or personal law systems. Still, it also does not prevent such legislation (*Women’s Legal Centre Trust* 2018, paras. 183–85). With the case currently being appealed in the Supreme Court of Appeal, there is just no knowing if or when the legislation will finally see the light. In the meantime, the rights of Muslim women remain unprotected.

There are also other developments in the pipeline which have not been discussed, such as the SALRC’s investigation into a single marriage code, which commenced at the request of the former Minister of Home Affairs (SALRC 2019, 1).⁷⁰

70 The author is chairperson of the advisory committee involved in the investigation. An Issue Paper 35 was published in 2019 (SALRC 2019, 1) for comment followed by a Discussion Document in 2021 (SALRC 2021) that includes all the comments received. The closing date for comment is 17 May 2021. Meanwhile, however, government commenced with a parallel investigation to draft a Green Paper Marriage Policy which will inform its review of current marriage legislation. There seems to be quite a few overlaps between the mandate of the Commission and that of the Department but also important differences. The Green Paper was published on 11 May 2021 in *Government Gazette* 44557.

While developing South African law with enthusiasm where constitutional norms and values require it, the judiciary remains overly cautious not to pass any judgment on cultural and religious practices which might be harmful. As emphasised in *Hassam* (2009, para. 17):

This case (...) is not concerned with the constitutional validity of polygynous marriages entered into in accordance with Muslim rites. (...) In the view I hold of the matter, it is not necessary to become entangled in the religious and cultural debates in this matter. It should also be emphasised that this judgment does not purport to incorporate any aspect of Sharia law into South African law.

Amien (2020, 109–10)⁷¹ is not pleased with the cautious approach of the courts. She points out that the mere recognition of the consequences of Muslim marriages does not provide enough protection for Muslim women. She pleads for “comprehensive regulation” of the consequences of Muslim marriages, including divorce. Such regulation would ensure that aspects of Muslim family law are brought into the public domain where they can be appropriately scrutinised for human rights violations.

Litigation is a slow and costly process (Seedat 2019, 186). Was it not for non-governmental organisations such as the WLCT, very few of the cases discussed in this chapter would have been possible.⁷² Additionally, the statutory recognition of aspects of Muslim family law seems to be much more nuanced than many believe. As pointed out by Moosagie (2019, 230–32), there is a tension between the so-called “secular” and other Muslims. The secularists believe in the supremacy of the Constitution, which would inevitably lead to the striking down of many discriminatory Muslim rules. He believes that the enactment of a Muslim Marriages Act would provide an official sanction for gender inequality based on religion, and he is therefore against the codification of Muslim family law in South Africa (Moosagie 2019, 232).

Our courts have said repeatedly that the legislature is better equipped for legislative intervention than the judiciary because it has the luxury of a more comprehensive consultation with the broader public, which the court does not have. Judges can only consider what is in front of it. The well-known Lord Denning, who wrote about “The Due Process of Law”, did not have the same view when he valiantly said:

⁷¹ Also see Amien (2019a, 115).

⁷² For a discussion of some of the strategies employed by and the cases the WLCT has been involved in, see Abrahams-Fayker (2019, 252–69).

Time and time again we have ventured out on a new line: only to be rebuffed by the House of Lords. On the ground that the legislature – advised by this body or that – can see all round; whereas the Judges see only one side. This I dispute. The Judges have better sight and longer sight than those other bodies: especially in the practical working of the law and in the safe-guarding of individual freedom. And when it is said that some other body should first investigate and report, I ask: ‘How long, O Lord (Chancellor), how long?’

DENNING 1980, v–vi

The same rings true for Muslim marriages in South Africa. ‘How long, (...) how long before’ the legislature give women the protection they need? The accommodation of Muslim family law should not rest on the shoulders of the courts alone and should also not come at a cost for women.

Bibliography

- Abrahams-Fayker, Hoodah. 2019. “South African Engagement with Muslim Personal Law: The Women’s Legal Centre, Cape Town and Women in Muslim Marriages.” In *Muslim Personal Law in South Africa: Evolution and Future Status*, edited by Najma Moosa and Suleman Dangor, 252–72. Claremont: Juta and Co.
- Albertyn, Catherine. 2014. “Judicial Diversity”. In *The Judiciary in South Africa*, edited by Cora Hoexter and Morné Olivier, 245–87. Claremont: Juta and Co.
- Allie, Shouket. 2019. “A Legal and Historical Excursus of Muslim Personal Law in the Colonial Cape, South Africa, from the Eighteenth to the Twentieth Century.” In *Muslim Personal Law in South Africa: Evolution and Future Status*, edited by Najma Moosa and Suleman Dangor, 26–42. Claremont: Juta and Co.
- Amien, Waheeda. 2019a. “A Discussion of *Moosa NO and Others v Harnaker and Others* Illustrating the Need for Legal Recognition of Muslim Marriages in South Africa.” *Journal of Comparative Law in Africa* 6, no. 1: 115–30.
- Amien, Waheeda. 2019b. “The Gendered Benefits and Costs of Legal Pluralism for Muslim Family Law in South Africa.” In *Muslim Personal Law in South Africa: Evolution and Future Status*, edited by Najma Moosa and Suleman Dangor, 94–111. Claremont: Juta and Co.
- Amien, Waheeda. 2020. “Judicial Intervention in Facilitating Legal Recognition (and Regulation) of Muslim Family Law in Muslim-Minority Countries: The Case of South Africa”. *Journal of Islamic Law* 1, no. 1: 65–114.

- Amien, Waheeda, and Christa Rautenbach. 2018. "Muslim Personal Law." In *Introduction to Legal Pluralism in South Africa*, edited by Christa Rautenbach, 345–82. Durban: LexisNexis.
- Bakker, Pieter. 2009. "Towards the Recognition of Diversity: Muslim Marriages in South Africa." *THRHR* 72, no. 3: 394–406.
- Cachalia, Firoz. 2019. "Citizenship, Muslim Family Law and a Future South African Constitution: A Preliminary Enquiry." In *Muslim Personal Law in South Africa: Evolution and Future Status*, edited by Najma Moosa and Suleman Dangor, 68–93. Claremont: Juta and Co.
- Carnelley, Marita. 2007. "Enforcement of the Maintenance Rights of a Spouse, Married in terms of Islamic Law, in the South African Courts." *Obiter* 28, no. 2: 340–51.
- Chanock, Martin. 1989. "Writing South African Legal History: A Prospectus." *The Journal of African History* 30, no. 2: 265–88.
- Corder, Hugh. 1984. *Judges at Work: The Role and Attitudes of the South African Appellate Judiciary, 1910–1950*. Cape Town: Juta and Co.
- Dadoo, Yousuf, and Fawzia Cassim. 2019. "The Debate Regarding Muslim Personal Law in South Africa: Achieving a Balancing of Interests." In *Muslim Personal Law in South Africa: Evolution and Future Status*, edited by Najma Moosa and Suleman Dangor, 49–67. Claremont: Juta and Co.
- Dangor, Suleman. 2019. "The *Majlis* and the Muslim Marriages Bill: A Dissection." In *Muslim Personal Law in South Africa: Evolution and Future Status*, edited by Najma Moosa and Suleman Dangor, 245–51. Claremont: Juta and Co.
- Denning, Alfred Thompson. 1980. *The Due Process of the Law*. London: Butterworths.
- Denson, Razaana, and Marita Carnelley. 2009. "The Awarding of Post-Divorce Maintenance to a Muslim Wife and Children in the South African Courts: The Interaction between Divine and Secular Law." *Obiter* 30, no. 3: 679–701.
- Domingo, Wesahl. 2011. "Muslim Personal Law in South Africa: 'Until Two Systems Do Us Meet?'" *Obiter* 32, no. 2: 377–92.
- Domingo, Wesahl. 2019. "Muslim Personal Law in South Africa and Women's Religious Rights and Freedoms." In *Muslim Personal Law in South Africa: Evolution and Future Status*, edited by Najma Moosa and Suleman Dangor, 309–28. Claremont: Juta and Co.
- Du Bois, François. 2007. "Letting and Hiring of Property." In *Wille's Principles of South African Law*, edited by François Du Bois, 906–23. Cape Town: Juta and Co.
- Du Plessis, Lourens M. 1999. *An Introduction to Law*. Cape Town: Juta and Co.
- Fishbayn, Lisa. 1999. "Litigating the Right to Culture: Family Law in the New South Africa." *International Journal of Law, Policy and the Family* 13, no. 2: 147–73.
- Forsyth, Christopher F. 1985. *In Danger for their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950–1980*. Cape Town: Juta and Co.

- Goolam, Nazeem, and Christa Rautenbach. 2004. "The Legal Status of a Muslim Wife under the Law of Succession: Is She Still a Whore in terms of South African Law?" *Stellenbosch Law Review* 15, no. 2: 369–80.
- Hahlo, Herman Robert, and Ellison Kahn. 1968. *The South African Legal System and Its Background*. Cape Town: Juta and Co.
- Henrard, Kristin. 2001. "The Accommodation of Religious Diversity in South Africa against the Background of the Centrality of the Equality Principle in the New Constitutional Dispensation." *Journal of African Law* 45, no. 1: 51–72.
- Himonga, Chuma. 2007. "Marriage." In *Wille's Principles of South African Law*, edited by François Du Bois, 227–369. Cape Town: Juta and Co.
- Hoctor, Shannon V. 2017. "Criminal Law." In *The Law of South Africa*, edited by Shannon V. Hoctor, Volume 11. Durban: LexisNexis Online. Accessed July 2, 2020. <https://www.lexisnexis.co.za/lexislibrary> (subscription needed).
- Hutchison, Dale, and François du Bois. 2007. "Contracts in General." In *Wille's Principles of South African Law*, edited by François Du Bois, 733–887. Cape Town: Juta and Co.
- Mahida, Ebrahim Mahomed. 1993. *History of Muslims in South Africa: A Chronology*. Durban: Arabic Study Circle.
- Malherbe, Vertrees. 2008. "Christian-Muslim Marriage and Cohabitation: An Aspect of Identity and Family Formation in Nineteenth-Century Cape Town." *The Journal of Imperial and Commonwealth History* 36, no. 1: 5–24.
- Manjoo, Rashida. 2019. "The Recognition of Muslim Marriages in South Africa: Implications for Women's Human Rights." In *Muslim Personal Law in South Africa: Evolution and Future Status*, edited by Najma Moosa and Suleman Dangor, 273–97. Claremont: Juta and Co.
- May, Charlene, and Seehaam Samaai. 2019. "A Marriage of Laws: The Recognition of Islamic Marriages through our Courts." In *Muslim Personal Law in South Africa: Evolution and Future Status*, edited by Najma Moosa and Suleman Dangor, 171–89. Claremont: Juta and Co.
- Mofokeng, Lesala L. 2009. *Legal Pluralism in South Africa: Aspects of African Customary, Muslim and Hindu Family Law*. Pretoria: Van Schaik.
- Moosa, Ebrahim. 1996. "Prospects for Muslim Law in South Africa: A History and Recent Developments." *Yearbook of Islamic and Middle Eastern Law Online* 3, no. 1. 130–55. <https://doi.org/10.1163/221129897X00126>.
- Moosa, Ebrahim. 2019. "Muslim Family Law in South Africa." In *Muslim Personal Law in South Africa: Evolution and Future Status*, edited by Najma Moosa and Suleman Dangor, 112–31. Claremont: Juta and Co.
- Moosa, Essa. 2019. "Muslim Marriages Bill: Mapping the Ongoing Socio-Ethico-Legal Challenges Facing South African Women." In *Muslim Personal Law in South Africa: Evolution and Future Status*, edited by Najma Moosa and Suleman Dangor, 396–400. Claremont: Juta and Co.

- Moosa, Najma, and Suleman Dangor. 2019. "An Introduction to Muslim Personal Law in South Africa: Past to Present." In *Muslim Personal Law in South Africa: Evolution and Future Status*, edited by Najma Moosa and Suleman Dangor, 1–25. Claremont: Juta and Co.
- Moosa, Najma, and Muneer Abduroaf. 2019. "Faskh (Divorce) and Intestate Succession in Islamic and South African Law: Impact of the Watershed Judgment in *Hassam v Jacobs* and the *Muslim Marriages Bill*." In *Muslim Personal Law in South Africa: Evolution and Future Status*, edited by Najma Moosa and Suleman Dangor, 329–417. Claremont: Juta and Co.
- Moosagie, Mohammed Allie. 2019. "The Muslim Marriages Bill: A Legal Quagmire." In *Muslim Personal Law in South Africa: Evolution and Future Status*, edited by Najma Moosa and Suleman Dangor, 228–44. Claremont: Juta and Co.
- Motala, Ziyad. 2004. "The Draft Bill on the Recognition of Muslim Marriages: An Unwise, Improvident and Questionable Constitutional Exercise." *Comparative and International Law Journal of Southern Africa* 37, no. 3: 327–39.
- Müller-Van der Westhuizen, Caroline. 2018. "Family Law." In *Introduction to Legal Pluralism in South Africa*, edited by Christa Rautenbach, 79–115. Durban: LexisNexis.
- Navsa, Mahomed Solomon. 2019. "Muslim Personal Law – An Update." In *Muslim Personal Law in South Africa: Evolution and Future Status*, edited by Najma Moosa and Suleman Dangor, 43–48. Claremont: Juta and Co.
- Paleker, Mohamed. 2017. "Intestate Succession." In *The Law of Succession in South Africa*, edited by Juanita Jamneck and Christa Rautenbach, 25–46. Cape Town: Oxford University Press Southern Africa.
- Rautenbach, Christa. 1999. "Muslim Personal Law and the Meaning of 'Law' in the South African and Indian Constitutions." *Potchefstroom Electronic Law Journal* 2, no. 2: 50–70. <https://doi.org/10.17159/1727-3781/1999/v2i2a2895>.
- Rautenbach, Christa. 2000. "Muslim Marriages in South Africa: Past, Present and Future." *Recht van de Islam* 17: 36–89.
- Rautenbach, Christa. 2003a. "Some Comments on the Status of Customary Law in Relation to the Bill of Rights." *Stellenbosch Law Review* 14, no. 1: 107–14.
- Rautenbach, Christa. 2003b. "Islamic Marriages in South Africa: *Quo Vadimus?*" *Koers* 69, no. 1: 121–52.
- Rautenbach, Christa. 2010. "Celebration of Difference: Judicial Accommodation of Cultural and Religious Diversity in South Africa." *The International Journal of Diversity in Organizations, Communities and Nations* 10, no. 2: 117–32.
- Rautenbach, Christa. 2016. "A Family Home, Five Sisters and the Rule of Ultimogeniture: Comparing Notes on Judicial Approaches to Customary Law in South Africa and Botswana." *African Human Rights Law Journal* 16, no. 1: 145–74.

- Rautenbach, Christa. 2018a. "The Phenomenon of Legal Pluralism." In *Introduction to Legal Pluralism in South Africa*, edited by Christa Rautenbach, 5–16. Durban: LexisNexis.
- Rautenbach, Christa. 2018b. "In the Shade of an African Baobab: Thomas W (Tom) Bennett on Custom and Religion." In *the Shade of an African Baobab: Tom Bennett's Legacy*, edited by Christa Rautenbach, 1–15. Cape Town: Juta and Co.
- Rautenbach, Christa. 2019a. "Cultural Expertise in Litigation in South Africa: Can the Western World Learn Anything from a Mixed, Pluralistic Legal System?" *Studies in Law, Politics, and Society* 78, Special Issue: 157–78.
- Rautenbach, Christa. 2019b. "Mapping Traditional Leadership and Authority in Post-Apartheid South Africa: Decentralisation and Constitutionalism in Traditional Governance." In *Constitutional Adjudication in Africa*, edited by Charles Fombad and Nico Steytler, 483–519. Oxford: Oxford University Press.
- Rautenbach, Christa. 2019c. "The Contribution of the Courts in the Integration of Muslim Law into the Mixed Fabric of South African Law." In *Muslim Personal Law in South Africa: Evolution and Future Status*, edited by Najma Moosa and Suleman Dangor, 145–70. Claremont: Juta and Co.
- Rautenbach, Christa, and Lourens du Plessis. 2017. "The Constitutional Court of South Africa." In *Comparative Constitutional Reasoning*, edited by András Jakab, Arthur Dyevre and Giulio Itzcovich, 560–603. Cambridge: Cambridge University Press.
- Rautenbach, Christa, and Willemien du Plessis. 2000. "The Extension of the Dependant's Action for Loss of Support and the Recognition of Muslim Marriages: The Saga Continues." *THRHR* 63, no. 3: 302–13.
- Rautenbach, Christa, Fanie Jansen van Rensburg, and Gerrit J. Pienaar. 2003. "Culture (and Religion) in Constitutional Adjudication." *Potchefstroom Electronic Law Journal* 6, no. 1: 1–20. <https://doi.org/10.17159/1727-3781/2003/v6i1a2857>.
- Samaai, Seham, Charlene May, and Harsha Gihwala. 2019. "Equal Rights and Recognition: Extending the Protection in the Wills Act to Women in Polygynous Muslim Marriages." In *Muslim Personal Law in South Africa: Evolution and Future Status*, edited by Najma Moosa and Suleman Dangor, 298–308. Claremont: Juta and Co.
- Seedat, Fatima. 2019. "Determining the Application of a System of Muslim Personal Law in South Africa." In *Muslim Personal Law in South Africa: Evolution and Future Status*, edited by Najma Moosa and Suleman Dangor, 178–89. Claremont: Juta and Co.
- Skelton, Ann, Marita Carnelley, Sonia Human, J.A. Robinson, and Bradley Smith. 2010. *Family Law in South Africa*. Cape Town: Oxford University Press Southern Africa.
- South African Law Reform Commission. 2003. *Report on Islamic Marriages and Related Matters: Project 59*. Pretoria: South African Law Reform Commission.

- South African Law Reform Commission. 2019. *Issue Paper 35 on Single Marriage Statute: Project 144*. Pretoria. South African Law Reform Commission.
- South African Law Reform Commission. 2021. *Discussion Paper 152 on Single Marriage Statute: Project 144*. Pretoria. South African Law Reform Commission.
- Statistics South Africa. 2016. *General Household Survey 2015*. Pretoria: Statistics South Africa.
- Toffar, Abdul Karim. 2019. "Muslim Marriages Bill Impasse – An Interim Way Forward." In *Muslim Personal Law in South Africa: Evolution and Future Status: Evolution and Future Status*, edited by Najma Moosa and Suleman Dangor, 401–04. Claremont: Juta and Co.
- Tayob, Abdulkader. 2019. "The Struggle over Muslim Personal Law in a Rights-Based Constitution: A South African Case Study". In *Muslim Personal Law in South Africa: Evolution and Future Status: Evolution and Future Status*, edited by Najma Moosa and Suleman Dangor, 132–44. Claremont: Juta and Co.
- Van der Linde, Anton. 2017. "Content of Wills: Substitution, Usufruct and Accrual." In *The Law of Succession in South Africa*, edited by Juanita Jamneck and Christa Rautenbach, 163–86. Cape Town: Oxford University Press Southern Africa.
- Van Staden, Marius. 2013. "The Role of the Judiciary in Balancing Flexibility and Security." *De Jure* 46, no. 2: 470–85.
- Venter, Francois. 1998. "Die Betekenis van die Bepalings van die 1996 Grondwet: Die Aanhef en Hoofstuk 1." *Potchefstroom Electronic Law Journal* 1, no 1: 31–109. <https://doi.org/10.17159/1727-3781/1998/viia2899>.
- Visser, Daniel. 2007. "Compensation for Pecuniary Loss – the *Actio Legis Aquiliae*." In *Wille's Principles of South African Law*, edited by François Du Bois, 1094–160. Cape Town: Juta and Co.
- Woolman, Stu. 2014. "Community Rights: Language, Culture and Religion". In *Constitutional Law of South Africa*, edited by Stuart Woolman and Michael Bishop, 58.1–75. Cape Town: Juta and Co.
- Zimmermann, Reinhard, and Daniel Visser. 1996. *Southern Cross: Civil Law and Common Law in South Africa*. Kenwyn: Juta and Co.

Case Law

Please refer to the list on pages viii–xvi.

The Role of the Constitutional Court in Protecting Minority Rights

A Case on Traditional Beliefs in Indonesia

Saldi Isra and Pan Mohamad Faiz

1 Introduction

One of Indonesia's goals as an independent state is protection and advancement of the people, enshrined in the preamble of the Indonesian Constitution as follows:

(...) in order to form a Government of the State of Indonesia that shall protect the whole people of Indonesia and the entire homeland of Indonesia, and in order to advance general prosperity, to develop the nation's intellectual life, and to contribute to the implementation of a world order based on freedom, lasting peace and social justice.

Fulfilling this goal has proved a significant challenge because Indonesia is a very heterogeneous country. With 17,504 islands (BPS-Statistics Indonesia 2017) located between 94°5' East Latitude to 141°5' East Longitude and 6°8' North Latitude to 11°5' South Latitude (Widiatmoko and Wahid 2006, 27), Indonesia is the largest archipelagic country. Its population in 2019 was 267 million and is projected to reach 294 million in 2030 (BPS-Statistics Indonesia 2018, 35), remaining the world's fourth most populous country. Furthermore, Indonesia has a high level of diversity in terms of tribal groups, ethnicities, languages, cultures, religions, and beliefs. The 2010 population census found that the country has around 1,340 ethnic groups and 652 different local languages (Welianto 2020).

In relation to this diversity, one constitutional issue that was rarely thoroughly discussed and often deemed sensitive was the issue of beliefs, especially regarding the adherents of traditional beliefs (*penghayat kepercayaan*).¹

1 The term *traditional beliefs* in this chapter refers to the Indonesian term *penghayat kepercayaan*, which is also sometimes translated as unofficial religious groups, Indigenous beliefs, and local faiths, among others.

Among the groups of traditional beliefs in Indonesia are *Parmalim* (North Sumatra Province), *Sunda Wiwitan* (Banten Province), *Buhun* and *Djawa Sunda* (West Java Province), *Kejawen* (Central Java Province and East Java Province), *Kaharingan* (Kalimantan Island), *Bayan Wetu Telu* (West Nusa Tenggara Province), *Marapu* (East Nusa Tenggara Province), *Aluk Todolo* and *Tolotang* (South Sulawesi Province), and *Tonaas Walian* (North Sulawesi Province). The number of believers in each group varies, from dozens to hundreds or thousands of people. Based on data of the Ministry of Education and Culture, Indonesia has at least 12 million followers of traditional beliefs across 187 organisations of these traditional beliefs. This number is expected to grow in line with improvements in population registration in remote areas in Indonesia (Erdianto and Nadlir 2017).

Accounting for more than 4% of the population and spread across numerous regions of Indonesia, adherents of traditional beliefs are a minority that is often discriminated against and stigmatised because of laws that do not explicitly recognise their human rights as citizens. For example, Human Rights Watch interviewed Dewi Kanti, a Sundanese woman, a believer of *Sunda Wiwitan*,² who married a Javanese Catholic man. Civil registry officials refused to accept their marriage because they did not recognise the woman's religion. If they have children, the birth certificates will not include the father's name (Pearson *et al.* 2013, 20).

In addition, followers of hundreds of other local Indigenous beliefs such as *Kejawen* (Javanese), *Wiwitan* (Sundanese), *Kaharingan* (Dayak), *Parmalin* (Batak), and believers of traditional beliefs are forced to choose one of six state-recognised religions when they apply for their identity card, which is compulsory upon reaching the age of 17 or upon marriage. Those six state-recognised religions are Islam, Protestantism, Catholicism, Hinduism, Buddhism, and Confucianism.³ Individuals who are reluctant to list their belief are at risk of being labeled godless by theologians or officials (Fadhli 2014, 358).

Discrimination occurs when individuals or groups are denied equal treatment before the law or equal opportunity for education, employment and other basic rights. Discrimination is then interpreted as not only if like situations

2 For a study on the civil rights of *Sunda Wiwitan* followers, see Rustandi (2019).

3 Islam, Protestantism, Catholicism, Buddhism, Hinduism, and Confucianism are recognised by the Ministry of Home Affairs for its administrative purposes. However, the Elucidation to Presidential Decree no. 1 of 1965 on the Prevention of Misuse and/or Disrespect of Religion (made into law by Law no. 5 of 1969) states that there is no ban on other religions or beliefs, such as Judaism, Zoroastrianism, Shintoism, and Taoism, and adherents are free to practice their religion.

are treated differently but also if different situations are treated similarly. Discrimination has two forms: (a) direct discrimination, when a person either directly or indirectly is treated differently than others; and (b) indirect discrimination, when the practical impact of a law or policy is a form of discrimination, even though it is not intended for discriminatory purposes (Soeprapto *et al.* 2012, 15–16).

This chapter discusses the role of the Indonesian Constitutional Court in protecting adherents of traditional beliefs against discriminatory norms and policies. It focuses on the constitutional review of Law no. 23 of 2006 on Civil Administration (hereinafter the Civil Administration Law). We first explore the concept of *minority rights* in international law and in the Indonesian legal system. Then we discuss the discriminatory treatment towards adherents of traditional beliefs and how the Constitutional Court provided constitutional protection to them. Finally, we look at the significance, challenges and enduring impact of the Constitutional Court's decision.

2 Minority Rights

Protection of individuals who belong to minority groups is an important milestone in the history of international human rights. However, until now, the international community is still faced with difficult questions about which groups can be characterised as minority groups (Bloch 2001, 374). There is no universally agreed definition of *minority* and it is therefore the responsibility of sovereign nations to determine who constitutes a minority in a particular setting. However, international law recognises the rights of individuals belonging to minority groups but does not recognise the rights of the group as a legal entity. In this regard, Tove H. Malloy (2013, 15) assesses:

The problem of a legal definition in international law is a question of whether a universal definition of minorities can be properly articulated. Inasmuch as international law instruments must apply to a wide range of states, a definition would by necessity have to be broad and general.

For example, Article 1 of the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UNDRM)⁴ refers to “minorities as based on national or ethnic, cultural,

⁴ The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities was adopted by General Assembly Resolution 47/135 on 18 December 1992.

religious and linguistic identity, and provides that States should protect their existence” (OHCHR 2010, 2). The United Nations (UN) has noted there is no internationally agreed definition as to which groups constitute minorities. Any reference in international law to minority rights is understood to refer to the rights of individuals who belong to minorities and not the rights of the minority itself. The reason being that the minority is a socio-cultural term and not a legal term. The minority group does not at common law or international law have a legal persona and it therefore cannot exercise legal rights. The individuals who belong to the minority identity may however exercise rights on the basis of their identity.

Regardless of the absence of international agreement on a definition, the UNDRM stipulates that states shall protect the ethnic, cultural, religious and linguistic identity of minorities (Gerung 2006, 145). This chapter focuses on the situation of adherents of traditional beliefs whose tribal, ethnic or linguistic identity is also a minority among the Indonesian population.

In addition, Indigenous groups are also included among minority groups (OHCHR 2010, 3), but this will not be specifically discussed in this chapter.⁵ However, it is worth noting the connection between Indigenous peoples and traditional beliefs in Indonesia.

Historically, the issue of minority groups’ rights emerged before the First World War. International agreements on borders between countries after the fall of European multinational empires signalled the emergence of this issue of minorities (Nowak 2003, 18). As Malloy (2013, 37) states:

The European multinational empires (the Habsburg, German, Ottoman and Russian Empires) collapsed, their place on the map taken up by new nation-states (Poland, Czechoslovakia, Albania, Finland, Lithuania, Latvia, and Estonia).

As a result of post-war border changes, several ethnic, cultural and national groups were split into two or more different countries, where some of them became minority groups. This was experienced, for example, by the

5 There is still debate as to whether a large number of Indigenous peoples in Indonesia can be categorised as minority groups or not. It is noted that the rights of Indigenous peoples are protected in international law pursuant to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The rights of Indigenous peoples do not apply to all minorities but only to the Indigenous peoples of a country. UNDRIP does not provide a definition as to who constitutes an Indigenous people and it is left for sovereign states to settle the definition.

German-speaking minority in Italy, Slovak minority in Austria, Albanian minority in Greece, and German minority in Denmark (Nowak 2003, 18).

The situation was different in the Dutch East Indies, where the thousands of ethnically diverse islands in 1945 became the single country of Indonesia; the only exception being Netherlands New Guinea, which was subsequently transferred to Indonesia in 1963. Why did the former Dutch East Indies choose to become a single nation, rather than many nations? The unity of the islands stems from the early 20th century, when native students, merchants and Muslim leaders began forming nationalist groups. When Japan occupied the Dutch East Indies over 1942–1945, it created unitary organisations across the colony. The abrupt surrender of Japan in August 1945 and the threat of an imminent Dutch return resulted in many groups embracing the revolutionary spirit for a united republic (Reid 2012, 35–39). There were subsequent rebellions outside Java in Sumatra and parts of Eastern Indonesia, but they were not successful (Henley 1995, 35).

After the First World War, the protection of minority groups became a serious concern. The Treaty of Versailles contained not only an agreement to end the war but also some articles related to the protection of minority groups in certain territories (Nowak 2003, 19). Furthermore, the treaty also contained provisions for the formation of the League of Nations. Through its Minority Committee, the League of Nations carried out its mandate to protect the rights of minority groups in Europe in accordance with the peace agreements that ended the First World War (*Ibid.*, 22).

The agenda for protecting minority groups has continued to strengthen. Shortly after UN was established in October 1945, the UN Human Rights Commission was formed in 1946 and given a mandate to develop an official definition of universal human rights. This was intended to encourage the birth of declarations, conventions, and mechanisms for international application related to human rights (*Ibid.*, 81). Two years later, on 10th December 1948, the UN issued the Universal Declaration of Human Rights (UDHR), which has several articles related to the protection of freedoms without distinction of any kind. Article 27(1) of UDHR states: “[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”.

Article 27 does not explicitly mention the rights of minority groups’ participation in the cultural life of the communities. It is also not aimed at certain community groups based on ethnicity, religion, and race in accordance with their culture. The exclusion from the UDHR of an explicit article on the rights of minority groups is because the UN General Assembly at that time was unable to approve it. This was due to the difficulty in formulating the scope

of minorities, which have specific aspects in each country (OHCHR 2012, 3). The rights of minorities are more explicitly covered in the 1966 International Covenant on Civil and Political Rights (ICCPR).⁶ Article 27 of ICCPR states:

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

According to Bloch (2001, 377), Article 27 of ICCPR is the most well-known provision on special rights for minorities. Cassese (1995, 61) states that Article 27 of ICCPR grants people belonging to ethnic, religious or language minorities the right to enjoy life, religious practices and use of their language and notes that this provision confers rights upon individual members of a minority group, and not the group itself. He further notes that Article 27 does not cover political, economic or social autonomy, but only refers to cultural, religious and linguistic freedoms (*Ibid.*).

Recognition and guarantee of the rights of minority groups are needed to ensure appropriate means, including differential treatment, to preserve the characteristics and traditions of minorities that distinguish them from the majority of the population (Bloch 2001, 375). In this context, the duty of the state is not only to refrain from interfering with the exercise of rights by persons who belong to minority groups, so-called negative rights, but also an obligation to take steps to support the fulfillment of the referred rights as positive rights. As a reference, the government of each country is required to refer to the UNDRM, which details the necessary steps to protect the rights of minority groups (*Ibid.*, 378). The UNDRM is what is called *soft law*, which means it does not constitute enforceable rights but that it proposes an international normative standard. The exact nature of support given by states to minorities depends on the specific circumstances of each sovereign state.

ICCPR is a legally binding treaty. Thus, the moral and legal obligations of countries to protect the rights of individuals who belong to minority groups in accordance with the UNDRM are even stronger when accompanied by Article 27 of ICCPR, which has legal force. Countries that have ratified the ICCPR are obliged to protect and not to deny the rights of individuals who belong

⁶ The International Covenant on Civil and Political Rights was adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976.

to minority groups to enjoy culture, practice and implement religion, and use their own language. Such protection includes policies that aim to support the cultural progress of minority groups.

Indonesia has ratified the ICCPR through Law no. 12 of 2005 on Ratification of the International Covenant on Civil and Political Rights. Therefore, moral and legal obligations to protect the rights of minority groups are also borne by Indonesia. Accordingly, the state must take legislative and administrative steps in order to protect the rights of minority groups in Indonesia. In respect to this matter, the Indonesian Constitution and the existing laws and regulations contain norms of protection of minority groups. The protection of the rights of Indonesian minority groups before the courts continues to receive special attention (Butt 2019, 55–74; Crouch 2012, 1–2).

Despite the protection of the rights of minority groups, Indonesia has some basic differences compared to European countries. While most European minority groups emerged as a result of border changes, many of the minority groups in Indonesia originate from the Indigenous ethnic groups of Indonesia itself. Indigenous tribes scattered in almost all regions existed during the colonisation era. After European and Japanese colonisation ended, awareness of the collective rights of ethnic minorities, religious groups, Indigenous peoples and traditional communities emerged (Magnis-Suseno 2016, 180). Indigenous groups or traditional communities with small representations were later known as minority groups. In addition, minority groups also emerged from factors of population migration to regions of the archipelago before Indonesia's 1945 Declaration of Independence. These minority groups included Chinese and Arabic migrants.

According to Indonesia's multi-nation state concept, the state is built and consists of many peoples from different ethnicities, races, and religions. Therefore, the state constitutionally recognises and guarantees the existence of different ethnic groups. Article 18 of the 1945 Indonesian Constitution recognises hereditary rights (in Indonesian *hak-hak asal usul*, literally *the rights of origin*):

The division of the territory of Indonesia into large and small regions, with the form of government structure, shall be determined by law in consideration of and with due regard to the principles of deliberation in the State Government system and the hereditary rights of special territories.

Regarding Article 18, the Elucidation⁷ to the 1945 Constitution specifies:

⁷ The Elucidation was declared a part of the Constitution in 1959. However, this explanatory memorandum has been removed after the People's Consultative Assembly amended the

In Indonesia's territory, there are approximately 250 self-governing regions (*zelfbesturende landschappen*) and village communities (*volks-gemeenschappen*), such as villages in Java and Bali, *nagari* (autonomous villages) in Minangkabau,⁸ hamlets and clans in Palembang, and so on. These regions have a hereditary rights arrangement, and can therefore be considered special regions.

The Republic of Indonesia respects the position of these special regions and all State regulations concerning these regions will have due regard to the hereditary rights of those regions.

Ethnic groups whose hereditary rights are recognised in the above provisions are partly a minority in terms of religion and partly a minority in terms of ethnicity, race and language. Each of the existing ethnic groups receives constitutional recognition of its hereditary rights. This recognition shows that Indonesia is built on and consists of various ethnic groups, both majority and minority groups. In this context, minority groups in Indonesia exist not because they are separated from original ethnic groups, but because they join and shelter in one country with other ethnic groups that are in the majority. Therefore, discussions related to minority groups in Indonesia must be understood in the context described above.

Next, the question that needs to be answered is whether the rights of minority groups are collective rights or individual rights for each member of a minority group. If referring to the formulation of Article 27 of UDHR as a moral basis for the guarantee of the rights of minority groups, then such rights are more directed to individual rights. This is indicated by the use of the term *everyone* as the subject of rights-holders in that article.

In the context of the struggle for minority rights, there are differences in emphasis between universal human rights groups and cultural relativism groups. Groups that struggle for universal human rights have a greater emphasis on the struggle for minority rights based on the principle of individual freedom, while cultural relativism groups adhere to the principle of group rights (Gerung 2006, 143).

The difference can also be seen in the views expressed by human rights and philosophy researchers. Referring to Article 3 of the UNDRM, Bloch (2001, 382) points out that minority rights may be exercised individually, as well as in community with other members of the group. Nevertheless, minorities are

Constitution in 1999.

⁸ Minangkabau is an area of West Sumatra Province traditionally inhabited by the Minangkabau ethnic group, while *nagari* refers to the lower level administrative unit in West Sumatra.

a socio-cultural phenomenon, formed by individuals freely associating with one another. Thus, minorities do not by nature have a collective personality or collective right. The fact that individuals together exercise rights does not give the community a legal personality.

International law recognises the rights of individuals, including the rights of individuals to promote and protect their language, culture and identity. Therefore, states must create conditions that facilitate the exercise of individual rights, including those of minorities, but there is no legal obligation to enact specific policies. In the Indonesian context, the Constitution guarantees the right of every individual to advance himself/herself in struggling for his/her collective rights to develop the community, nation and state. On the other hand, the collective rights of groups based on cultural identity and traditional communities also receive recognition and guarantees. In connection with this, individual and collective rights are equally guaranteed and protected by the Constitution.

3 Human Rights in the Indonesian Constitution

In the life of the Indonesian nation, religious, ethnic and racial minority groups are spread across almost all regions. Religious minorities are formed based on the classification of religions in a particular region (Nasution 2013, 315). Overall, Muslim communities constitute the majority and non-Muslim communities are minority groups. However, when the determination of majority and minority is reduced to the level of each region, then majority and minority positions differ from one another. In Bali Province, East Nusa Tenggara Province, North Sulawesi Province, Maluku Province, Papua Province and several other centers, Muslim communities are in a minority position (Nasution 2013, 314–15). Therefore, religious minorities in Indonesia cannot be identified exclusively as non-Muslim groups, although Muslims represent the majority population in most provinces.

Furthermore, ethnic minority groups are formed because of the classification of ethnic groups that live in an area. The majority ethnicity of Indonesians is Javanese. Meanwhile, ethnic minorities are very diverse, including the Gayo ethnic group in Aceh whose members speak Gayo, and do not speak Acehese. Other ethnic minorities include Chinese, Arabic, Indian, European and Japanese (Nasution 2013, 315). Ethnic minority groups also include non-Javanese Indigenous groups in various parts of Indonesia.

In the framework of the minority concept discussed earlier, the Indonesian Constitution expressly guarantees and protects the rights of minority groups.

Those guarantees and protections are a form of state recognition of the Indonesian community that was formed long before the Declaration of Independence. In the framework of recognition, it is believed that humans are culturally inherent in communities, and their identities have been deeply shaped by their respective cultures (Gerung 2006, 135).

In this context, the Second Amendment to the Indonesian Constitution, enacted in 2000, includes 10 articles on human rights, covered in Chapter XI (Articles 28A-28J) and also in several separate articles, such as Article 28 and Article 31 to Article 34. These include human rights stipulated in international law. Article 28I(4) of the Second Amendment stipulates that the state, particularly government, is responsible for the protection, advancement, enforcement and fulfillment of human rights.

3.1 *Guarantee of Freedom of Religion and Belief*

In the context of protecting the freedom of religion and belief, the Indonesian Constitution provides guarantees and protections for all citizens, including the religious minority groups. Guarantees of religious and belief rights are regulated in the following constitutional norms:

Article 28E. (1) Every person shall be free to choose and to practice the religion of his/her choice, to choose one's education, to choose one's employment, to choose one's citizenship, to choose one's place of residence within the territory of the state, to leave it and to subsequently return to it.

(2) Every person shall have the right to the freedom to believe his/her faith, to express his/her views and thoughts, in accordance with his/her conscience. (...)

Article 29. (2) The state guarantees all persons the freedom of worship, each according to his/her own religion or belief.

The above constitutional provisions provide recognition of the religious rights and beliefs of everyone. In fact, the state also guarantees that each citizen, whether minority or majority, is free to embrace their religion and worship according to their religion and beliefs. This is consistent with the right to freedom of association as in international law. In relation to this matter, religions and beliefs adopted by each adherent must be addressed and treated equally by the state (Hasan 2012, 15). At the same time, the state is obliged to guarantee that there are no acts of blasphemy and defamation of adherents or other beliefs. In this context, the state must also play a role in maintaining harmonious relations between adherents of different religions and beliefs (*Ibid.*, 16).

In line with the constitutional guarantee referred to, not only adherents of majority religions such as Islam, Protestantism, Catholicism, Hinduism, Buddhism and Confucianism are protected, but also adherents or followers of traditional beliefs such as *Kejawen* (Java), *Wiwitan* (Sunda), *Kaharingan* (Dayak), *Parmalin* (Batak), and adherents of religions such as Judaism and Sikhism (Fadhli 2014, 358). In provinces such as Aceh, where Sharia regulations have been implemented, religious freedom is still guaranteed, although concerns have been raised over the extent to which this freedom is upheld (Uddin 2010).

3.2 *Protection of Ethnic Minorities against Discriminatory Treatment*

In the realm of ethnic minority groups, the Indonesian Constitution also provides explicit protection by prohibiting discrimination on any grounds, including ethnic and racial differences. This is confirmed in Article 28I(2) of the Constitution which states: “Every person has the right to be free from discriminatory treatment based upon any grounds and has the right to protection against such discriminatory treatment”.

The norm requires that the protection of every person from discriminatory treatment on any grounds be carried out by the state. At the same time, every person in Indonesia, whoever and from any ethnicity, must be free from all forms of discrimination in exercising all rights attached to him/her (Prajasto and Aswidah 2014). In the minority rights context, these norms exist as guarantees and protections for minority groups’ vulnerability from all discriminatory actions (Fadhli 2014, 356). This is also in line with the scope of protection of minority rights established by the UN Human Rights Commission, where equality and non-discrimination constitute one of the four pillars of protection of minority groups’ rights (OHCHR 2010, 7).

3.3 *Guarantee on the Use of Local Languages*

The Constitution also provides guarantees and protections for minority groups’ use of languages, especially local languages. This guarantee is given in the context of how language continues to be developed as part of the culture of the communities, as well as part of Indonesia’s national culture. One form of guarantee is the recognition and respect of local languages as national cultural assets. This matter is stated in Article 32 of the Indonesian Constitution as follows:

- (1) The state shall advance Indonesian national culture among the civilizations of the world by assuring the freedom of society to preserve and to develop cultural values.

- (2) The state shall respect and preserve local languages as national cultural treasures.

Such norms are born from the understanding that the nation's local languages are a manifestation of its plurality (Constitutional Court of Indonesia 2010a, 542). At the same time, local languages are also part of the customs and culture owned by hundreds of Indonesian ethnic groups (Constitutional Court of Indonesia 2010b, 116). National and regional cultures interact and shape each other (Constitutional Court of Indonesia 2010a, 543). Therefore, regional languages as part of national culture must be protected and preserved by the state. Some of the regional languages are those used by minority groups, especially Indigenous peoples. The protection of local languages is an effort to preserve national cultural assets. With the recognition and protection of regional languages, Indonesia has also avoided restrictions on the rights of minority groups in using their own language.

3.4 *Recognition of the Rights of Indigenous Peoples*

The Third Amendment to the Indonesian Constitution also recognises the rights of Indigenous peoples in Article 18B(2):

The State shall recognise and respect entities of the adat law societies along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law.

Several Indonesian laws implicitly recognise the “*adat* law societies” (*mas-yarakat hukum adat*).⁹ However, there has been a long-standing debate concerning the place of *adat* law in national land law (Bedner and Arizona 2019).

9 *Adat* law is the traditional, non-codified rules of conduct, manifested in the rules and decisions about social relations within communities, see Vollenhoven (1933) and Koesnoe (1971). For examples of Indonesian laws implicitly recognising the “*adat* law societies”, see Law no. 5/1960 on Basic Agrarian Regulation, Law no. 39/1999 on Human Rights and the Decree of People's Consultative Assembly no. X/2001 on Agrarian Reform.

4 Discrimination towards Traditional Beliefs

One of the constitutional issues that is often of concern in Indonesia regards the protection of traditional beliefs. The reason is that adherents of traditional beliefs are one of the minority groups that often experience discriminatory treatment and negative stigma in various sectors of life because of laws and regulations that do not explicitly recognise their human rights and minority rights. There is no definitive definition of traditional beliefs. However, a National Workshop on Traditional Beliefs in November 1981 formulated one as follows:

Belief in Almighty God is a statement and implementation of a personal relationship with Almighty God based on beliefs and it is manifested by pious behaviour towards Almighty God or worship and experience of virtue (Ministry of Education and Culture of Indonesia 1990, 21–22).

Most of the traditional beliefs in Indonesia existed before the 1945 Declaration of Independence. This is because many traditional beliefs are derived from virtuous values bequeathed by ancestors and practiced in their followers' respective region or community. Legal protection by the government towards followers of traditional beliefs undergoes occasional paradigm shifts. This can be seen from the change in the ministry which functions to protect beliefs.

Initially, the protection function was held by the Ministry of Religion since 1949. Later, the function was transferred to the Ministry of Education and Culture. This transfer was based on the consideration that beliefs in Indonesia are more likely to be seen as part of cultural wealth. Interestingly, the function of protecting beliefs was also handled by the Ministry of Culture and Tourism, before finally being returned to the Ministry of Education and Culture from 2011 to the present (Wijayanti 2019, 89–102).

Although the existence of beliefs is recognised in Indonesia, the protection of adherents of traditional beliefs has not been optimal, especially when there are restrictions on the inclusion of beliefs on family cards (*Kartu Keluarga*) and identity cards (*Kartu Tanda Penduduk*). Pursuant to the Civil Administration Law, the family card is issued to Indonesian citizens and used as a basis for the issuance of the identity card. Every Indonesian citizen upon reaching age 17 or upon marriage is required to have an identity card. One of the data listed on the family card and identity card is information about religion.

The inclusion of religion on the family card and identity card went through a long debate when the House of Representatives discussed the draft Civil Administration Law. The decision to include religion in the two civil documents

comes from the paradigm of religion as the identity of Indonesian citizens, reflected in the first principle of the state ideology *Pancasila*,¹⁰ namely “Belief in the One and Only God” (Hosen 2005, 424). In addition, the inclusion of religion is essential for the obligations and responsibilities of religious groups towards a religious adherent, for example in relation to adoption or funeral processes. Unfortunately, Indonesia lacks an integrated system for a complete online population database using only an electronic version of the identity card. Government and private institutions, especially in the regions, still rely on the identity card in physical form to carry out various administrative management processes.

One problem is that the Civil Administration Law stipulates that the column for religion on the family card and the identity card for adherents of traditional beliefs be left blank, even though the holder is still served and recorded in the population database. Article 64(2) of the Civil Administration Law states:

Population data elements regarding religion as referred to in paragraph (1) for residents whose religion has not been recognised as a religion based on the laws and regulations or for the adherents of *traditional beliefs* are not filled out, but are still served and recorded in the population database.

As a result of this arrangement, adherents of traditional beliefs did not have the right to include their belief on their identity card (Chilton and Versteeg 2020, 245). Therefore, the available alternative for them was to be forced to choose another religion option available in the population administration system, such as Islam, Protestantism, Catholicism, Hinduism, Buddhism, or Confucianism, or leave the religion data column on their identity card blank. Neither of these options was acceptable for the followers of traditional beliefs. Choosing to put another religion on their identity card would mean denying their beliefs, while leaving the religion column blank would cause stigmatisation of the concerned person, who could be considered an atheist, an infidel, or a communist. Moreover, the absence of religion data for followers of traditional beliefs makes it difficult for them to access public services and exercise their rights as citizens.

10 *Pancasila* is the state ideology of Indonesia consisting five principles, namely (1) belief in the One and Only God, (2) just and civilised humanity, (3) the unity of Indonesia, (4) democratic life led by wisdom of thoughts in deliberation amongst representatives of the people, and (5) achieving social justice for all the people of Indonesia. These principles are explicitly stated in the preamble of the 1945 Constitution.

For instance, the Office of Religious Affairs may not record the marriage of followers of traditional beliefs because of no indication of religion on the family card or the identity card. Moreover, this situation may exclude parents from obtaining birth certificates when their children are born. As a result, many families of adherents of traditional beliefs do not have state-issued civil documents, such as marriage certificates and birth certificates.

Adherents of traditional beliefs also face obstacles in the field of education. They often must attend religious education classes for a religion outside their faith and are hampered in obtaining student administrative documents. Therefore, some parents decide not to send their children to school. Such adherents have limited access to the labour market, especially if they want to become civil servants, members of the Indonesian military or Indonesian police, simply because there is no indication of religion on their identity card. Even if they are employed, either in state or private institutions, they often lose family benefits and facilities. They also face difficulties in obtaining banking services.

Likewise, low-income followers of traditional beliefs often cannot receive social or health assistance from the government. Because of the discriminatory treatment that they face in various areas of public life, followers of traditional beliefs do not dare to openly express their religious beliefs (National Commission on Violence against Women 2016). Followers of traditional beliefs had tried to defend their rights by submitting recommendations and review requests to the Ministry of Home Affairs, the Ministry of Education and Culture, and other government agencies. However, all efforts were unsuccessful until they approached the Constitutional Court and submitted an application for a constitutional review of the Civil Administration Law.

5 Constitutional Court and Protection for Traditional Beliefs

The Indonesian Constitutional Court is a judicial institution that is separate and equal to the Supreme Court. This judicial institution began operating in 2003 after it was formed based on the results of the Third Amendment to the Indonesian Constitution in 2001. It has the function of guarding the Constitution and protecting human rights through its five powers, namely: examine the constitutionality of the law, resolve disputes between state institutions, decide upon dissolution of political parties, resolve disputes over general election results, and decide on impeachment cases against the president and/or vice-president (Butt and Lindsey 2018, 101–05).

With this authority, the Constitutional Court interprets cases relating to the constitutional review of law. Generally, cases handled by the Constitutional Court relate to the protection of fundamental rights and freedoms guaranteed by the Indonesian Constitution, and the strengthening of democratic principles.¹¹ Specifically, the amended Indonesian Constitution includes a special chapter on human rights, which contains almost all human rights listed in the UDHR (Asshiddiqie 2009, 512–18).

Therefore, the Constitutional Court is often used as a forum to fight for justice by the Indonesian people, including the followers of traditional beliefs. On 26 October 2016, four adherents of traditional beliefs, comprising one farmer, one student and two entrepreneurs, requested an examination of the constitutionality of Article 61(1) and (2) as well as Article 64(1) and (2) of the Civil Administration Law, which provide for no indication of religion on family cards and identity cards of followers of traditional beliefs.

These petitioners were adherents of traditional beliefs of *Marapu* (East Nusa Tenggara Province), *Parmalim* and *Ugamo Bangsa Batak* (North Sumatra Province), and *Sapto Darmo* (Central Java Province), who claimed that their right to access public services was violated because their marriages were not recognised by the state so their children had not received birth certificates. In addition, they were also forced to choose and change their religion to facilitate the process of obtaining an identity card and access to loans from banks or cooperatives. The *Sapto Darmo* adherents suffered stigmatisation and their families were denied funerals at any public cemeteries in their area. Their children were also forced to follow the teaching of religious education contrary to their belief as adherents of *Sapto Darmo* (Qamariyah 2018; Halili and Naipospos 2015, 131–32).

Unlike in other cases of constitutional review, the government, in dealing with this case was very moderate and cooperative by not opposing the petitioners' arguments outright. Thus, the government acknowledged its own challenges in making arrangements related to indication of religion for the adherents of traditional beliefs. Therefore, the government welcomed that the Constitutional Court provide constitutionality considerations as a solution to the problems that had been faced by the adherents of traditional beliefs in Indonesia for decades (Constitutional Court of Indonesia 2017, 109). On the contrary, the House of Representatives asked the Constitutional Court to reject

11 For a comprehensive discussion on the Indonesian Constitutional Court, see Butt (2015) and Hendrianto (2018).

the petition because the provisions examined were deemed not contrary to the Constitution (*Ibid.*, 117–18).

This case was politically sensitive because it involved a position of traditional beliefs juxtaposed with state-recognised religions in the Indonesian legal system. Therefore, before giving legal consideration to the substance of the case, the Constitutional Court started by emphasizing the existence of religious rights, including the right to adhere to the belief in God Almighty and the right to access public services in the Indonesian legal system.

According to the Constitutional Court, the right to embrace religion or belief in God Almighty is the constitutional right of citizens. The fundamental right to adhere to a religion, which includes the right to adhere to a belief in God Almighty, is part of civil and political human rights. This right is based on natural rights and applies to everyone because he/she is a human being, and the right is not a gift from the state. Therefore, the state exists or was formed precisely to protect these rights (*Ibid.*, 137–38). As the right to religion and adherence to belief are also part of human rights, the state has the responsibility to respect, protect and fulfil these rights as obligations given by the Indonesian Constitution. Moreover, these rights cannot be limited under any circumstances based on Article 28I(1) of the Indonesian Constitution.

In deciding this case, the Constitutional Court also referred to international standards provided by the UDHR and the ICCPR. Article 18(1) of the UDHR states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

In addition, Article 18(2) of the ICCPR states: “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice”. The Constitutional Court argued that the word “or” in those provisions refers to an alternative nature. Thus, the terms “religion” and “belief” must be understood as two different things that are equalised (Constitutional Court of Indonesia 2017, 141).

The Constitutional Court’s ruling did not mention the UNDRIP. Although Indonesia is a signatory to UNDRIP, Indonesian government officials since the reign of president Suharto consider that the concept of *Indigenous peoples* in Indonesia is different from the definition in the International Labour

Organization's Convention no. 169,¹² as all Indonesians are equally Indigenous (Li 2000, 1). Indeed, the traditional belief case is closely related to freedom of religion, not rights of Indigenous peoples.

To understand the meanings of religion and belief in the Indonesian Constitution, the Constitutional Court examined the minutes of the debates within the Preparatory Committee for Indonesian Independence during the drafting of the 1945 Constitution, using the original intent interpretation model. From its investigation, the Constitutional Court concluded the term "belief" in the Indonesian Constitution is indeed not intended as something separate from religion, although after the amendments to the Indonesian Constitution in 2000, the regulation of religion and belief is separated (Constitutional Court of Indonesia 2017, 143–45).

In relation to the main problems experienced by the followers of traditional beliefs due to the Civil Administration Law, the Constitutional Court presented three main legal considerations in its decision. First, the Court held that the population database must be compiled within the framework of respecting, protecting, and fulfilling the rights of citizens; all categories of personal data must be filled in but no data that is not in accordance with a person's actual religion or beliefs is to be recorded (Constitutional Court of Indonesia 2017, 147). According to the Constitutional Court, the different rules in the Civil Administration Law do not provide state protection and guarantees for citizens who are adherents of belief in Almighty God (*Ibid.*, 149).

Second, the Constitutional Court noted that the challenged provisions of the Civil Administration Law caused uncertainty, different interpretations, and inconsistency with other norms in the same law. As a result, citizens who adhere to traditional beliefs have difficulty in obtaining a family card and an electronic identity card. This has a negative impact on the fulfillment of other rights, such as official recognition of marriages and access to other public services. Therefore, some adherents of traditional beliefs are forced to lie about their beliefs to obtain a family card or electronic identity card. Such matters, according to the Constitutional Court, are a loss of citizens' constitutional rights, which should not be allowed to happen, as it results in obstacles in accessing public services (*Ibid.*, 151–52).

Third, the Constitutional Court argued that a different treatment between citizens in terms of personal data recorded in the population database has no constitutional ground. According to the Court, the differences are not related

12 Convention concerning Indigenous and Tribal Peoples in Independent Countries (no. 169) of the International Labour Organization (ILO). It was adopted on 27 June 1989 and entered into force on 5 September 1991.

to respect for the rights and freedoms of others. On the contrary, the distinction would cause unfair treatment of citizens who adhere to traditional beliefs. In its *ratio decidendi*, the Court emphasised that the limitation on the basis of belief, which has implications for the emergence of different treatment between citizens, is a discriminatory action (Constitutional Court of Indonesia 2017, 152–53).

Although in the Constitutional Court's legal considerations, the challenged provisions of the Civil Administration Law were declared contrary to the Constitution, the Court did not immediately invalidate them. The reason is that if the provisions were annulled, it would create a legal vacuum, resulting in new uncertainty in the population data recording system. As a solution, the Court made a legal breakthrough by issuing a decision of *conditional unconstitutionality*. It means that a legal provision is deemed unconstitutional if its application is not in accordance with the Court's interpretation; conversely, the respective provision is constitutional provided that it is applied in the way specified by the Court (Butt and Lindsey 2018, 105–06).

The Court gave a constitutional interpretation by stating that the word “religion” in Article 61(1) and Article 64(1) of the Civil Administration Law is contrary to the Indonesian Constitution and has no binding legal force as long as the provision is not interpreted as including “belief”. Thus, these provisions are not repealed but their application requires that family cards and electronic identity cards list also the category of *adherents of traditional beliefs* without specifying the beliefs held by each citizen (Constitutional Court of Indonesia 2017, 153–54). Following this decision, the adherents of traditional beliefs will be able to obtain family cards and identity cards that specify their belief in God Almighty.

The Ministry of Home Affairs must take the necessary measures to implement the Constitutional Court's decision such as drafting implementation regulations, updating the application for recording electronic identity card data, and conducting awareness-raising for government employees, the general public, and the adherents of traditional beliefs (Salfutra *et al.* 2019, 271).

6 Conclusions

Indonesia is an archipelago that has a high level of ethnic, linguistic, cultural, and religious pluralism. The protection of such diversity is guaranteed by the Indonesian Constitution. However, some laws and regulations are not in line with the spirit of the Constitution and, in practice, members of minority groups such as adherents of traditional beliefs still face discrimination. In

terms of pluralism, generally each group of adherents of traditional beliefs has a different ethnicity, culture, language, and territory.

The 2006 Civil Administration Law is an example of a regulation that had a negative impact on adherents of traditional beliefs. According to this law, adherents of traditional beliefs had no right to receive civil documents indicating their beliefs. To obtain identity cards, some declared themselves adherents to one of the six state-recognised religions, but this meant that their civil documents contained false indications of religious affiliation. Others chose to leave blank the field regarding religious affiliation, but they faced stigmatisation and obstacles in accessing various public services.

Several provisions of the Civil Administration Law have been challenged before the Constitutional Court. In a landmark 2017 decision, the Court held that the differential treatment of adherents of traditional beliefs is unconstitutional. They now have the same right as adherents of other religions and can fill in their religious affiliation. The inclusion of their traditional belief, both on the family card and the electronic identity card, has had significant implications for the adherents, especially regarding access to public services, education, employment, banking services, etc. In other words, the decision of the Constitutional Court not only recognises the existence of adherents of traditional beliefs, but it also strengthens their right to equality and non-discrimination.

Following the Constitutional Court's decision, the Indonesian government needs to correct the information in its database regarding millions of adherents of traditional beliefs spread across Indonesian territory. The Indonesian Constitution guarantees freedom of religion and belief, and the Constitutional Court's decision has laid the foundation for an end of discrimination against adherents of traditional beliefs in Indonesia. It is a constitutional obligation of the executive branch to implement the necessary administrative measures to make this change a reality.

Bibliography

- Asshiddiqie, Jimly. 2009. *The Constitutional Law of Indonesia*. Singapore: Sweet & Maxwell Asia.
- Bedner, Adriaan and Yance Arizona. 2019. "Adat in Indonesian Land Law: A Promise for the Future or a Dead End?". *The Asia Pacific Journal of Anthropology* 20: 416–34.
- Bloch, Anne-Christine. 2001. "Minorities and Indigenous Peoples". In *Economic, Social and Cultural Rights*, second revised edition, edited by Asbjørn Eide, Catarina Krause and Allan Rosas. Dordrecht, Boston, London: Martinus Nijhoff Publisher.

- BPS-Statistics Indonesia. 2018. *Indonesian Population Projection 2015–2045*. Jakarta: BPS-Statistics Indonesia.
- BPS-Statistics Indonesia. 2017. “Area and Number of Islands by Province, 2002–2016”. *BPS-Statistics Indonesia*. Accessed December 1, 2020. <https://www.bps.go.id/statictable/2014/09/05/1366/luas-daerah-dan-jumlah-pulau-menurut-provinsi-2002-2016.html>.
- Butt, Simon and Tim Lindsey. 2018. *Indonesian Law*. Oxford: University Press.
- Butt, Simon. 2015. *The Constitutional Court and Democracy in Indonesia*. Leiden, Boston: Brill, Nijhoff.
- Butt, Simon. 2019. “The Constitutional Court and minority right: analysing the recent homosexual sex and indigenous belief cases”. In *Contentious Belonging*, edited by Greg Fealy and Ronit Ricci. Singapore: ISEAS Publishing.
- Cassese, Antonio. 1995. *Self-Determination of Peoples: A Legal Reappraisal*. Cambridge: Cambridge University Press.
- Chilton, Adam and Mila Versteeg. 2020. *How Constitutional Rights Matter*. Oxford: Oxford University Press.
- Constitutional Court of Indonesia. 2010a. *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Latar Belakang, Proses, dan Hasil Pembahasan 1999–2002, Buku IV, Kekuasaan Pemerintahan Negara Jilid 2* [Comprehensive Manuscript on the Amendment of the 1945 Constitution of the Republic of Indonesia: Background, Process and Results of Discussion 1999–2002, Book IV, Executive Powers Volume 2]. Jakarta: Secretariat General and Registry Office of the Constitutional Court of Indonesia.
- Constitutional Court of Indonesia. 2010b. *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Latar Belakang, Proses, dan Hasil Pembahasan 1999–2002, Buku IX, Pendidikan dan Kebudayaan* [Comprehensive Manuscript on the Amendment of the 1945 Constitution of the Republic of Indonesia: Background, Process and Results of Discussion 1999–2002, Book IX, Education and Culture]. Jakarta: Secretariat General and Registry Office of the Constitutional Court of Indonesia.
- Crouch, Melissa. 2012. “Law and Religion in Indonesia: The Constitutional Court and the Blasphemy Law”. *Asian Journal of Comparative Law* 7: 1–46.
- Erdianto, Kristian and Moh Nadlir. 2017. “Hapus Diskriminasi Penghayat Kepercayaan [Removing Discrimination towards Adherents of Traditional Beliefs]”. *Kompas.com*, December 6, 2017. Accessed December 1, 2020. <https://nasional.kompas.com/read/2017/12/06/06050061/hapus-diskriminasi-penghayat-kepercayaan?page=all>.
- Fadhli, Yogi. 2014. “Kedudukan Kelompok Minoritas dalam Perspektif HAM dan Perlindungan Hukumnya di Indonesia [Position of Minority Groups in Human Rights Perspective and Its Legal Protection in Indonesia]”. *Jurnal Konstitusi* 11: 352–370.

- Magnis-Suseno, Franz. 2016. *Etika Politik, Prinsip Moral Dasar Kenegaraan Modern* [Political Ethics, Basic Moral Principles of Modern State]. Jakarta: Gramedia Pustaka Utama.
- Gerung, Rocky. ed. 2006. *Hak Asasi Manusia: Teori, Hukum, Kasus* [Human Rights: Theory, Law, Cases]. Jakarta: Filsafat UI Press.
- Halili and Bonar Tigor Naipospos. 2015. *From Stagnation to Pick the New Hopes: The Condition of Freedom of Religion/Belief in Indonesia 2014*. Jakarta: Pustaka Masyarakat Setara.
- Hasan, Hasbi. 2012. "Islam, Negara dan Hak-hak Minoritas di Indonesia [Islam, the State and Minority Rights in Indonesia]". *Jurnal Analis* 7: 1–18.
- Hendrianto, Stefanus. 2018. *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes*. London: Routledge.
- Henley, David. 1995. "Regional nationalism in a colonial state: a case study from the Dutch East Indies". *Political Geography* 14: 10–58.
- Hosen, Nadirsyah. 2005. "Religion and the Indonesian Constitution: A Recent Debate". *Journal of Southeast Asian Studies* 36: 419–40.
- Koesnoe, Moh. 1971. *Introduction to Indonesian Adat Law*. Nijmegen: Katholieke Universiteit.
- Li, Tania. 2000. "Articulating Indigenous Identity in Indonesia: Resource Politics and the Tribal Slot". *Working Papers, Berkeley Workshop on Environmental Politics*, Institute of International Studies, University of California, Berkeley.
- Malloy, Tove. 2013. *Minority Issues in Europe: Rights, Concepts, Policy*. Berlin: Frank & Timme.
- Ministry of Education and Culture of Indonesia. 1990. *Dasawarsa Direktorat Pembinaan Penghayat Kepercayaan terhadap Tuhan Yang Maha Esa Tahun 1979 s.d. 1989* [A Decade of the Directorate of Development of Traditional Beliefs to God Almighty from 1979 to 1989]. Jakarta: Ministry of Education and Culture.
- Nasution, Muhammad. 2013. "Demokrasi dan Politik Minoritas di Indonesia [Democracy and Minority Politics in Indonesia]". *Jurnal Politica* 4: 313–35.
- National Commission on Violence against Women. 2016. *Diskriminasi dan Kekerasan terhadap Perempuan dalam Konteks Kebebasan Beragama dan Berkeyakinan bagi Kelompok Penghayat Kepercayaan/Penganut Agama Leluhur dan Pelaksana Ritual Adat* [Discrimination and Violence against Women in the Context of Freedom of Religion and Belief for Adherents of Traditional Beliefs Groups/Ancstral Beliefs and Customary Rituals]. Jakarta: National Commission on Violence against Women.
- Nowak, Manfred. 2003. *Pengantar pada Rezim HAM Internasional* [Introduction to the International Human Rights Regime]. Jakarta: Pustaka Hak Asasi Manusia Raoul Wallenberg Institute.

- OHCHR – Office of the United Nations High Commissioner for Human Rights. 2010. *Minority Rights: International Standards and Guidance for Implementation*. New York and Geneva: United Nations.
- OHCHR – Office of the United Nations High Commissioner for Human Rights. 2012. *Promoting and Protecting Minority Rights, A Guide for Advocates*. Geneva & New York: United Nations.
- Pearson, Elaine *et al.* 2013. “In Religion’s Name: Abuses against Religious Minorities in Indonesia”. *Human Rights Watch*, February 28, 2013. Accessed December 1, 2020. <https://www.hrw.org/report/2013/02/28/religions-name/abuses-against-religious-minorities-indonesia>.
- Prajasto, Antonio and Roichatul Aswidah. 2014. *Perlindungan Hak-hak Minoritas dan Demokrasi* [Protection of Minority Rights and Democracy]. Jakarta: Lembaga Studi dan Advokasi Masyarakat.
- Qamariyah, Farihatul. 2018. “Religious Freedom for Indigenous Religion: A Case Study of Cemetery in Sapta Dharma”. *DINIKA Academic Journal of Islamic Studies* 3: 345–58.
- Reid, Anthony. 2012. “Revolutionary State Formation and the Unitary Republic of Indonesia”. In *Multination States in Asia: Accommodation or Resistance*, edited by Jacques Bertrand and André Laliberté. Cambridge: Cambridge University Press.
- Rustandi, Nanang. 2019. “The Plurality and Minority in Religiosity (A Study on the Civil Right of Sunda Wiwitan Followers)”. *Hanifiya: Jurnal Studi Agama-Agama* 2: 28–41.
- Salfutra, Reko *et al.* 2019. “Implementation of the Constitutional Court Decision Number 97/PUU-XIV/2016 for *Orang Lom* in Bangka Belitung”. *Jurnal Konstitusi* 16: 255–73.
- Soeprapto, Enny *et al.* 2012. “Hak Asasi Manusia Kelompok Rentan dan Mekanisme Perlindungannya [Human Rights of Vulnerable Groups and its Protection Mechanism]”. In *Vulnerable Groups: Kajian dan Mekanisme Perlindungannya* [Vulnerable Groups: A Study and its Protection Mechanism], edited by Eko Riyadi and Syarif Nurhidayat. Yogyakarta: Pusham UII.
- Uddin, Asma. 2010. “Religious Freedom Implications of Sharia Implementation in Aceh, Indonesia”. *University of St. Thomas Law Journal* 7: 603–48.
- Vollenhoven, Cornelis van. 1933. *Het adatrecht van Nederlandsch-Indië*. Leiden: Brill.
- Welianto, Ari. 2020. “Daftar Suku Bangsa di Indonesia [List of Ethnic Groups in Indonesia]”. *Kompas.com*, January 4, 2020. Accessed December 1, 2020. <https://www.kompas.com/skola/read/2020/01/04/210000869/daftar-suku-bangsa-di-indonesia?page=all>.
- Widiatmoko, Yudha and Fathul Wahid. 2006. “Aplikasi Web Data Spasial Kependudukan Indonesia dengan *Scalable Vector Graphics* (SVG) [Indonesian Population Spatial Data Web Application with Scalable Vector Graphics]”. *Media Informatika* 4: 27–37.

Wijayanti, Winda. 2019. *Penghayat Kepercayaan: Perlindungan Hukum Melalui Hukum Administrasi* [Traditional Beliefs: Legal Protection through Administrative Law]. Jakarta: Rajawali Pers.

Case Law

Please refer to the list on pages viii–xvi.

Land, Consultation and Participation Rights of Indigenous Peoples in the Jurisprudence of the Inter-American Court of Human Rights

The Cases of Kichwa Indigenous People of Sarayaku v. Ecuador and Kaliña and Lokono Peoples v. Suriname

Alexandra Tomaselli and Federica Cittadino

1 Introduction*

The role of the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights (hereinafter, the Commission and the Court, respectively) in assessing the interpretation and advancing the rights of Indigenous peoples in the context of the Americas, and especially Latin America, is absolutely undeniable. The landmark decisions of these bodies have set what has been defined by the Court itself as an “evolutionary interpretation” of human rights, which has been firstly conceived and applied in a case of violation of land rights of Indigenous peoples, i.e. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001, para. 148). In the words of the Court, “human rights treaties are living instruments, the interpretation of which must evolve over time and reflect current living conditions” (*Kichwa Indigenous People of Sarayaku v. Ecuador* 2012, para. 161). In particular, the American Declaration on the Rights and Duties of Man of 1948 and the American Convention on Human Rights – Pact of San José (ACHR) of 1969 must be interpreted extensively to protect the rights of Indigenous peoples. This notwithstanding the absence of any expressive norm or provision on Indigenous rights until the adoption of the American Declaration on the Rights of Indigenous Peoples in 2016, which, however, is a non-binding document.

In this frame, this chapter aims to explore both how the Commission and the Court have analysed the alleged violations of Indigenous rights and how they have developed their legal reasonings in two pivotal cases, namely *Kichwa*

* In the common elaboration of this chapter, sections 2 and 3 have been written by Alexandra Tomaselli, section 4 by Federica Cittadino, and sections 1 and 5 by both.

Indigenous People of Sarayaku v. Ecuador (2012) and *Kaliña and Lokono Peoples v. Suriname* (2015). Both these cases build upon what the Court calls the “case law of the organs of the Inter-American system” (*Kichwa Indigenous People of Sarayaku v. Ecuador* 2012, para. 125), i.e., previous ground-breaking decisions such as the abovementioned *Awas Tingni* case (2001) or *Saramaka People v. Suriname* (2007). This chapter explores the cases of *Kichwa Indigenous People of Sarayaku v. Ecuador* and *Kaliña and Lokono Peoples v. Suriname* not only because they have comparatively received less academic attention (especially the latter), but particularly because of the innovative and pioneering effect of these judgments with regard to the interpretation of the rights to land, consultation and participation of Indigenous peoples. This chapter does not aim to assess the content of such rights or how to exercise them, also in relation to their right to self-determination, since this has been tackled elsewhere¹ but it rather focuses on the milestones that these two decisions offer for an evolutionary (and systematic) interpretation of such Indigenous rights that may be applied or inspire other judiciary bodies in other parts of the world, as it occurred in the past in the African regional human rights system with the case of *Endorois Welfare Council v. Kenya* (2010).²

Hence, this chapter first briefly introduces the Inter-American system of human rights;³ second, it delves into the two above-mentioned decisions; and, finally, it draws some concluding remarks on the significance of such rulings for the current and future Indigenous rights agenda.⁴

1 See, for example., Gilbert (2006; 2013), Doyle (2015), Tomaselli (2016b; 2017) and Cittadino (2019).

2 The African Commission on Human and Peoples’ Rights expressively recalled the *Awas Tingni* case (2001) especially in paras. 190, 207 and 208 of its decision in *Endorois Welfare Council v. Kenya* (2010).

3 For a complete analysis of the work of the Inter-American Court of Human Rights, see Haeck, Ruiz-Chiriboga and Burbano-Herrera (2015).

4 The authors would like to specify that they are both well-aware that the mere adoption of these decisions do not imply their ultimate execution on the part of the involved state. Indeed, even the best-known cases, such as *Awas Tingni* (2001) or *Sarayaku People* analysed here (2012), remain partially or totally unimplemented. On the former, see the recent analysis of Macdonald and Wetterslev (2019). In the latter case, the Sarayaku people have filed a complaint before the Constitutional Court of Ecuador to demand the full and fair implementation of the Court’s decisions on 13 November 2019 (Pueblo Originario Kichwa de Sarayaku, 2019).

2 A Brief Overview on the Inter-American System of Human Rights and Its Role for Indigenous Peoples

After the (non-binding) American Declaration was signed in 1948, the Inter-American Specialised Conference on Human Rights led to the adoption of ACHR on 22 November 1969 in San José (Costa Rica). Initially, 12 States signed the ACHR, which ultimately entered into force in 1978 after 11 State Parties ratified it as in accordance with its Article 74(2). The competences and the procedure to be followed before the Commission and Court are regulated by the ACHR itself. However, the former has been operative before the adoption of the ACHR, in 1959, at the same time during which the Inter-American Council of Jurists began working on the ACHR's draft (Organization of American States 1959). The Court had to wait for the ACHR to enter into force in 1978, but it took another ten years to adopt its first decision in 1988.

Along with the ACHR and its two judicial bodies, several other thematic conventions complete the Inter-American system of human rights, and seven thematic Rapporteurships were created by the Commission during the 1990s. These Rapporteurships were to draw attention to human rights issues related to specific groups that face or have faced systematic discrimination, live at the margins of the society, and may therefore be more at risk of human rights violations than other sectors of the society. Among the marginalised groups for which the Inter-American system has instituted a Rapporteurship, there are Indigenous peoples and Afro-descendants.⁵

The Rapporteurship on the Rights of Indigenous Peoples has the tasks to enhance, foster, and categorise the work of the Commission's work on Indigenous peoples of the Americas. *Inter alia*, the mandate of this Rapporteurship includes coordinating, consolidating and advancing the Inter-American system of human rights in relation to Indigenous peoples and their rights, promoting and enabling Indigenous access to this system, co-analysing Indigenous petitions, organizing on-site visits in member states of the Organization of American States (OAS) to observe more closely the situation

5 The Rapporteurships are currently as follows (ordered per year of creation): Rapporteurship on the Rights of Indigenous Peoples (1990); Rapporteurship on the Rights of Women (1994); Rapporteurship on the Rights of Migrants (1996); Rapporteurship on the Rights of the Child (1998); Rapporteurship on Human Rights Defenders (2001); Rapporteurship on the Rights of Persons Deprived of Liberty (2004); and Rapporteurship on the Rights of Afro-Descendants and against Racial Discrimination (2005). Additionally, one Special Rapporteurship for the Freedom of Expression and two Units on the Rights of Lesbian, Gay, Trans, Bisexual and Intersex Persons and on Economic, Social and Cultural Rights were founded in 1997, 2011 and 2012, respectively.

on the ground, and preparing thematic reports.⁶ Among recent reforms, the OAS annual review in 2008–2009 led to the adoption of new procedural rules and thus reinforced the role of the Commission, in particular, to grant precautionary measures (Meyer 2018, 14). Since then, the Rapporteurships may also urge the Commission to adopt such measures. Hence, these bodies constitute a reference point for those vulnerable groups they are dedicated to in order to report alleged violations of their rights.

In more general terms, the jurisprudence that involved Indigenous peoples and their rights has passed through three different phases: the late-indigenist period (*tardo-indigenista*) during the 1970s; the growing interest during the 1980s and 1990s; and the present-day phase beginning in the 2000s with the start of the “evolutionary jurisprudence” in the abovementioned *Awás Tingni* case (Rodríguez-Piñero Royo 2006, 160).⁷ In a nutshell, the applicants of this case were the Awás Tingni Indigenous people of Nicaragua that requested the definitive demarcation of their land in accordance with Article 5(3) of the Nicaraguan Constitution. This case has become a pivotal ruling mainly because the Court, *inter alia*, recognised that an Indigenous people may enjoy a collective right to land within the frame of the general property right enshrined in Article 21 of the ACHR. In particular, it stated that:

Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention – which precludes a restrictive interpretation of rights –, it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua.

Mayagna (Sumo) Awás Tingni Community v. Nicaragua 2001, para. 148

The Court recalled this case in a number of subsequent decisions (Tomaselli 2016a), among which the following are best known: *Yakye Axa Indigenous Community v. Paraguay* (2005), *Moiwana Community v. Suriname* (2005), *Sawhoyamaxa Indigenous Community v. Paraguay* (2006), *Xákmok Kásek*

⁶ For details, see the information published on the webpage of the Rapporteurship on the Rights of Indigenous Peoples at <http://oas.org/en/iachr/indigenous/mandate/Functions.asp> (accessed November 17, 2020).

⁷ For an overview on the jurisprudence of the Inter-American Court of Human Rights on Indigenous peoples' rights, see Fuentes (2015).

Indigenous Community v. Paraguay (2010); *Saramaka People v. Suriname* (2007); *Kichwa Indigenous People of Sarayaku v. Ecuador* (2012); *Kaliña and Lokono Peoples v. Suriname* (2015); and the most recent decisions of *Xucuru Indigenous People and its members v. Brazil* (2018) and *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina* (2020).⁸ In addition, in those cases in which the Court had no jurisdiction, the Commission used the *Awás Tingni* case to argue for the right to collective land, e.g. in *Mary and Carrie Dann v. United States* (2002) and *Maya Indigenous Communities v. Belize* (2004).

3 *Sarayaku People v. Ecuador*

The 2012 landmark decision of the Court in *Kichwa Indigenous People of Sarayaku v. Ecuador* (hereinafter *Sarayaku People v. Ecuador*) is particularly known for having assessed that the protection of property rights for Indigenous peoples, in terms of collective land rights, and the use and enjoyment thereof is of utmost importance since it ensures the survival of these peoples (*Sarayaku People v. Ecuador* 2012, para. 146), and that the right to consultation of Indigenous peoples – which must be prior to any measure likely to affect them – is a principle of international law (*Ibid.*, para. 164).

This case was initiated by the Association of the Kichwa People of Sarayaku (*Tayjasaruta*), the Center of Economic and Social Rights (*Centro de Derechos Económicos y Sociales*) and the Center for Justice and International Law (*Ibid.*, para. 1), which sued the Ecuadorian state before the Inter-American system of human rights by alleging that a number of rights of the Kichwa Indigenous people of Sarayaku (hereinafter Sarayaku people) had been violated. In a nutshell, this case regarded the granting of concessions for oil exploration and exploitation activities and the use of explosives in the Sarayaku Kichwa territory without having consulted these peoples or obtaining their consent (*Ibid.*, para. 2).

The petition reached the Commission in December 2003. In June 2004, the Commission urged the Court to issue provisional measures in favour of the Sarayaku people and its members in accordance with Article 63(2) of ACHR and Article 25 of the Court's Rules of Procedure. Such measures were ordered the following July and remained in effect until the adoption of the decision (*Ibid.*, para. 5). The Commission deemed the case admissible in October 2004

⁸ All these judgments are available online at https://www.corteidh.or.cr/casos_sentencias.cfm?lang=en (accessed December 1, 2020).

and adopted its Report on Merits no. 138/09 in December 2009 (*Ibid.*, para. 1). The Commission further requested the Court to declare the international responsibility of Ecuador for having violated the following ACHR provisions to the detriment of the Sarayaku people: the right to private property (Article 21, in relation to Articles 13, 23, and 1.1); the right to life and personal integrity (ACHR Articles 4 and 5 in relation to Article 1.1); freedom of movement and residence (ACHR Article 22 in relation to Article 1.1); and the right to judicial guarantees and judicial protection (ACHR Articles 8, and 25 in relation to Article 1.1). The Commission also urged the adoption of both domestic legal measures established in Article 2 of ACHR and specific measures of reparation (Inter-American Court of Human Rights 2012, para.3). The petition was notified to the parties on 9 July 2010 (*Ibid.*, para. 4). The plaintiffs' requests coincided with the Commission's but also alleged violations of Article 26 of ACHR with regard to the right to culture, the right to personal integrity and the right to personal liberty (Articles 5 and 7 ACHR) and Article 6 on the prevention and punishment of torture (*Ibid.*, para. 6).

Concerning the factual background of the case, the Sarayaku people live in different sectors of the province of Pastaza, along the banks of the Bobonaza River in the Amazonian region of Ecuador (*Ibid.*, para. 52), in one undivided parcel of land (Block 9), which was granted by Ecuador to all the communities of the Bobonaza River – including them – in 1992 (*Ibid.*, para. 61). The Sarayaku people count for approximately 1,200 members, who are divided into five groups (*Ibid.*, para. 52). They provide for their livelihoods by carrying out traditional activities such as collective family-based farming, hunting, fishing and gathering (*Ibid.*, para. 54). In 2004, the Sarayaku people registered their Statute before the competent governmental body, which included indications on the dimension of their territory (*Ibid.*, para. 61).

In 1996, following the results of a call for proposals, the state granted a concession to *Petroecuador* (the national oil company of Ecuador), consociated with the *Compañía General de Combustibles S.A.* and *Petrolera Argentina San Jorge S.A.*, for the exploration and exploitation of hydrocarbons in Block 23 of the Amazonian basin (*Ibid.*, paras. 63–64). These companies had to comply with two obligations: to elaborate an environmental impact assessment and to make every effort to preserve the existing ecological balance in the surrounding area of the granted block (*Ibid.*, para. 67). The environmental impact assessment was completed in 1997 but was never executed (*Ibid.*, para. 69). Similarly, the obligation to maintain an ecological balance was not seriously taken into account and the companies' lawyers tried to obtain Sarayaku people's consent by offering them different types of monetary compensations (*Ibid.*, para. 73). Following this, the Sarayaku people appealed for the protection of the national

Ombudsman (*Ibid.*, para. 86), and filed a constitutional protection lawsuit (*amparo*) before the First Civil Judge of Pastaza against the *Compañía General de Combustibles S.A* and its subcontractor, *Daymi Services*, in November 2002. Although the judge ordered the suspension of the activities as precautionary measure (*Ibid.*, para. 88), the hearing never took place (*Ibid.*, para. 90), and when the case reached the Superior Court of Justice of Pastaza, the latter noted irregularities in the proceeding of first instance (*Ibid.*, para. 91). In December 2002, the Ecuadorian government adopted the “Regulations for Consultation on Hydrocarbon Activities”, which included a standard procedure to consult Indigenous peoples in accordance with the national Constitution of 1998 (*Ibid.*, para. 93). Between 2002 and 2003, few meetings were held between the government and Sarayaku people and other Sarayaku representatives, but these never reached any substantial common agreement (*Ibid.*, paras. 94–97). In the same two years, many other facts occurred: *inter alia*, four members of Sarayaku people were accused of criminal offences; the company placed 1,433 kilograms of explosive (pentolite) both in the surface and at deeper levels to continue the seismic operations, which damaged Sarayaku people’s sacred sites and their surrounding environment and remained in the Sarayaku territory until the time of the decision; and, other grave facts, such as threats and attacks to the community by the involved companies and other local people (*Ibid.*, paras. 98–113). On some of these facts, the Ecuadorian Ombudsman of the province of Pastaza opened *ex officio* a complaint procedure in December 2003 (*Ibid.*, para. 112). Although in 2007 the police were put in charge of removing the explosive from the Sarayaku territory, by the end of 2009 only 14 kilograms had been eventually taken away (*Ibid.*, paras. 114 and 121). The oil exploration activities were resumed in May 2009 (*Ibid.*, para. 118). In 2010, *Petroecuador* and *Compañía General de Combustibles S.A.* terminated their partnership agreement without informing the Sarayaku people (*Ibid.*, para. 123).

3.1 *Substantive Points of the Decision and Reparations*

Eventually, the Court found that Ecuador had violated certain rights of the Sarayaku people: a) the rights to consultation, to Indigenous communal property, and to cultural identity, in accordance with Article 21 ACHR on the right to property; b) the rights to life and to personal integrity (Articles 4 and 5 ACHR), which according to the Court had been severely jeopardised; and c) the right to judicial guarantees and judicial protection (Articles 8 and 25 ACHR) (*Sarayaku People v. Ecuador* 2012, para. 341). The Court dismissed the allegations on threats, attacks and torture in accordance with Articles 5, 6, and 7 ACHR due to insufficiency of the provided evidence (*Ibid.*, paras. 250–254). The main substantive points of the decision and the reparations are reported as follows.

a) Right to Consultation and to Indigenous Communal Property

Unlike other cases, such as the abovementioned *Awas Tingni* (2001) or *Saramaka v. Suriname* (2007), the Court affirms that in the case of the Sarayaku people there is no doubt regarding the recognition of the rights to their territories, since it has been also acknowledged by the state in the domestic proceedings (*Sarayaku People v. Ecuador*, para. 124). Moreover, the state never contested that a number of standards to guarantee the right to consultation were in force (*Ibid.*, paras. 172–173), and clearly the Sarayaku people have always opposed the oil exploration project (*Ibid.*, paras. 174–175).

Content-wise, the Court recalls the spiritual relationship between Indigenous peoples and their land, which includes an essential component (i.e., their cultural identity and worldviews) that needs to be respected in a democratic society and may be precisely safeguarded by their right to consultation (*Ibid.*, para. 159). The Court supports this argument by citing domestic jurisprudence, and, more specifically, that of the Constitutional Court of Colombia and the judgment C-169/01 (*Ibid.*, para. 159, footnote 177).⁹ Thus, the Court links participation with consultation by affirming that the right to consultation is one of the fundamental guarantees to safeguard not only the participation of Indigenous peoples but also the exercise of those rights that imply decision-making on measures likely to affect their rights (including, to communal property) (*Ibid.*, para. 160). Participation and consultation rights of Indigenous peoples are both recognised in the ILO Convention no. 169 concerning Indigenous and Tribal Peoples in Independent Countries of 1989 (hereinafter the ILO Convention 169) and other international instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (*Ibid.*, para. 160, footnote 178). In this respect, the Court reiterates that “human rights treaties are living instruments, the interpretation of which must evolve over time and reflect current living conditions” (*Ibid.*, para. 161). This is consistent with both Article 29(b) ACHR¹⁰ and Article 31 of the Vienna

9 The Constitutional Court of Colombia affirmed that Colombia has an obligation to carry out prior consultations with Indigenous peoples (and Afro-descendants) whenever new legislative or administrative measures may directly affect them (Constitutional Court of Colombia 2001, para. 2.3. of para V. *Consideraciones*).

10 Article 29(b) reads as follows: “No provision of this Convention shall be interpreted as... restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party”.

Convention on the Law of Treaties (*Ibid.*).¹¹ Hence, by indicating how the right to consultation of Indigenous peoples is increasingly enshrined in both international and/or domestic legislations and jurisprudence, the Court reaches the very innovative conclusion that “the obligation to consult, in addition to being a treaty-based provision, is also a general principle of international law” (*Ibid.*, para. 164). Additionally, the Court clarifies the content and the process of the right to consultation and participation of Indigenous peoples, as follows:

Given that the State must guarantee these rights to consultation and participation at *all stages of the planning and implementation of a project* that may affect the territory on which an indigenous or tribal community is settled, or other rights essential to their survival as a people, *these dialogue and consensus-building processes must be conducted from the first stages of the planning or preparation of the proposed measure, so that the indigenous peoples can truly participate in and influence the decision-making process*, in accordance with the relevant international standards. In this regard, the State must ensure that *the rights of indigenous peoples are not ignored in any other activity or agreement reached with private individuals, or in the context of decisions of the public authorities that would affect their rights and interests.*

Ibid., para. 167; emphasis added.

Moreover, by recalling the previous case of *Saramaka v. Suriname* (2007), the Court sets some parameters to assess whether the actions of the Ecuadorian state *vis-à-vis* the Sarayaku community respected those

minimum standards and essential requirements of a valid consultation process with indigenous communities (...) [which are]: (a) the prior nature of the consultation; (b) good faith and the aim of reaching an agreement; (c) appropriate and accessible consultation; (d) the environmental impact assessment, and (e) informed consultation.

Sarayaku People v. Ecuador, para. 178.

The Court also added that consultation is an obligation of the state, which cannot be avoided by delegating it to a company (*Ibid.*, para. 187) and thus

11 Moreover, the Court recalls its case law in cases against Nicaragua, Paraguay, and Suriname where it has interpreted Article 21 ACHR on property rights in the light of ILO Convention 169 (*Sarayaku People v. Ecuador* 2012, para. 161).

the State's failure to conduct a serious and responsible consultation (...) encouraged, by omission, a climate of conflict (...). Although it is true that numerous meetings took place, (...) it is also evident that there was a disconnect between these efforts and a clear determination to seek consensus, which encouraged situations of tension and dispute.

Ibid., para. 198

As to Indigenous communal land rights, the Court recalls its previous cases *Awas Tingni* (2001) and *Saramaka v. Suriname* (2007) and affirms that, in accordance with Article 21 in relation to Articles 1(1) and 2 ACHR, States have a "positive obligation to adopt special measures to ensure that members of indigenous and tribal peoples enjoy the full and equal exercise of their right to the lands that they have traditionally used and occupied" (*Sarayaku People v. Ecuador* 2012, para. 171). This must be interpreted in relation to other domestic or international instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹² Moreover, the Court assesses that the special relationship the Sarayaku people have with their land encompasses not only their livelihoods, but also worldview and cultural and spiritual identity (*Ibid.*, para. 155), based on the statements made by Sarayaku representatives in the provided evidence (*Ibid.*, paras. 150–154).

Finally, the Court concludes that:

The State, by failing to consult the Sarayaku People on the execution of a project that would have a direct impact on their territory, *failed* to comply with its obligations, under the principles of international law and its own domestic law, *to adopt all necessary measures to guarantee the participation of the Sarayaku People, through their own institutions and mechanisms and in accordance with their values, practices, customs and forms of organization, in the decisions made regarding matters and policies that had or could have an impact on their territory, their life and their cultural and social identity, affecting their rights to communal property and to cultural identity.*

Ibid., para. 232; emphasis added.

¹² Specifically, the Court argues that Articles 21 and 29 of ACHR on Indigenous communal property need to be interpreted in accordance with other international norms, included Article 1(1) and (2) of both ICCPR and ICESCR with reference the right to pursue their economic, social and cultural development, freely dispose of their natural wealth and resources, and thus not be deprived of their own means of subsistence (*Sarayaku People v. Ecuador* 2012, para.171).

Hence, the Court found that the Ecuadorian state was responsible at least since May 1999 due to the ratification of the ILO Convention 169 and the adoption of the new Constitution in 1998 (*Ibid.*, para. 176).

b) Rights to Life, to Personal Integrity, and to Personal Liberty

Although in this case fortunately no Sarayaku individual passed away, the Court decides to examine alleged violations under Article 4 ACHR on the right to life. It does so by recalling its similar previous case law in which there was no human loss but the exceptional circumstances of the case had allowed the Court to evaluate the allegations in the context of Article 4 (*Sarayaku People v. Ecuador* 2012, para. 244).¹³ The Court starts by clarifying that it is not possible to hold a state responsible any time that the right to life is at risk. However, it adds that a positive obligation on the part of the state does arise whenever the state authorities were or should have been acquainted with a situation that posed at risk the life of one or more individuals and did not take any reasonable measure to prevent such risk (*Ibid.*, para. 245). This applies in the case of the Sarayaku people because of the huge amount of explosives deposited in their territory, the almost totality of which was never removed (*Ibid.*, paras. 246–248). Hence, the Court holds Ecuador responsible for having put at serious risk the life and the physical integrity of the Sarayaku people in accordance with Articles 4(1) and 5(2) ACHR in relation with their right to communal property (Articles 21 and 1(1) ACHR) (*Ibid.*, para. 249).

c) Rights to Judicial Guarantees and to Judicial Protection

The Court frames the content of the rights to judicial guarantees and judicial protection (Articles 8(1) and 25 ACHR) by making reference to its previous case law. It thus clarifies that it is the state that has an obligation to provide effective judicial remedies that are substantiated by the rules of the due process of law (*Sarayaku People v. Ecuador* 2012, para. 260).¹⁴ The Court also specifies that the right to remedies and to judicial guarantees are pillars of both the ACHR and the principle of the rule of law in a democratic society (*Ibid.*, para. 262).¹⁵ In addition, a proper interpretation of Article 25 ACHR does not only imply (and cannot be reduced to) the existence of such legal remedies or the access to them but it also requires from the state that

13 The Court refers, in particular, to the case of *Yakye Axa Indigenous Community v. Paraguay* (2005).

14 The Court recalls its previous decisions in the cases of *Velásquez-Rodríguez v. Honduras* (1987), and *Lysias Fleury et al. v. Haiti* (2011).

15 For this argument, the Court recalls its previous decisions in the cases of *Castillo Páez v. Peru* (1997), and *Xákmok Kásek Indigenous Community v. Paraguay* (2010).

such remedies are truly effective (*Ibid.*, para. 261).¹⁶ This is also related to the legal certainty that a final judgment (i.e., a *res judicata*) shall provide on the examined right or dispute and thus the mandatory nature of compliance (and execution) of the decision (*Ibid.*, para. 263). Moreover, whenever Indigenous peoples are involved, their inherent and socio-economic characteristics, their customary law, customs, practices and values as well as their status of vulnerability (and power imbalance) need to be taken into account by the state in order to comply with its obligation of granting effective remedies (*Ibid.*, para. 264).¹⁷ In the specific case of the Sarayaku people, the lack of investigation and due diligence on the part of the state notwithstanding the many complaints filed by the Sarayaku people (*Ibid.*, paras. 270–271), irregularities in the constitutional protection lawsuit (*amparo*), the very same admission by the state that the remedy was ineffective, and the lack of compliance by the state to provide those necessary measure to ensure compliance of the *res judicata* lead the Court to conclude that Ecuador violated Articles 5(1), 8(1), 25(1), 25(2)(a), and 25(2)(c) in relation to Article 1(1) ACHR (*Ibid.*, paras. 274–278).

3.2 *Legal Argumentation Techniques of the Court*

The principal legal argumentation techniques of the Court in the case of *Sarayaku People v. Ecuador* may be grouped into the following fourfold categorisation, which, however, has no pretension to be exhaustive, but is illustrative of the peculiarities of how the Court has analysed the alleged violations in this case and reached its conclusions.

First, this case promoted the very first visit of the Court *in situ* (*Sarayaku People v. Ecuador* 2012, para. 21), which had repercussions in the proceedings. This is also linked to the Ecuadorian state's own admission of responsibility, which was clearly enunciated during the visit to the Sarayaku lands (*Ibid.*, paras. 21, 23 and 24). The visit was requested both by the Ecuadorian state in their final arguments brief during the public hearing on 5 August 2011 and by one of the presumed victims. The (then) president of Ecuador Rafael Correa Delgado approached the Court's president to formalise and organise the visit in late September 2011 (*Ibid.*, para. 18). Hence, a delegation from the Court was appointed in January 2012 with the goal to gather additional information about the alleged violations and the presumed victims in those parts of the Sarayaku lands where the events had occurred (*Ibid.*, paras. 19 and 20). The visit

16 For this argument, the Court recalls the case of *Saramaka People v. Suriname* (2007).

17 On this, the Court recalls its previous judgments in cases of *Rosendo Cantú et al. v. Mexico* (2010) and *Xákmok Kásek Indigenous Community v. Paraguay* (2010).

eventually took place in the second half of April 2012, and the Court's representatives was accompanied by delegations from the Commission, the claimants, and the state. This visit was the opportunity for the Court's delegation to hear many statements by the Sarayaku people themselves, including women, children and elderly, to visit the center of Sarayaku, and to fly over the territory where the events had occurred (*Ibid.*, para. 21). At the Court's request to the other delegations to express their opinions, the Secretary for Legal Affairs of the Presidency of Ecuador acknowledged the state's responsibility for the events occurred from 2003 on (i.e., the environmental damages, the placement of explosive, etc.) by praising the role of the then administration¹⁸ to avoid future oil extraction activities without the consent of the involved Indigenous peoples (*Ibid.*, para. 23).¹⁹ This admission eventually led to the conclusion that a dispute no longer existed. Nonetheless, the Court deemed it appropriate to ascertain the events "because this contributes to making reparation to the victims, to preventing a recurrence of similar acts and, in general, to the satisfaction of the purposes of the inter-American jurisdiction over human rights" (*Ibid.*, para. 28).

Second, the Court builds its reasoning on general principles of law. Hence, as previously mentioned, judicial guarantees and judicial protection are seen by the Court as pillars of the rule of law in a democratic society (*Ibid.*, para. 262). A pluralistic, multicultural and democratic society requires respect for Indigenous peoples' rights to culture or cultural identity and, thus, to land and to consultation (*Ibid.*, para. 159). More specifically, for the justification of the above-mentioned on-site visit, the Court adheres to the adversarial principle and procedural equality by arguing the need for the Court's delegation to be accompanied by other delegations, especially from both the claimants and the defendant (*Ibid.*, para. 20). In the same vein, the Court specifies that the statements heard during such visit were to be considered in conjunction with other provided evidence (*Ibid.*, para. 49). For the overall assessment of the provided documentary evidence, the Court finally abides by the principles of sound judicial discretion within the applicable legal framework (*Ibid.*, para. 31).

Third, the Court frames the applicable legal framework by making use of other international human rights treaties (ICCPR and ICESCR),²⁰ *ad*

18 President Correa was first elected in 2006, and the new Constitution entered into force in 2008.

19 This has eventually proved to be false in the case, e.g., of the Yasuní National Park, which has become an area of oil extraction without any process of consultation to the Indigenous peoples living there. For details see San Lucas Ceballos (2019).

20 On the use of ICCPR and ICESCR, see note 12 *supra*.

hoc international Indigenous rights instruments (ILO Convention 169 and UNDRIP)²¹ as well as domestic law and jurisprudence of Ecuador,²² and of other Latin American countries (e.g., Colombia) to sustain its arguments (*Ibid.*, paras. 160, 168 and 159). In particular, as mentioned, the Court builds an elaborated argument on how international and/or domestic legislations and jurisprudence in the region of the Americas (ranging from those Latin American countries that have ratified ILO Convention 169 to those which have not but have shown relevant domestic jurisprudence, e.g., Canada)²³ have contributed to recognise the right to consultation of Indigenous peoples and innovatively concludes that “the obligation to consult (...) is also a general principle of international law” (*Ibid.*, para. 164).

Last, but not least, the Court makes a wide use of the previous case law of the organs of the Inter-American system (*Ibid.*, para. 125) by citing numerous previous Court decisions as well as reports of the Commission as mentioned in the previous sections. For instance, it suffices to recall here how the Court builds upon the pivotal *Awas Tingni* decision (2001) to assess what Article 21 of ACHR implies in terms of Indigenous communal property in the case of the Sarayaku people (*Sarayaku People v. Ecuador* 2012, paras. 145–147); the Court recalls its reasoning in *Yakye Axa Indigenous Community v. Paraguay* (2005) to examine alleged violations of Article 4 ACHR on the right to life also in those cases in which there was no human loss (*Sarayaku People v. Ecuador* 2012, para. 244); or, again, it refers to the cases of *Castillo Páez v. Peru* (1997) and *Xákmok Kásek Indigenous Community v. Paraguay* (2010) to assess how the right to remedies and to judicial guarantees are pillars of the ACHR (*Sarayaku People v. Ecuador* 2012, para. 262).

4 *Kaliña and Lokono Peoples v. Suriname*

In January 2014, the Inter-American Commission of Human Rights, after adopting its report on the merits (*The Kaliña and Lokono Peoples* 2013), seized

21 See, in particular, on the triangulation among Indigenous participation, communal land rights and consultation by using both ILO Convention 169 and UNDRIP (*Sarayaku People v. Ecuador* 2012, para. 160, footnote 178).

22 On how Article 57 of the new Ecuadorian Constitution of 2008 fully recognises both the rights to land and consultation of Indigenous peoples see *Sarayaku People v. Ecuador* (2012, para. 168).

23 Among the best-known cases, the Court refers to judgments of the Constitutional Court of Colombia (2001), the Constitutional Court of Peru (2010), and the Supreme Court of Canada (2004) (*Sarayaku People v. Ecuador* 2012, para. 164, footnotes 206, 211, and 213).

the Inter-American Court about “a series of violations of the rights of the members of eight communities of the Kaliña and Lokono indigenous peoples of the Lower Marowijne River”, allegedly committed by Suriname (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 1). On 25 November 2015, the Court released its decision where it found the responsibility of Suriname for the violation of Articles 3 (legal personality), 21 (property) and 25 (judicial protection) of the ACHR.

The case originated from the unresolved land claims of the Kaliña and Lokono peoples aggravated by both the actions and inactions of Suriname. In 1966, 1969 and 1986 respectively the Wia Wia, Galibi and the Wane Kreek nature reserves were created by order of the president of Suriname in areas that are partly located on the Kaliña and Lokono peoples’ lands without their consultation.²⁴ Following this designation, fishing and hunting, activities essential for the material and spiritual development of these Indigenous peoples, were forbidden except partially in the Wane Kreek reserve. Later, in the last part of the 1980s and the beginning of the 1990s, the Kaliña and Lokono were forced to flee their traditional lands in the Northeast part of the country during the internal conflict between some Maroon tribes²⁵ and the military regime. After that period, some members of the community managed to come back to their territories but at the same time the tourism development projects of the State started on the same lands. Then in 1958 Suriname granted bauxite mining concessions to a company called *Suralco* until 2033. Some of these activities were planned to take place in some areas of the Wane Kreek reserve and started in 1997. Mining operations resulted in the prohibition for the Kaliña and Lokono peoples to enter their traditional territory in the Wane Kreek reserve. Furthermore, mining caused a significant environmental impact, which further contributed to the decline of fishing and hunting. Mining activities in the Wane Kreek area only ended in 2009.

Already in 1992, the Kaliña and Lokono peoples started legal actions to recover their lands before national jurisdictions and via different forms of petitions. These actions, however, failed to get recognition of traditional ownership over the claimed traditional territories. That is why the Kaliña and

24 “[T]he three reserves cover approximately 59,800 ha of the 133,945 ha claimed in this case” (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 71).

25 The Maroons are descendants of Africans who fled the colonial Dutch forced labour plantations along the coast and established their own communities in the interior rainforests. They have retained a distinctive identity based on their West African origins. For details, see <https://minorityrights.org/minorities/maroons/> (accessed November 20, 2020).

Lokono submitted their claims to the Inter-American Commission, which in turn seized the Court.

The following subsections recount the main points of the decision in the *Kaliña and Lokono* case concerning the issues of legal personality, land rights and judicial protection; they also illustrate the main legal argumentation techniques used by the Court to reach its conclusions.

4.1 *Substantive Points of the Decision and Reparations*

The Court pronounces itself on the violation of Articles 3, 21, and 25 in connection to Articles 1(1) and 2 of the ACHR. The analysis of these provisions allows the Court to address the following substantive issues: (a) the existence of a collective legal personality of Indigenous peoples; (b) the content of and limitations to Indigenous collective property rights, which includes an analysis of Indigenous participation rights and the safeguards necessary in the face of the creation and management of protected areas and of mining operations; and (c) the meaning of effective judicial protection.

a) Legal Personality

Concerning legal personality, the Court finds a violation of Article 3 of the ACHR based on the fact that the Surinamese legal framework on this matter was not amended after the Court's previous decisions, which ascertained the lack of recognition of Indigenous legal personality (*Kaliña and Lokono Peoples v. Suriname* 2015, paras. 112 and 114). In the *Saramaka* case, the Court considers that legal personality is "one of the special measures" that may allow for the enjoyment of collective rights to land (*Saramaka People v. Suriname* 2007, para. 172).²⁶ In *Kaliña and Lokono*, the Court takes a step further since it orders Suriname to grant legal personality both to the Kaliña and Lokono peoples and to all Indigenous peoples in the country, in order to ensure the conditions for the protection of their right to land and to judicial protection (Inter-American Court of Human Rights 2015, paras. 107, 279(i)(a) and 305). The novelty of the solution adopted by the Court concerns not only the recognition of collective legal personality (Lixinski 2017, 152), but also its acceptance as a necessary step to ensure the enjoyment of other rights. This is also reflected in the collective nature of the reparations that are owed to both Kaliña and Lokono peoples and to the Indigenous peoples of Suriname (MacKay 2018, 37–38). It is interesting to note that, according to Judge Pérez Pérez, who issued a partially

26 In other countries, such as Argentina, the recognition and registration of the legal personality of Indigenous peoples is a requirement for the recognition of their right to land. See Rosti (2019, 211).

dissenting opinion, the invocation of Article 3 is unnecessary, because a collective legal personality can be presumed under Article 21, and *praeter legem*, because Article 3 only grants legal personality to individuals (*Kaliña and Lokono Peoples v. Suriname* 2015, Partially dissenting opinion of Judge Alberto Pérez Pérez, para. 9). Judge Pérez Pérez, however, seems to overlook the fact that Article 21 of the ACHR literally grants individual property rights. In this sense, the Court's interpretation of Article 3 is certainly in line with the evolutionary interpretation of the scope of the rights guaranteed under the ACHR with regard to Indigenous peoples. Furthermore, the invocation of Article 3 configures an autonomous violation of the ACHR, which can be used in the future independently from the violation of Indigenous land rights.

b) Land Rights: Collective Property, Related Restrictions, and Participatory Rights

Concerning collective property rights, the Court is called upon to assess violations to Article 21 deriving from four main acts of Suriname: (1) the lack of recognition of collective property rights and failure to delimit, demarcate or grant land titles to Indigenous peoples; (2) the continuous granting of property titles to non-Indigenous persons; (3) the creation of the nature reserves; and (4) the mining concessions without free, prior and informed "consultation", (social and environmental) impact assessment, and benefit-sharing.

Before assessing the abovementioned alleged violations, the Court proceeds to delimit the scope of collective property for Indigenous peoples under Article 21 of the ACHR. This provision, interpreted in light of common Article 1 ICCPR and ICESCR on self-determination and Article 27 ICCPR,²⁷ delineates a collective right to property based on traditional occupation and use, which confers to Indigenous peoples the full enjoyment of property rights "in keeping with their community-based tradition" (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 124). Furthermore, the spiritual relationship of Indigenous peoples with land makes their traditional property titles survive even when possession had been lost involuntarily (*Ibid.*, paras. 149–159 and 152). Thus, the need to defend this spiritual relationship and the concrete enjoyment of land rights obliges States to delimit, demarcate and grant title on traditional territories

27 Article 27 ICCPR reads 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 practise their own religion, or to use their own language".

“following a consultation process” (*Ibid.*, para. 141)²⁸ which Suriname, concludes the Court, had failed to do (*Ibid.*, para. 136).

When a conflict exists between Indigenous traditional property and property titles granted to non-Indigenous third parties, states must assess on a case-by-case basis whether the limits on Indigenous land rights deriving from individual property are legal, necessary, proportional, and pursue a legitimate aim in a democratic society (*Ibid.*, para. 152). The Court proceeds then to delegate the performance of this balance of interests and rights to the national courts of Suriname (*Ibid.*, para. 156). While this subsidiarity may risk giving too much discretion to national authorities (Lixinski 2017, 153), limits to that are set out by the Court in the *Kaliña and Lokono* case, which recalls that the right balance between Indigenous rights and private titles cannot pose a threat to “the survival of the members of the indigenous communities as a people” (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 155). The survival as distinct peoples is indeed a general limit to the restrictions imposed on Indigenous rights both in the jurisprudence of the Inter-American Court and the decisions of human rights treaty bodies more generally (Cittadino 2019, 21, 35, 88–89, 111 and 160). In other words, the mere existence of private titles on Indigenous lands cannot be considered a sufficient reason to deny Indigenous peoples their traditional land rights and thus does not meet the requirements of legality, necessity and proportionality invoked by the Court. At the same time, the existence of Indigenous land claims cannot nationally produce any automatic prevalence of Indigenous rights over third-party property titles. The balance to be struck between these conflicting titles is therefore delicate and must be achieved by considering the special nature of Indigenous peoples’ rights.

Even when third-party rights do prevail and restitution is not possible, Indigenous peoples must both “obtain other lands of the same size and quality” (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 149) and be able to continue to have access to the natural resources with which they have a traditional relationship (*Ibid.*, paras. 159 and 283). The Court, therefore, foresees as a form of reparation that Suriname decides whether to expropriate and compensate non-Indigenous third parties or to grant the *Kaliña and Lokono* with alternative and comparable lands (*Ibid.*, para. 281). Until then, Suriname must additionally refrain from any actions that could interfere with the enjoyment of traditional lands by the *Kaliña and Lokono*, thus avoiding granting additional property titles to third parties (*Ibid.*, para. 282).

28 This measure is also foreseen as a form of reparation by the Court (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 279(i)(b)).

The Court similarly pronounces itself on the restrictions placed on Indigenous land rights deriving from the creation of protected areas. Since all nature reserves were created before Suriname accepted the Court's jurisdiction in 1987, the Court is not competent to reach conclusions on the modalities of the establishment of these nature reserves (*Ibid.*, para. 162). It can instead evaluate the consequences of this establishment and the management choices made thereafter. In other words, the Court is called to assess whether the restrictions on traditional land and resource use following the creation of the nature reserves was proportionate to the public interest of protecting the environment.

According to the Commission and the representatives, proportionality was not met since granting mining concession within the reserves while restricting hunting and fishing rights was hardly justifiable as proportionate (*Ibid.*, paras. 117–118). The Court reaches similar conclusions and affirms the compatibility in principle of the protection of nature through the creation of nature reserves and the protection of the rights of Indigenous peoples, going so far as to affirm that “the indigenous and tribal peoples can make an important contribution to (...) conservation” (MacKay 2018, 36–37).²⁹ In addition, the Court concludes that “the establishment, management and monitoring of protected areas should take place with the full and effective participation of, and full respect for the rights of, indigenous and local communities” (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 177).

The risk of cultural stagnation deriving from this asserted complementarity lamented by some authors (Lixinski 2017, 154; Young 2020, 181) must be relativised in the face of the circumstances of the case, which have prompted the Court to rely on the argument of the mutual supportiveness of Indigenous rights and nature protection. The Court aimed to demonstrate that access to natural resources in the reserve as well as the Kaliña and Lokono's participation in the management of these protected areas do not negatively affect the legitimate purpose of protecting the environment. This conclusion does not necessarily limit the development ambitions of Indigenous peoples in ways that are not in line with the environmental objectives of states but only requires that a number of guarantees are met when creating or managing protected areas. As affirmed by the Court, in order to ensure that natural reserves are compatible with the full enjoyment of Indigenous peoples' rights, three criteria have to be met, namely “a) effective participation, b) access and use of their traditional territories, and c) the possibility of receiving benefits from conservation” (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 181). These criteria

29 See also *Kaliña and Lokono Peoples v. Suriname* (2015, paras. 173 and 181).

mirror those established in the *Saramaka v. Suriname* decision to assess the restrictions posed on Indigenous land rights but adapt it to the possible threats posed by the existence of protected areas on Indigenous lands. In this context, the continued access to natural resources plays a specific role when it comes to ensuring the compatibility of natural reserves with Indigenous rights. Effective participation and benefit-sharing allow moreover for a double-checking and an adaptation of environmental goals with the needs of the Indigenous peoples that have land rights over the areas included in the nature reserves.

Based on these criteria, the Court reaches the conclusion that with regard to both the Galibi reserve and the Wane Kreek reserve, Suriname has violated Article 21 in conjunction with Article 23 (right to participate in government)³⁰ of the ACHR since it impeded the Kaliña and Lokono's participation in the conservation of these reserves, it denied access to some portions of their traditional land and it therefore prevented these Indigenous peoples from enjoying the benefits the reserve could yield (*Ibid.*, paras. 196–198). Therefore, the Court does not condemn the limited restrictions to access to natural resources posed by Suriname or private parties, nor the supervisory role of the state in the management of these reserves (*Ibid.*, paras. 183–184, 189 and 191). Rather, it bases the responsibility of Suriname on its failure to meet the criteria that would have ensured the compatibility of some restrictions deriving from the operation of the nature reserves with Indigenous peoples' rights. As reparation, the Court orders Suriname to adopt the necessary measures to “guarantee, by appropriate mechanisms, the Kaliña and Lokono peoples' effective access, use and participation” in the Galibi and Wane Kreek nature reserves (*Ibid.*, para. 286). In addition, the State must deal with restitution claims of the territory included in the protected areas, as in the case of the issuance of private property titles discussed above (*Ibid.*, para. 168).

In addition to the substantive points raised above, the Court based its reasoning by relying extensively not only on human and Indigenous rights instruments other than the ACHR, such as the UNDRIP,³¹ but also on international environmental law sources, including Articles 8(j) and 10(c) of the Convention

30 Article 23(1) reads as follows: “Every citizen shall enjoy the following rights and opportunities: a. to take part in the conduct of public affairs, directly or through freely chosen representatives; b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and c. to have access, under general conditions of equality, to the public service of his country”.

31 The Court makes reference to Articles 29 (right to environment), 25 (spiritual relationship with land), and 18 (participation in matters that could affect their rights) of UNDRIP (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 179).

on Biological Diversity (CBD) of 1992, decisions of the CBD Conference of the Parties,³² and Principle 22 of the Declaration of the United Nations Conference on Environment and Development (*Ibid.*, paras. 173, 177–179). This testifies to both the increasing contamination between international human rights law and international environmental law (Cittadino 2019) and the importance of soft law and non-binding standards in the evolution of the jurisprudence of the Inter-American Court (Barelli 2009; Tomaselli 2015).

Concerning the mining operations, the Court was competent to judge about the compatibility of the extractive operation started in 1997 in the Wane Kreek reserve with the collective property rights of the Kaliña and Lokono under Article 21 of the ACHR. In this respect, the Court reiterates the applicability of the guarantees elaborated in the 2007 *Saramaka v. Suriname* case to ensure the survival of Indigenous peoples when mining operations restrict their rights to collective property (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 201). In particular, three conditions must be met: (1) the state must ensure the effective participation of the members of Indigenous peoples with regard to any development and investment plans; (2) Indigenous peoples must receive a reasonable benefit; (3) no concession can be issued without a prior social and environmental impact assessment.

With regard to effective participation, the Court defines the scope of this guarantee with reference to Article 23 of the ACHR, and Articles 18 and 32 of the UNDRIP (*Ibid.*, paras. 202–203, and 305). As observed by some commentators, the way in which this requirement is framed in *Kaliña and Lokono* is more restrictive than the Court's previous jurisprudence since the Court only refers to free, prior and informed "consultation" rather than to free, prior and informed consent, as the reference to the UNDRIP would have let us presume (MacKay 2018; Hofbauer 2016, 270–272; Young 2020, 182).³³ Differently from the *Saramaka v. Suriname* case, for instance, even in the face of multiple and reiterated violations of collective property rights by Suriname, the Court does not delineate the conditions under which consent would be needed (MacKay 2018, 40–41). Notwithstanding the restrictive interpretation of participatory rights,

32 Among the decisions of the CBD Conference of the Parties referred to, two deserve specific mention, namely the Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity (Decision VI/12) and the Programme of Work on Protected Areas (Decision VI/28). They are available online at <https://www.cbd.int/decisions/cop/7> (accessed November 20, 2020).

33 Interestingly, reporting on the state's allegations, the Court refers to free, prior and informed "consultation" (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 210), where the state had explicitly referred to free, prior and informed consent (*Ibid.*, para. 204).

the Court concludes that Suriname has not met the guarantee of effective participation because the state failed to consult with the Kaliña and Lokono peoples prior to the commencement of the mining operations (*Kaliña and Lokono Peoples v. Suriname* 2015, paras. 207 and 212).

Concerning the conduct of a prior social and environmental impact assessment, the Court highlights not only that no such assessment had been conducted in 1997 when the mining operations started, but also that Suriname failed to exercise its supervisory role, by guaranteeing *inter alia* the participation of the Kaliña and Lokono, in the 2005 assessment carried out on the initiative of the mining company (*Ibid.*, paras. 214–216 and 226). The supervisory role of the state, according to the Court, derives from a joint reading of Article 21 of the ACHR with Article 32 of the UNDRIP, which imposes on states a duty to provide effective mechanisms for just and fair redress, and with the UN Guiding Principles on Business and Human Rights (*Ibid.*, paras. 221 and 224).

Furthermore, the lack of an impact assessment has aggravated the consequences of the mining operations on the Kaliña and Lokono peoples. Following bauxite extraction in the Wane Kreek reserve, an area originally created to protect the environment, tangible environmental damages have been produced, such as deforestation, water pollution and noise. These environmental impacts in turn have had consequences on the cultural survival and land rights of the Kaliña and Lokono peoples affecting the natural resources of the area and, thus, these peoples' traditional hunting and fishing activities and the possibility for them to access the area traditionally used (*Ibid.*, para. 222).

Concerning the sharing of benefits, the Court derives this duty from Article 21(2) of the ACHR, which foresees compensation in case property or its normal uses are restricted (*Ibid.*, para. 227). In this respect, the Court acknowledges the lack of this safeguard in the Surinamese legal frameworks. Furthermore, it concludes that the unrestricted access to the highway constructed to prepare for the mining operations and other exploitation activities “cannot be considered to provide a direct, mutually-agreed benefit for the peoples” (*Ibid.*, para. 229).

Having found the absence of consultation, impact assessment and benefit-sharing, the Court declares the violation of Articles 21 and 23 of the ACHR (*Ibid.*, para. 230),³⁴ and orders reparations to reverse the negative effects of the mining operations. Although the mining concession in the Wane Kreek reserve must not be revoked given that mining activities have ceased in 2009, in light of the fact that the mining licence is valid until 2033, Suriname “must take the

34 See also the partially dissenting opinion of Judge Pérez Pérez who claims no violation of Article 23 since the latter is about political participation (*Kaliña and Lokono Peoples v. Suriname* 2015, Partially dissenting opinion of Judge Alberto Pérez Pérez, para. 23).

necessary measures to ensure that no actions are taken that could affect the traditional territory” without the consultation of the Kaliña and Lokono peoples (*Ibid.*, para. 287). Furthermore, the state must be responsible for adopting and supervising the execution of an action plan, in conjunction with the mining company and with the participation of Kaliña and Lokono, in order to remedy the adverse effects of the mining operations and to ensure reforestation (*Ibid.*, para. 290). Finally, to compensate for the material and immaterial damages suffered by the Kaliña and Lokono peoples (MacKay 2018, 38), Suriname must create a community-development fund of 1 million US dollars administered by a state-nominated authority “to develop projects in the areas of health, education, food security, resource management, and others that the Kaliña and Lokono peoples consider pertinent for their development” (*Kaliña and Lokono Peoples v. Suriname* 2015, paras. 295–296).

c) Judicial Protection

The Court is also called to judge on the violation of Article 25 of the ACHR on judicial protection with regards to two allegations, namely the lack of effective remedies at national level available for Indigenous peoples alleging the violation of their rights and the failure of the state to provide the Kaliña and Lokono with the requested information on third-party property titles. Regarding the former aspect, the Court emphasises not only that states must have an adequate system of judicial and non-judicial remedies in place (*Kaliña and Lokono Peoples v. Suriname* 2015, paras. 238–239), but also that these remedies must be both effectively available for Indigenous peoples and instrumental for obtaining the redress of their rights in line with the guarantees of due process. On the existence of appropriate remedies in the national legislation, the Court concludes that the obligation to establish appropriate proceedings under national law has not been met, as ascertained in previous decisions and international reports (*Ibid.*, para. 240). Furthermore, existing remedies are judged as ineffective both because the procedures activated by the Kaliña and Lokono have not been successful and since the lack of recognition of collective legal personality would hamper the award of collective land titles (*Ibid.*, paras. 247–248, 251 and 258). On the guarantees of due process with regard to Indigenous peoples, the Court also requires the use of interpreters to guarantee mutual understanding, access to legal and technical assistance for the most vulnerable, the need to reduce physical distances with judicial and administrative bodies and to mitigate too elevated costs, and the issuance of appropriate measures to guarantee demarcation and titling. These requirements are necessary to take into account the specific characteristics that differentiate Indigenous peoples from the general population and to avoid discrimination (*Ibid.*, para. 251).

Concerning the right to access information, the Court finds a violation of Articles 25 and 13 of the ACHR. In the view of the Court, the latter provision “includes not only the right and freedom to express one’s own thoughts, but also the right and freedom to seek, receive and disseminate information and ideas of all kinds” (*Ibid.*, para. 261).³⁵ In this respect, Suriname has failed to justify its refusal to provide the respondents with the pieces of information required (*Ibid.*, para. 266). In turn, the lack of information on the extent of the property titles granted to third parties has put the Kaliña and Lokono peoples in a position of disadvantage since these could have used the details requested to better substantiate their land claims before domestic jurisdictions (*Ibid.*, para. 267). For these reasons, the Court finds a violation of Article 25 in relation to Article 13 of the ACHR (*Ibid.*, para. 268). It further establishes, as a form of reparation, that Suriname must “ensure effective collective access to justice for the indigenous and tribal peoples, and also to ensure access to the necessary information to exercise this right” (*Ibid.*, para. 305).

4.2 *Legal Argumentation Techniques of the Court*

The Court reaches the substantive conclusions discussed in the previous subsection mainly through four legal argumentation techniques. First, the Court refers extensively to its previous jurisprudence concerning the violation of Indigenous peoples’ rights in Suriname. It does so by arguing that Suriname’s legal system does not recognise Indigenous peoples’ legal personality (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 112), their right to communal property (*Ibid.*, para. 122), and their right to judicial protection (*Ibid.*, para. 240), and, finally, reiterates that Suriname has not complied with its previous decisions in these matters (Koorndijk 2019). The Court also makes reference to previous decisions on Indigenous peoples’ rights to delimit the scope of the rights analysed, although in some cases it distances itself from previous conclusions, such as on legal personality and on the scope of participatory rights.³⁶

Second, the Court relies explicitly on the conclusions reached by other UN bodies. For instance, it makes reference to the Committee on Economic, Social and Cultural Rights to embrace the interpretation that common Article 1 of ICCPR and ICESCR is applicable to Indigenous peoples (*Kaliña and Lokono*

35 According to Judge Pérez Pérez, the reference to this provision is unjustified, because access to the information requested by the respondents was not related to the democratic control of state actions, but rather to the exercise of some rights (*Kaliña and Lokono Peoples v. Suriname* 2015, Partially dissenting opinion of Judge Alberto Pérez Pérez, para. 15).

36 See sections 4.1.a and 4.1.b of this chapter.

Peoples v. Suriname 2015, para. 122). It cites General Comment no. 23 of the Human Rights Committee to support the argument on the collective scope of Indigenous communal property rights (*Ibid.*). It refers twice to the reports of the UN Special Rapporteur on the Rights of Indigenous Peoples both to support the factual conclusions that international environmental law and international human rights law are complementary bodies of law (*Ibid.*, para. 174), and to ascertain the lack of effective national remedies against the violation of Indigenous peoples' rights (*Ibid.*, para. 248). The Court also "takes note of" the UN Guiding Principles on Business and Human Rights to claim that Suriname has supervisory duties with regard to the actions carried out by national mining companies operating on Indigenous lands (*Ibid.*, para. 224; MacKay 2018, 32).

Third, as highlighted in section 4.1.b of this chapter, on the basis of Article 29(b) of the ACHR,³⁷ the Court interprets in an evolutionary way the provisions of the ACHR in light of other human rights provisions protecting Indigenous peoples' rights, such as common Article 1 of ICCPR and ICESCR, Article 27 ICCPR, and some UNDRIP provisions (*Kaliña and Lokono Peoples v. Suriname* 2015, paras. 122 and 124).³⁸ Moreover, the Court uses binding and non-binding legal instruments within the realm of international biodiversity law to found its argument that the protection of nature and the rights of Indigenous peoples must be seen as complementary.³⁹

Finally, the Court recurs to the *iura novit curia* principle to interpret respectively Article 21 in light of Article 23 and Article 25 in light of Article 13 of the ACHR (*Ibid.*, paras. 196 and 260). In the former case, the result has been to dilute Indigenous participation rights, while in the latter the right to receive information instrumental for ensuring effective judicial protection could have been probably subsumed only on the basis of Article 25.⁴⁰

A last brief remark concerns the role of on-site visits and experts, which cannot be considered an argumentation technique but rather represent a mechanism of proof when it comes to ascertain Indigenous peoples' rights (MacKay, 32–33). For instance, in *Kaliña and Lokono*, Jeremy Gilbert's testimony that Indigenous peoples "are part of the protection of nature" (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 175) was used again to find the complementarity between the protection of nature and the rights of Indigenous peoples. The on-site visit was instrumental for assessing the impact of mining activities, as in the *Sarayaku People v. Ecuador* case.

37 See note 10 *supra*.

38 On the interpretative role of the UNDRIP, see MacKay (2018, 33).

39 See the CBD and the decisions of the CBD Conference of the Parties at note 32 *supra*.

40 See sections 4.1.b and 4.1.c of this chapter.

5 Conclusions

This chapter has explored the content and the legal argumentation techniques of two pivotal decisions of the Inter-American Court of Human Rights, namely the *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador* (2012) and the *Case of the Kaliña and Lokono Peoples v. Suriname* (2015). Both these cases are extremely significant with regard to the interpretation of the Indigenous peoples' rights to land, participation and consultation in the light of the ACHR. Moreover, both decisions have not only built upon other previous landmark decisions of the Court but also added new elements for framing such rights within the Inter-American system and beyond it.

In particular, in *Sarayaku People v. Ecuador*, the Court has ascertained that the protection of communal property of Indigenous peoples, and the use and enjoyment thereof, is of utmost importance since it ensures the survival of these peoples (*Sarayaku People v. Ecuador* 2012, para. 146). Also, the Court finds interdependencies among four fundamental Indigenous rights, i.e., to culture or cultural identity, consultation, participation and land. First, it argues that the spiritual relationship between Indigenous peoples and their land includes an essential component that need to be respected, i.e., their cultural identity and worldviews. One way to safeguard this identity is precisely the right to consultation of Indigenous peoples (*Ibid.*, para. 159). Second, the Court specifies that such right to consultation is one of the fundamental guarantees to protect not only Indigenous participation but also the exercise of those rights that imply decision-making on measures likely to affect Indigenous peoples and their rights (including, their communal property) (*Ibid.*, para. 160). Last, but not least, the Court reaches the very innovative conclusion that such right to consultation – which must be prior to any measure likely to affect them – is a principle of international law (*Ibid.*, para. 164).

In *Kaliña and Lokono Peoples v. Suriname*, the Court innovatively recognises Indigenous collective legal personality as both an autonomous right and a necessary step to ensure the enjoyment of other rights, including the right to land. Concerning land rights, the Court not only emphasises the importance of demarcation of Indigenous territories but it also identifies the survival of Indigenous peoples as an important element to strike the right balance between national restrictions and the enjoyment of Indigenous property rights. Importantly, the parameter of survival must be used even when the decision on the right balance is delegated to national authorities. Finally, the Court identifies innovative requirements when establishing or managing protected areas on Indigenous territories. The main difference with respect to its previous jurisprudence is the guarantee to ensure the compatibility between

conservation and Indigenous rights, which includes the continued access to natural resources and the possibility of receiving benefits from conservation (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 181).

Both cases are, furthermore, very relevant when it comes to defining the legal scope of the rights to consultation and participation. While in *Sarayaku People v. Ecuador* consultation is framed as a general principle of international law and must be “aimed at reaching an agreement” with Indigenous peoples (*Sarayaku People v. Ecuador* 2012, paras. 177 and 185 ff.), in *Kaliña and Lokono* consultation must be free, prior and informed although no mention of consent is made notwithstanding the reference to the survival of Indigenous peoples to assess restrictions to land rights (Young 2020, 183).

The legal argumentation techniques of the Court partly coincide. First, in both cases, the Court makes a wide use of the previous case law of the organs of the Inter-American system, which is formed not only by its previous decisions but also by those ones of the Commission in those countries that have not accepted the jurisdiction of the Court (e.g., Canada, Belize, USA) as well as other reports, etc. Second, the Court invokes in both cases other international human rights treaties (ICCPR and ICESCR) and international Indigenous instruments (ILO Convention 169 and UNDRIP), but in *Kaliña and Lokono* it amply refers also to the works of other UN bodies as well as to binding and non-binding legal instruments of international biodiversity law. Third, in *Sarayaku People v. Ecuador* the Court uses a number of general principles of law (e.g., adversarial principle, rule of law) in order to cement its reasoning for legal certainty. In *Kaliña and Lokono* the Court specifically uses the *iura novit curia* principle to interpret respectively Article 21 in light of Article 23 and Article 25 in light of Article 13 of the ACHR. In both cases, the Court has performed on-site visits, without which, perhaps, the Court’s legal reasoning (but maybe not the outcome) would have been different, especially in the case of *Sarayaku People v. Ecuador*. Finally, in both cases the consideration of national circumstances has played an important role in the legal argumentation of the Court. In *Sarayaku People v. Ecuador*, the Court extensively refers to national legislation and international treaties ensuring Indigenous rights to consultation and participation, including the circumstance that Ecuador has ratified ILO Convention 169. In *Kaliña and Lokono*, the Court delegates the national judiciary system with the task to strike a balance between Indigenous land rights and third-party property titles.

As a final general reflection, we would like to point out that, while these two decisions undeniably represent a milestone for Indigenous rights in the continent, there is a need to go *beyond* them and their implementation, and point out that Indigenous peoples continue to face significant power imbalances.

Hitherto, even according to the Court, Indigenous peoples can only resist, be consulted or eventually give the consent to states' or private parties' projects (Melo 2014, 289). Giving the necessary relevance to Indigenous peoples' projects and worldviews is a challenge that the Inter-American human rights system, as well as national systems that wish to embrace Indigenous peoples' needs and fully comply with their rights, still need to appropriately face.

Bibliography

- Barelli, Mauro. 2009. "The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples". *International and Comparative Law Quarterly* 58(4): 957–83.
- Cittadino, Federica. 2019. *Incorporating Indigenous Rights in the International Regime on Biodiversity Protection: Access, Benefit-sharing and Conservation in Indigenous Lands*. Leiden and Boston: Brill.
- Doyle, Cathal M. 2015. *Indigenous Peoples, Title to Territory, Rights, and Resources. The transformative role of free, prior and informed consent*. Abingdon, New York: Routledge.
- Fuentes, Alejandro. 2015. "Judicial Interpretation and Indigenous Peoples' Rights to Land, Participation and Consultation. The Inter-American Court of Human Rights' Approach". *International Journal on Minority and Group Rights* 23: 39–79.
- Gilbert, Jérémie. 2006. *Indigenous Peoples' Land Rights under International Law. From Victims to Actors*. Ardesley (NY): Transnational Publisher.
- Gilbert, Jérémie. 2013. "Land Rights as Human Rights: The Case for a Specific Right to Land". *SUR – International Journal on Human Rights* 18: 115–35.
- Haeck, Yves, Oswaldo-Rafael Ruiz-Chiriboga, and Clara Burbano-Herrera. 2015. *The Inter-American Court of Human Rights: Theory and Practice, Present and Future*. Cambridge, Antwerp and Portland: Intersetia.
- Hofbauer, Jane A. 2016. *Sovereignty in the Exercise of the Right to Self-Determination*. Leiden and Boston: Brill.
- Koorndijk, Jeanice L. 2019. "Judgements of the Inter-American Court of Human Rights Concerning Indigenous and Tribal Land Rights in Suriname: New Approaches to Stimulating Full Compliance". *International Journal of Human Rights* 23: 1615–47.
- Lixinski, Lucas. 2017. "Case of the Kaliña and Lokono Peoples v. Suriname". *American Journal of International Law* 111: 147–54.
- Macdonald Ted, and Julie Wetterslev. 2019. "Accompanying a Search for Self-Determination. Mayagna Awas Tingni and Indigenous Land Rights in Nicaragua". *ReVista – Harvard Review of Latin America*, Spring/Summer 2019 Issue on 'Nicaragua'.

- MacKay, Fergus. 2018. "The Case of the *Kaliña and Lokono Peoples v. Suriname* and the UN Declaration on the Rights of Indigenous Peoples: Convergence, Divergence and Mutual Reinforcement". *Erasmus Law Review* 1: 31–42.
- Melo, Mario. 2014. "Derechos Indígenas en la Jurisprudencia de la Corte Interamericana de Derechos Humanos. Avances alcanzados en la sentencia del Caso Sarayaku contra Ecuador". *Anuario Facultad de Derecho – Universidad de Alcalá* 7: 277–90.
- Meyer, Peter J. 2018. "Organization of American States". *CSR Report for Congress*, 14 March. Accessed November 20, 2020. www.fas.org/sgp/crs/row/R42639.pdf.
- Organization of American States. 1959. "Declaration of the Fifth Meeting of Consultation of Ministries of Foreign Affairs. Final Act". OAS Doc. OEA/Ser.C/II.5. Santiago de Chile. Accessed November 20, 2020. www.oas.org/consejo/MEETINGS%20OF%20CONSULTATION/Actas/Acta%205.pdf.
- Pueblo Originario Kichwa de Sarayaku. 2019. "Press release: Sarayaku regarding the non-compliance of the Inter-American Court of Human Rights. The case of Kichwa Indigenous People of Sarayaku vs Ecuador". On file with authors.
- Rodríguez-Piñero Royo, Luis. 2006. "El sistema interamericano de los derechos humanos y los pueblos indígenas". In *Pueblos indígenas y Derechos Humanos*, edited by Mikel Berraondo, 153–203. Bilbao: Universidad de Deusto.
- Rosti, Marzia. 2019. "The right to consultation and free, prior and informed consent in Argentina. The case of Salinas Grandes-Laguna de Guayatayoc". In *The Prior Consultation of Indigenous Peoples in Latin America: Inside the Implementation Gap*, edited by Claire Wright and Alexandra Tomaselli, 210–24. London, New York: Routledge.
- San Lucas Ceballos, Malka. 2019. "The failure to consult Indigenous Peoples and obtain their free, prior and informed consent in Ecuador. The Yasuní ITT case". In *The Prior Consultation of Indigenous Peoples in Latin America: Inside the Implementation Gap*, edited by Claire Wright and Alexandra Tomaselli, 197–209. London, New York: Routledge.
- Tomaselli, Alexandra. 2015. "The UN Declaration and the Organization of American States". In *The United Nations Declaration on Minorities. An Academic Account on the Occasion of its 20th Anniversary (1992–2012)*, edited by Ugo Caruso and Rainer Hofmann, 319–32. Leiden: Brill.
- Tomaselli, Alexandra. 2016a. "Indigenous Peoples' Right(s) to Land in Latin America". In *Problems and Progress in Land, Water and Resources Rights at the Beginning of the Third Millennium*, edited by Cristiana Fiamingo, 285–308. Broni: Edizioni Altravista.
- Tomaselli, Alexandra. 2016b. *Indigenous Peoples and their Right to Political Participation. International Law Standards and their application in Latin America*. Baden-Baden: Nomos.
- Tomaselli, Alexandra. 2017. "The Right to Political Participation of Indigenous Peoples: A Holistic Approach". *International Journal on Minority and Group Rights* 24: 390–427.

Young, Stephen. 2020. *Indigenous Peoples, Consent and Rights: Troubling Subjects*. Oxon and New York: Routledge.

Case Law

Please refer to the list on pages viii–xvi.

Litigating Linguistic Rights of National Minorities in Central, Eastern, and South-Eastern Europe

Francesco Palermo and Sergiu Constantin

1 Introduction*

Central, Eastern, and South-Eastern Europe is perhaps the most advanced laboratory for minority rights in general and linguistic rights of persons belonging to minorities¹ in particular. This is due to a number of circumstances, notably including the strong impact of international conditionality: in order to be admitted to the *European club* after independence or re-gained full sovereignty in the 1990s, these countries had to accept conditions in terms of respect of human and minority rights (Pinelli 2004). As a consequence, all of them have ratified the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM), most of them have ratified the European Charter for Regional or Minority Languages (ECRML),² and all their Constitutions have been influenced, to a different extent, by the international community through special assistance, expertise and, in some case, by *de jure* or *de facto* imposition.

This extraordinary development of minority (including linguistic) rights has not been followed, however, by full and effective implementation. Besides the *usual* difficulties in implementing linguistic rights that are common to most countries (high costs, administrative and organisational requirements,

* The chapter has been written and discussed together. Francesco Palermo is mainly responsible for parts 1, 2, 3.1, 3.2, 3.3, and Sergiu Constantin for parts 3.4, 3.5, 3.6, 3.7 and 4.

- 1 In this chapter the general term "persons belonging to national minorities" or simply "national minorities" is used. This term is the most recurrent in international practice, encompassing a wide range of minority groups, including religious, linguistic, and cultural as well as ethnic minorities, although the individual countries often use different terminology. In particular, in several Western Balkan countries, the expression "community" is used rather than minority, and sometimes a legal difference is associated with the term. Precisely to avoid possible misunderstandings, the terminology chosen follows the practice of international organisations such as the Council of Europe and the OSCE.
- 2 For the full list of ratifications, see the webpages of the FCNM and the ECRML at <https://www.coe.int/en/web/minorities/etats-partie> and <https://www.coe.int/en/web/european-charter-regional-or-minority-languages/signatures-and-ratifications> (accessed December 1, 2020).

political will, structural conditions), in the context of Central, Eastern, and South-Eastern Europe several other obstacles hamper effective implementation. Among them, the fact that linguistic rights of minorities have generally been granted as a concession to the international community rather than out of sincere commitment,³ and that, consequently, minority rights are highly politicised and (often irrationally) linked to threats to the territorial integrity of the new states. Nationalistic policies are all the more frequent, the more insecure and fragile the identity of a country is (Sabanadze 2009).

In such a context, the role of the judiciary in determining principles and criteria for linguistic rights also presents a contradiction: on the one hand, given the extent of linguistic rights granted by the domestic legislation, as well as the overall disappointing degree of their implementation, the courts have been less decisive than one could have expected in enforcing the linguistic rights of national minorities; on the other hand, considering that most of these countries are still in transition and the rule of law – including judicial independence – is not yet fully achieved and in some case openly regressive (Halmai 2012), the role played by judicial decisions on linguistic rights is all but insignificant.

This chapter casts some light on the adjudication of linguistic rights of national minorities in Central, Eastern, and South-Eastern Europe, by examining the relevant case law and, above all, by trying to infer the underlying principles and criteria developed by the courts. It concludes that courts are overall quite deferential to the general political climate in their respective country and tend to uphold the interpretation provided by the main political actors, i.e., by the majority. At the same time, however, some judicial decisions clearly indicate that courts try to emancipate from the mainstream political options and are increasingly able to impose non-majoritarian decisions (usually on procedural grounds), thus proving evidence of a slow but evolving establishment of the rule of law. It is argued that the role of the courts as guarantors of linguistic rights of persons belonging to national minorities will be key to the ongoing battle (Halmai 2017) on the enforcement or dismantling of the rule of law.

3 In fact, most of these states were (re-)established having a clear titular majority in mind, and minorities in most cases were at best tolerated, if not expressly repressed.

2 Language Rights in Central, Eastern, and South-Eastern Europe: Main Features and Criteria for Selection of Cases

Language issues are deeply intertwined with other aspects of minority rights, to which they are a precondition (e.g., educational rights) or instrumental (e.g., participation rights).⁴ Linguistic rights are thus conditioned, in practice, by factors that may be linked with the overall approach to minority rights. This goes, in particular, for the territorial scope of application of the rights. Due to the widespread suspicion vis-à-vis territorial solutions to ethno-national claims in Central, Eastern, and South-Eastern Europe (Palermo 2016), minority rights, including linguistic rights, are usually not defined in territorial terms but are rather conceived as rights valid for the state as a whole. However, in practical terms, almost all countries make the use of linguistic rights of national minorities conditional upon a minimum threshold of minority language speakers (in most cases 20%) in a given territory.⁵ This discrepancy between rights designed as non territorial but practically limited to specific territories is one of the reasons that make implementation of linguistic rights sometimes difficult and has led to some important clarifications by the courts on the territorial scope of application of linguistic rights.

Moreover, when linguistic rights are litigated and adjudicated in courts, several different aspects are considered: seldom is the linguistic issue at stake decided as a matter of principle; rather, it is often linked with other issues (administrative procedures, consumers protection, territorial scope of norms, etc.), that make it sometimes difficult and arbitrary to identify the relevant cases. In this analysis, the cases are classified according to the main language-related element brought to the attention of the respective court. Accordingly, the analysis looks at the cases dealing with language laws in general – both on state language(s) at the national and sub-national level and on laws on the use of minority language(s) – with the use of language(s) in dealings with the

4 See for these links the commentaries adopted by the Advisory Committee on the Framework Convention for the Protection of National Minorities (ACFC), especially the one on linguistic rights of persons belonging to national minorities. They are available online at <https://www.coe.int/en/web/minorities/thematic-commentaries> (accessed December 1, 2020). See further Palermo (2013).

5 Most of the countries provide for a threshold of 20% (usually at local level, but sometimes also at national level, such as in North Macedonia) in order to allow the official use of minority languages. In some cases, thresholds are even higher, such as in the case of Croatia and Estonia, where the requirement is that of a minimum of 33% (“at least one third of the population”) and 50% respectively of minority language speakers at local or district level. This practice is criticised by the ACFC for being too high. See ACFC (2005) and ACFC (2002a).

administration, with the use of language(s) in judicial proceedings, with language(s) in the media, with personal and geographic names, and with the use of language(s) in schools.

For each of these areas, the main principles and interpretative criteria are highlighted in a comparative perspective, balancing thematic, geographic and chronological breadth in the cases covered. Some general conclusions are drawn on the trends of comparative adjudication regarding language rights of persons belonging to national minorities in Central, Eastern, and South-Eastern Europe.

3 Specific Areas of Significant Judicial Adjudication of Linguistic Rights

3.1 *Language Laws*

a) At the Level of the State...

Not infrequently, linguistic rights for minorities, while generous on paper, are limited by measures adopted to strengthen majority identities. This clearly emerges especially in the field of language laws. In this area, in fact, a permanent tension is to be noted in several Central, Eastern, and South-Eastern European countries between progressive rights for minorities and repressive practice by majorities. All countries of Central, Eastern, and South-Eastern Europe have adopted specific legislation on the use of languages of national minorities, demonstrating the high level of protection of these rights in the region. At the same time, several of these countries have also adopted laws protecting and promoting the state language, often demonstrating much greater interest in the language of the majority than in those of the minorities. Even more significantly, the languages of the minorities are often seen as the main threat to the development of the state language, thus something against which the state language must be protected. This often creates a clash between laws aimed at protecting the minority languages and state language laws. Such a clash sometimes ends up in courts and courts find it difficult to strike the right balance between the legitimate protection of the state language and the necessity that this protection is not pursued at the expenses of the fundamental rights of persons belonging to national minorities.

The first landmark decision on the relationship between promotion of the state language and protection of minority languages was issued in 1997 by the Slovak Constitutional Court. Two years before, the Slovak parliament, controlled by a nationalistic majority, passed a law on the state language of the Slovak Republic (State Language Law).⁶ While aimed at protecting and promoting the use of the state language, the law contained several restrictions

⁶ Act no. 270/1995 of 15 November 1995 on the state language of the Slovak Republic.

to the use of minority languages in Slovakia, including the obligation to use exclusively the state language in written communication with the administration. The law also provided for pecuniary sanctions in case of violation of some of its provisions. The law prompted sharp reaction of the international community, and was challenged in courts by some opposition parties, including the party representing the Hungarian minority (ACFC 2001). The Slovak Constitutional Court declared some provisions of the 1995 State Language Law to be contrary to the Slovak Constitution, notably the obligation to use the state language in written dealings with the administration and the imposition of fines (Constitutional Court of Slovakia 1997). The Court, however, dismissed several other complaints against the law and upheld its overall aim and structure by affirming that the protection and promotion of the national language is a legitimate interest protected by the Constitution, limited only by the general interpretative criteria of proportionality and reasonability. The most immediate consequence of the judgment was the elimination of fines for breaches of the State Language Law. In 1999, the Slovak parliament adopted a law on the use of languages of national minorities (Minority Languages Law)⁷ which, however, designs a relatively weak system of protection of linguistic rights of national minorities (Venice Commission 2010). In 2009, the 1995 State Language Law was substantially amended and sharpened in a number of provisions, limiting again the possibility to use minority languages in public life and even in some private undertakings, and fines for the violation of the state language law were re-introduced.⁸ While largely criticised and considered problematic by the international community,⁹ the new regulations have not been challenged in the Constitutional Court.

In 2011, an amendment to the State Language Law reduced the maximum amount of fines and the number of situations in which sanctions apply. In the same year, Slovakia introduced fines also in the 1999 Minority Languages Law and lowered the threshold required for the exercise of language rights from 20% to 15%. However, until 2021 there will be no change in practice regarding the number of bilingual municipalities in which persons belonging to a national minority can exercise their linguistic rights in relations with public authorities. Municipalities in which the 2011 census recorded a minority

7 Act no. 184/1999 of 10 July 1999 on the use of the languages of national minorities.

8 Act no. 318/2009 of 30 June 2009 and Act no. 357/2009 of 9 September 2009 on the state language of the Slovak Republic. These amendments to the State Language Law were complemented by some guidelines (Principles of the Government) for their implementation adopted in December 2009.

9 See in particular Venice Commission (2010).

population of at least 15% will become officially bilingual in 2021 if the census confirms that their minority population still reaches this threshold (Marko *et al.* 2019).

Another seminal decision on the compatibility of restrictive state language laws with the fundamental rights guaranteed by the Constitution, particularly those of persons belonging to national minorities to use their own language, was issued in 1999 by the Ukrainian Constitutional Court. The Court was asked whether Article 10 of the Ukrainian Constitution, which confers the status of state language to Ukrainian only, obliges the state to ensure “the comprehensive development and functioning of the Ukrainian language in all spheres of social life throughout the entire territory” of the country and guarantees “the free development, use and protection of Russian and other languages of national minorities”. The case brought to the Court concerned, *inter alia*, the status of the state language in educational institutions and had to determine the concrete balance between the constitutional obligation to promote the state language and the constitutionally guaranteed opportunity for Russian and other minority languages to develop freely (Hrytsenko 2008).

The Court tried to find an interpretative way out of the dilemma. It stated that Ukrainian is the “obligatory means of communication in the whole territory of the country for all the bodies of the state power and local governments”, i.e. the language of acts, work, correspondence, documentation, etc (Constitutional Court of Ukraine 1999). However, “together with the state language, local governments (as well as state bodies in Crimea) could use Russian and other minority languages within the framework provided by the legislation” (*Ibid.*). In practice, other languages could also be used in education, while Ukrainian must be utilised as the language of teaching. The Court also stressed the symbolic meaning of the state language for the Ukrainian nation:¹⁰ “It entirely corresponds to the state-building role of the Ukrainian nation, specified in the Preamble of the Constitution, which has traditionally resided on the territory of Ukraine, makes up the majority of its population and has given the official name to the state” (Constitutional Court of Ukraine 1999, point 4 of the resolute part). Notwithstanding some limited openings to the use of minority languages, it has been noted that “the decision was unequivocally perceived as being aimed at strengthening the position of the state language, primarily by implicitly ruling out Russian as an acceptable language in the central power bodies” (Kulyk 2002, 112).

10 For a comprehensive historical and legal analysis of language disputes in Ukraine, see Ulasiuk (2010a). For post-Maidan developments, see Kulyk (2016).

It is precisely the systemic effect of the decision that matters more than its specific contents. Even more than the ruling by the Slovak Court, the Ukrainian decision contributed to *set the tone* with regard to the interplay between state language and minority languages and such a constitutional tone contributed greatly to creating the overall climate discouraging the use of minority languages even where this was legally possible.

By the same token, the Ukrainian Constitutional Court ruled in 2000 that the ratification procedure of the ECRML followed by Ukraine in 1999 was unconstitutional (Constitutional Court of Ukraine 2000). The reasoning of the Court was based on the procedure for ratification of international treaties, which was declared unconstitutional,¹¹ while the contents of the Charter were not scrutinised. As a result, however, the ratification of the Charter was delayed until 2003.¹² It had been noted at the time that while based on procedural grounds, the decision of the Court, given the overall political climate in the country at that time, “was a political one, designed to foster exclusionary language policies” (Stepanenko 2001, 324).

The issue is still unresolved and language laws remain a bone of contention in Ukraine. In July 2012, then president Yanukovich pushed the *Verkhovna Rada* (parliament) to adopt a new law on language policy (State Language Policy Law),¹³ which provided for the possibility to make minority languages regional languages in the regions where they are spoken by at least 10% of the population.¹⁴ According to the then opposition, the law aimed at making Ukraine a *de facto* bilingual Ukrainian-Russian country. The international community pointed out the polarizing effect that the law had on Ukrainian society.¹⁵ At the culminating point of the Euromaidan demonstrations on 23 February 2014, the *Verkhovna Rada* voted to abrogate the law, but the then acting president Turchynov vetoed the abrogation. The matter was then referred to the

11 The issue was whether or not the speaker of the parliament did or did not submit the law to the president for promulgation. The speaker of the parliament followed the procedure laid down in Article 7 of the Law on ratification of international treaties, which exempts such laws from presidential promulgation. According to the Court such provision violated the constitutional division of powers between the parliament and the president and was thus declared unconstitutional.

12 Law no. 802-IV of 15 May 2003 on ratification of the European Charter for Regional or Minority Languages.

13 Law no. 5029-VI of 3 July 2012 on the principles of the state language policy of Ukraine.

14 In at least 9 regions of Ukraine Russian has been declared regional, thus co-official language (ACFC 2018, para. 119).

15 See Venice Commission (2011). This opinion of the Venice Commission referred to an early draft of the law, not to the final text, which was rushed through in parliament.

Constitutional Court by a qualified minority of deputies of the *Verkhovna Rada*, and in 2018 the Court declared it unconstitutional not on merit but rather due to severe violations of the rules on parliamentary adoption of legislation and evidence of voting fraud (Constitutional Court of Ukraine 2018).¹⁶

This decision deserves particular consideration. Article 152 of the Ukrainian Constitution stipulates that laws are declared unconstitutional in whole or in part by the Constitutional Court “in the event that they do not conform to the Constitution of Ukraine, or if there was a violation of the procedure for their consideration, adoption or their entry into force established by the Constitution of Ukraine.” Thus, there are two grounds for declaring a law unconstitutional: (1) violation of constitutional principles; (2) violation of constitutional procedure for the consideration, adoption or entry into force of the respective regulation. It is obvious that a law may be unconstitutional on one or both grounds. However, in its 2018 decision, the Constitutional Court declined to check the constitutionality of the provisions of the 2012 State Language Policy Law after it declared the law unconstitutional on procedural grounds. The Court noted that the compliance with the constitutional procedure for the review, adoption and entry into force of laws is one of the conditions for the legitimacy of the legislative process. If this condition is violated, the Court held, “it is not the content of the law, but the procedure of its reviewing and adopting, established by the Constitution of Ukraine, which becomes the subject to constitutional control” (Constitutional Court of Ukraine 2018, para. 5). This line of reasoning is quite astonishing. The Constitutional Court was so wary of dealing with contentious language issues that it preferred to diminish its own constitutional authority.¹⁷

In April 2019, the *Verkhovna Rada* adopted a new law on the state language (State Language Law)¹⁸ and president Poroshenko promulgated it few days before the end of his term in office. The preamble of the 2019 State Language Law declares that it aims “to strengthen the state-building and consolidating

16 For example, some MPs whose votes were counted were not even present at the *Verkhovna Rada* and some MPs voted with cards of other MPs.

17 Several constitutional judges issued dissenting opinions. For instance, judge Mykola Melnyk highlighted the Court’s self-limitation of constitutional authority and argued that it “was not only entitled but also required to review the content” of the 2012 State Language Policy Law which, in his view, was “clearly anti-Ukrainian” as it laid the ground for a “systematic Russification of Ukraine” and for the “destruction of the Ukrainian state” (Constitutional Court of Ukraine 2018; Dissenting opinion of judge Mykola Melnyk).

18 Law no. 2704-VIII of 25 April 2019 on ensuring the functioning of Ukrainian as the state language. It replaced the 2012 State Language Policy Law which had been declared unconstitutional by the Constitutional Court in February 2018.

functions of the Ukrainian language [and to] increase its role in ensuring the territorial integrity and national security of Ukraine.”

The 2019 State Language Law reaffirms the status of Ukrainian as the sole state language functioning as “the language of interethnic communication” and provides for its mandatory use throughout the entire territory of Ukraine “in the exercise of powers by government authorities and local self-government authorities, as well as in other common spheres of public life.”¹⁹ It establishes liability for the deliberate distortion of the Ukrainian language in official documents, in particular “the deliberate use of the Ukrainian language in violation of the requirements of the Ukrainian spelling and standards of the state language, as well as the creation of obstacles and restrictions in the use of the Ukrainian language.”²⁰ Besides regulating language use in several fields, the 2019 State Language Law establishes the Commissioner for the Protection of the State Language who *inter alia* monitors the compliance with the requirements of the Law.²¹ In December 2019, the Venice Commission concluded that the 2019 State Language Law fails to strike a fair balance between the legitimate aim of strengthening and promoting the state language and safeguarding national minorities’ linguistic rights. The Law establishes a differential treatment that is “very problematic from the perspective of non-discrimination” and contains several provisions “which impose limitations on the freedom of expression and the freedom of association” (Venice Commission 2019, para. 137) as enshrined in the European Convention on Human Rights (ECHR). In June 2019, a group of MPs challenged the constitutionality of several provisions of the 2019 State Language Law.²²

The language issue is extremely contentious in Moldova too. The 1989 law on the use of languages of the Moldovan Soviet Socialist Republic (Law on the Use of Languages)²³ referred to the “existing Moldo-Romanian linguistic identity” and “retained the designation of ‘Moldovan’ as the name of the republic’s official language while implicitly recognising that it was the same as Romanian” (King 2000, 131). The 1991 Declaration of Independence of the Republic of Moldova²⁴ refers to “Romanian language” but Article 13(1) of the

19 2019 State Language Law, Article 1(1)-(4), (7), (8).

20 *Ibid.*, Article 1(6).

21 *Ibid.*, Articles 49–52.

22 At time of writing, this issue has not been resolved. The parliament however decided to start drafting a new law on national minorities, which is supposed to provide the required balance with the promotion of the state language.

23 Law no. 3465 of 1 September 1989 on the use of languages on the territory of the Moldovan Soviet Socialist Republic.

24 Law no. 691/1991 of 27 August 1991 on Declaration of Independence of the Republic of Moldova.

1994 Constitution declares that the state language is Moldovan based on the Latin alphabet.

In the period 2001–2009, president Voronin and the parliament dominated by his Party of Communists attempted to make Russian an official language alongside Moldovan, as well as to reintroduce Russian as a compulsory subject in all schools. In December 2003, the parliament adopted a “Concept of the state national policy of the Republic of Moldova”,²⁵ a political document based on the theory that Moldovan and Romanian are different languages. The “Concept” was approved by law with the aim to serve as guidelines for public authorities in promoting a Moldovan-Russian bilingualism. The ruling party failed to implement its national policy because of strong public opposition including street protests and demonstrations. Post-2009 governments focused overall on the promotion of the state language (Prina 2015, 57; Baar and Jakubek 2017, 80).

In 2013, several MPs asked the Constitutional Court of Moldova to interpret Article 13(1) of the 1994 Constitution in conjunction with the preamble of the 1991 Declaration of Independence. The Court noted that the 1991 Declaration of Independence lays out a set of key legal principles and values which represent the foundations of the republic and emphasised its “transversal function” in relation to other constitutional provisions in a manner similar to the general principles regarding the rule of law, fundamental rights and freedoms, political justice and pluralism (Constitutional Court of Moldova 2013, paras. 117–18). Following a historical and teleological interpretation, the Court observed that the struggle for the Romanian language and the Latin alphabet was a key element of the process of national emancipation which found its consecration in a Declaration of Independence that has a constitutional status. The 1991 Declaration of Independence and the 1994 Constitution form a so-called “constitutionality block” in which they have equal status and the interpretation of the Constitution shall take into consideration not only the fundamental law, but also the constitutional principles laid down in the Declaration of Independence (*Ibid.*, paras. 87, 90, 114 and 122). The Court concluded that, in case of divergence between the Declaration of Independence and the Constitution, the primary constitutional text of the Declaration of Independence prevails, thus the state language of Moldova is Romanian.

In October 2017 the Constitutional Court of Moldova delivered a positive opinion on a legislative initiative by a group of MPs to amend Article 13 of the

25 Law no. 546/2003 of 19 December 2003 on the approval of the Concept of the national policy of the Republic of Moldova.

Constitution by replacing the term “Moldovan language based on Latin alphabet” with the term “Romanian language”. The Court referred to the *res judicata* status of its 2013 decision on the state language which is binding for all public authorities, legal entities and persons and cautioned against politicizing constitutional issues. While recalling the legislature’s obligation to implement the Court’s decisions, the Court emphasised that a passive parliament fails to fulfil its main function as legislative body (Constitutional Court of Moldova 2017, paras. 10, 12 and 13). The Court stated that its interpretative judgments have constitutional value. Being an integral part of the Constitution, they are mandatory for all public authorities and apply directly. Thus, irrespective of whether a constitutional amendment is adopted or not, the 2013 decision of the Court regarding the state language takes precedence over Article 13 of the Constitution and is directly applicable without any other formal requirements (*Ibid.*, paras. 14 and 22).

In January 2018, a group of MPs challenged the constitutionality of several provisions of the 1989 Law on the Use of Languages and other subsequent laws,²⁶ which stipulate *inter alia* the obligation of public authorities to translate all regulations into Russian language, to ensure that persons belonging to national minorities enjoy the right to use Russian in relations with public institutions and to provide education in Russian at all schools levels.²⁷ The applicants claimed that the challenged provisions breach Article 13 (“State language, use of other languages”) and Article 16 (“Equality”) of the Constitution: they are inconsistent with the status of Romanian as the state language of Moldova and discriminate against national minorities other than Russian minority, as their languages do not enjoy the special status granted to Russian language.

The constitutional judges examined the 1989 Law on the Use of Languages and found its provisions obsolete and inconsistent with several subsequent special regulations on the use of languages.²⁸ This Soviet-era law had fallen

26 E.g. Law no. 382/2001 of 19 July 2001 on the rights of persons belonging to national minorities and the legal status of their organisations; Law no. 173/1994 of 6 July 1994 on the publication and enactment of official acts; Law no. 797/1996 of 2 April 1996 on parliament’s rules of procedure.

27 According to Article 3 of the 1989 Law on the Use of Languages, Russian is “the language of communication among the USSR’s nations” and its use along the state language guarantees “an effective national-Russian, and Russian-national bilingualism”. Article 4 of the Law guarantees the use of other minority languages according to their “national-cultural needs”.

28 E.g. Law no. 382/2001 of 19 July 2001 on the rights of persons belonging to national minorities and the legal status of their organisations; Law no. 344/1994 of 23 December 1994 on the special legal status of Gagauzia; Law no. 173/2005 of 22 July 2005 on the basic provisions of the special legal status of the settlements on the left bank of the Dniester; Law

into desuetude, so it had been impliedly repealed. Second, the Court focused on the protection and promotion of the state language as a legitimate aim and cited the FCNM Explanatory Report²⁹ and the preamble of the ECRML.³⁰ It is worth noting that Moldova ratified the FCNM but not the ECRML. Interestingly, the Court declared that the ECRML is a source of law for Moldovan authorities based on Article 38 of the Vienna Convention on the Law of Treaties regarding provisions of treaties that become binding on third states as customary rules of international law (Constitutional Court of Moldova 2018, para. 40). The Court declared that Moldovan legislation must ensure a comprehensive use of Romanian in all areas of public life, state institutions and education system. This is an essential condition for the protection and promotion of the state language. Third, the constitutional judges noted that the challenged provisions do not provide for an exclusive use of Russian and pointed out that the official status of the Romanian language does not preclude the additional use of Russian “in certain social spheres”. For the Court, it would be a “logical fallacy” (*Ibid.*, para. 41) to accept the argument that the use of Russian alongside the state language is unconstitutional. After referring to Moldova’s obligations under international law and the international instruments (including the ECRML) providing minimum standards for minority protection, the Court declared that the protection of linguistic rights of national minorities is part of Moldova’s “constitutional identity” (*Ibid.*, para. 46) and recalled that it is for the democratically elected parliament to design, debate and decide on the general principles of minority-related legislation. The Court bluntly stated that it is not its role to “deliver to MP s disappointed by a state policy – which is in line with international standards in the field – a victory at the Constitutional Court, a victory they could not secure in the [parliament]” (*Ibid.*, para. 48).

b) ... and at the Level of Sub-state Entities

In the context of a multinational federal country, state language laws can also be adopted at the level of the concerned sub-national unit. An important example for the purposes of this chapter is represented by the Russian Federation. Article 68(2) of the Constitution of the Russian Federation guarantees the right of the republics composing the Russian Federation to establish

no. 1227/1997 of 27 June 1997 on advertisement, Law no 125/2007 of 11 May 2007 on the freedom of conscience, thought and religion.

29 “[K]nowledge of the official language is a factor of social cohesion and integration” (FCNM Explanatory Report, para.78).

30 “[P]rotection and encouragement of regional or minority languages should not be to the detriment of the official languages and the need to learn them” (ECRML Preamble).

their own state languages, alongside with Russian which has official status throughout the territory of the Federation. Most of the republics composing the Russian Federation have adopted language laws making the language of the titular nationality a co-official language of the republic. Only in a few cases, however, these laws were challenged in courts, thus confirming the relatively limited role played by courts in defining the contours of this matter, even less in recent times. In some not too recent cases, however, the Constitutional Court of the Russian Federation has been called to interpret the concrete meaning of Article 68(2) of the Constitution with regard to state language laws adopted by some sub-national entities.

In 1998, the issue at stake was whether the provision of the State Language Law of the republic of Bashkortostan requiring the proficiency in the Bashkir language (alongside with Russian) in order to stand for the election of the president of Bashkortostan was in compliance with the said provision of the Russian Constitution. The Court found this provision in breach of the federal Constitution (Constitutional Court of the Russian Federation 1998). According to the judgment, Article 68(2) of the federal Constitution grants the right for the republics to determine additional official languages in their territories as a means to preserve bilingualism (multilingualism) of their multinational people, but this is just a right and not an obligation. This right, however, cannot extend to the provision of special linguistic requirements for acquiring passive electoral rights, since political rights are recognised and guaranteed by the federal Constitution and cannot be limited by linguistic proficiency in a language that can never be the only official language of a republic. In other words, only proficiency in Russian could be imposed as a legal requirement.

In 2004, the Russian Constitutional Court established an important interpretative principle with regard to the choice of alphabets for languages that are official at sub-national level. For the Court, the right granted by the federal Constitution to the constituent republics to establish other official languages in their territories in addition to Russian does not extend to the choice of the alphabet for that language (Constitutional Court of the Russian Federation 2004). The State Language Law of the republic of Tatarstan not only declared Tatar as the state language of the republic (alongside with Russian according to the federal Constitution), but also envisaged to switch from the Cyrillic to the Latin alphabet for the Tatar language.³¹ The Court declared that the power to legislate on the alphabet to be used for the written languages in the Russian

31 The Tatar language was originally written in Arabic characters. These were replaced by the Latin script in the 1920s and in 1939 the Soviet authorities imposed the exclusive use of the Cyrillic alphabet. For details, see Sebba (2006).

Federation is vested with the federal level, since this represents a guarantee against possible disadvantages suffered by Russian citizens if any republic would be allowed to introduce a different script. The existence of a single alphabet in the Russian Federation is essential, according to the Court, as it guarantees the balanced functioning of the Russian language and the state languages of the republics “within a common language space”.³²

In this decision, the Court deliberately omits reference to the fact that where local official languages exist, Russian (in Cyrillic script) is always official too and the linguistic regime the republics may institute is just bilingualism: no document, sign, or any act may be written in the local language only, thus the right for any Russian citizen to obtain information in a language s/he can understand and read is granted. The ruling has therefore the function of posing clear limits³³ to the linguistic freedom of constituent republics and it is not by chance that it was issued with regard to Tatarstan, which used to be the most proactive republic of the federation with regard to the assertion of its own regional identity and language and used to enjoy a special status before the centralising wave imposed by president Putin (Sharafutdinova 2013).

3.2 *Use of Language(s) in Dealings with the Administration*

According to international standards, the right to use a minority language extends both to the private and the public sphere (see in particular Article 10 FCNM). Since the freedom to use the minority language in private is a fundamental freedom of each person and does not require, in principle, any authorisation by the public authorities to be exercised, the legal regulation of linguistic rights and freedoms usually concerns the public sphere or at least areas of public interest (such as the media). Within the public sphere, the first and main field where linguistic rights of persons belonging to national minorities come to the fore is the possibility to use minority languages in written and oral communication with public authorities, particularly with the administration (Woehrling (2005, 160–63)). It is not surprising that most of the cases involving linguistic rights relate to the use of minority languages in dealings with the public administration. The question of relevance to this chapter is to identify essential interpretative principles and criteria governing the issue.

32 As appropriately reminded by the ACFC (2007, para. 199), however, “it is difficult to draw a clear distinction between the right to use a minority language and the right to choose the alphabet for the use of the language at issue. The choice of alphabet, as part of the right to use a minority language in private and in public [...] should be decided by the person concerned”.

33 For broader considerations, see Trochev (2008).

In this regard, the most relevant aspect is the threshold of speakers provided by most legislation in Central, Eastern, and South-Eastern Europe, in order to allow the official use of recognised minority languages in dealings with the public administration, especially at the local level. In no case has a court declared the threshold provided by the legislation for allowing the use of minority languages at the local level as disproportionate or unreasonable and therefore unconstitutional.³⁴ This might be an indicator of the difficulty for the courts to challenge the balance determined by political agreement between the right to use a minority language and the necessary numbers to make such right effective.³⁵ At the same time, however, it might also be the consequence of an established practice followed by nearly all countries in the region to agree on a shared common denominator, represented by a threshold of 20% of minority-language speakers to make that language official at the local level. In fact, where higher thresholds have been introduced, such as in Estonia or in Croatia, this has been sharply criticised by the “soft-jurisprudence” (Packer 2004, 45) of international monitoring bodies,³⁶ which in some case led to the lowering of the threshold.³⁷

In other words, while courts have never substantially challenged the thresholds established by the legislator of the respective countries, thus undoubtedly showing (excessive?) deference in this respect, they have also been confronted with uniform standards applied throughout the region and thus were rarely called upon to scrutinise such standards. An interesting and indicative case confirming this approach was decided by the Romanian Constitutional Court.

34 As it has been the case, on the contrary, in Austria, where the Constitutional Court declared that the threshold of at least 20% of minority-language speakers determined by the legislator was arbitrary and unconstitutional, thus lowering the threshold to 10% (Constitutional Court of Austria 2001) The Court ruled that a Carinthian municipality with 10.4% Slovene speakers should be considered an “administrative district with mixed populations” within the meaning of Article 7(3) of the State Treaty of Vienna, implying that Slovenian is recognised as an official language, thus enabling its use in official dealings at local level. It must be pointed out, however, that implementation of this decision took ten years: only after a difficult political compromise in 2011 was the threshold put at 17.5%. This demonstrates how difficult it is, in practice, to enforce by judicial decision a principle that is not accepted by the (or, in the case of Austria, only by some) political forces. See Pirker (2010) and Marko *et al.* (2019).

35 In the language of the Canadian Charter of Rights and Freedoms, this could be phrased with the formula “where numbers warrant”. See Section 23 of the Canadian Charter of Rights and Freedoms (1982).

36 See ACFC (2002a) and ACFC (2002b), At the time when the ACFC issued these Opinions, in both Estonia and Croatia the threshold set by the legislator was 50%.

37 In 2002, Croatia lowered the threshold from 50% to 33%. For the case of Croatia, see Petričušić (2004) and Palermo (2011).

The Court was asked to rule on the constitutionality of the 2001 Local Public Administration Law.³⁸ Articles 19 and 76(2) of the law stipulate that in territorial units where a national minority amounts to at least 20% of the population, citizens have the right to use the respective minority language, in writing or orally, in relations with local public administration authorities and to receive the answer both in Romanian and in their mother tongue. Article 120(2) of the Romanian Constitution establishes the general principle that in the territorial units where citizens belonging to a national minority are significantly represented, provision shall be made for the oral and written use of that national minority's language in relations with local public administrative authorities, under the terms stipulated by the organic law. In rejecting the claim and thus maintaining the constitutionality of the law, the Court directly applied Article 10(2) FCNM.³⁹ The Court found that the contested law is nothing but the implementation of the FCNM provision: "the law of local public administration merely states and fixes the details of the enforcement of the provisions in Article 10(2) of the FCNM, which, according to Article 11(2) and 20(2) of the Constitution, may be directly enforced" (Constitutional Court of Romania 2001, para. I.1.). This ruling confirmed that the courts retain the power to determine whether a numerical threshold for the use of minority languages with the administration is proportionate, and that such determination is directly influenced by the comparative practice and the international standards.

In 2013 and 2014, the Romanian High Court of Cassation and Justice (HCCJ) issued two decisions which affected the right to use minority languages in relations with the public administration (Marko *et al.* 2019). According to Article 76(3) of the 2001 Local Public Administration Law, in municipalities where the minority population reaches the 20% threshold, local authorities shall employ persons who know the respective minority language in positions requiring interactions with the public. Article 117 of the law states that the secretary of a territorial-administrative unit has the task to ensure the transparency of and the communication to the interested authorities, institutions and persons, of the documents issued by the local council and mayor. In 2011, a small municipality with 93% ethnic Hungarian population advertised the position of secretary of the municipality. The job requirements included *inter*

38 Law no. 215/2001 of 23 April 2001 on the local public administration.

39 Article 10(2) of the FCNM states: "In areas inhabited by persons belonging to national minorities *traditionally or in substantial numbers*, if those persons so request and where such a request corresponds to a *real need*, the Parties shall *endeavour* to ensure, *as far as possible*, the *conditions* which would make it possible to use the minority language in relations between those persons and the administrative authorities" (emphasis added).

alia knowledge of the Hungarian language at advanced level. One of the candidates challenged this language requirement at the regional Court of Appeal and the National Council for Combating Discrimination. The plaintiff claimed that the language requirement discriminated against persons belonging to the Romanian majority. Both the anti-discrimination body and the court rejected the complaint. The National Council for Combating Discrimination emphasised that the knowledge of the respective minority language is an occupational requirement in line with Romanian anti-discrimination law. The Court of Appeal held that the local authorities acted in accordance with the specific minority related provisions of the law on local public administration. The plaintiff appealed both decisions and the case came before the HCCJ. In its first decision, the HCCJ held that administrative jobs that require interactions with citizens are only those involving a “direct contact” with the public, such as working at an information counter. The Court stated that as the secretary holds a management position within the hierarchy of the civil service, s/he does not have direct contact with citizens but only coordinates the communication activities (High Court of Cassation and Justice of Romania 2013). The judges reiterated this argument in the second decision but contradicted themselves in a phrase that illustrates the Court’s apparent ideological bias: “The fact that the secretary of the municipality has direct contact with Romanian citizens of Hungarian ethnicity in the exercise of his/her tasks cannot objectively justify, in itself, the imposition of Hungarian language knowledge as occupational requirement in a state in which the relations between citizens and public authorities are conducted in Romanian, as official language” (High Court of Cassation and Justice of Romania 2014 part II). As a court of cassation, one of the tasks of the HCCJ is to ensure uniform interpretation and application of the law by all lower courts. Therefore, one may argue that the restrictive approach of the HCCJ rendered inoperable a basic language right of national minorities in Romania (Marko *et al.* 2019, 248–49).

3.3 *Use of Language(s) in Judicial Proceedings*

A particular segment of the right to use languages in dealings with the administration regards the language regulation in judicial proceedings. In this area, international standards are weaker than in other fields (including with regard to the right to use minority languages with the administration as a whole) and thus conditionality has operated to a much lesser extent as compared to other areas. It must be recalled, in particular, that with regard to judicial proceedings, Article 10(3) of the FCNM does not go significantly beyond the minimum requirement of the assistance of an interpreter in criminal proceedings with no additional costs for the person, which is already prescribed by Article

6 of the ECHR. Slightly more advanced on this subject is the ECRML, which contains provisions also with regard to civil and administrative proceedings, although it leaves to the signatory states a broad discretion as to the measures to implement these provisions (Woehrling 2005, 165–75).

Judicial proceedings thus remain, to a large extent, the domain in which national authorities have the broadest margin of discretion in regulating the language issue, limited only by the guarantee of the basic individual right to be informed in a language that the person understands. While such an approach might be justified as the judicial proceedings have to take in due account the speediness and effectiveness of administration of justice, there is broad scope for improvement in this area (Cardi 2007).

Against this background, it is no surprise that courts abstain from challenging restrictive provisions as to the use of minority languages in judicial proceedings, since the standards in international and usually also in domestic constitutional law overall support or at least do not discourage such provisions.

The Ukrainian Constitutional Court ruled in 2008 that the preferential use of the state language in civil and administrative proceedings is in line with the Constitution (Constitutional Court of Ukraine 2008). More precisely, the Court upheld the provisions of the Code of Civil Procedure (Article 7) and of the Code of Administrative Court Proceedings (Article 15) which provide that the trials be conducted in the state language and at the same time guarantee the rights of citizens to use their native language or a language they have command of. Drawing on its own precedent from 1999 on the meaning of the official status of the state language, the Court reiterated that the Ukrainian legal system presupposes the use of the state language as a mandatory means of communication in all spheres of public life. The right to use other languages in public, including in judicial trials, is to be seen as an exception to this rule. Such an exception guarantees that citizens who have insufficient or no command of the state language are allowed to use their language or the language of their preference (i.e., Russian) in official dealings including in civil and administrative trials, while at the same time preserving the constitutional privilege of the state language (Constitutional Court of Ukraine 2008, para. 6.1.). For the Court, the linguistic rights of national minorities in Ukraine in judicial proceedings are “completely in line with the European Charter for Regional or Minority Languages ratified by Ukraine” (*Ibid.*).

It must be noted, however, that in its decision the Court deliberately narrowed the scope of constitutional guarantees of language rights, by interpreting Article 10 of the Constitution as a mere non-discrimination provision, and “remained silent on the duty of the state to ensure the exercise of language rights of national minorities” (Ulasiuk 2010b, 299–300). The ruling was

described as “a ritualistic political act of state support for the Ukrainian language, aiming to satisfy the nationalistic public during visible reverse trends of re-Russification” (Stepanenko 2003, 118). The Court, in other words, chose a formalistic and restrictive approach which safeguarded the elementary linguistic rights of minorities in judicial proceedings but ruled out any positive support by the state for the minority languages: only the state language deserves support through positive measures, while all other languages are guaranteed only insofar as their speakers are not directly discriminated against in their linguistic rights. This is also the approach of the current Ukrainian regulations on language policy. Article 14 of the 2019 State Language Law stipulates that judicial proceedings shall be conducted in Ukrainian and all court records must be kept in the state language. A language other than Ukrainian may be used in court proceedings in accordance with the procedural Codes and the special regulations on the judiciary. As mentioned earlier, the 2019 State Language Law has been challenged before the Constitutional Court but no decision has been issued yet by the Court.

3.4 *Use of Language(s) in the Media*

In the field of media, courts have been asked to intervene essentially in two areas. On the one hand, they have been called to check the compatibility of media broadcast in minority languages with the constitutional provision of official status to the national language only. On the other hand, quotas for state language broadcast imposed by some countries have been scrutinised with regard to their compatibility with minority rights as well as with the freedom of the media.

As to the first set of issues, an important decision was issued by the Constitutional Court of North Macedonia in 1998, i.e., before the constitutional amendments introduced by the so called Ohrid Framework Agreement in 2001, which expanded the linguistic rights of the non-majority communities in the country, notably of the Albanian group. At the time of the judgment, the Constitution of North Macedonia clearly established the official status of the sole Macedonian language throughout the territory of the country, while recognising the right of persons belonging to national minorities, when sufficiently representative, to use their own language in some areas of public life, such as in dealings with local public administration, in education, and in the media. Against this background, a political party lodged a complaint against the law on radio broadcasting, claiming that the provisions ensuring the use of minority languages in the public radio was impeded by the constitutional provision on the official status of the Macedonian language. The Constitutional Court found that a limited radio broadcast in the minority language was

absolutely compatible with the status of Macedonian as the sole official language of the State (Constitutional Court of North Macedonia 1998). The Court was satisfied that there is no contradiction between the official status of one language only and the use of minority languages in some areas as provided by the law.

Following the same rationale, the Ukrainian Constitutional Court upheld in 2007 the national law on cinematography which provided for quotas for the state language with regard to movies. The law dictated a complex system of quotas for domestically produced movies as well as for the transmission of foreign movies, with the aim to guarantee that most of the movies performed in the country's cinemas and television were in Ukrainian, as a means to promote the state language as prescribed by the Constitution. The suit was commenced by a number of MPs, who claimed that the quotas for movies were in contrast with the protection of minority languages as well as with the freedom of media and of profession. The Court rejected the claim, affirming that the privileged status conferred to the state language by the Constitution allows (and in some circumstances even mandates) positive measures aimed at protecting the state language against the influence of foreign languages (Constitutional Court of Ukraine 2007).

In both cases, thus, the courts showed deference to the choices of the legislature and used the margin of appreciation conferred in this issue by the respective Constitution to uphold the balance already achieved by the political forces. Conversely, in a 2003 case, the Latvian Constitutional Court recognised language quotas for private media as being not in conformity with the Constitution. A group of MPs challenged a provision of the law on radio and television stipulating that the proportion of foreign languages programs created by a broadcasting organisation must not exceed 25% of the total airtime per day. They claimed that the challenged norm hinders the right of private organisations to broadcast programs in minority languages and restricts the right of persons belonging to national minorities to receive information in minority languages. The Court found that the "implementation of the challenged norm has neither furthered more extensive use of the state language nor advanced the process of integration" of national minorities and held that such limitation to the use of languages "cannot be regarded as socially needed in the democratic society" (Constitutional Court of Latvia 2003, para. 4.1.).

3.5 *Personal Names*

International standards are very detailed with regard to the right of persons belonging to national minorities to have their name spelled in its original form and written in official documents according to the rules of the minority

language, including phonetic pronunciation.⁴⁰ Where states have a discretion, however, is in the use of the alphabet. It is consistent with the FCNM, for example, if states provide that names of their citizens be written in the alphabet of the state language.⁴¹

Such discretion has been sometimes used (and abused) by some countries to restrict the linguistic (and in this case also identity) rights of persons belonging to national minorities, and again courts have been overall deferential when called upon to challenge such practices. An interesting case in point is Lithuania.⁴² The country's legislation provided that spelling of names and their registration in official documents must be in the state language and alphabet only. This rule obliged persons belonging to some national minorities to have their names spelled differently than in their native language, such as in the case of persons belonging to the Polish minority, since the Polish language has letters that are alien to Lithuanian. In 1999, the Lithuanian Constitutional Court ruled on the constitutionality of the norms stipulating that in passports, the names of Lithuanian citizens belonging to national minorities should be written in Lithuanian letters, as they are pronounced. The Court referred to the status of the Lithuanian language as the official language of the state and emphasised the fact that it therefore had a "constitutional value" which made its use compulsory in public life. The judges upheld the constitutionality of the name-related legislation, noting that a passport is an official document certifying a permanent legal relationship between an individual and his/her country of citizenship. This type of relations belongs to the public sphere of the state, thus, the names of individuals must be written in the state language. The Court emphasised that "[i]n case legal norms provided that the names and family names of these citizens had to be written in other, non-Lithuanian letters, then not only the constitutional principle of the state language would be denied but also the activity of state and local government institutions, that of other enterprises, establishments and organisations would be disturbed" (Constitutional Court of Lithuania 1999, item 7).

40 See in particular Article 11 FCNM.

41 See ACFC (2004), In this First Opinion on Azerbaijan, the ACFC noted that language should not be disconnected from its essential elements such as the alphabet. "While recognising that the Azerbaijani authorities may, in accordance with Article 11 of the Framework Convention, use the Latin alphabet when writing the names of persons belonging to national minorities, the Advisory Committee expects that the right to official recognition of names in minority languages be fully respected in this connection" (ACFC 2004, para. 58).

42 For details on the Lithuanian case, see Marko *et al.* (2019, 240–42).

The reasoning of the Court reflects a strong ideological bias against linguistic heterogeneity within a clear assimilationist paradigm. First, in the logic of ethno-nationalism, assigning a constitutional value to the Lithuanian language puts the state language hegemony at the heart of the nation-building project. The use of non-Lithuanian letters in a personal identification document would undermine a basic constitutional principle. Second, from this perspective of an “instrumental language ideology” (May 2012, 2019), linguistic diversity would “disturb” not only the functioning of state institutions but also of the whole society.

In 2009, the Lithuanian parliament asked the Constitutional Court to interpret the main points of its 1999 judgment (a power conferred to the Court). The Court provided a slightly more nuanced interpretation, but the substance remained the same: a Lithuanian passport should contain the names of individuals written in the state language. Exceptionally, it would be possible “to specify the name and family name of the individual in other, non-Lithuanian graphic signs of writing and in non-grammaticised form in other sections for entries of the passport when the individual requests so; such entry of the name and family name of the individual in non-Lithuanian graphic signs of writing in other sections for entries of the passport should not be made equal to the entry regarding the identity of the individual made in the state language” (Constitutional Court of Lithuania 2009, para. 8).

In 2014, the Ministry of Justice asked the Constitutional Court another interpretation of some points of its judgment of 1999. The Court stated that, in certain cases, following the prior approval of the State Commission of the Lithuanian Language,⁴³ non-Lithuanian names and surnames can be registered not only in Lithuanian characters but also in different characters of the Latin alphabet which are consistent with the tradition of the Lithuanian language and do not violate the rules of the national language (Constitutional Court of Lithuania 2014, para. 7). In other words, no names may be written in the Cyrillic script which is an indirect discrimination of any person – member of a national minority – whose mother tongue uses the Cyrillic alphabet.

In more recent years, a number of Lithuanian courts found that the refusal to register personal names in their original spelling was discriminatory and contrary to the jurisprudence of the European Court of Justice and the European Court of Human Rights (Mickonytė 2017). For instance, in February

43 The State Commission of the Lithuanian Language is the main official body responsible for the implementation of language policies and *inter alia* has the task of submitting conclusions to state institutions on the draft legal acts that contain provisions regulating the use of the state language.

2017, the Supreme Administrative Court of Lithuania decided that competent authorities must issue a citizen belonging to the Polish minority a passport in which her name is written in its original form, i.e., with the letters “x” and “w” which do not exist in the Lithuanian alphabet (Supreme Administrative Court of Lithuania 2017). The Court held that such measure is necessary in order to protect the right to private and family life guaranteed under Article 8 ECHR (Mickonytė 2017, 360–61).

3.6 *Place Names*

The right to give places a name in a minority language (or, as it is more frequent, also in the minority language alongside with the language of the majority), albeit clearly established in international standards,⁴⁴ is subject to the same general conditions for linguistic rights as a whole, i.e., to numerical thresholds.⁴⁵ The courts have in some occasions been asked to interpret the conformity of thresholds for the establishment of bilingual municipalities with the respective Constitution, but also to determine the relationship between the right to toponymy in minority languages and the constitutional preference for the state language.

The first set of issues is exemplified by two decisions adopted by the Constitutional Court of Croatia before the radical change in attitude brought in 2002 by the adoption of the constitutional law on the rights of national minorities (Law on National Minorities),⁴⁶ which started a new and more favourable phase for the protection of minority rights in Croatia (Petričušić 2004). Prior to that law, the Croatian legislation and even more its interpretation were marked by significant nationalism and the rights of national minorities were limited and scarcely implemented. With regard to place names in minority languages, the legislation provided for a threshold of at least 50% of persons belonging to national minorities in order to make the minority language co-official in the territory of that individual administrative unit, including with respect to the toponymy in minority languages. The first autonomy statute of Istria, adopted in 1994, tried to circumvent this provision by establishing a “presumption of

44 See again Article 11 FCNM.

45 Although the FCNM provides that the right to co-official place names in minority languages should not be limited to areas where “minorities reside in substantial numbers” (the “substance” having to be determined by the national authorities, that usually impose a threshold of 20%, as stated above), but also to areas where national minorities reside “traditionally” (Articles 10 and 11 FCNM), this second aspect is often neglected by the national authorities. See ACFC (2006) and ACFC (2011).

46 Constitutional Law of 13 December 2002 on the rights of national minorities.

bilingualism” in the region and allowing each municipality, irrespective of the numerical threshold, to determine the co-official status of Italian alongside with Croatian including for the official name of the municipality concerned. The government challenged the statute on as many as 35 different grounds, including the criteria for determining the official names of the municipalities. The Court struck down most provisions of the statute (Constitutional Court of Croatia 1995). In upholding the government’s observations, the Court affirmed that it follows from the principle of equality between all citizens of the republic, irrespective of the region in which they live, that only the Constitution and the law can recognise or limit individual freedoms and rights. It follows that only the state could regulate special minority rights, as exceptions to the principle of equality. Besides the formal equality approach, this argument contains another basic contradiction, because it was the national legislation that transferred the concrete enforcement of minority rights to the municipalities, even though the Court certainly had a point in ruling that the content of the first Istrian statute exceeded its competence (*ultra vires*).

The second case arose from an administrative appeal of the Istrian regional government against an order imposed by the central government to remove bilingual signs displayed in the regional headquarters and offices of the town of Pazin/Pisino (Constitutional Court of Croatia 2003). The case was complex and essentially administrative in nature. The relevancy for purposes of this chapter was that the Court rejected the case of the Istrian administration, but basically on the grounds of the law that was in force at the time of the removal of signs: indeed, the Court ruled that the legislative situation in 1998 enabled central authorities to remove the bilingual signs, whereas subsequent evolution of the laws at least partly changed the picture.

The new course was epitomised by the Constitutional Court’s decision to declare inadmissible a referendum aiming at amending the Law on National Minorities in 2014. The proposed referendum’s objective was to reintroduce the threshold of 50% for linguistic rights as opposed to 33%, which is what the law demands.⁴⁷ The target was in particular the country’s Serbian minority, as the initiative came from a radical nationalistic group protesting against the display of bilingual signs (in Latin and Cyrillic script) in Vukovar. The Court found that although enough signatures had been collected to call a referendum, the question itself was unconstitutional, as the proposed change would

47 Article 12(1) of the 2002 Constitutional Law on the rights of national minorities provides that the units of local self-government must guarantee “the equal official use of the language and script” used by a national minority if members of the respective national minority account for “at least one third of the population of such unit”.

undermine minority rights (Constitutional Court of Croatia 2014).⁴⁸ In 2019, the Court further stroke down parts of the amended city statute which were making it more difficult to use Serbian (and the Cyrillic alphabet) in Vukovar for official purposes, for instance making services and documents available in Serbian only upon request (Constitutional Court of Croatia 2019).

Particularly remarkable is the restrictive interpretation given by some high courts to the FCNM and domestic legislation on minority protection. For instance, the Supreme Administrative Court of Lithuania held that the FCNM is “a document of a political and policy-making character and not a normative document” (Supreme Administrative Court of Lithuania 2009). This astonishing statement challenges the legally binding character of the FCNM but the Court reiterated this position in 2011 and 2013 rulings regarding the use of minority languages on public signs and street names (Marko *et al.* 2019). The judges consistently held that all inscriptions displayed in public should be in the state language. Therefore, it is illegal to display signs and street names in minority languages (Supreme Administrative Court of Lithuania 2011). In 2013, the Court required the local authorities of Šalčininkai district to remove all bilingual signs from private homes and replace them with Lithuanian language signs, despite the fact that residents paid for the bilingual signs and displayed them on their private properties (Supreme Administrative Court of Lithuania 2013). According to the narrow interpretation of the judges, only the names of organisations of national minorities and their information signs could be displayed in a minority language, next to the state language (*Ibid.*). Such ideologically biased rulings allow state interference even into the private sphere without restriction or necessary justification (Marko *et al.* 2019, 238–39). The approach of the Lithuanian judges stemmed from a state language ethos and a national narrative whereby linguistic assimilation is a legitimate aim. As the Constitutional Court put it, “state language preserves the identity of the nation, it integrates a civic nation, it ensures the expression of national sovereignty, the integrity and indivisibility of the state, and the smooth functioning of the state” (Constitutional Court of Lithuania 1999).

3.7 *Use of Minority Language(s) in Schools*

One of the most important areas where linguistic rights of national minorities have been frequently challenged in courts is that of education. The right to receive instruction in or of their mother tongue is an essential component of linguistic rights of persons belonging to national minorities, since it makes

48 For more details, see Dudás (2015).

possible the perpetuation, the promotion, and not least the public use of minority languages (Milian i Massana 1994). It is in this area that the more significant and courageous steps have been taken by courts. There are several examples where courts have struck down restrictive governmental policies regarding education in minority languages and have thus strengthened the rights of minorities. At the same time, however, there are also remarkable cases of judicial endorsement of restrictive practices in some case upholding clearly discriminatory legislation adopted by governments against some national minorities.

The first case of relevance is a seminal judgment by the Latvian Constitutional Court in 2005. The Court was asked to check the constitutionality of some amendments passed in 2004 to the 1998 Education Law,⁴⁹ which aimed at restricting the availability of education in Russian language. The amended law prescribed, *inter alia*, that not less than 3/5 of the total number of classes be given in the state language, thus limiting the teaching in minority and foreign languages. Such amendment clearly targeted the education in Russian language and reduced the opportunities for Russian speakers⁵⁰ to obtain education in their mother tongue. The Court upheld the amended law and considered it in line with the constitutional preference for the state language as a means for strengthening the national identity (Constitutional Court of Latvia 2005). The Court dismissed the argument that such a policy had a negative impact on the rights of persons belonging to national minorities, because in its opinion the system still allows for education in minority languages. In addition, and more importantly, the Court based its decision on the theory of occupation, which has been developed since the independence of Latvia from the Soviet Union: accordingly, the Russian speakers in Latvia are not to be considered as a national minority, but as settlers who moved into the country during the time of an illegal occupation by a foreign state. These people (and their children, even if born in Latvia) are thus denied, in principle, the citizenship of the country (although this gradually changed over time)⁵¹ and are denied the status of a national minority and the rights connected to this status, including education in their mother tongue.⁵² The only Russian

49 Law of 5 February 2004 on amendments to the Education Law (which was adopted on 29 October 1998).

50 In the 2011 census, 26.9% of the residents self-identified as ethnic Russians. However, 37.2% of the population of Latvia speak Russian at home. For details, see the information published by the Central Statistical Bureau of Latvia at <https://www.csb.gov.lv/en/statistics/statistics-by-theme/population/census> (accessed December 1, 2020).

51 On the complex process of reduction of statelessness in Latvia, see Kemp (2001, 153–65).

52 On these issues, with particular regard to educational rights in Latvia, see Silova (2006).

speakers that can be considered a national minority in Latvia are thus the so called “old Russians”, i.e., those who were settled in Latvia before the Soviet occupation (1939), who make up about 7% of the population and for whom the pedagogical offer in their mother tongue allowed by the system would be more than sufficient.

What is striking in this judgment is, in particular, the timing of the decision. It was adopted just a few days before the FCNM entered into force in Latvia.⁵³ This made it possible for the Court to avoid the analysis of compatibility between the amended Education Law and the FCNM, which would have been extremely problematic, also considering that, according to the Latvian Constitution, international treaties prevail over ordinary legislation. Aware of that, the Court denied that the FCNM could have become a norm of international customary law: “the fact of signing the Minority Convention and the content of it do not restrict Latvia in realization of such an education policy, which it considers as well-grounded” (Constitutional Court of Latvia 2005, para. 8.2). Against this background, the Court also provides its peculiar reading of the FCNM and of the comparative practice developed by the signatory states. The Court ruled that the FCNM allows the states parties to define what a national minority is, and its implementation in the various countries would justify the exclusion of the Russian community from the scope of the FCNM, even after its entry into force in Latvia: “The practice of the European Union Member States in realization of the Minority Convention [*sic*] testifies that the aim of the above [mentioned] Convention usually is to protect the assimilated ethnic minorities from vanishing. In fact, in the understanding of this Convention, in Western Europe there are no ethnic minorities, the greatest part [*sic*] of which does not know the State language. In the same way, in the greatest number of the European Union Member States this Convention is not applied to the post-war settlers and the greatest part of Russians of Latvia may be regarded as such” (*Ibid.*, para. 9).⁵⁴ Thus, the Court is extremely diligent in finding peculiar arguments to support the overall minority policy of the government and, more generally, the spirit of the (drafters of the) Constitution, reducing to the greatest extent the scope of minority rights, including in education.

In 2019, the Latvian Constitutional Court reiterated the same approach on the same issue, by upholding the further amendments to the 1998 Education Law that further strengthened the role of the state language in minority

53 The decision was adopted on 13 May 2005 and the FCNM was ratified by Latvia on 6 June 2005.

54 For a reading of the judgment in light of the FCNM, see Palermo (2008).

schools. According to the amendments introduced in 2018,⁵⁵ “in the education programmes of ethnic minorities, from Grade 1 to Grade 6, the acquisition of the study content in the official language is ensured at least in the amount of 50% of the total workload of classes in the school year, including foreign languages” and “in the education programmes of ethnic minorities, from Grade 7 to Grade 9, the acquisition of the study content in the official language is ensured at least in the amount of 80% of the total workload of classes in the school year, including foreign languages”. According to the Court, such provisions are fully compatible with the Constitution as they represent ways to “integrate [ethnic minorities] into the common democratic identity” of the country (Constitutional Court of Latvia 2019a).⁵⁶ A further decision was delivered in November 2019, when the Court applied the conclusions from the earlier case to private schools. Upholding the legislation, the Court found it fully in compliance with the right to education, the rights of national minorities and the prohibition of discrimination (Constitutional Court of Latvia 2019b; Dimitrovs 2020).

In September 2017, Ukraine adopted a new Education Law⁵⁷ which has drawn strong condemnation both domestically and internationally. The contested provisions concern the use of minority languages. Article 7(1) of the 2017 Education Law lays down the following principles: a) the language of the educational process in Ukraine’s schools is the state language; b) persons belonging to Indigenous peoples have the right to study in their mother tongue – along with the state language – in communal educational institutions at the pre-school, primary and secondary school levels; c) persons belonging to national minorities have the right to study in their mother tongue⁵⁸ – along with the state language – in communal educational institutions⁵⁹ at pre-school

55 Law of 22 March 2018 on amendments to the Education Law introduced *inter alia* new para. 1¹ and 1² at Article 41 of the Education Law which regulates the education programmes of ethnic minorities.

56 For more details, see Dimitrovs (2019) and Kascian (2019).

57 Law no. 2145-VIII of 5 September 2017 on education.

58 The Ministry of Education and Sciences of Ukraine uses “native language” and “mother tongue” as interchangeable terms in its Position Paper on the Article 7 of the 2017 Education Law: “[P]rovided that ‘in accordance with the law’ the guarantees for national minorities are preserved with regard to the education in the *native language* at some levels of education, and the study of the *mother tongue* at other levels of education in state and municipal educational institutions (and not only ‘through national cultural societies’), there is no narrowing of the content or scope of constitutional rights provided in Article 53 of the Constitution” (Government of Ukraine 2017, 12; emphasis added).

59 Ukrainian education system consists of state, communal, private, and corporate educational institutions. While state educational institutions are established by the central

and primary school levels; speakers of minority languages which are EU official languages may receive some of their education at secondary school level through the medium of their mother tongue, along with the state language; d) persons belonging to national minorities and Indigenous peoples have the right to study their mother tongue as a subject in communal institutions at secondary school level or in “national cultural associations”.

The Law does not define the terms “national minorities” and “Indigenous peoples” and does not specify the proportion of education that will take place in their languages. Indigenous peoples enjoy the most favourable regime as they have the right to study in their mother tongue also at secondary school level. According to Article 7(4), “one or more subjects” may be taught in two or more languages – that is, state language, English and other EU official languages. This provision has two implications. First, the establishment of such type of education is not a guaranteed right, but an option left at the discretion of public authorities. Second, in practice, persons belonging to national minorities might be treated differently depending on whether their mother tongue is an official EU language or not. While speakers of minority languages which are official languages of the EU may receive at least some of their secondary level education through the medium of their mother tongue, other national minorities will only be entitled to teaching of their languages as a subject. The 2017 Education Law establishes a hierarchy among three categories of languages: languages of Indigenous peoples; languages of national minorities which are EU official languages (e.g., Hungarian, Polish, Romanian, Slovak); languages of national minorities which are not EU official languages (e.g., Belarusian, Gagauz, Moldovan, Russian).

The Venice Commission’s Opinion on the 2017 Education Law concludes that “Article 7 contains important ambiguities and does not appear to provide the guidance needed from a framework law in the application of the country’s international and constitutional obligations. It contains some guarantees for education in the minority languages, mainly limited to primary education, though the exact scope of such guarantees is not as clear as it could be” (Venice Commission 2017, para. 120). The Commission continued that Article 7 is silent on “the subjects of the protection, the relevant territorial areas or the necessary criteria, procedures, or the stakeholders involved” and this vagueness “raises a clear issue of legal uncertainty likely to create serious problems of interpretation and application” (*Ibid.*, paras. 62 and 67). The Commission concluded that

government, communal educational institutions are established by region (*oblast*), district (*raion*) or local self-governments. Corporate educational institutions are based on the principles of public-private partnership (Cserniczó and Oros 2019, 15).

some provisions of Article 7 do not comply with international instruments binding on Ukraine. For instance, the principle of compulsory education in the state language applies to private schools with no exception. This is a violation of Article 13 of the FCNM regarding the right of minorities to set up and manage their own private schools. (*Ibid.*, para. 105). Moreover, the different treatment applied to national minorities according to whether their language is or is not an official language of the EU raises questions in the light of the principle of non-discrimination (*Ibid.*, paras. 105 and 109). The hierarchisation of minority languages places persons belonging to the Moldovan minority in a very peculiar situation: they could be treated differently depending on whether they consider Romanian or Moldovan to be their mother tongue. As mentioned earlier, in 2013, the Constitutional Court of Moldova held that the state language of the Republic of Moldova is Romanian. However, Ukrainian authorities continue to treat Moldovan and Romanian as two distinct minority languages (Government of Ukraine 2016).

In October 2017, a group of MPs challenged the 2017 Education Law before the Constitutional Court. They argued that it narrows the content and scope of the existing right of persons belonging to national minorities to study in their mother tongue in secondary schools, violates the principle of legal certainty, and discriminates on linguistic and ethnic grounds. In July 2019, the Court held that the disputed provisions of the law comply with the Constitution (Constitutional Court of Ukraine 2019). The Court noted that the state must ensure the comprehensive development and functioning of the Ukrainian language in all spheres of public life throughout the entire territory of the country and argued that the 2017 Education Law provides persons belonging to national minorities with “means and mechanisms” for the realisation of the right to study (in) their mother tongue along with the state language, since this is a precondition for “their full integration into Ukrainian society” and a “conscious unification of citizens within the territory of Ukraine” (*Ibid.*, para. 3). According to the Court, the 2017 Education Law does not preclude the study of languages of national minorities; it ensures a balanced approach to the study of state language and creates the legislative prerequisites for the effective functioning and development of the state language as a means of communication and socialisation. Its provisions are aimed at creating for all citizens of Ukraine the conditions necessary to attain a high level of state language proficiency which, in the future, will enable them to carry out professional activities in Ukrainian (*Ibid.*, para. 3–4). Finally, the Constitutional Court held that the law is consistent with the requirement of legal certainty because “the essence of certain disputed provisions [...] is revealed through the lexical meaning of words” (*Ibid.*, para. 4).

In January 2020, Ukraine adopted a new law on complete general secondary education (Secondary Education Law).⁶⁰ The new regulations follow only partially the previous recommendations of the Venice Commission. The positive change regards the use of minority languages in private education. While the 2017 Education Law and the 2019 State Language Law applied the principle of compulsory education in the state language to private schools with no exception, Article 5 of the 2020 Secondary Education Law stipulates that private educational institutions which do not receive public funding have the right to freely choose the language of the educational process while remaining under the obligation to ensure that students achieve proficiency in Ukrainian according to state standards. The 2020 Secondary Education Law however maintains the differential treatment between national minorities deemed discriminatory by the Venice Commission (2017). The 2020 Secondary Education Law does not specify the minimum amount of time to be allocated to the teaching in languages of Indigenous peoples and national minorities. It seems that the school authorities have the power to decide whether and to what extent persons belonging to minority groups can study in their mother tongue. The new regulations contain no safeguards to prevent arbitrary decisions by school authorities. In March 2020, a group of MPs challenged the minority-related provisions of the 2020 Secondary Education Law before the Constitutional Court. At time of writing, the Constitutional Court had not ruled on the case.

Conversely, in a judgment from February 2010, the Ukrainian Constitutional Court struck down a restrictive language policy in education. This decision is particularly relevant as the Ukrainian Court has not been deferential to the overall nationalistic linguistic policy of the government and struck down a governmental provision on the use of language in schools. The Court declared a governmental decree of 2009⁶¹ which banned the use of languages other than Ukrainian (i.e., *de facto*, Russian) by school personnel outside of classrooms, as unconstitutional (Constitutional Court of Ukraine 2010). In practice, the decree intended to stop the quite widespread practice of school employees of schools with Ukrainian as language of instruction (teachers, administrative staff, cleaners, etc.) from talking to each other in Russian within the school building, including outside of classes and official meetings (for example during coffee breaks and alike). The case was brought by a group of MPs and the Court ruled only on who is responsible for establishing rules on languages, without dealing with the substance of the law. In fact, the judges found that the power

60 Law no. 463-IX of 16 January 2020 on complete general secondary education.

61 Governmental Decree no. 1033/2009 of 30 September 2009 concerning amendments to the Regulations on secondary education.

to regulate the use of languages in schools belongs to the *Verkhovna Rada* and it was not for the government to adopt the decree (*Ibid.*, para. 5.2). In other words, the governmental decree had violated the prerogatives of the parliament, but not necessarily the linguistic rights of school personnel. While based on the division of powers between the government and the parliament and not addressing the substance of rights, the decision nevertheless represents an important step to mark a certain degree of independence by the judiciary from the governmental policies in linguistic issues.

A further important decision was issued by the Constitutional Court of North Macedonia and mirrors in many ways the just mentioned Ukrainian case. In 2009, the Ministry of Education and Science in Skopje issued a decree according to which, from the following school year, the Macedonian language had to be taught in schools with minority language of instruction from the first grade.⁶² Until then, Macedonian language had been introduced in minority language schools as a compulsory subject from the third grade and in practice several schools with Albanian as a language of instruction provided instruction in English already from the first or the second grade, thus making Macedonian, the official language of the state, *de facto* the third language for the pupils. The minister justified the decree by referring to integration needs. The argument was that pupils belonging to minority communities (notably Albanians), especially those living in the West of the country where they form the overwhelming majority, would have had too little and too late exposure to the state language, thus making their integration into the wider Macedonian society more difficult and hampering their chances for professional success in their own country (Constitutional Court of North Macedonia 2010). The decree upset a large number of Albanian parents and worried the schools with Albanian as language of instruction, which challenged the provision. In July 2010, the Constitutional Court struck down the contested decree (*Ibid.*). Similarly to the Ukrainian case, the Court based its decision on the violation of the prerogatives of the parliament rather than on the substance of the right. According to the Constitution of North Macedonia (as amended after the 2001 Ohrid Framework Agreement), laws that directly concern culture, use of languages, education, personal documents, and the use of symbols must be approved by parliament by a special majority (so-called “Badinter majority”) – i.e. also with the majority of votes of the present MPs that belong to the communities which are not the majority in the country (Amendment X, item 2 of the Constitution). The parliamentary procedure thus represents a special

62 Decree of the Ministry of Education and Science no. 07-6323/1 of 27 August 2009.

guarantee for the minority (i.e., Albanian) community, since it is vested with a veto right on bills affecting its vital interests. At the same time, it represents a missed chance to address the substance of a very fundamental question: to what extent do minorities have the right to *be let alone*, and to what extent can the obligation to learn (properly) the state language be imposed? Put differently, where does the line lie between segregation and integration? The Court has (deliberately?) refrained from tackling such questions, which are essential in a multiethnic society.

In 2011, the Romanian Constitutional Court dealt with a case regarding the alleged unconstitutionality of several provisions of the newly adopted National Education Law.⁶³ A group of MPs argued that the education law recognises a collective right of national minorities because it stipulates that in the schools with instruction in a minority language, the subject "Romanian language and literature" must be taught on the basis of special syllabi and textbooks elaborated specifically for the respective minority. According to the plaintiffs, this provision represented a form of (reverse) discrimination⁶⁴ of the majority based on ethnic criteria. The Court declared that "the law on national education does not lay down any collective right for minorities, but only individual rights" and argued that "no international legal instrument confers collective rights to minorities" (Constitutional Court of Romania 2011). The judges held that the specific situation of persons belonging to national minorities requires a special treatment with the aim to ensure their effective and equal access to quality education. Adapting the teaching requirements for the subject "Romanian language and literature" to the existing situation of national minorities does not discriminate against the majority. The Court concluded that, when it comes to national minorities, the state has a negative obligation (to refrain from policies or practices aimed at assimilation) as well as a positive obligation (to support the preservation and development of their cultural identity) and acknowledged that positive measures may also be necessary to protect minority rights (*Ibid.*).

All this goes to show that for the time being linguistic rights of minorities in education represent perhaps the most fluid area where the interplay between generous minority rights and reticent implementation, as well as between courts and politics, is developing.

63 Law no. 1/2011 of 5 January 2011 on national education.

64 For a discussion around "reverse discrimination", see Marko (2019).

4 Conclusions

In Central, Eastern, and South-Eastern Europe minority rights, including the right to use minority languages in the public sphere, are experiencing extraordinary, complex developments. A considerable amount of constitutional and legislative provisions have been adopted, mostly incorporating international standards, although in some case, like the language laws, such standards are (even blatantly) contradicted. The adjudication of minority rights in courtrooms, instead, is somehow lagging behind: rights that are seemingly well developed on paper are often scarcely implemented in practice. Adding thereto, the rights are frequently not given the full legal effect by the courts as minorities may expect. A careful analysis of the foregoing judgments presents more nuanced outcomes and provides some explanation for such a situation.

First, court rulings on (linguistic) rights of national minorities are numerous. The overall number might be less than one could expect, given the widespread legislation on the topic and the problems with the implementation of several provisions, but it is nevertheless substantial. Although no statistics are available on the subject, it is estimated that the judicial cases involving linguistic rights of persons belonging to national minorities in Central and Eastern European countries are by far more numerous than in Western Europe.

Second, the context of transition should be taken into due account in order to explain some difficulties to adjudicate (linguistic) rights of minorities in courts. After the fall of the Berlin Wall, the countries in Central, Eastern, and South-Eastern Europe were (re)established or created essentially alongside ethnic borders and the markers of ethnicity (including, in a prominent position, language) have played an essential role in defining the nation-building and the very *raison d'être* of these states. At the same time, however, they have been exposed to an unprecedented degree of international conditionality, especially in the field of minority rights. The permanent tension between international commitments (formalised in constitutional documents and legislation) and intrinsic nationalistic attitudes by the leading elites (including the judges) led to extreme politicisation of minority issues. These were thus (seen as to be) resolved in the political arena rather than by courts.

Third, transition from communist authoritarianism to liberal democracy implies a profound shift in the attitude towards the judicial power. It takes time and a change in the overall societal approach before trusting an independent judiciary. This means that the minorities themselves have for long time preferred the political arena (and sometimes even the battleground) over litigation to affirm and execute their rights. It is only in more recent times that the judicial option is increasingly seen as the more rational avenue to enforce

minority rights. Therefore, it can be said that many chances have been missed in the past, especially during the 1990s and 2000s, to commence proceedings in the courts. It is notable that in the last years there is an increase of cases affecting minority rights brought to the courts. However, often the plaintiffs are political actors. Under certain circumstances, this may lead to the judiciary becoming an appendix of the political process.

Fourth, and not least important, transition has affected the judiciary itself. The establishment of working democracies in Central, Eastern, and South-Eastern Europe went hand in hand with the development of independent judiciary. This process – and democratisation as a whole – happened to a very different degree in the various countries of the region. In fact, it is still an ongoing process. It follows that the judiciary is, although with remarkable differences from country to country, still on its way to become fully independent. Especially the higher courts are somewhat influenced by the political climate, and the closeness to politics regards even more the constitutional courts. In the countries covered in this chapter, constitutional judges are appointed by the political actors (mostly by parliaments). In such a context, it is normal that the establishment of a really independent judiciary is a long and challenging process. The considerable backsliding going on in several Central-Eastern European countries with regard to autocracy and departure from the rule of law (Sadurski 2019) shows that high courts in the region have a rocky road ahead and that the process towards full judicial independence is all but straightforward.

Fifth, it is worth noting that most judges (particularly constitutional judges due to the procedure for their appointment) come from the majority milieu. Even if independent, they are not (nor they should be) indifferent to the overall political climate. In addition, they usually come from the elite of the society and, most importantly for our purposes, from the majority. This is to say that, also involuntarily, they bring the perspective, the approach, and the legal reasoning of the majority into their judgments. This is clearly exemplified by the many decisions mentioned in this chapter that adopted a strictly formal reading of equality, that unavoidably lead to privilege the position of the majority over that of the minority. While in some of the analysed cases such an approach has clearly been intentional, also the unintentional side of this interpretative attitude is to be taken into consideration.

The contribution of the courts in developing minority rights, and particularly linguistic rights, in Central, Eastern, and South-Eastern Europe should not be underestimated. While overall deferential to the choices of the (political) majorities, the case law has, albeit timidly, forced some small step forward in guaranteeing minority rights. Even though the most progressive judgments

were based on procedural rather than on substantial grounds, their contribution to the safeguard of the rights of national minorities is highly relevant.

However, taking an historical perspective, different moments can be identified with regard to the stabilisation of the role of courts as independent actors. While nearly all judgments from the 1990s endorsed the restrictive governmental policies towards minorities, in the first decade of the millennium case law took a somewhat more careful and balanced approach and went as far as to strike down some of the most repressive measures with regard to linguistic rights. In the last decade, instead, counter-majoritarian rulings became again more seldom, due to the steps back made in several countries on the way to the establishment of the rule of law.

Bibliography

- ACFC. 2001. First Opinion on Slovakia adopted on 22 September 2000. ACFC/INF/OP/I(2001)1 published on 6 July 2001. Strasbourg: Council of Europe.
- ACFC. 2002a. First Opinion on Estonia adopted on 14 September 2001. ACFC/INF/OP/I(2002)005 published on 12 April 2002. Strasbourg: Council of Europe.
- ACFC. 2002b. First Opinion on Croatia adopted on 6 April 2001. ACFC/INF/OP/I(2002)003 published on 6 February 2002. Strasbourg: Council of Europe.
- ACFC. 2004. First Opinion on Azerbaijan adopted on 22 May 2003. ACFC/INF/OP/I(2004)001 published on 26 January 2004. Strasbourg: Council of Europe.
- ACFC. 2005. Second Opinion on Croatia adopted on 1 October 2004. ACFC/INF/OP/II(2004)002 published on 13 April 2005. Strasbourg: Council of Europe.
- ACFC. 2006. Second Opinion on the Slovak Republic adopted on 26 May 2005. ACFC/OP/II(2005)004 published on 21 June 2006. Strasbourg: Council of Europe.
- ACFC. 2007. Second Opinion on the Russian Federation adopted on 11 May 2006. ACFC/OP/II(2006)004 published on 2 May 2007. Strasbourg: Council of Europe.
- ACFC. 2011. Third Opinion on the Slovak Republic adopted on 28 May 2010. ACFC/OP/III(2010)004 published on 18 January 2011. Strasbourg: Council of Europe.
- ACFC. 2018. Fourth Opinion on Ukraine adopted on 10 March 2017. ACFC/OP/IV(2017)002 published on 5 March 2018. Strasbourg: Council of Europe.
- Baar, Vladimír and Daniel Jakubek. 2017. "Divided National Identity in Moldova." *Journal of Nationalism, Memory and Language Politics* 11(1): 58–92.
- Cardi, Valeria. 2007. "Regional or Minority Language Use before Judicial Authorities: Provisions and facts." *JEMIE – Journal on Ethnopolitics and Minority Issues in Europe* 2(2007). Accessed December 1, 2020. <https://www.ecmi.de/publications/jemie/issue-22007>.

- Csernicskó, István and Ildikó Orosz. 2019. "The Hungarian language in education in Ukraine." Mercator European Research Centre on Multilingualism and Language Learning, Regional Dossiers Series. Accessed December 1, 2020. <https://www.mercator-research.eu/en/knowledge-base/regional-dossiers/>.
- Dimitrovs, Aleksejs. 2019. "A Dangerous Precedent for Minority Rights: the Latvian Constitutional Court's Ruling on Minority Schools." In *Verfassungsblog* 2019/5/02. Accessed December 1, 2020. <https://verfassungsblog.de/a-dangerous-precedent-for-minority-rights-the-latvian-constitutional-courts-ruling-on-minority-schools/>.
- Dimitrovs, Aleksejs. 2020. "Riga and Venice on a Collision Course: On the Controversial New Constitutional Court Decisions on Minority Languages in Latvia." In *Verfassungsblog*, 2020/6/23. Accessed December 1, 2020. <https://verfassungsblog.de/riga-and-venice-on-a-collision-course>.
- Dudás, Endre. 2015. "Croatian Constitutional Court: The Referendum on the Cyrillic Script." *Vienna Journal on International Constitutional Law* 9(1): 126–33.
- Government of Ukraine. 2016. "Third Periodic Report of Ukraine on the implementation of the European Charter for Regional or Minority Languages." MIN-LANG(2016) PR1. Strasbourg: Council of Europe. Accessed December 1, 2020. <https://rm.coe.int/16806fofo8>.
- Government of Ukraine. 2017. "Position on the Article 7 of the Law of Ukraine on Education." CDL-REF(2017)051. Strasbourg: Council of Europe. Accessed December 1, 2020. [https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2017\)051-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2017)051-e).
- Halmi, Gábor. 2012. "From the 'Rule of Law Revolution' to The Constitutional Counter-Revolution in Hungary." In *European Yearbook of Human Rights* edited by Wolfgang Benedek, Florence Benoit-Rohmer, Wolfram Karl, Manfred Nowak, 367–84. Vienna: Intersentia and Neuer Wissenschaftlicher Verlag.
- Halmi, Gábor. 2017. "Second grade constitutionalism? The cases of Hungary and Poland." CFS-SSSUP Working Paper Series no. 1/2017. Accessed December 1, 2020. http://www.csfederalismo.it/images/csf_sssp/csf-sssup_halmi_second-grade-constitutionalism_1-2017.pdf.
- Hrytsenko, Oleksandr. 2008. "Imagining the Community: Perspectives on Ukraine's Ethno-cultural Diversity." 36 *Nationalities Papers* (2008): 197–222.
- Kascian, Kiryl. 2019. "A Judicial Path to Nowhere? Challenging the Minority Education Reform Before Latvia's Constitutional Court." In *Verfassungsblog* 2019/10/03. Accessed December 1, 2020. <https://verfassungsblog.de/a-judicial-path-to-nowhere/>.
- Kemp, Walter. 2001. *Quiet Diplomacy in Action. The OSCE High Commissioner on National Minorities*. The Hague: Kluwer Law International.
- King, Charles. 2000. *The Moldovans: Romania, Russia, and the Politics of Culture*. Stanford: Hoover Institution Press.

- Kulyk, Volodymyr. 2002. "Revisiting a Success Story: Implementation of the Recommendations of the OSCE High Commissioner on National Minorities to Ukraine, 1994–2001." *CORE Working Paper 6* (2002), Hamburg.
- Kulyk, Volodymyr. 2016. "Language and identity in Ukraine after Euromaidan." *Thesis Eleven* Vol. 136 (1): 90–106.
- Milian i Massana, Antoni. 1994. *Derechos lingüísticos y derecho fundamental a la educación: Un estudio comparado: Italia, Bélgica, Suiza, Canadá y España*. Madrid: Editorial Civitas.
- Marko, Joseph, Sergiu Constantin, Günther Rautz, Andrea Carlà and Verena Wisthaler. 2019. "Against assimilation. The right to multiple identities." In *Human and Minority Rights Protection by Multiple Diversity Governance. History, Law, Ideology and Politics in European Perspective* edited by Joseph Marko and Sergiu Constantin, 227–306. London and New York: Routledge.
- Marko, Joseph. 2019. "Against discrimination. The right to equality and the dilemma of difference." In *Human and Minority Rights Protection by Multiple Diversity Governance. History, Law, Ideology and Politics in European Perspective* edited by Joseph Marko and Sergiu Constantin, 307–39. London and New York: Routledge.
- May, Stephen. 2012. *Language and Minority Rights: Ethnicity, Nationalism and the Politics of Language*. London, New York: Routledge.
- Mickonytė, Aistė. 2017. "The right to a name versus national identity in the context of EU Law: the case of Lithuania." *Review of Central and East European Law* 42 (4): 325–63.
- Packer, John. 2004. "Situating the Framework Convention in a wider context: achievements and challenges." In *Filling the Frame. Five years of monitoring the Framework Convention for the Protection of National Minorities* edited by the Council of Europe, 43–51. Strasbourg: Council of Europe Publishing.
- Palermo, Francesco. 2008. "Domestic Enforcement and Direct Effect of the Framework Convention for the Protection of National Minorities. On the Judicial Implementation of the (Soft?) Law of Integration." In *The Framework Convention for the Protection of National Minorities: A Useful Pan-European Instrument?* edited by Annelies Verstichel, Andre Alen, Bruno de Witte, Paul Lemmens, 187–214. Antwerp *et al.*: Intersentia.
- Palermo, Francesco. 2011. "Minority Protection and regulation of Place Names in Croatia." In *Minorities and Toponymy* edited by Giuseppe de Vergottini and Valeria Piergigli, 307–31. Frankfurt am Main *et al.*: Peter Lang.
- Palermo, Francesco. 2013. "Addressing Contemporary Stalemate in the Advancement of Minority Rights: Commentary on Language Rights of Persons Belonging to National Minorities." In *Minorities, their Rights, and the Monitoring of the European Framework Convention for the Protection of National Minorities. Essays in Honour*

- of Rainer Hofmann edited by Tove H. Malloy and Ugo Caruso, 121–40. Leiden-Boston: Martinus Nijhoff.
- Palermo, Francesco. 2016. "Territory and the Law of Ownership: From Misunderstanding to Opportunity." In *Law, Territory and Conflict Resolution. Law as a Problem and Law as a Solution* edited by Matteo Nicolini, Francesco Palermo, Enrico Milano, 16–38. Leiden-Boston: Brill Nijhoff.
- Petričušić, Antonija. 2004. "Constitutional Law on the Rights of National Minorities in the Republic of Croatia." *European Yearbook of Minority Issues* Vol. 2 (2002/3).
- Pirker, Jürgen. 2010. *Kärntner Ortstafelstreit: der Rechtskonflikt als Identitätskonflikt*. Baden Baden: Nomos.
- Pinelli, Cesare. 2004. "Conditionality and Enlargement in Light of EU Constitutional Developments." *European Law Journal* 10(3): 354–62.
- Prina, Federica. 2015. "Linguistic Justice, Soviet Legacies and Post-Soviet *Realpolitik*: The Ethnolinguistic Cleavage in Moldova." *Ethnopolitics* 14(1): 52–71.
- Sadurski, Wojciech. 2019. *Poland's Constitutional Breakdown*. Oxford: Oxford University Press.
- Sebba, Mark. 2006. "Ideology and Alphabets in the former USSR." *Language Problems and Language Planning* 30(2): 99–125.
- Sharafutdinova, Gulnaz. 2013. "Gestalt Switch in Russian Federalism: The Decline in Regional Power under Putin". *Comparative Politics* 45 (3): 357–76.
- Silova, Iveta. 2006. *From Sites of Occupation to Symbols of Multiculturalism: Re-conceptualizing minority education in post-soviet Latvia*. Greenwich: Information Age Publishing.
- Stepanenko, Viktor. 2001. "A State to Build, a Nation to Form: Ethno-Policy in Ukraine." In *Diversity in Action: Local Public Management of Multi-Ethnic Communities in Central and Eastern Europe* edited by Anna-Maria Bíro and Petra Kovacs, 309–46. Budapest: Open Society Institute.
- Stepanenko, Viktor. 2003. "Identities and Language Politics in Ukraine: The Challenges of Nation-State Building." In *Nation-Building, Ethnicity and Language Politics in Transition Countries* edited by Farimah Daftary and Francois Grin, 107–35. Budapest: Open Society Institute.
- Sabanadze, Natalie. 2009. *Globalization and Nationalism: The Cases of Georgia and Basque Country*. Budapest: Central European University Press.
- Trochev, Alexei. 2008. *Judging Russia. The Role of the Constitutional Court in Russian Politics, 1990–2006*. New York, Cambridge: Cambridge University Press.
- Ulasiuk, Iryna. 2010a. "The Language Issue in the Evolution of Ukrainian Constitutionalism." 54 *Revista de Llengua i Dret* (2010): 135–65.
- Ulasiuk, Iryna. 2010b. *Europeanization of Language Rights in Russia and Ukraine: A Myth or a Reality?*. Saarbrücken: Lambert Academic Publishing.

- Venice Commission. 2010. "Opinion no. 555/2009 on the Act on the state language of the Slovak Republic." CDL-AD(2010)035. Strasbourg: Council of Europe.
- Venice Commission. 2011. "Opinion no. 605/2010 on the draft Law on languages in Ukraine." CDL-AD(2011)008. Strasbourg: Council of Europe.
- Venice Commission. 2017. "Opinion no. 902/2017 on the provisions of the Law on Education of 5 September 2017 which concern the use of the state language and minority and other languages in education." CDL-AD(2017)030. Strasbourg: Council of Europe.
- Venice Commission. 2019. "Opinion no. 960/2019 on the Law on supporting the functioning of the Ukrainian language as the state language." CDL-AD(2019)032. Strasbourg: Council of Europe.
- Woehrling, Jean-Marie. 2005. *The European Charter for Regional or Minority Languages. A Critical Commentary*. Strasbourg: Council of Europe Publishing.

Case Law

Please refer to the list on pages viii–xvi.

International Treaty-based Protection of Minorities

Select Cases of the UN Human Rights Committee

Hennie Strydom

1 Introduction

The subject-matter of this chapter is Article 27 of the 1966 International Covenant on Civil and Political Rights (ICCPR or the Covenant) and the evolution of its interpretation and application by the UN Human Rights Committee.¹ The Committee was established under Article 28 of the Covenant and empowered by the Covenant's Optional Protocol to receive and consider individual complaints of human rights violations under the Covenant by states parties. As the select cases will show, Article 27, which is the provision pre-eminently relevant for the protection of minority rights, is often relied on by members of minority groups, or applied by the Committee, in conjunction with other provisions of the Covenant, depending on the range of issues raised by the complaint. However, there seems to be a frequent reliance in these matters on especially Article 2(1), which obliges states parties to ensure to all individuals the rights in the Covenant without discrimination, and Article 26, which guarantees equal protection before the law. The reason is that their relevance is self-evident in matters involving discriminatory treatment in the context of Article 27.

The chapter is structured as follows. It commences with an explanation of the nature and scope of Article 27, matters the Committee clarified in a General Comment of 1994.² This is followed by select decisions by the Human Rights Committee under the Optional Protocol involving Article 27 and other provisions of the Covenant to substantiate the Committee's findings. The conclusion covers obstacles faced by individual claimants under the Optional Protocol and issues concerning the obligations of states parties to comply with the findings of the Committee.

1 For commendable general commentaries on this see Schultz, Joseph and Castan (2013); Nowak (2005).

2 See Human Rights Committee (1994).

2 The Nature and Scope of Article 27 of the ICCPR

Article 27 of the ICCPR is the only UN treaty-based provision on the protection of minority rights. Like all the human rights guarantees in the Covenant, it is formulated in individualistic terms and reads as follows:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to these 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.

This has the consequence that the bearers of the rights are the individuals belonging to minority groups as opposed to the groups themselves. The communal exercise of the rights under Article 27 is therefore distinct from and additional to all the other rights which all individuals are entitled to under the Covenant. For instance, the right of individuals belonging to a linguistic minority, to use their language among themselves, supplements the general right of all individuals, whether they belong to a minority or not, to freedom of expression which is guaranteed under Article 19 of the Covenant (Human Rights Committee 1994, para. 5.3). The same holds true for the right to freedom of thought, conscience and religion under Article 18(1) of the ICCPR, as well as under the general non-discrimination provision in Article 2(1)(a).

The Human Rights Committee has also declared that the Article 27 rights must not be confused with the right to self-determination in Article 1 of the Covenant which applies to peoples as opposed to persons (*Ibid.*, paras. 1, 2, 3.1). As such, the right to self-determination, unlike the Article 27 right, is not subject to the individual complaints procedure provided for in the Optional Protocol to the ICCPR. The Committee has made this position clear already in one of its earlier communications in the matter of the *Lubicon Lake Band v Canada* (para. 32(1)).

Article 27 does not refer to *Indigenous peoples* but according to the Human Rights Committee, groups identifying themselves as Indigenous peoples that are in a minority situation fall under the protection of Article 27. The Human Rights Committee (1994, paras. 3.2. and 7) emphasised the applicability of Article 27 in respect of Indigenous peoples. Since Article 27 confers rights on “persons” belonging to minorities, the protection of Article 27 is not limited to the citizens or nationals of a state and may apply to migrants, refugees and even visitors (Human Rights Committee 1994, para. 5.2). Moreover, whether an ethnic, religious or linguistic minority exists, is not dependent on a decision

or authorisation of the territorial state, but on the establishment of objective criteria pointing to the existence of such a minority (*Ibid.*). Consequently, the Article 27 rights that accrue to persons belonging to a minority may entail that the territorial state is under an obligation to take positive measures aimed at ensuring the existence and identity of the minority and at protecting the Article 27 rights against denial or violation. Such measures are required not only against state conduct but also against the conduct of private entities within the territorial state (*Ibid.*, paras. 6.1, 6.2, 9). Measures in pursuit of this objective will be subject to the general non-discrimination provision in Article 2(1)(a) of the Covenant and to the equal protection provision in Article 26 of the Covenant, which determines in part as follows:

(...) 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.

On occasion the Human Rights Committee has provided the following interpretation of Article 26 in its “General Comment no. 18”:

In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.

Human Rights Committee 1989, para. 12

In determining what will constitute discrimination, both with regard to Article 2(1) and Article 26 of the Covenant, the Committee’s own interpretation of discrimination should guide member states when compliance with their Covenant obligations come under scrutiny. The Committee interpreted discrimination as used in the Covenant to

(...) imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political

or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

Ibid., para. 7

3 Select Decisions of the Human Rights Committee under the First Optional Protocol

The cases that follow are dealt with chronologically. Applying a substantive issue criterion in arranging the cases would have been too problematic in view of the multiple and overlapping grounds the individual complaints invoked under the Covenant in petitioning the Human Rights Committee under the Optional Protocol. Moreover, in several of the cases the matter was decided by the Committee on grounds that differ from the grounds invoked by the complainant. Finally, only cases that were found to be admissible by the Committee feature here, which means, *inter alia*, that domestic remedies were exhausted by the complainants. In the conclusion the procedural requirements for the admissibility of cases are revisited.

3.1 Lovelace v Canada (1981)

The complainant in this matter, Sandra Lovelace, was born and registered as *Maliseet Indian* but lost her rights and status as an Indian following her marriage to a non-Indian. This occurred as a result of the operation of Canada's Indian Act which determined that a woman who has married a person who is not an Indian will not be entitled to register as an Indian. Since the Act did not apply to Indian men, the complainant petitioned the Human Rights Committee, invoking Articles 2(1), 23(1) and (4), 26 and 27.

What caused the case to more specifically fall within the preserve of Article 27, was the question raised by the Committee, namely whether there were persistent effects of the loss of status occurring after the Covenant came into effect for Canada, namely the 19 August 1976. On this point the Human Rights Committee was informed that persons such as the complainant were denied the right to live on an Indian reserve which caused her to be separated from the Indian community and family members, her main cultural attachment following the dissolution of her marriage. On the strength of this evidence, the Committee found a violation by Canada, since the complainant, as a result of the loss of her Indian status by law, had been denied the right under Article

27, to enjoy her own culture and to use her own language in community with other members of her group who were not residing in a place outside the reserve. Also damaging for the provisions of the Indian Act was the finding by the Committee that the restrictions affecting the right to residence of persons in the position of the complainant were not reasonably or objectively linked to the Act's objective, which, according to the Canadian government, was to preserve the resources and identity of the reserve; neither were they consistent with other relevant provisions of the Covenant.

This is one of those rare cases where the state party responded positively to the findings of the Committee, seemingly motivated by a concern with the discriminatory consequences of the applicable law. On 19 November 1982, the UN Secretary-General informed Canada about the findings of the Committee and the latter's request for information on measures taken by the government in respect of the Committee's findings. In its response, the Canadian government informed the Committee about amendments to the Indian Act aimed at removing the loss of status provision and at restoring the status and rights of persons in the position of the complainant. Furthermore, in 1982, the Canadian Charter of Rights and Freedoms came into effect which provided for equal treatment of male and female persons on the basis of a general non-discrimination provision against which federal laws could be tested.³

3.2 Kitok v Sweden (1988)

The complainant, Ivan Kitok, belonged to a Sámi family who has been active in reindeer breeding for over a century. This entitled him to reindeer breeding as of right as well as rights to land and water on Sámi land. However, his engagement in another profession for some time caused him to lose his status as a reindeer breeder and his name was removed from the rolls of the Sámi community to which he belonged under the 1971 Reindeer Husbandry Act and according to which a Sámi community operated like a trade union with a *closed shop* rule. The purpose of this Act, the state party claimed, was to restrict the number of reindeer breeders for economic and ecological reasons and to ensure the well-being of the Sámi Indigenous people. Under Swedish law, refusals by a Sámi family community to re-admit a former member, as in this instance, could only be undone by government authorities on the basis of "special reasons"⁴ which, according to the state party, were absent in the case of the complainant.

3 Sections 15(1) and 28 of the Constitution Act, of 1982.

4 Section 12(2) of the 1971 Reindeer Husbandry Act.

It is this “special reasons” arrangement in Swedish law that formed the basis of the complainant’s case, namely that it constitutes an arbitrary deprivation of his right to enjoyment of his own culture under Article 27 of the Covenant. The underlying issue were the Act’s criteria for participation in the life of an Indigenous people group according to which a person who is ethnically a Sámi can nevertheless be held not to be a Sámi for the purposes of the Act. What concerned the Committee in this regard was the ostensible disregard by the Act of objective criteria in determining membership of an Indigenous community, which, coupled with the application of the Act’s rules to the complainant’s situation, may have caused a restriction of the complainant’s rights which lacks objective justification for not being reasonable and necessary for the continued viability and welfare of the minority as a whole. In the Committee’s own words, it applied, in this instance, the *ratio decidendi* of the *Lovelace* case (para. 9.8). Nevertheless, the Committee found no violation of Article 27 by the state party in the context of the case. What led the Committee to this conclusion was the fact that the complainant was not prevented from continuing to graze and farm his (domesticated) reindeer, and to hunt and fish, as he was culturally used to do. What was affected was to engage in these activities as of right and under the same protected conditions enjoyed by the Sámi community.

It is not clear from the facts of the matter whether the loss by the complainant of his legal entitlements negatively affected his right to enjoy his culture in community with the other members of his Indigenous people group. Instead of raising this element as part of his claim, his complaint was restricted to the issue that there were special reasons on the basis of which the authorities could grant him the rights claimed despite the Sámi community’s refusal to do so.

3.3 Cadoret and Bihan v France (1991)

The complainants in this matter were denied the right to express themselves in Breton, their mother tongue, in criminal proceedings in a French court and claimed that they were denied a fair trial under the Covenant as a result. The state party argued that they were bilingual and were therefore not disadvantaged by the proceedings in French. If this were the only issue, the case could easily have been ignored for current purposes since it could have been disposed of under Articles 14 and 26 of the Covenant, on which the complainants relied in respect of the fair trial and discriminatory aspects of their treatment. However, they also invoked Article 27 of the Covenant as members of the Breton minority, which, they argue, like other minorities, speak languages other than French and do exist despite the fact that the state party does not recognise the existence of minorities.

While the complaint fails to establish a connection between the language issue in the criminal proceedings and Article 27 on the rights of minorities, the latter is of interest as a result of the state party's response to this part of the complaint. It argued that upon ratification of the Covenant, the French government entered a reservation, stating that in view of Article 2 of the French Constitution (which declares French as the language of the Republic), Article 27 is not applicable as far as the Republic is concerned. Hence, the state party further argues that the idea of membership of an ethnic, religious or linguistic minority is irrelevant to the case and inconsistent with the government's non-recognition of the existence of minorities in the Republic (*Cadoret and Bihan v France*, para. 4.9). Thus, from the state party's point of view the existence of a minority is not a matter of objective assessment, as the "General Comment no. 23" directs,⁵ but dependent on the subjective views of the government.

This raised interesting questions about the scope and lawfulness in treaty law of the French reservation to Article 27. Unfortunately, this escaped the attention of the Committee who found that the facts of the complaint did not raise issues under Article 27. A similar fate has befallen the complaint in the case of *Barzhiq v France* (1991).

3.4 Diergaardt Et al v Namibia (2000)

This communication was submitted to the Committee by members of the Rehoboth Baster Community who are descendants of the Indigenous Khoi and Afrikaans settlers who settled in Namibia in 1872. In the area they occupied they enjoyed self-government and managed their affairs according to their own culture, language and economy and sustained their own institutions, such as schools and community centers. This form of existence came to an end on 21 March 1990 when Namibia gained independence under a new Constitution which caused their independent existence to cease and their communal land to be expropriated by the Namibian government. This move threatened their traditional existence and brought economic hardship to the community, causing members of the community to become homeless and bankrupt.

To add insult to injury, Section 3 of the Namibian Constitution declared English as the only official language in Namibia. This resulted in the complainants to have been denied the use of their mother tongue (Afrikaans) in administration, justice, education and public life. On this basis they claimed a violation of Articles 26 and 27 of the Covenant. However, they also invoked Article 27 in relation to the loss of land for cattle raising which they claimed to

⁵ See Human Rights Committee (1994, para. 5.2).

be an essential element of the culture of the community. This latter claim was unsuccessful for the following reasons espoused by the Committee:

(...) in the present case the Committee is unable to find that the authors can rely on article 27 to support their claim for exclusive use of the pastoral lands in question. This conclusion is based on the Committee's assessment of the relationship between the authors' way of life and the lands covered by their claims. Although the link of the Rehoboth community to the lands in question dates back some 125 years, it is not the result of a relationship that would have given rise to a distinctive culture. Furthermore, although the Rehoboth community bears distinctive properties as to the historical forms of self-government, the authors have failed to demonstrate how those factors would be based on their way of raising cattle.

Diergaardt et al. v Namibia, para. 10.6

The language issue was eventually decided in favour of the complainants, albeit on the basis of Article 26. Of specific relevance in this instance was the evidence submitted by the complainants to the effect that the state party has instructed civil servants not to reply to the author's written or oral communications in the Afrikaans language, even if they are perfectly capable of doing so, an instruction that applied to written and telephonic communications. Since the state party failed to provide written statements on the merits of the complaint after the case was found admissible by the Committee, the Committee was entitled to rule on the basis of the evidence before it.

State party intransigence in proceedings under the Optional Protocol is not unique and casts doubt on the resoluteness with which a non-complying state party will respond to a request for particulars concerning an effective and enforceable remedy where a violation has been established. In the *Diergaardt* matter, the state party ignored two reminders by the Committee to submit evidence on the merits of the case and following a finding that a violation has occurred under Article 26, the state party was requested to provide within 90 days information about the measures taken to provide a remedy as required by Article 2(3) of the Covenant.

3.5 **Waldman v Canada (1999)**

This matter emanated from a private school funding system that had its origins in Canada's 1867 Constitution which guaranteed denominational school rights in Section 93 and granted each province in Canada exclusive jurisdiction to enact education laws subject to the Constitution. At the time of the

Confederation, in the province of Ontario, Catholics represented 17% of the population and Protestants 82% which led to fears that the Protestant majority might use their power over education to take away the rights of the Catholic minority. As a countermeasure, Ontario determined by law that every separate school will be entitled to full public funding and *separate schools* were defined as Roman Catholic schools. This resulted in Roman Catholic schools to be the only religious schools entitled to the same public funding as public secular schools. Under this funding scheme, Roman Catholic schools were funded from kindergarten to grade 10, which, ironically, was increased, by legislative amendment, to include grades 11 to 13 when the Canadian Charter of Rights and Freedoms took effect in 1982. In subsequent proceedings challenging the constitutionality of the amendment, the Supreme Court of Canada upheld the full funding of Roman Catholic schools under the new law.

The complainant in this matter, who experienced financial hardship in providing his children with a Jewish education at a private school, argued that the Ontario funding policy for Roman Catholic schools creates a religious distinction or preference which has the effect of impairing the enjoyment or exercise by all persons, on an equal footing, of their religious rights and freedoms. He also claimed that this religion-based discrimination is not based on reasonable and objective grounds any more since the historical rationale for it no longer exists and that it has been abandoned by the other Canadian provinces. As a result, it is the complainant's case that he is a victim of a violation of Articles 26, 18(1) and (4) and 27, read in conjunction with Article 2(1).

A rather peculiar aspect of this matter was the argument by the state party that since the distinction favouring Roman Catholic schools was still enshrined in the Constitution of Canada, henceforth, the distinction was based on objective and reasonable criteria (*Waldman v Canada*, para. 10.3). This approach, to justify a discriminatory arrangement on the basis of its source as opposed to its substantive character or consequences, was easily rejected by the Committee as wrong. Of relevance in the instant case was that there was no substantiating evidence showing that members of the Roman Catholic community were still in a disadvantaged position compared with members of the Jewish community who wished to provide a religious education for their children in religious schools (*Ibid.*, para. 10.4). Further countering the state party's argument that it is not unreasonable to differentiate in the allocation of public funds between private and public schools, the Committee noted that under the funding model only Roman Catholic schools were incorporated into the public school system. This meant, that in the case of the complainant, the public funded school system did not provide for his religious denomination (public schools were not allowed to engage in religious indoctrination), while members of the

Roman Catholic faith could benefit from publicly funded religious schools (*Ibid.*, paras. 10.5, 11).

It is this unequal treatment aspect which led the Committee to find a violation by the state party under Article 26 of the Covenant. In view of this conclusion the Committee made no finding in respect of the other provisions of the Covenant the complainant relied on, including Article 27, because no additional issues arose that would justify a consideration of these provisions (*Ibid.*, para. 10.7).

3.6 Äärelä and Näkkäljärvi v Finland (2001)

The complainants, who were reindeer breeders of Sámi origin and, hence, members of an Indigenous people, claimed, under Article 27 of the Covenant, that government logging and road construction activities on herding lands amounted to a denial of their rights to enjoy their culture in community with other Sámi, for which the survival of reindeer herding is essential. The deciding issue before the Committee was whether the interference of the logging and road construction complained of was so substantial that it amounted to a failure by the state party to properly protect the Article 27 rights of the complainants. This *substantial interference* threshold (see also *Länsman et al. v Finland*, 2005), which the Committee usually applies in instances of this nature, could only be arrived at on the basis of information relating to the factual importance of the affected area for reindeer husbandry, the long-term impacts on the sustainability of the complainants' breeding enterprise, and the consequences for them under Article 27 of the Covenant. Apart from the fact that the domestic courts held different views on these aspects, the Committee was not apprised of sufficient information to make a finding as to the *substantial interference* threshold. It was therefore unable to conclude whether there was a violation of the complainants' rights under Article 27.

3.7 Howard v Canada (2005)

The complainant in this matter belonged to a First Nations community. As a result of treaties concluded between the Crown and the First Nations in 1923, the First Nations' fishing rights, they previously held, were extinguished. In 1985, the complainant caught fish from a river just outside his First Nations' reserve and was convicted in an Ontario court for unlawfully fishing out of season. In an attempt to bring greater legal certainty to the fishing rights of Indigenous peoples the Ontario government committed itself in 1990 to negotiate agreements with Indigenous peoples on the issue of hunting, fishing, gathering and trapping. One such agreement was signed with the First Nations, allowing for the exercise of certain hunting and fishing rights they lost as a result of the

1923 treaties. However, acting within its rights in terms of the agreement, the newly elected Ontario government terminated this agreement in 1995, which the domestic courts endorsed as a lawful exercise of the government's rights in terms of the agreement.

Following these events, the complainant approached the Committee, arguing that the state party failed to take effective positive measures under Article 27 of the Covenant to ensure the exercise of the complainant's aboriginal fishing rights individually and in community with each other and that this failure threatens the First Nations' cultural, spiritual and social survival. Before the Committee, the state party contended that the complainant has the right to fish throughout the year on and adjacent to his Nation's reserve and also outside those areas during the fishing season subject only to a valid fishing license. In response, the complainant argued that there was not enough fish on and adjacent to the reserves to render the right meaningful and that the other areas fell outside his Nation's traditional fishing grounds. In addition, he argued that a licence constituted a privilege to fish, while he claims to fish as of right.

The licence issue was easily disposed of by the Committee on the basis that states parties are entitled to regulate activities affecting Indigenous peoples provided that the regulatory measures do not amount to a *de facto* denial of the rights in question, which was not the case here. The remaining issue, namely whether there was enough fish to allow the complainant to exercise this part of his culture meaningfully, caused the success of the complaint, as is often the case in matters of this kind, to depend on questions of fact. In this respect, not only were the questions of fact not placed before the domestic courts, who are, as a matter of course, in the best position to evaluate facts and evidence, but before the Committee the parties were also in disagreement as regards the availability of fish and the extent of the traditional fishing grounds. This caused the Committee not to be in a position to draw independent conclusions on the factual circumstances on which the complainant relied with the result that the Committee was not in a position to make a finding on whether there was a violation under Article 27 (*Howard v Canada*, paras. 12.8–13).

3.8 Mavlonov and Sa'di v Uzbekistan (2009)

The main complainant was the editor of a newspaper *Oina* which was published almost exclusively in the Tajik language, a minority language in the Samarkand region of the state party. The newspaper was distributed to numerous schools that use the Tajik language of instruction and published educational and other materials for Tajik-language students and young persons to assist them in their intellectual and cultural development. As a result of the opting out of one of the newspaper's founders, *Oina* had to apply for re-registration according to

the state party's law on mass media. An application for re-registration was duly submitted but turned down by the relevant government organ on the basis that the application contained several errors, that its contents were obstructing the government's efforts at "national ideology building" and were inciting separatism and inter-ethnic hostility. No specific examples of published material were referred to by the government to substantiate these allegations and all attempts by the complainant to find a remedy in the domestic courts were futile.

Before the Committee, the complainant claims to be a victim, *inter alia*, of a violation of his rights under Article 27 of the Covenant since he was prevented from enjoying his own culture and language in community with other members of the Tajik minority in Uzbekistan. In response, the state party has not provided specific observations to counter the claims by the complainant, but has merely stated that the decisions by the domestic courts were substantiated and in accordance with the law. In considering the complainant's claims in respect of Article 27, the Committee made specific reference to its "General Comment no. 23"⁶ on the essence and scope of this provision dealt with earlier in this chapter and reiterated the obligation states parties have under Article 27, namely to take positive measures towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities in question (*Mavlonov and Sa'di v Uzbekistan*, para. 8.6).

The Committee also reiterated that the test whether a violation has taken place under Article 27 is whether the restriction imposed by the state party has an impact, so substantial that it effectively denies the complainant the enjoyment of his rights under Article 27. In the instant case, the Committee took into account that in the context of Article 27 education in a minority language is a fundamental part of a minority culture and the uncontested role played by *Oina* in this regard. It was also of the view that the use of a minority language press in raising issues of significance and importance to the Tajik community formed an essential element of the Tajik minority culture. Since the restriction imposed by the state party had the substantial impact referred to above on the enjoyment of the rights in question, the Committee concluded that a violation under Article 27 has taken place (*Ibid.*, para. 8.7).

3.9 Poma Poma v Peru (2009)

The complainant in this matter owned an alpaca farm in the Tacna region of Peru where she and her children raised alpacas, llamas and other animals as

6 See Human Rights Committee (1994).

their only means of subsistence. This farming activity was practiced in accordance with the traditional customs of the family who are descendants of the Indigenous Aymara people as part of their way of life for thousands of years and passed on from generation to generation.

In the 1950s and 1980s water diversion projects authorised by the state party reduced water supply to the pastures and to areas from where water was drawn for human and animal consumption. This caused the gradual drying out of wetlands on which the complainant and other families depended for grazing and underground springs. The situation was exacerbated when in the 1990s the government approved the drilling of wells in the area which accelerated the drainage and degradation of the pastures, causing thousands of animals to perish, depriving the community of their only means of survival.

In her complaint to the Committee, the complainant alleged violations under Article 1 of the Covenant (right to self-determination) which is not susceptible to the procedure under the Optional Protocol, as indicated earlier on, and under Article 17 of the Covenant (right to privacy and a family). Acting *ex mero motu*, the Committee decided to deal with the complaint under Article 27 since the facts presented by the complainant raised issues germane to that provision. To further illustrate the relevance of Article 27, the Committee invoked its "General Comment no. 23"⁷ to stress the point that the right to enjoy a particular culture under Article 27 may consist of a way of life that is closely connected with a territory and the use of its resources, which, in particular, may apply in the case of members of an Indigenous community constituting a minority. Where this is the case, the enjoyment of the rights associated with the community's traditional activities may require positive measures to be taken by the state party to ensure the effective participation of members of the community in decisions affecting them (*Poma Poma v Peru*, para. 7.2).

It was not in dispute that the complainant was a member of an Indigenous people and that the raising of llamas constituted an essential element of her community's culture as a form of subsistence. This entitled the complainant to protection under Article 27 (*Ibid.*, para. 7.3). Where a state party takes steps in the interest of economic development, as it is entitled to do, it cannot be done in a way that will undermine the Article 27 rights but must be commensurate with its obligations under Article 27. In making this point the Committee was left with the question whether the state party's water diversion schemes were such that they had a "substantive negative impact" on the complainant's enjoyment of her rights under Article 27. Answering this in the affirmative, the

7 See Human Rights Committee (1994).

Committee took into account the uncontested allegations of the complainant, namely that the degradation of the pastures, which was a direct result of the water diversion schemes, caused the death of thousands of head of livestock and the financial ruin of the community including that of the complainant (*Ibid.*, paras. 7.5, 7.7).

Seemingly, the Committee, in reaching this conclusion, also took into account the failure of the state party to properly consult with the complainant and the affected community and to require impact studies to be undertaken by a competent independent body to determine the potential impact of the wells on the economic activities of the complainant and community. The nature and scope of the required consultation appear from the following:

In the Committee's view, the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members.

Ibid., para. 7.6

3.10 Sanila-Aikio v Finland (2018)

The importance of this matter relates to the fact that it involves the political rights of the Sámi Indigenous people which became the subject-matter of two other proceedings before international treaty bodies as will become clear below.

In this matter, Tiina Sanila-Aikio, complained before the Committee on her own behalf, on behalf of the Sámi people and in her capacity as president of the Sámi parliament of Finland. The complaint arose from a 2011 decision by the Supreme Administrative Court, departing from a consensual interpretation of Section 3 of the Act on the Sámi Parliament of 1995, which defines a Sámi for purposes of being allowed to vote in the elections for parliament. The decision resulted in the right to vote for 93 persons who had been found ineligible by the Sámi parliament. It is the complainant's case that this decision has undermined the voice of the Sámi people in the parliament and the

effective representation of the Sámi people in parliamentary decisions by the state party affecting their lands, culture, and interests. More specifically, she claims that the decision by the Supreme Administrative Court violates Article 1 of the Covenant in that the decision constitutes an unlawful interference with the right of the Sámi to decide for themselves who is entitled to participate in elections to their parliament; violates their rights to political participation in Article 25; was arbitrary in deciding who was entitled or not entitled to be admitted to appear on the electoral roll, which constituted a violation of Article 26; and violates Article 27 in that the Sámi parliament was weakened in playing its essential role in the protection of the Sámi peoples' rights to enjoy their culture and language and as an instrument in ensuring that the free, prior and informed consent of the Sámi people is obtained in matters implicating their interests.

On 28 March 2017, the Committee found the complaint admissible insofar as it raises issues under Article 25, 26 and 27. Interesting though, is the Committee's explanation with regard to Article 1 (the right to self-determination), which as indicated earlier, and again reiterated in this instance, is inadmissible under the Optional Protocol. However, the Committee considered Article 1 nevertheless relevant in determining whether rights in parts II and III of the Covenant (like Articles 25, 26 and 27) have been violated. Since the Committee dealt with this matter only towards the end of its argumentation, it may be sensible to first explain what informed the Committee's reasoning in finding a violation by the state party of Article 25, read alone and in conjunction with Article 27, and how Article 1 fits into the scheme.

Since Article 25 of the Covenant guarantees the rights of citizens to take part in public affairs, the right to vote and to be elected and the right to have access to public service, the Committee invoked its "General Comment no. 25"⁸ where it was made clear that state parties are obliged by the Covenant to take legislative and other measures to ensure that citizens have an effective opportunity to enjoy the rights protected by Article 25. The "General Comment no. 25" also requires that any interference with an Article 25 right must be justifiable on reasonable and objective criteria (Human Rights Committee. 1996, para. 4). The Committee further underscored this requirement with reference to its decisions in the *Lovelace* and *Kitok* cases (*Sanila-Aikio v Finland*, para. 6.5).

The "General Comment no. 25" also raised the Article 1 self-determination issue in the context of Article 25 by stating that the rights under Article 25 are related to, but distinct from, the right of peoples to self-determination under

8 See Human Rights Committee (1996).

Article 1 (Human Rights Committee. 1996, para. 2). The distinction lies in the fact that the Article 25 rights are individual rights (as opposed to the right of peoples) and can, as such, give rise to claims under the Optional Protocol. Although it is not further explained in the “General Comment no. 25”, it is apparent that the relation between the two categories of rights has to do with the fact that both give expression to the exercise of political power, but in different contexts.

Also important for the Committee’s consideration of the *Sanila-Aikio* matter was the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), a non-binding instrument adopted in 2007 by the UN General Assembly⁹ and the most widely supported framework on the rights of Indigenous peoples. Of specific relevance in the *Sanila-Aikio* matter is Article 33 of the UNDRIP which recognises the right of Indigenous peoples to determine their own identity or membership in accordance with their customs and traditions and to select the membership of their institutions in accordance with their own procedures. This self-identification rule was also part of Article 3 of the Act on the Sámi Parliament of 1995 which, in addition, required certain objective criteria to be satisfied in respect of language, family origin, and parental link to a former Sámi delegate. It was not in dispute that these objective criteria were ignored by the Supreme Administrative Court in the majority of cases (*Sanila-Aikio* para. 6.7).

In this context, the Committee found it necessary to interpret Article 27 of the Covenant in light of the UNDRIP as well as Article 1 of the Covenant for construing an inalienable right of Indigenous peoples to freely determine their political status and freely pursue their economic, social and cultural development (*Ibid.*, para. 6.8). This right the Committee considered to be interrelated with other provisions of the Covenant and rules of international law, a position adopted by the Committee already in 1984 in its “General Comment no. 12”.¹⁰ The reference to “other provisions of the Covenant and rules of international law” (*Sanila-Aikio* para. 6.8) implies that in the context of Article 27, self-determination is limited to internal self-determination in the sense of an autonomous say over own affairs by an ethnic, religious or cultural community and not in the sense of a right to independence or separation from the territorial state. This is more explicitly clear from the Committee’s following statement in *Sanila-Aikio*:

9 The UNDRIP Resolution was adopted by the UN General Assembly on 13 September 2017, UN Doc A/Res/61/295.

10 See Human Rights Committee (1984, para. 2).

Moreover, although the rights protected under article 27 are individual rights, they depend in turn on the ability of the group to maintain its culture, language or religion. The Committee further recalls that the preamble of the United Nations Declaration on the Rights of Indigenous Peoples establishes that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples. In view thereof, the Committee considers that in the context of indigenous peoples' rights, articles 25 and 27 of the Covenant have a collective dimension and some of those rights can only be enjoyed in community with others. The rights to political participation of an indigenous community in the context of internal self-determination under article 27, read in the light of article 1, of the Covenant, and in pursuance of the preservation of the rights of members of the community to enjoy their own culture or to use their own language in community with the other members of their group, are not enjoyed merely individually. Consequently, when considering the individual harm in the context of this communication, the Committee must take into account the collective dimension of such harm. With respect to dilution of the vote of an indigenous community in the context of internal self-determination, harm directly imposed upon the collective may injure each and every individual member of the community. The author is a member of an indigenous community and all of her claims are related to her rights as such.

Ibid., para. 6.9

On the basis of this reading of the relevant Covenant provisions, the Committee turned to the meaning and role of the Sámi parliament for both the Sámi community and the state party. For the Sámi community the Sámi parliament constituted an important instrument for the Sámi, individually as well as collectively, to enjoy and exercise the rights under Articles 25 and 27. For the state party the Sámi parliament and its effective functioning in adequately representing the views of the Sámi were essential for reaching its implementation obligations under the two provisions (*Ibid.*, para. 6.10). Consequently, by infringing on the capacity of the Sámi people to exercise their right to internal self-determination through the Sámi parliament, the Supreme Administrative Court has violated the complainant's rights under Article 25, read alone and in conjunction with Article 27 (*Ibid.*, para. 6.11).

The *Sanila-Aikio* matter was decided on 1 November 2018. In virtual contemporaneous proceedings, based on the same set of facts but involving different complainants, the Committee, on the 2 November 2018, reached the same

conclusion on the violation of Articles 25 and 27 in the case of *Käkkäljärvi et al. v Finland* (2018).

4 Conclusions

The case law of the Human Rights Committee, coupled with its General Comments in respect of Article 27 and related provisions of the Covenant have produced a body of jurisprudence which provides potential claimants and state parties with a fair amount of clarity as regards the individual entitlements under Article 27 and the obligations state parties assume under that provision. However, for an individual complainant to find a remedy under the Optional Protocol for the violation of any of the Covenant rights is a slow and laborious process.

As a general observation, it must be noted that the individual complaints procedure under the Covenant's first Optional Protocol is intended as a safety net in cases where the victim of a rights violation was deprived of a suitable remedy in domestic law. Several obstacles, procedural and substantive, must be anticipated when a complainant decides to pursue this avenue in cases where the state party under the Covenant is also a state party to the Optional Protocol and temporal jurisdiction is established. First there is the exhaustion of domestic remedies which is a procedural requirement under Article 2 of the Optional Protocol. This may in itself become a bone of contention, since it is usually the state party's argument that the complainant has failed to exhaust all available domestic remedies. A complaint may also be rendered inadmissible under Articles 3 and 5 of the Optional Protocol if it is anonymous, constitutes an abuse of the proceedings, fails to substantiate a violation of the complainant's right/s, is being dealt with under another procedure of international investigation; or if domestic remedies were not exhausted. Depending on which of these procedural requirements the state party decides to concede or dispute, and whether additional information is required from the parties and timeously provided by them, or not, considerable delays may occur even before the merits are considered following a finding of admissibility of the complaint. Preparing a case for consideration on the merits may cause further delays, depending on the factual and legal complexities involved with the result that it may take between two to five years from the initial submission of a complaint to the eventual adoption of views by the Committee on the merits.

Once a violation has been found by the Committee the state party is requested by the Committee to provide an effective remedy. The obligation to provide an effective remedy derives from the state party's Covenant obligation

in Article 2(3)(a) which determines that each state party undertakes “to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”. To determine whether a state party has complied with a request to provide an effective remedy, the Committee has provided for a follow-up procedure in 1997 under Rule 101 of its General Rules of Procedure, the results of which are published in the reports of the Special Rapporteur on follow-up procedures in respect of individual communications.

The fact that the Committee is not capacitated to force a state party to comply with its findings and that some state parties failed to accept and comply with the Committee’s findings, even though they have participated in the proceedings, should not obscure the fact that a state party against whom a finding has been made are bound to give effect to the finding. As the Committee has pointed out in its “General Comment no. 33”,¹¹ this obligation derives from a number of factors in addition to Article 2(3)(a) of the Covenant mentioned above. Firstly, although the Committee is strictly speaking not a judicial body, its findings under the Optional Protocol exhibit some of the main characteristics of a judicial decision, since they are arrived at in a judicial spirit by individual members acting with impartiality and independence when arriving at a considered interpretation of the Covenant provisions and concluding with decisions that have a determinative character (Human Rights Committee 2008, para. 11). Secondly, the Committee is a creation of a binding multilateral treaty, the Covenant, and under the Optional Protocol, which is also legally binding for its states parties, it is charged with receiving and considering individual communications alleging violations by state parties under the Covenant (*Ibid.*, para. 13). Thirdly, in terms of international treaty law, and more specifically Article 26 of the Vienna Convention on the Law of Treaties (1969), states parties are under an obligation to perform their treaty obligations in good faith. Consequently, they are under an obligation to cooperate with the Committee in good faith (*Ibid.*, para. 15). To these one could add Article 27 of the Vienna Convention on the Law of Treaties. This provision prohibits a state party from invoking provisions of its domestic law as justification for its failure to comply with a treaty obligation. In instances where the domestic law is at variance with the treaty obligation, the former must be amended to facilitate compliance with the treaty obligation.

11 See Human Rights Committee (2008).

Bibliography

- Human Rights Committee. 1984. "General Comment no. 12: Article 1 (Right to self-determination) The Right to Self-determination of Peoples", 13 March 1984.
- Human Rights Committee. 1989. "General Comment no. 18: Non-discrimination", 10 November 1989.
- Human Rights Committee. 1994. "General Comment no. 23: Article 27 (Rights of Minorities)", 8 April 1994.
- Human Rights Committee. 1996. "General Comment no. 25: Article 25 (Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service", 12 July 1996.
- Human Rights Committee. 2008. "General Comment no. 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights", 5 November 2008.
- Schultz, Jenny, Joseph, Sarah and Melissa Castan. 2013. *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*. Oxford: Oxford University Press.
- Nowak, Manfred. 2005. *UN Covenant on Civil and Political Rights. CCPR Commentary*. Kehl am Rhein: Engel Publishers.

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Comparing Jurisprudence from Five Continents

Concluding Observations in Search for Meaning through Intercultural Understanding

Joseph Marko

1 Introduction: Methodological and Theoretical Considerations

There are three caveats to be taken into consideration from the very beginning. First, the double meaning of the book title *Comparative Matters* (Hirschl 2014) must be a warning for everybody daring to compare not only the law of and for religious and linguistic minorities and Indigenous peoples in the jurisprudence from five continents, the topical *substance* of all the scholarly articles collected in this volume. Hence, the central question is: Comparison of what? Legal *texts* and their *application* in case law through courts? Is it possible to draw general conclusions from *precedents* or even *paradigmatic* cases which can travel as legal transplants from one legal system or continent to another? Do we compare *groupings* and their relations vis-à-vis *society at large*? But is it possible to compare groupings and their relations without a *clear and unambiguous*, let alone universally accepted definition of the concepts and terms *minority* and *reasonable accommodation* in light of the scholarly battles about what makes the difference between assimilation and integration both as sociological concepts as well as legal categories as this was, for instance, highlighted in the contribution by Isra and Faiz on the role of the Constitutional Court of Indonesia in the protection of minority rights and which I have tried to analyse for the European context elsewhere (Marko 2019a, 138–77)?

Second, “at the heart of comparative constitutional law’s blurred epistemological and methodological matrix is the tension between universalism and particularism” (Hirschl 2014, 197). Whereas the former emphasises the common elements of legal systems “across time and place”, the latter take as axiomatic vantage point the “unique and idiosyncratic nature of any given legal system” (*Ibid.*). From this juxtaposition follow two conclusions. For *universalist* constitutionalists, *progress* will mean that legal systems shall finally converge around the protection of human, including minority rights as one of the two core elements of any constitutional system based on the normative principles of rule of law and democracy combined with an institutional system of

separation of powers, including an effective mechanism of judicial review. For *particularists* or *culturalists* then, “a given polity’s laws are inevitably reflective of that polity’s shared history, culture, and aspirations” (*Ibid.*, 198). Hence, from this standpoint, convergence will not occur. Moreover, “a neutral or objective comparison is virtually impossible” (*Ibid.*).

Third, and only seemingly paradoxically, I will methodologically not reject any of these positions as a possible and therefore necessary vantage point of analysis. This *logic* of comparison follows from a theoretical position of “constitutional pluralism” which I have explored and further developed elsewhere (Marko 2019c, 398–413). From the underlying epistemological perspective of social constructivism, particularists have a valid point in arguing that the claim of “neutral or objective comparison” (Hirschl 2014, 198). simply masks the fact that all legal systems are inherently based on values which are expressed in more or less abstract language in constitutional texts or derived from their *spirits*, not as ghostly objects in space and time, but *meaning* in terms of *original intent* to be identified through a linguistic, historic and systematic interpretation of the respective legal materials. Insofar, the universalist position based on the belief in the normative principles of democracy, rule of law, and the protection of human and minority rights, cannot be separated from the worldview, i.e. ideology of liberalism. All efforts to *neutralise* this ideology as a *meta-theory* against which all other ideologies, cultures and legal systems can and must be measured are, therefore, nothing but an exercise in *othering* which must be criticised as Eurocentrist and imperialist, owing to their intellectual origins in the European history of state formation and nation building and their empirical consequences in the world history of colonialism and imperialism.

However, the juxtaposition of universalism and particularism in terms of an either/or dichotomy is in itself an ideological construction, based on the confusion of the normative dimensions of universalism and cosmopolitanism and the political desirability and/or empirical possibility of establishing a universal human rights regime. By distinguishing four “meanings” and concepts of “universality”, Jack Donnelly makes clear that the opposition of universalists and particularists/relativists cannot be overcome by a reformulation in presenting universality and relativity as a continuum, thus suggesting that it is possible to have *more or less* of both at the same time, but that a much better representation would be to conceive of their relationship as “a multidimensional discursive space” (Donnelly 2013, 197). He thereby distinguishes the “conceptual universality” as the epistemological vantage point in defining the very idea of personal human dignity from “substantive universality” as the “universality of a particular conception or list of human rights” (*Ibid.*, 196) with the Universal

Declaration of Human Rights (1948) as the prime example. “Functional universality” then is the claim that human rights perform the function of protection against certain standard threats to human dignity posed by modern states and modern markets in most places of the modern world. Finally, “anthropological universality” means that there is an emerging cross-cultural consensus on the necessity of human rights “in some large or significant groups of societies, civilisations, or cultures” driven by functional universality and supported by international legal universality (Donnelly 2013, 196–99).

But what are the various “dimensions” which can be taken as analytical frame for the analysis of the mentioned “discursive space”? Against the bifurcation in the opposition of the normative validity of law on the one hand and the social recognition of law on the other in all theories of legal positivism, and thus taking the multidimensionality and multifunctionality of law seriously into account, we can again distinguish (see Fredman 2016, 281–84 and Marko 2019a, 166–67) four dimensions.

First, there is the “redistributive dimension” with regard to the socio-economic sphere of so-called *modern* societies. The concept of formal equality before the law instead of status hierarchies, translated into the legal obligation of state authorities to treat, as a minimum requirement, persons alike “without discrimination on any ground such as sex, race, colour, language, religion”,¹ was conceived in classic anti-discrimination adjudication as an anti-classification approach as can be seen from notions of a “colorblind constitutionalism” (Kennedy 2013) or the “myth” of the cultural neutrality of law (Kymlicka 2002) to this day. Thus, from a liberal-individualistic or liberal-egalitarian ideological viewpoint, any *special measure* or *affirmative action* in US constitutional terminology, in particular when conceived as a *group right* for effective minority protection, was and is revealingly termed *positive discrimination* to this day as if amounting by definition to *reverse discrimination* of the members of the majority population as such. However, respecting and protecting cultural diversity requires not only equal opportunities in terms of redistribution of material resources as we will learn below from the overview on the case law concerning Indigenous peoples and religious or linguistic minorities.

Second, it is necessary to take the “recognition dimension” much more seriously when we deal with the court jurisprudence in this volume in dealing with the factors why Indigenous peoples and minorities and their individual

1 Article 14 of the European Convention on Human Rights reads as follows: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

members have been excluded from the legal systems of the respective countries until recently by denying them legal status as groups or members of groups with a *distinct culture* for the protection of rights necessary not only for their physical survival or the preservation of their life-styles, but even more so for the preservation of their cultural identities. As we could see from the chapters in this volume, both liberal-individualistic and liberal-egalitarian as well as all forms of nationalist or racist ideologies support non-recognition policies and laws in order to discriminate minorities and their members from achieving equal social and economic status or legal status at all.

Third, the phenomena of racial discrimination and the poverty trap for Indigenous peoples and minorities all over the world are structurally interdependent in terms of an intergenerational vicious circle based on mutually re-enforcing socio-economic deprivation and the racial inferiorisation of their members. Hence, understanding the problem of structural discrimination with the possibility for nationalist and populist political elites to mobilise fears and hatred following from such situations or even societal configurations to polarise societies into an us-versus-them antagonism, requires finally a holistic analytical approach by taking into account also the “participatory dimension” and the “transformative dimension” for social, political and the overall societal development. Against the postulates of modernisation theories in the social sciences only a few decades ago, this was and is, however, never a unilinear *progress* from *primitive societies* towards a universal model of *modernity* in terms of industrialisation, urbanisation, and secularisation, but a permanent process of social and societal integration and disintegration within what I have termed the “identity/diversity – equality – participation nexus” (Marko 2019a, 166) which shall serve as analytical framework for comparison of the minority jurisprudence in this concluding chapter.

When carefully reading all the articles of this volume, two major fields of inquiry into the discursive space of minority rights jurisprudence of all the countries and regions, respectively national and transnational or supra-national courts come to the fore. These are, first, the problem how to deal with and possibly overcome the categorical majority – minority distinction either as a normative proposition or as assimilatory or exclusivist empirical effect of seemingly culturally *neutral* policies? Following from this, does individual anti-discrimination law and piecemeal litigation of international bodies and national courts then suffice or is it necessary to recognise groups and corporate rights following from either international law, national law or the recognised customary law of Indigenous peoples or even non-recognised law of religious communities themselves? Hence, what we can – in the next section – observe from the argumentative claims of parties in the proceedings as well

as reasonings of judges and courts, are the multiple challenges of conceptualisation and operationalisation of legal, ideological, political and sociological concepts and terms and their interplay about status and membership, whether ethnicity, race, and nation are subjective or objective criteria in this regard, and which role the principles of dignity of equality and the functional requirement of participation as interpretative principles and/or justiciable rules play.

This last juxtaposition already hints to the second field of inquiry guiding us as a red thread through all the articles, namely the mechanisms of judicial review and thus the role of courts in a system of separation of powers or, in US constitutional terminology, checks and balances which will be dealt with in the third section of this chapter. Is the process of judicial review when courts establish more generalised rules through *precedents* – not necessarily only in common law systems (see Chang *et al.* 2014, 308, 324–25) – already transforming courts from law interpreting bodies into *law-makers* with the danger of what was termed in French a *gouvernement des juges* over the legislative and the executive powers? Can, in particular, constitutional courts or courts of final appeal not only review legislation whether it is in conformity with the Constitution or not, but even instruct the legislator to adopt a new piece of legislation or even write a law itself as this was done by the Indian Supreme Court (see Chang *et al.* 2014, 459)? Hence, is any norm-generative process driven by courts in any case a *violation* of the principle of separation of powers or do we simply have to give up our century-old doctrines and positivistic legal theories and adapt these doctrines and theories to new realities in order to better grasp new challenges?

2 Against the Dichotomy of Individual versus Collective Rights or the Problem How to Organise Diverse and Multiple Identities

As we learn from George Barrie's chapter on the “‘Discovery’ of Native Title” in Australian law, until a few decades ago legal doctrines such as “doctrine of discovery” of a *terra nullius* helped justifying the occupation of land of so-called *non-civilised peoples* and its economic exploitation by European Christian nations with their alleged *innate superiority* through what we call today genocide and ethnic cleansing.² However, not only the ideologies of racism and nationalism will deny collective as well as individual rights to members

2 See, for instance, the 2019 Final Report of the Canadian National Inquiry into Missing and Murdered Indigenous Women and Girls at <https://www.mmiwg-ffada.ca/final-report/> (accessed November 27, 2020).

of minorities and Indigenous peoples. Also the so-called problem of lack of a universally accepted definition of the concepts and terms of *minority* or *Indigenous people* after the Second World War, based on the underlying liberalist “myth of neutrality” (Kymlicka 2002, 343–47) of law, seems to have contributed to the political unwillingness of their recognition as we can conclude from Hennie Strydom’s article on the case law of the UN Human Rights Committee as well as Alexandra Tomaselli’s and Federica Cittadino’s assessments of the jurisprudence of the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights when requiring an “extensive interpretation” of the American Convention on Human Rights (ACHR) to protect rights of Indigenous peoples “notwithstanding the absence of any expressive norm or provision on Indigenous rights”, that is either individual or collective rights, “until the adoption of the American Declaration on the Rights of Indigenous Peoples in 2016, which, however, is a non-binding document.”

Bertus de Villiers article with his thought provoking title about the “elephant in the room” is, however, an important contribution to make us aware that (legal) definitions in the positivistic tradition of natural and legal sciences do not necessarily constitute the vantage point of law-making in constitutional assemblies or parliaments, but that courts, adjudicating about claims of parties in a norm contestation process, do not decide only about the legal validity of *binding sources* of law in the liberalist tradition of the myth of neutrality of law, but even more so about social recognition, including the dimension of cultural validation of normative principles and rules, when it comes to the question whether the party submitting a claim has legal standing, i.e. what constitutes *status* and/or *membership* both in legal as well as sociological terms. This more processual perspective helps to overcome the ideological dichotomy of individual versus collective rights as we can see also from the debate about the right to vote and to stand in elections for individual members of the Sámi people in Finland, when they elect their members for the transnational Sámi parliament, or individual Māoris in New Zealand who can make a choice to have their names registered on the General or Māori electoral roll to cast their vote on the basis of a quota system, that is, a certain number of reserved seats for Māori in parliament. But, as De Villiers emphasises with the examples of case law from Finland, Australia and New Zealand, the “elephant in the room” is not the dichotomy between individual and collective rights, but the epistemologically and methodologically tricky question when *is* a person a Sámi or Māori? Can this legally be determined on the basis of allegedly *objective* criteria as positivists in legal sciences and the humanities claim such as *belonging* to a race, nation, minority group, or Indigenous people by *descent*? Or speaking the *same*, from the rest of the population different, language as

the other members of the group? Or adhering to the *same*, but again different, religion or belief? Or is only an absolute, *subjective* right to self-identification, as this is the case for the Māori, the only way out in order to avoid endless legal battles with the consequence of stigmatisation of persons and groups and the polarisation of societies?

As the contributions by De Villiers, Barrie, Rautenbach, and Isra and Faiz clearly demonstrate, there is, however, not a one-size-fits-all solution. The assumption, reported by De Villiers, that also non-Māori persons, if they register for the Māori roll in the elections, can promote the interests of the Māori is the great exception from the rule of self-identification, because of the possibility and reality of the creation of what is then called “inflation of membership” and “ethno-business” (De Villiers) for the financial profit of self-appointed political elites.³ In particular the ideology of nationalism, which is best characterised not by content but by the requirement for absolute loyalty to the particular nation, and therefore the rules of belonging imprinted in constitutional law and legislation, underlying, for instance, constitutional provisions for *official or state languages* as the article of Palermo and Constantin proves, do exclude the possibility of *subjective* self-identification.. From their chapter on linguistic rights litigation of and for national minorities in Central, Eastern, and South-Eastern Europe we can draw more general lessons about the historic legacy and ongoing effects of the ideology of nationalism in the political context and legal framework of centuries’ old multi-ethnic empires having been turned into a communist multi-national federation in the case of the Russian Empire after First World War and, after the model of the Soviet Union after the Second World War, with the Socialist Federal Republic of Yugoslavia and bi-national Czechoslovakia. After the breakdown of the communist regimes in this region between 1989 and 1993, several newly independent states were thought to *transform* themselves from communist-authoritarian rule to liberal democracies based on the principle of democracy and institutions and mechanisms of rule of law. Moreover, due to the ongoing parallel process of European integration and the transformation of the European (Economic) Communities into the European Union as a political entity based on these very same values and principles of democracy, rule of law, and respect for human rights, “including the rights of persons belonging to minorities”,⁴ the parliaments of

3 For a similar problem and debate in Romania concerning the constitutionally guaranteed seats for minorities see Marko and Constantin (2019, 371).

4 Article 2 Treaty on European Union reads as follows: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are

these newly independent states and other former communist countries in the region ratified two international treaties for minority protection and language rights, namely the Council of Europe's Framework Convention for the Protection of National Minorities and the European Charter on Regional and Minority Languages both of which had entered into force in 1998. However, what Palermo and Constantin now conclude from their analysis of 20 years of implementation of both internationally supervised and valid national law, is a paradox at best.

Most apex courts in the region consider it necessary to protect the *official* or *state language* against encroachments which, in the view of the majority of judges of these courts, would follow from the implementation of linguistic rights of minorities. A case in point was the judgment of the Constitutional Court of Lithuania which argued in 1999 that the Lithuanian language as state language had "constitutional value" which made it compulsory for communication in public life so that names written in passports "in other, non-Lithuanian letters" would deny this constitutional value, but also disturb "the activity of state and local government institutions, (...) of enterprises, establishments and organisations (...)" (Constitutional Court of Lithuania 1999, item 7). And in 2014 the Lithuanian Ministry of Justice asked the Constitutional Court to "{interpret} some points of its 1999 ruling" (Palermo and Constantin). This time, the Court held that non-Lithuanian names and surnames can be registered also in different letters, however of only the Latin alphabet which were consistent with the tradition of the Lithuanian language and the rules of the Lithuanian language. It is important to note, however, what the Court does not directly express but actually means with this formula. Namely, that names must not be written in the Cyrillic alphabet, which is a clear case of indirect discrimination against citizens belonging to the Russian speaking minority in Lithuania, the second largest minority after Poles, comprising 5.8% of the population according to the 2011 census.

This example can make us sensitive for two more general problems. In line with Rogers Brubaker's analytical framework for the new nationalisms in Eastern Europe, we can see in the case of the Russian minority that they are in a cross-pressure situation caught between the "nationalizing nationalism" of the newly independent democracies and the "homeland" or "transborder nationalism" of the former hegemons of multi-ethnic empires (Brubaker 1996; see also the reference to European empires in the contribution of Isra and Faiz

common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

in this volume describing the difference with regard to the Dutch East Indies) neither of which simply transform their political regimes and societal cultures from communist authoritarianism to liberal democracy. On the contrary, what is going on in these countries is a revival of ethno-nationalism so that courts defer to the political pressures of the nationalist political elites of the majority population leading to processes of “renationalisation” and “linguistic homogenisation” (Marko *et al.* 2019b, 303–06). Nevertheless, the *national revival* is again and again democratically legitimised in general elections since 2010, even if some countries such as Hungary, Poland or Bulgaria are more and more criticised as *illiberal* and thus authoritarian democracies after the abolishment of a pluralist, free press and public TV and so-called *reforms* in the organisation of the judiciary in order to get rid of an independent judiciary which is dominated instead by party affiliates of the right-wing populist parties in power by now.

The second, general problem comes to the fore through a judgment of the Russian Constitutional Court as problem for multi-national federations in 1998, namely how to protect and preserve bi- or multilingualism. The state language law of the republic of Bashkortostan required proficiency in the Bashkir language alongside Russian in order to be allowed to stand for the elections of the president of Bashkortostan. Despite the fact that the Russian Federal Constitution grants the right for republics to determine additional official languages in their territories (Article 68), the language proficiency requirement in the second official language was found in violation of the Federal Constitution with the argument that political rights cannot be made dependent on linguistic proficiency in a language which “can never be the only official language of a republic” (Palermo and Constantin). And in 2004 the Russian Constitutional Court ruled in a case concerning the state language of Tatarstan that the power to legislate about the alphabet to be used for the languages in the Russian Federation is vested in the federal level, since this represents a guarantee against possible disadvantages suffered by Russian citizens if any republic would be allowed to introduce a different script. A single alphabet to be used throughout the territory of the Russian Federation is thus “essential, according to the Court, as it guarantees the balanced functioning of the Russian language and the state languages of the republics ‘within a common language space’” (Palermo and Constantin).

This case, aptly criticised by Palermo and Constantin, confuses the fact and legal-dogmatic conclusions drawn. The Russian language and Cyrillic script are *official* anyhow so that the rights of Russian speakers are *not by definition* limited or even endangered through bilingualism. Hence, the rights of minority speakers cannot – in the language of US constitutional law – be declared

reverse discrimination as the judgment might insinuate. Quite contrary, the judgment is much more a demonstration of the politics of centralisation of the federation under president Putin and dogmatically speaking a problem which is not specifically Russian, but can be traced back to the 19th century history of the Habsburg Empire. With the Basic Law of the Rights of Citizens adopted in 1867 and still in constitutional rank in today's Republic of Austria, the minority German speakers in the Crown land of Bohemia (today territorially comprising the major part of the Czech Republic) required a provision that prohibits any duty to learn a "second official language" in public educational facilities.⁵ The entire article of this law, guaranteeing in paragraphs 1 and 2 the "equality" of "nationalities and languages" became, however, one of the major drivers in judicial disputes about the question who is a *member* of a "nationality" (*Volksstamm* in German) entitled to which rights of nationalities and their members in the administration, educational facilities and "public life", that is, not only in dealings of individuals vis-à-vis state authorities. However, the ongoing ethno-national mobilisation in the second half of the 19th century turned judicial litigation about the choice between monolingual and multilingual equality, which did exist in practice in several Crown lands at the local and regional level, more and more into a politic battlefield of *Germans* versus *Slavic* peoples and became, thus, one of the major reasons for the collapse of the Habsburg Empire along ethnic lines (Kann 1974).

Moreover, as we can learn from several of the contributions in this volume, not only language nationalism, but also the legal category of (biological) *descent* as prominent marker in both the ideologies of racism and nationalism has not yet been overcome. For instance, the Act on the Sámi Parliament of 1995 only indirectly refers to descent for the definition of being a Sámi with the conditions established in its Section 3 that in addition to a self-declaration "at least one of his parents or grandparents has learnt Sámi as his first language" or that "he is a descendent of a person who has been entered in a land, taxation or population register as a mountain, forest or fishing Lapp (...)." Hence, the notion of biological descent has to a certain degree been substituted in practice by the decision of the election committee of the Sámi parliament itself on who is entitled to vote. Despite of the fact that the Sámi parliament has been concerned that persons who are not accepted as Sámi have attempted to register as Sámi in order to influence policy issues on which the Sámi parliament must be consulted, it remains, however, as De Villiers correctly argues, a very

5 Article XIX, para. 3 of the Basic Law of the Rights of Citizens (*Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger* von 1867).

critical position of potential conflict of interests between exclusion and inclusion when the members of an elected body also decide about membership and thereby the right to vote in the next elections.

The problem becomes even more complex since disputes about the right to vote can be appealed to the Supreme Administrative Court of Finland. This Court obviously sought a compromise in 2015 when it allowed 93 persons to be registered as Sámi. This decision was based on the weight the Court gives to self-identification and the fundamental right to free association in balancing it with the right of the community to define itself as culturally distinct from the rest of society. Thus, any dispute about rights concerning status and membership is therefore embedded in a *triadic structure* of individual(s) – groups/communities – society at large, represented by state courts as supervisory bodies and therefore ultimately *guardians* in a legal system based on rule of law. However, are the principles and institutional mechanisms of democracy, rule of law and the protection of human and minority rights through judicial review sufficient guarantees for a peaceful living together in diversity? Hence, there is one basic question which follows from all the contributions in this volume and addressed in the title of this section, namely how to organise different and multiple identities also in liberal-democratic national states in order to preserve and protect cultural diversity?

First, this problem is highlighted by De Villiers with the example of the Afrikaans *community* in South Africa which is characterised as “smorgasbord of identities” with its internal multiplicity of racial groups, with different histories and ideologies, scattered throughout the whole territory, but categorised and classified as one *community* on the basis of language. But when De Villiers notes that it is ironic that not size, but internal diversity and the geographical distribution of speakers must be seen as main challenge in what I dubbed the identity/diversity – equality – participation nexus as necessary functional requirement for the effective representation and participation as group, the following question must be raised: How is it possible to overcome the implicit assumption that this necessarily requires the cultural homogeneity of groups with the consequence that society at large is seen as multi-ethnic society and multi-national state composed of neatly distinguished cultural and, in the end, also political containers based, at best, on the co-existence of groups?⁶

Second, none of the courts and countries under consideration can provide a solution how to resolve the regular double conflict of “external intervention”

6 See my critique of the concept of “multi-national federalism” in Marko (2020), as well as the different territorial and demographic context in Indonesia elaborated by Isra and Faiz in this volume with the overlapping majority – minority positions in different regions.

and “internal restriction” (Kymlicka 2002, 341). Is it undue or even illegal external intervention when the Supreme Administrative Court of Finland decides as court of final appeal insofar as the judgment above was criticised by the UN Human Rights Committee with the argument “that it eroded the sovereignty of the Sámi parliament to make final decisions about matters of membership of the Sámi” (De Villiers) despite of the fact that it tried to balance a right to self-identification in conjunction with the human right to freedom of association with the acceptance (of the democratically elected representatives) by the community? But, and this is the dilemma for all the reflections about recognition, participation and transformation as analytical lenses addressed in the introductory section, what about persons, communities and situations in which human rights principles, in particular the principle of equality for those without a less powerful status and thus in a minority position, are not invoked in order to justify external intervention to impose internal restrictions on behalf of individual members of groups in the name of human rights? Are there no borderlines and therefore no limits of tolerance under the justificatory heading of *legal pluralism* for not only possible, but also actual cultural practices such as female circumcision as Michel Rosenfeld (2011, 118)⁷ has argued?

This issue which is also known as problem of *protection of minorities within minorities* in scholarly literature about minority rights lies at the heart of Christa Rautenbach’s contribution about key judgments on the accommodation of Islamic family law in South Africa. As an example for legal pluralism she describes South African law as “mostly uncodified amalgam of laws to be found in various sources (...) [that] include the Constitution, legislation, judicial precedent, customary law (traditional laws) and common law (a mixture of Roman-Dutch law and English common law).” What has not been included to date are the legal rules of religious communities such as Muslims, who practice their rules in what she terms “the private sphere”, in accordance with Muslim religious authorities. Nevertheless, ongoing disputes about issues arising under non-recognised Muslim family law, in particular the (non-)recognition of Islamic marriages as valid contracts and the consequences for other rights for women which must be seen as particularly unfair to them, are brought before the courts of South Africa.

As elaborated by Rautenbach, the judicial response to the non-recognition of Muslim family law by legislation followed several steps. After the case *Ryland* (1997) prescribing accommodation “in the spirit of cultural diversity and human rights” despite the long history of the notion of *sacred marriage*

7 For a critique of Rosenfeld’s model of “comprehensive pluralism”, see Marko (2019c, 407–09).

between one man and one woman following from Christian values so that polygyny would undermine the monogamous status of civil marriages according to the South African Marriage Act of 1961, Muslim marriages were declared putative ones and Muslims had the right to convert their *de facto* monogamous marriages into *de jure* (civil) marriages in terms of the Marriage Act. Next, following from a dispute whether a Muslim husband should pay maintenance to his wife from a polygynous marriage, the court declared in *Khan* (2005) that the common law duty to support is a “flexible concept” that has been developed over time to include other relationships than just civil marriages. Moreover, it confirmed that polygyny is an acceptable form of religious marriage that should be protected by South African family law. In a next step, Judge van Heerden made clear in *Hassam* (2008) that unless the terms *spouse* and *survivor* in South African family law are

construed to encompass also widows of polygynous Muslim marriages, the practical effect would be that the widows of such marriages will be discriminated against solely because of the exercise by their deceased husbands of the right accorded to them by the tenets of a major faith to marry more than one woman. Such discrimination would not only amount to a violation of their rights to equality on the basis of marital status, religion (it being an aspect of a system of religious personal law) and culture, but would also infringe their right to dignity.

Hassam 2008, para. 16

Due to such a judicially driven *progress* in the partial recognition of parts of Muslim family law, also the problems addressed above for the justification of *external intervention* pop up in the reasoning of judges and courts when comparing the differences in approach between a religious and secular state in Moosa (1996, 142), quoted by Rautenbach:

Contrast [the approach of a religious state] to the application of MPL [Muslim Personal Law] in a secular state, where the state provides the enforcement of personal law as a matter of policy. For if MPL is enforced as a matter of religion then it raises questions of doctrinal entanglement and the permissible limits of state enforcement of religious policy. As a matter of policy, on the other hand, it raises questions as to how MPL fits into a constitutional framework and a secular administration. This invariably leads to a paradox where communities expect and demand the recognition of MPL from the modern state in a multicultural and secular

context; but at the same time they may express reservations about a secular authority implementing and interpreting religious law!

It is further argued in this context by courts that “it is quite inimical to all values of the new South Africa for one group to impose its values on another and that the Courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large, by all right-thinking people in the community and not only one section of it” (*Ryland* 1997, 707) and that both the principles of equality and the principle of tolerance of diversity and the recognition of the plural nature of society are seen as values underlying chapter 3 of the South African Constitution. The *paradox* quoted and the problem of *external intervention* leading to *internal restriction* under one and the same Constitution will, however, remain a paradox only, if this line of argumentation were seen as “two opposing central forces” which “may well be irreconcilable in the context of the Constitution” (Rautenbach). In my view, however, it is not the purported paradox, but the dichotomising view which might become a self-fulfilling prophecy when it is declared “that these conflicting interests have the potential of causing a constitutional tug-of-war between the self-same constitutional values provided in the Constitution, namely the right to equality on the one hand and culture- and religion-based rights on the other hand” as if a “politics of equal dignity” must, by definition, exclude a “politics of difference” and vice versa (*Ibid.*).

Moreover, what is termed court-driven “accommodation” in a multicultural context as achievement is summarised by Judge Yekiso in *Hoosain* (2010, para. 19) and disappointing at best by declaring that “[T]he courts, relying on the provisions of the Constitution, have been able to ameliorate the onerous consequences resulting from non-recognition of Muslim marriages by extending piecemeal recognition to such marriages (...)” so that neither the recognition dimension, nor participation dimension, let alone transformative dimension in the discursive space about effective minority rights protection has been effectively driven forward in complementing the necessary *tolerance* of people in a multicultural context to an *effective guarantee of rights and obligations*. Whether this can be achieved through the legislative recognition of Muslim family law as this has been ordered by the Western Cape High Court in *Women’s Legal Centre Trust* (2018), as an obligation following from the Constitution’s provision under Section 7(2) that the state is under a duty “to respect, promote and fulfil the rights in the Bill of Rights” remains to be seen.

However, how is it possible that a court may order the legislative power to adopt an act with a content pre-determined by that court’s ruling? Is this not in violation of the system of separation of powers as Rautenbach herself critically

addresses the problem in her introduction by stating that “Courts have been transformed from law-interpreters into law-makers by several constitutional provisions that permit them to develop the common law and legislation to give effect to the rights in the Bill of Rights” so that “the interpretive role of the courts has evolved from one that gives effect to clear and unambiguous legal texts, irrespective of their injustice consequences, to one ‘that involves making constitutional choices by balancing conflicting fundamental rights and freedoms’”?

This statement, assuming a role of courts in judicial review proceedings as mere interpreters of the *law of the land*, including the Constitution on top of the hierarchy of norms in a legal system, and bound by the “clear and unambiguous” text “irrespective of injustice consequences” brings us now to the next general field of inquiry.

3 Methods of Interpretation and Courts as Law-makers

In dealing with two cases of the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights concerning land rights of and for Indigenous peoples as group rights, Tomaselli and Cittadino celebrate the “evolutionary interpretation” of these judicial bodies by recognising the ACHR as “living instrument.” However, as can be seen from the dissenting opinion quoted, not everybody would join this celebratory comment by arguing that Article 3 ACHR literally grants that “[e]very person has the right to recognition as a person before the law” so that Indigenous peoples would not need a collective right to property following from Article 21 ACHR. Hence, is the recognition of legal status for groups and therefore the concept of group rights by the Court an interpretation *extra legem* or even *contra legem* as the dissenting opinion seems to assume?

Another example of the interpretation of the *ordinary meaning* of terms in legal texts is reported by Rautenbach in the South African case *Daniels* (2004) concerning Muslim marriages where Justice Sachs has only seemingly argued from a “linguistic point of view” but highlighted how the “ordinary meaning” is in effect *framed* by ideology so that (only) a functional analysis, in this case the question whether the interpretation serves inclusion or exclusion, can deconstruct a purportedly *neutral* legal analysis:

The word ‘spouse’ in its ordinary meaning includes parties to a Muslim marriage. Such a reading is not linguistically strained. On the contrary, it corresponds to the way the word is generally understood and used. It

is far more awkward from a linguistic point of view to exclude parties to a Muslim marriage from the word 'spouse' than to include them. Such exclusion as was effected in the past did not flow from courts giving the word 'spouse' its ordinary meaning. Rather, it emanated from a linguistically strained use of the word flowing from a culturally and racially hegemonic appropriation of it. Such interpretation owed more to the artifice of prejudice than the dictates of the English language. Both in intent and impact the restricted interpretation was discriminatory, expressly exalting a particular concept of marriage, flowing initially from a particular worldview, as the ideal against which Muslim marriages were measured and found to be wanting.

Daniels 2004, para. 19

As can be seen from this quote therefore, the opinion that the ordinary meaning of words is self-evident, must be called a myth having been created by positivistic legal sciences.

Moreover, each and every legal text and terminology is based on *concepts* as not only a social constructivist approach in legal and social sciences declares. Also Judge von Heerden highlighted this linguistic *fact* in his reasoning in the case *Hassam* (2008) already quoted above. Hence, with the mechanism of judicial review, courts are primarily tasked with the business of (re-)conceptualisation and operationalisation of more or less abstract language of constitutional and legal texts in light of not only changing norms, but also changing facts. In regard to the title of this chapter, law can never be understood properly if law is conceived as static phenomenon of an existing hierarchy of norms having been created by a revolutionary big-bang with a new Constitution and legislation so that judges simply have to and in practice do implement the "clear and unambiguous" norms they find in the Constitution and parliamentary acts. Quite the contrary, as this has already been addressed in the previous section, every legal system must be understood as a "cycle of norm-generation" (Marko 2019a, 167–75) following from the competitive interplay of values and interests which follow from both legal norms *and* facts and which are brought by parties before courts and lead to new norm-setting processes when apex courts have finally decided the case and parliaments become active again.

This dynamic view of law has also been recognised by Judge Farlam in the already mentioned case *Ryland* (1997) where the court had to decide whether to overrule previous judgments that had refused, on the grounds of public policy, to recognise Muslim marriages as valid contracts under South African law or not. Judge Farlam agreed that public policy is a question of fact and not of law, but, at the same time, he argued that "facts" were amended by the

transitional Constitution which altered “the basic values on which our civil policy is based” (*Ryland* 1997, 704).

But is it then possible any longer not to conceive a supra-national human rights charter or a Constitution like the South African one, which is ordering all state authorities to give the norms of the Bill of Rights effect in practice, a “living instrument” and to argue that the “interpretative role of courts” must be exercised “irrespective of their injustice consequences”, a doctrine which would follow only from a legal theory of strict separation of law and morals?

As we can see from the case law of Canadian, Australian and international courts in the chapters of Barrie, Strydom, Tomaselli and Cittadino and De Villiers through an extensive *historic analysis* the courts developed the arguments which are termed “revolutionary” in the Australian context by Barrie in the analysis of the *Mabo (no. 2)* decision (1992). This case had been stimulated by the Canadian case *Calder* (1973) in rejecting the ethnocentric, even racist perspective in order to overturn the doctrines of discovery and *terra nullius*. By establishing aboriginal rights as group rights against the classic-liberalist interpretation of property as an individual right as this is still the case with the European Court of Human Rights (Marko *et.al.*, 2019a, 208–10), we can find now a doctrine in the case law under scrutiny here which could be termed “the prohibition to uphold the effects of past ethnic cleansing”. This dogmatic concept was developed by the Bosnian Constitutional Court in the so-called *Constituent Peoples* case U 5/98 (2000) concerning the problems of restitution for so-called *minority returns*⁸ which had been prevented by state authorities on the regional and local level after the end of the war in 1995.⁹ In the same vein, the Justices in the *Mabo (no. 2)* case overturned the doctrine of discovery holding that the common law of Australia would “perpetuate injustice if it were to continue to embrace it” and that “Australian common law should not be frozen in in age of racial discrimination” (Barrie).

What all these judgments have in common is thus a strong transformative impact not only with regard to the recognition of group rights in terms of land and property rights as can be seen from the case law of the ACHR elaborated in detail by Tomaselli and Cittadino, but also a strong participatory and transformative dimension in terms of *restorative justice*.¹⁰

8 The return of Bosniaks, Croats and Serbs in areas where they would be numerically in a minority position.

9 See Marko (2006); the author of this chapter has also been the judge rapporteur in this case serving as international judge in Bosnia-Herzegovina.

10 For an overview in the European context see Marko *et al.* (2019a, 193–96).

This brings us therefore to two examples for the task of *reconceptualisation* and *operationalisation* exercised by these courts and ensuing problems.

As can be seen from the case law, the Inter-American Court first, by using the phrase “evolutionary interpretation”, re-interpreted Article 21 ACHR in the *Awás Tingni* case (2001, para. 148) as “the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognised by the Constitution of Nicaragua” thereby, in conjunction with the rights to judicial guarantees and protection under Articles 8 and 25 ACHR, effectively also establishing legal standing for Indigenous peoples themselves. Moreover, Article 21 ACHR was also interpreted in conjunction with Articles 1 and 2 ACHR as imposing on state parties “a positive obligation to adopt special measures to ensure that the members of indigenous and tribal peoples enjoy the full and equal exercise of their right to the lands that they have traditionally used and occupied” (*Kichwa Indigenous People of Sarayaku v. Ecuador* 2012, para. 171) taking thereby into account “the special relationship the Sarayaku people have with their land [which] encompasses not only their livelihoods, but also worldview and cultural and spiritual identity” (Tomaselli and Cittadino). In the final analysis, the Court declared that Ecuador had failed its obligations under international law

to adopt all necessary measures to guarantee the participation of the Sarayaku peoples, through their own institutions and mechanisms and in accordance with their values, practices, customs and forms of organization, in the decisions made regarding matters and policies that had or could have an impact on their territory, their life and their cultural and social identity, affecting their rights to communal property and to cultural identity.

Kichwa Indigenous People of Sarayaku v. Ecuador 2012, para. 232.

In the case *Kaliña and Lokono Peoples v. Suriname* (2015) the Inter-American Court was called to assess the lack of recognition of collective property rights and the failure to delimit, demarcate or grant land titles to Indigenous peoples, the continuous granting of property titles to non-Indigenous peoples, the creation of nature reserves and granting mining concessions to private third parties without free, prior and informed consultation, including an impact assessment and benefit-sharing. After having, first, confirmed its jurisprudence on group rights and legal standing, the Court orders states, second, in an interpretative move to reverse the burden of evidence – which in the European legal context follows from the concept of *indirect discrimination* to

be tackled effectively (Marko, 2019b, 314–15) – and to assess whether the limits on Indigenous land deriving from individual property of third parties are legal, necessary, and proportional in pursuing a legitimate aim in a democratic society. And third, the Court establishes that Indigenous peoples must “obtain other lands of the same size or quality” (*Kaliña and Lokono Peoples v. Suriname* 2015, para. 149) even when third-party rights do prevail, and restitution is not possible.

In assessing the task of (re-)conceptualisation and operationalisation of courts, we can thus summarise:

- The Inter-American Court reconceptualises seemingly individual rights under the ACHR into group rights by recognising also Indigenous peoples and tribal communities as right-holders with legal standing before courts so that the invocation of Article 3 ACHR shall provide an “autonomous” (Tomaselli and Cittadino) ground for legal standing in claims against violation of the ACHR. This can be seen in analogy to the jurisprudence of the European Court of Human Rights with regard to Article 14 of the European Convention on Human Rights (ECHR), the non-discrimination provision (see Marko 2019b, 308) which also provides for the *autonomy* of this guarantee independent of the fact whether the Court has found a violation of the substantive rights and freedoms guaranteed under the ECHR;
- in addition to generally using the proportionality principle which is becoming more and more a global *gold standard* of judicial review (Kremnitzer *et al.* 2020), the Court operationalises the equality principle and establishes an *affirmative duty* of states by a reversal of the burden of evidence, in order to
- give effect to the rights of restitution, benefit-sharing and last, but not least, effective participation through free, prior, and informed consultation in line with the (non-binding) UN Declaration on the Rights of Indigenous Peoples.

However, as we can see from the Canadian and Australian case law reported, the results from the court-generated (*r*)evolutionary interpretation processes cannot resolve all problems in all contexts.

In operationalising the *meaning* of aboriginal rights under Section 35(1) of the Canadian Constitution Act of 1982, the Supreme Court of Canada in the case *Van der Peet* (1996) established the following criteria:

- The claimant to an aboriginal right must demonstrate that the practice, custom or tradition was a central and significant part of the society’s distinctive culture so that without this practice, custom or tradition the culture in question would fundamentally be altered;

- Concerning the timeline, a court should consider whether the claimant’s demonstration of the connection with the land in its customs and laws has been continuing from the period prior to contact with European societies to the present day. This should, however, be interpreted *flexibly* so as not to impose too high a burden of evidence; nevertheless, the Court determines, a native title cannot be revived for contemporary recognition which has ceased with the abandoning of laws and customs based on tradition;
- The aboriginal title is held communally. It cannot be held by individual aboriginal persons so that it is a collective right to land held by all members of an aboriginal nation, distinguishing it from normal, that is, individual, private property interest.

In operationalising the *meaning* of free, prior, and informed consultation of Indigenous peoples (Eichler 2019) as part of the concept of *effective participation*¹¹ we can conclude from the case law under scrutiny:

- Free and informed consultation is not guaranteed, if negotiations to conclude private law contracts between Indigenous peoples and third parties are not supervised by state authorities which is declared an *affirmative duty* of states;
- Free, prior and informed consultation must contribute to “dialogue and consensus-building processes” from the first stages of the planning or preparation of the proposed measure in “good faith and [with] the aim of reaching an agreement” (*Kichwa Indigenous People of Sarayaku v. Ecuador* 2012, paras. 167 and 178)
- However, Indigenous and Aboriginal peoples have no veto rights, nor can their cultural autonomy rights justify claims for “independence or separation” (Strydom; see *Sanila-Aikio v. Finland* 2018, para. 6.9).

Concerning Rautenbach’s critical remarks about courts as “law-makers”, we can now summarise the findings in the chapters of this volume about *methods of interpretation* and the *forms of judicial decisions and remedies*.

First, and above all, seen from a perspective which conceives law not as a static hierarchy of norms, but as a norm-generative cycle and therefore process which is driven in the same way by parliaments as well as by individuals and groups through litigation before courts, we can no longer conceive the *interpretation* of law and *law-making* as a dichotomy. As we could learn from all the chapters, judges do not simply follow the *ordinary* or *linguistic meaning* of a legal text. Since almost all legal language is subject-specific and/or abstract, it

¹¹ For an overview in the European context, see Marko and Constantin (2019, 340–95).

is almost impossible to read the everyday meaning into a legal text as we could learn from the South African case *Daniels* (2004) above.

Judges and courts thus refer either to the *historic and systematic interpretation* with the “original intent” topos (see Isa and Faiz in their chapter on Indonesia) or make use of the functional interpretation, that is, the “purposive approach” (see also Chang *et al.* 2014, 417–431). It goes without saying that the choice between these different methods of interpretation is usually dependent on the respective legal culture and/or change of generations of judges sitting on the bench. Several examples of cases and dissenting opinions quoted in the previous section demonstrate that even a *text-based* approach may lead to surprising results through the (*r*)*evolutionary approach* developed not only by the Inter-American Court of Human Rights when turning classic liberal-individualist human rights into group rights or collective rights to communal land. Another example was the interpretation of constitutional principles and rules, in particular, the right to equality which was turned into an *affirmative duty* of states to take *special measures* on behalf of minorities and Indigenous peoples by reversing the burden of evidence. The critique raised from a positivistic-legal perspective then is the question, whether such results of interpretation are *extra legem* or even *contra legem*. Also the development of the dogmatic topos of “past *de jure* discrimination” as legitimation for the declaration that constitutional rights and obligations must go beyond the usual test of the validity of law *ratione temporae* since, otherwise, the effects of past injustice for which state authorities are responsible could not be corrected, will at least be considered *extra legem* by legal positivists. But as we can conclude, this topos is now used on three continents at least in order to get rid of the legacies of racist policies and laws under colonial rule or the consequences of wars in deeply ethnically divided societies and states.

The real challenge for all critics of *judicial activism* is the fact that apex courts – after having unsuccessfully *warned* the legislator or administration that the law or administrative regulation implemented will no longer be interpreted as being in conformity with the Constitution or law except for the interpretation given by the Court as we could see from the Indonesian case analysed by Isa and Faiz¹² – will *instruct* the legislator to amend the respective law or to adopt a new law within a certain time period or, in the final analysis, the Court will itself draft and impose the new law and thus become a *positive* law-maker, not only a *negative* law-maker as this was already distinguished and elaborated by Hans Kelsen in his *pure theory of law* (see also Chang *et al.* 2014, 308, fn 9).

12 See also Chang *et al.* (2014, 443–48) with reference to European case law.

In conclusion, therefore, all the chapters in this volume give evidence that the perennial debate about the advantages and disadvantages of *judicial self-restraint* and *judicial activism* will go on. As De Villiers aptly remarks, the *gold standard* of the proportionality test in judicial review which has become a legal transplant travelling to all continents by now, can be and is criticised for the almost absolute *discretionary power* in the hands of judges and triggering frequently a debate about the legitimacy of the judicial power in general and apex courts in particular in public discourse under the heading of a *gouvernement des juges*. Moreover, De Villiers criticises the use of the proportionality test as a “product of Western dispute resolution” approach which is “not necessarily reflective of Aboriginal laws”, thereby echoing the critique of the UN Human Rights Committee in its critique of the Supreme Administrative Court of Finland, quoted above, so that our central problem, how to organise diverse and multiple identities in light of the paradox of *external intervention* and *internal restrictions* will also remain contested. As we have seen, however, in the contribution of Isra and Faiz on Indonesia and the context of the state ideology of *Pancasila* whose first principle is the “Belief in the One and Only God” (see also Shah 2017, 37–9), the reference to human rights as “natural rights” (Isra and Faiz) in analogy to the meaning of the philosophical concept of European Enlightenment philosophy became decisive for the Constitutional Court of Indonesia to be able to conceptually and constitutionally clarify in a “politically sensitive case” the relationship between state-recognised religions and traditional beliefs and, in effect, to overcome the direct discrimination of adherents of traditional beliefs in access to education, the labour market, and public services.

Last, but not least, due to the processes of industrialisation and urbanisation of almost all countries of the world and the demographic processes going hand in hand with the former and despite the fact that most members of Aboriginal peoples live in cities and regional areas where little land is available to claim, all the *progressive* results achieved in the jurisprudence of courts must realistically be assessed so that Barrie comes to the conclusion that the Australian Native Title Act of 1993 must be perceived as “a major advance in national reconciliation displacing racism and the denial of justice for aboriginal peoples.”

4 Preliminary Conclusions

These observations in search for meaning through intercultural understanding in comparing jurisprudence on the rights of minorities and Indigenous peoples from five continents have shown that different cultures, in particular also legal

cultures based on legal traditions of either Anglo-Saxon pragmatist common law or more theoretical, abstract, definition requiring, and top-down legislation and jurisprudence in civil law traditions are not independent, sovereign realms of and for legal thinking. There is not only mutual “cross-pollination” of the reasoning of judgments as this was demonstrated with cases from Canada and Australia, not the least due to their common heritage from British colonialism. We have, moreover, seen that similar problems lead to similar approaches in dispute resolution. In particular the proportionality test in judicial review seems to become a legal transplant all over the world through the interplay of national and international or supra-national courts.

What we could also observe is the danger of ideologically triggered dichotomisations such as individual versus collective rights, objective versus subjective criteria for the determination of legal status, or private versus public affairs. Instead, I hope that I could demonstrate against the doctrines of positivistic legal theory with the examples highlighted in this chapter that there cannot be a *strict separation* between law and politics or law and morals and that substantialist or even naturalist conceptualisations of race, descent, or nation in order to determine the *ordinary meaning* of legal texts would only help to preserve racist or other ideological prejudices, since law and therefore legal language itself is never value-neutral as liberal ideology would like to make us believe. Quite contrary, in order to avoid reifications, naturalisations and dichotomisations of socially constructed concepts and empirical social relations, legal analysis thus requires a multiperspectival approach which is based on the four problem-oriented dimensions elaborated in the introductory section of this chapter.

Nevertheless, problems and therefore misunderstandings will also remain concerning the relationship between *universalists* and *particularists/relativists* as we could see from the unresolved problem how to deal with the intricate relationship of *external intervention* and *internal restriction* and the question how to organise multiple identities and thus achieve social and system integration without the classical assumptions of the ideologies of state and nation building which either define culture as legally irrelevant for *abstract* citizenship or transform culture into neatly separated *ethnic*, that is, culturally and socially closed boxes. However, what we could see from the case law discussed in all the chapters of this volume and what gives hope for enhanced intercultural understanding is the fact that the notions and concepts of *functional* and *anthropological universality* (Donnelly 2013) come more and more to the fore in the jurisprudence in all the five continents.

Bibliography

- Brubaker, Rogers .1996. *Nationalism Reframed: Nationhood and the National Question in the New Europe*. Cambridge: Cambridge University Press.
- Chang, Wen-Chen *et al.* 2014. *Constitutionalism in Asia. Cases and Materials*. Oxford: Hart Publishing.
- Donnelly, Jack. 2013. *Universal Human Rights in Theory and Practice*. 3rd ed, Ithaca, NY, London: Cornell University Press.
- Eichler, Jessica. 2019. Reconciling Indigenous Peoples' Individual and Collective Rights: Participation, Prior Consultation and Self-Determination in Latin America. New York, London: Routledge.
- Fredman, Sandra. 2016. "Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights." *Human Rights Law Review* 16(2): 273–301.
- Hirschl, Ran. 2014. *Comparative Matters: The Renaissance of Comparative Constitutional Law*. Oxford: Oxford University Press.
- Kann, Robert A. 1974. *A History of the Habsburg Empire 1526–1918*. Berkeley, Los Angeles, London: University of California Press.
- Kennedy, Randall. 2013. "Colorblind Constitutionalism." *Fordham Law Review* 82(1): 1–20.
- Kremnitzer, Mordechai *et al.* 2020. *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice*. Cambridge: Cambridge University Press.
- Kymlicka, Will. 2002. *Contemporary Political Philosophy: An Introduction*. 2nd ed., Oxford: Oxford University Press.
- Marko, Joseph. 2006. "United in Diversity?" Problems of State- and Nation- Building in Post- Conflict Situations: The Case of Bosnia- Herzegovina." *Vermont Law Review* 30(3): 503–50.
- Marko, Joseph. 2019a. "Law and sociology: the constructivist and interpretative turn." In *Human and Minority Rights Protection by Multiple Diversity Governance. History, Law, Ideology and Politics in European Perspective*, edited by Joseph Marko and Sergiu Constantin, 138–77. London and New York: Routledge.
- Marko, Joseph. 2019b. "Against discrimination: the right to equality and the dilemma of difference." In *Human and Minority Rights Protection by Multiple Diversity Governance. History, Law, Ideology and Politics in European Perspective*, edited by Joseph Marko and Sergiu Constantin, 307–39. London and New York: Routledge.
- Marko, Joseph. 2019c. "From minority protection to multiple diversity governance." In *Human and Minority Rights Protection by Multiple Diversity Governance. History, Law, Ideology and Politics in European Perspective*, edited by Joseph Marko and Sergiu Constantin, 396–429. London and New York: Routledge.

- Marko, Joseph *et al.* 2019a. "Against annihilation: the right to existence." In *Human and Minority Rights Protection by Multiple Diversity Governance. History, Law, Ideology and Politics in European Perspective*, edited by Joseph Marko and Sergiu Constantin, 178–226. London and New York: Routledge.
- Marko, Joseph *et al.* 2019b. "Against assimilation: the right to multiple identities." In *Human and Minority Rights Protection by Multiple Diversity Governance. History, Law, Ideology and Politics in European Perspective*, edited by Joseph Marko and Sergiu Constantin, 227–306. London and New York: Routledge.
- Marko, Joseph and Sergiu Constantin. 2019. "Against marginalisation: the right to effective participation." In *Human and Minority Rights Protection by Multiple Diversity Governance. History, Law, Ideology and Politics in European Perspective*, edited by Joseph Marko and Sergiu Constantin, 340–95. London and New York: Routledge.
- Marko, Joseph. 2020. "What is Wrong with the Concept of Multinational Federalism. Some Thoughts about the Interrelationship between the Concept of (Multi-) Nationalism, Federalism, Power Sharing and Conflict Resolution." *Ethnopolitics* 19(4): 416–32.
- Moosa, Ebrahim. 1996. "Prospects for Muslim Law in South Africa: A History and Recent Developments." *Yearbook of Islamic and Middle Eastern Law Online* 3, no. 1: 130–55. <https://doi.org/10.1163/221129897X00126>.
- Rosenfeld, Michel. 2011. *Law, Justice, Democracy, and the Clash of Cultures. A Pluralist Account*. Cambridge *et al.*: Cambridge University Press.
- Shah, Dian A.H. 2017. *Constitutions, Religion and Politics in Asia. Indonesia, Malaysia and Sri Lanka*. Cambridge: Cambridge University Press.

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