

The deficiency of individual rights and the quest for community protection

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OPSOMMING

Die ontoereikendheid van individuele regte en die noodsaak vir die beskerming van gemeenskappe

Hierdie bydrae sluit aan by en brei uit op die artikel “Perspektief op die regsbeskerming van kollektiwiteite” 2003 *THRHR* 67 ev. Daar word geargumenteer dat die tradisionele liberale oortuiging as sou individuele regte genoegsame beskerming vir die belange van kollektiwiteite soos taal- en kultuurgemeenskappe bied, ongegrond is. Selfs in die aansig van ’n volledige katalogus van individuele regte bly daar steeds ’n beduidende aantal regsbelange van ’n kollektiewe aard oor waarna nog nie omgesien word nie. Om daardie rede word regsbeskerming van ’n besondere kollektiewe aard juis vereis. Die tradisionele liberale argumente teen kollektiewe regsbeskerming (benewens individuele regte), wat sigself soms as regswetenskaplik voordoen, word behandel en weerlê. Ofskoon die argumente grootliks teoreties van aard is, word daar ten slotte spesifiek na die besondere noodsaak vir kollektiewe regsbeskerming van minderhede binne hegemoniese kontekste (soos Suid-Afrika) verwys.

The state need not consist of a single people and could be a community of communities, each enjoying different degrees of autonomy but all held together by shared legal and political bonds – Bhikhu Parekh.

1 THE TRADITIONAL MODEL

Traditionally, the recognition of individual rights has been offered as an effective and comprehensive safeguard for the protection of both individuals and the communities they associate with or belong to. The concept of community rights, particularly for the protection of minority communities, and of measures for the safeguarding of institutions for communities (as collectivities) has often been met with condemnation. This is also particularly valid for South Africa where many politicians and public commentators have dismissed – occasionally quite bluntly – the notion of legal protection for collectivities. Seemingly authoritative support for this has been forthcoming from some lawyers. The rejection of the notion of the collective legal protection for communities is rooted in a deeply-held faith in individual rights. Traditional belief, propagated tirelessly by many, holds that the protection of individual rights also implies sufficient protection for the communities that individuals belong to and that specific legal protection for communities is therefore unnecessary and redundant. A system of individual rights *enshrined* in a bill of rights within an *entrenched* constitution and overseen by an independent judiciary is believed to constitute a complete and comprehensive system of rights protection. Consequently, from a constitutional point of view, nothing additional needs to be provided for: specific rights for communities need not be considered, neither would there be a need for any other constitutional

measures for the legal protection of communities; individual rights overseen by the courts are maintained to cover the entire field of legal protection and provide the fool-proof and comprehensive system and strategy for legal protection of *all* interests including those of minority communities. The traditional approach – quite evidently rooted in orthodox liberal convictions – that places so much faith in justiciable rights of the individual legal subject and dismisses specific measures for the protection of communities has profoundly influenced South African constitutionalism and is fundamental to the South African constitutional order.

The more extreme supporters of this approach go even further and refuse to entertain the very notion of *community* within their conceptual framework.

In spite of the rejection of community and collective legal protection, many branches of positive law have consistently been recognising collective rights by conferring rights on the whole of the populace of the territorial state.¹ This is done by conferring rights on the state as a juristic person. According to the traditional view, the state therefore enjoys a monopoly to collective rights protection. Rights, in terms of this view, accrue either to individuals or to the state, leaving intermediary entities (communities/collectivities) without any claim to legal protection. As Van Dyke stated:

“The assumption was that rights exist at two levels, the level of the individual and the level of the nation state. Groups other than the nation or the population of the state could be ignored.”²

This assumption departs from the premise upon which most political theories, from the time of the Greeks onward, have been based, namely that of the national or ethnic homogeneity of the communities that these theories reflected upon.³

Collective rights protection – of the entire population of the state – enjoys the support of the very same detractors of the collective legal protection for minority communities. The detractors have tried to advance legal arguments for their views. These will be dealt with *infra*. Suffice it to say at this stage that the detractors’ excuse for denying specific legal protection for communities is based among other things on the contention that (minority) communities, unlike the state, are not legal subjects (juristic persons in this case) and for that reason cannot be the bearers of rights.

1 The term nation state suggests some cultural commonality among the citizenry of the modern state. This is clearly incorrect. The state is rather a sovereign political organisation within a defined territory regardless of the degree of homogeneity or heterogeneity of the population. The only commonality among the populace is their abstract legal relationship with the state and the fact that they permanently live within the boundaries of the same territory. It is precisely for this reason that the term territorial state is more descriptive and hence to be preferred. It is also used by the English historian Holdsworth *A history of English law* Vol VIII (1937) 310, Falk “The rights of peoples (in particular indigenous peoples)” in Crawford *The rights of peoples* (1988) 26, Strange “The defective state” 1995 *Daedalus* 70, Figgis *Political thought from Gerson to Grotius 1414–1625* (1960) 72, Habermas “Law and morality” in Mc Currin (ed) *The Tanner lectures on human values* Vol VIII (1988) 260, Bozeman *Conflict in Africa* (1976) 131, Kymlicka “Liberalism and the politicisation of ethnicity” 1991 *Canadian J Law and Jurisprudence* 239 who calls it the multination state in stead of the nation state and Walzer “Pluralism: A political perspective” in Kymlicka (ed) *The rights of minorities* (1995) 140 refers to the modern state as the *putative national state*.

2 “Human rights and the rights of groups” 1974 *American J Political Science* 726.

3 Walzer 139.

In the pages to follow, the inadequacy of the traditional approach and the kind of constitutional order that it engenders will be dealt with. It will be indicated that individual rights, including the individual rights to culture, language, mother tongue education, freedom of expression, association and many more, in the way they are dealt with in terms of the traditional approach is inadequate for accommodating the interests of the individual members of minority communities on an equal footing with those belonging to the majority. In order to secure the equal recognition and protection for members of minority communities and non-hegemonic cultures and so promote a just constitutional order, collective legal protection for minority communities is crucial. Equal rights for individuals in a heterogeneous society, in the absence of particular protection for minority communities, creates an unjust dispensation that systemically operates to the undue disadvantage of minority communities and their members. Consequently, a constitutional order in a heterogeneous state, without specific legal protection for minority communities generates an established pattern of group advancement, namely that of the majority (group).

2 THE REDUNDANCY AND LEGAL SUBJECTIVITY ARGUMENTS

Mainly two arguments form the basis for the traditional approach and of the case against collective legal protection for (minority) communities. They might be called the *redundancy (individually reductionist)* argument and the *definition (legal subjectivity)* argument. The first claims that the legal protection of (minority) communities is redundant and unnecessary and the second that a collectivity such as a minority community is not susceptible to neat legal definition and is for that reason incapable of holding rights.

Opponents of the collective protection of minorities contend that individual rights (and rights exercised by juristic persons) fully cover the terrain of rights protection. Particularly in the decades immediately following World War II there was a strong belief that cultural groups could best be protected through a bill of rights,⁴ protecting the rights of individuals. The belief was based on the argument that since cultural groups consist of individual members, groups as such do not require protection as long as the individual rights of all individuals, including the members of groups, are protected. Hence, it is argued that when individual rights are protected, the collectivities, to which the individuals belong, automatically draw the benefit thereof, thus making it unnecessary to give protection to collectivities in addition to the rights that individuals already have.⁵ It was even claimed that *logics* and *legal science* support this contention. The South African Law Commission, for example, in its much discussed inquiry into group and human rights acknowledged that there might be collective *interests*, but then went on to state that in the final analysis all rights vest in and are enforced by individuals. With a notable amount of certainty the Commission claimed:

4 De Villiers "Comparative studies of federalism: Opportunities and limitations as applied to the protection of cultural groups" 2004 *TSAR* 211.

5 Hartney "Some confusion concerning collective rights" 1991 *Canadian J Law and Jurisprudence* 294; see also unpublished address by Mr Justice Olivier, former head of the SA Law Commission at Justice College, Pretoria on 15 May 1992 9–10.

“It is an error of logic to suppose that the protection of these rights can only take place through a group; in fact, juridically it can only take place through an *individual*” (own emphasis).⁶

In the summary to its report the Commission stated:

“Neither in legal theory nor in legal practice is it correct or necessary to recognize these values as anything other than individual rights in a bill of rights. After all, every individual member of the group subscribing to these values can enforce them... The Commission therefore stand by the proposal that these values be given full recognition and protection in the proposed bill of rights as individual rights.”⁷

Some jurists hold similar views and allege that *legal science* rules out the possibility of collective rights protection, claiming that something like language rights can *juridically speaking* be protected only as the rights of individuals.⁸ The objection to the legal protection of cultural communities is based upon what has been christened *legally scientific* and *legal philosophical* grounds. A collectivity, such as an ethnic, language or cultural community cannot be defined as a legal subject, and they can therefore neither be the holders of rights, nor be able to enforce any rights. Hence, both substantive law and procedural law lack the conceptual framework for dealing with community claims in the form of rights.

In what was sanctified as a *philosophical perspective*, the impossibility to legally define communities was enough for decisively rejecting the legal protection of communities. It was stated that since an ethnic or cultural community is not juridically definable, there is no such thing as group rights or group interest worthy of protection.⁹

The Law Commission mooted similar objections.¹⁰ It acknowledged the importance of certain interests of minority communities but nevertheless found the difficulty or impossibility to define a minority community as a legal subject, to be, what it called a *fundamental legal problem*.

“From a legal point of view before there can be any question of an enforceable right in respect of any person, there must also be a legal subject, *a persona juris*, to whom the right belongs. After all, this is obvious.”¹¹

Distinguishing between interests, which the Commission conceded communities might have, and rights which in the eyes of the Commission a community could never have, it stated:

“In that sense it is possible to speak of a group interest, but juridically it is not a group right. It remains an individual right which an individual can protect in a court of law although he upholds the value together with other individuals.”

6 SA Law Commission Project 58 *Group and human rights working paper* 25 386 para 13.11.

7 SA Law Commission Project 58 *Group and human rights. Summary of interim report* (Aug 1991) 35 para 1.112.

8 Du Plessis “’n Regsteories-regsfilosofiese peiling van die menseregtehandvesdebat in Suid-Afrika” 1987 *TRW* 133.

9 Du Plessis “Filosofiese perspektief op ’n menseregtehandves in Suid-Afrika” in Van der Westhuizen and Viljoen *A bill of rights for South Africa* (1988) 17. Du Plessis stated: “Omdat ’n etniese groep of volk ’n maatskap en daarom juridies ondefinieerbaar is, bestaan daar ook nie so iets soos regtens beskermenswaardige etniese groepe of regsbelange nie.” See also Coetzee “Groepe en kategorieë in Suid-Afrika” 1983 *Woord en Daad* 6–7.

10 SA Law Commission (fn 6 above) para 13.5 ff.

11 Para 13.4

To this Mr Justice Olivier under whose supervision the Law Commission conducted its inquiry added procedural objections arguing that groups were incapable of enforcing rights. How would a group (for example Afrikaners), pursue their legal action, he asked:

“Must all Afrikaners sign the power of attorney to institute an action, who is going to pay the legal costs and against whom must execution be taken in the event the action is unsuccessful?”¹² (own translation).

Paul Sieghart, specifically dealing with the question of the rights of peoples, added two further objections to the recognition of collective rights.

In the first instance he stated that it is difficult to identify the entities that are obliged to respect the rights of peoples. It is not clear in whose power it lies to perform the obligations owed to peoples and therefore also impossible to prove when the rights have been infringed.¹³ Secondly, Sieghart fears that the rights of peoples might pose a danger to individual human rights, which might become subservient to the rights of peoples.¹⁴

3 DEVELOPMENTS IN POSITIVE LAW

The above objections have to a considerable extent been overtaken by practical legal developments both in the international sphere as well as in South Africa, thus stripping them of much of the relevance that they possibly might have had. It is now increasingly acknowledged in international and constitutional law that special arrangements, in addition to a bill of rights (or with new types of rights being included in the bill of rights) may have to be considered to address the concerns of some cultural groups.¹⁵

While and since these objections against collective rights protection were raised, legal protection of collectivities and specifically of minorities in collective form has made considerable headway. Not only in Western Europe, which is the most advanced in the field of minority protection, but also within the United Nations system of human rights protection, the legal protection of minorities in the form of collective entities have come to be well-established. Quite remarkable is the fact that the work done in this regard both within the UN and the Organisation for Security and Co-operation in Europe has been advancing in the absence of a generally accepted definition of the concepts of minority¹⁶ and community.

The legal interest of minorities may for example find expression – and has in fact indeed found expression – by minorities indicating over which matters they prefer to exercise self-determination or in a dispensation providing for autonomy for communities with regard to certain matters, regional self-government,

12 Olivier (fn 5 above) 9–10. (Original Afrikaans text: “Moet alle Afrikaners die volmag teken om ’n aksie in te stel, wie gaan die koste betaal en teen wie moet eksekusie gehef word as die aksie verloor word?” Olivier, who later served as a judge of the Supreme Court of Appeal, headed the team conducting the inquiry into human and group rights.

13 Sieghart *The international law of human rights* (1992) 367.

14 *Idem* 368. It should be noted that Sieghart’s objections apply to *peoples* and not to all collectivities. Sieghart 367 also mentioned that there is no generally accepted definition of peoples as an objection to the legal recognition of peoples’ rights.

15 De Villiers 211–212.

16 Benoit-Rohmer *The minority question in Europe: Towards a coherent system of protection for national minorities* (1996) 13.

participation in the national process of decision making and so on¹⁷ or in the form of minorities' entitlement to positive action by their national government to safeguard their identity and to the development of various qualities and assets of such minorities.¹⁸ Corporate federalism is particularly relevant in this context. In terms thereof, an arrangement is made for cultural groups, rather than geographical entities, to make up the federal units of the state.¹⁹

It is quite obvious that these developments are not restricted solely to the protection of individual rights, but involve the legal protection of collectivities, enabling individuals to benefit therefrom by reason of their involvement in the collectivities they belong to. Collective facilities are provided and individual members of these collectivities benefit from these.

Within the context of the UN article 27 of the Covenant for Civil and Political Rights (CCPR) is to date the most important provision pertaining to the rights of persons belonging to ethnic, language and religious minorities. However, article 27 is a strikingly weak legal formulation. In the first instance it places no positive duties upon governments in relation to the interests of minorities. Governments' duties are negative, namely solely to allow persons belonging to these minorities in community with other members to practice their religion and culture. Secondly, there is no protection for the collectivity as such, but merely for the individuals belonging to such minorities.

The provision reads:

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

This provision, together with the rest of the Covenant is interpreted, applied and supervised by the Human Rights Committee.²⁰ An important development in the field of minority rights took place in 1992 when the UN Declaration on the Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities was adopted by the General Assembly.²¹ The declaration goes considerably further than article 27. It is not restricted to the individual rights of persons belonging to the minorities in question, but seeks to secure the existence and identity of the minority *communities* as collective entities.²² One of the distinctive characteristics furthermore of the Declaration is that it imposes positive obligations upon governments to implement measures for safeguarding the identity and promoting the well-being of minorities.²³

The content of the declaration corresponds with the extensive interpretation that the Committee has lately given to article 27. Hence, even though its phraseology suggests that the provision is limited to the protection of individual rights only, the Committee now understands and applies it also to provide for the

17 Cassese *Self determination of peoples: A legal reappraisal* (1995) 352.

18 *Idem* 253.

19 De Villiers 218–219.

20 CCPR Part VI.

21 General Assembly Resolution 47/135 of 18 December 1992.

22 See Strydom "Minority rights protection: Implementing international standards" 1998 *SAJHR* 377.

23 Cf amongst others a 1, 2 and 4 of the Declaration.

protection of the integrity of minority *groups* as *collective* bearers of rights.²⁴ On occasion the Committee for example required governments to report on which positive measures states had introduced to protect minority interests. By virtue of this extensive interpretation of article 27 the Committee therefore expected governments to take active measures towards the promotion of minority *communities* as such.²⁵ On various occasions the Committee wanted to learn from governments whether pupils from minority communities received mother tongue education in their own schools and also whether university education was provided for members of a minority community in their mother tongue.²⁶

Recent developments in South African are also particularly informative in the present context. Particularly land restitution and land tenure legislation adopted since 1994 recognises and confers rights on communities without requiring that such communities be defined with preciseness.²⁷ The case law in which the definition of communities was dealt with clearly demonstrates that neat and precise definition of a community is no prerequisite for rights to vest in such communities. There is no need in particular to precisely determine which individuals are members of a community and which not in order for such community to be the bearer of rights.²⁸ In the *Kranspoort* case, the court noted that a community has a dynamic nature. The fact that it was not possible to determine on the evidence precisely which individuals belong to the community in question and which not, did not matter to the court. The court stated: “In my view, provided that the elements of commonality and cohesiveness are present, it does not matter that this precision is lacking.”²⁹

The court said that, when in a land claim matter there is a dispute on the existence of the claimant community, a broad inquiry into who the persons making up the community might be is legitimate. This will assist the court in determining whether or not the required element of commonality which is a prerequisite for a community was present. But this enquiry, said the court, does not mean that each and every member of the group constituting the community needs to be identified in order to find, on a balance of probabilities, that a community indeed exists.³⁰

Developments both in South African and international law therefore show that even though it is conceded that there is no clear definition of the concept of community or of communities in practical cases (minorities or other communities), this has not been allowed to stand in the way of the increasing trend of

24 Cf Strydom 375–376.

25 Cf the discussion by Åkermark *Justification of minority protection in international law* (1997) 139–140.

26 *Idem* 143–144.

27 Upgrading of Land Tenure Rights Act 112 of 1991, Restitution of Land Rights Act 22 of 1994, Interim Protection of Informal Property Act 31 of 1996, National Environmental Management Act 107 of 1998. See in this regard Pienaar “The meaning of the concept of community in South African Land Tenure Legislation” 2005 *Stell LR* 60–76.

28 See eg *In re Macleantown Residents’ Association: Re certain erven and commonage in Macleantown* 1996 4 SA 1272 (LCC); *In re Kranspoort Community* 2000 2 SA 124 (LCC) as well as the three *Richtersveld* cases which were in agreement as far as this question was concerned: *Richtersveld Community v Alexkor Ltd* 2001 3 SA 1293 (LCC) paras 66–75; *Richtersveld Community v Alexkor Ltd* 2003 6 SA 104 (SCA) para 5.

29 *Kranspoort* para 45.

30 Para 46.

legal protection for communities.³¹ The lack of a clear definition, at least from the perspective of positive law, clearly illustrates how unfounded the so-called *legal philosophical* and *legal scientific* protestation against the recognition and protection of (minority) communities really is. Specifically in the context of minority interests, the absence of a definition of the minority appears to be used as hardly more than an excuse for denying legitimate minority interests.³²

4 THE THEORETICAL MERITS OF THE TRADITIONAL APPROACH

4.1 Individual reductionism

The insistence that individual rights exhaust the entire terrain of rights protection and that the legal protection of communities would therefore be redundant and unnecessary is based upon an *individual reductionism* informed by classically liberal ideology, which reached its zenith in the nineteenth century. In terms thereof, the notion of community is regarded as purely fictitious and all legal interests are strictly reduced to the individual.³³ It is believed that legal interests can vest in nothing but individuals. Communities simply do not exist and consequently nothing can vest in them. Jeremy Bentham provided the classical formulation for *individual reductionism* when in 1789 in his *Principles of morals and legislation* he answered as follows the question as to what a community is:

“The community is a fictitious body, composed of the individual persons who are considered as constituting as it were its members. The interest of the community then – is what? The sum of the several interests of the members who composed it.”³⁴

The claim that all rights are exclusively individual and that collective rights protection is redundant overlooks the fact that many interests are in fact not reducible exclusively to any specific individual or specific individuals. Many rights nominally conceived as individual are in fact rather collective due to their complete dependence on a community of people sharing the enjoyment of the same rights. Moreover, there are certain rights that can in fact only be implemented in a collective manner.³⁵ Individual rights contained in a bill of rights do not exhaust the entire field of rights protection, which means that even when all the individual rights that one can conceive of have been recognised, there still remains a vast field of legally protectable interests still to be accounted for.³⁶

There is a vast terrain of interests that individual rights alone cannot protect. I refer here to interests which are supra-individual, that do not vest in a single individual to the exclusion of other individuals and never fall within the exclusive control of any single individual.³⁷ These are interests that are non-severable:

31 Sigler *Minority rights: A comparative analysis* (1983) 3.

32 Benoit-Rohmer 12.

33 See in this regard the observation by Berent “Collective rights and the ancient community” 1991 *Canadian J Law and Jurisprudence* 390.

34 Bentham “Principles of morals and legislation” in Burt *The English philosophers from Bentham to Mill* (1967) ch 1 iv.

35 Burgers “The function of human rights as individual and collective rights” in Berting *et al* (eds) *Human rights in a pluralist world: individuals and collectivities* (1990) 72–73.

36 Green “Two views on collective rights” 1991 *Canadian J Law and Jurisprudence* 326.

37 Hartney 298.

they cannot be divided into separate individual interests:³⁸ they are never only *mine*, but always *ours*. When one person benefits from these interests others simultaneously (and instantaneously) also benefit there from and when one person suffers as a result of the violation of these interests others instantaneously also suffer similar prejudice.

These interests have an inherently collective dimension. They can never be exercised exclusively by one person alone. They require a collective of similarly interested people and are always exercised within a collective setting.

The right to freedom of association immediately comes to mind in this context. It is not possible to conceive of the exercise thereof in an exclusively individual way. The exercising of this right always presupposes and implies the mutually cooperative involvement of other people. Association is inherently reciprocal. A prerequisite for the exercising of the right is other people with whom to associate. When the right is exercised a number of people always (and never only one person) benefit, and when it is infringed the ensuing harm every time befalls a number of people.

The same obtains to the right to freedom of expression. Freedom of expression is an integral and inseparable element of a broader interactive process with other people. When the *others* to whom the expression is directed are absent, the expression is meaningless and the exercising of the right is simply impossible. Exercising of the right requires an audience of addressees. The right to freedom of expression is therefore community-dependent, which means that a collective dimension is an indispensable ingredient for the existence and enjoyment of the right. Both the rights to association and expression depend upon a community of people. Such community is a crucial part of the goods/assets to which these rights pertain and without which they cannot be exercised.³⁹

The right to profess and practice religion is hardly conceivable in purely individualistic terms. Religious *goods/assets*, that is, the belief system and a religious community within which someone is born, or to which a person subscribes and may join, are key requirements for the exercising of religious rights. These goods provide the myths and the intellectual, social, and psychological space without which religious practice would be barely possible. Essential aspects of the professing and more so, of the practising of religion, take place within the context of a (religious) community of people and are therefore materially impoverished and thus infringed in the absence of such community. When the religious right of any one person is violated, the religious rights of fellow believers, whose religious practice depends upon the existence of a religious community, also suffer. Réaume articulates this truth when she states:

“Although in some aspects their relationship with God may be capable of individual enjoyment, there are also many aspects of their religious practice, including communal worship and celebration of sacred events, which require the joint participation of others to make them valuable. No one person can have the good unless at least some others also enjoy it. Part of the meaning, and therefore

38 McDonald “Should communities have rights? Reflections on liberal individualism” 1991 *Canadian J Law and Jurisprudence* 218.

39 Taylor *Reconciling the solitudes: Essays on Canadian federalism and nationalism* (1993) 176 states in this respect that the French language can be seen as a collective resource that individuals may make use of.

part of the value, of these events would be lost if each member of the community celebrates them privately.”⁴⁰

Language and cultural rights are also not susceptible to individual reductionism.⁴¹ Language and cultural rights can be exercised (optimally) only in communicative interaction with other people of the same culture and speakers of the same language. The enjoyment of these rights is possible only within the cultural and linguistic contexts within which people of the same language can interact. It requires other people of the same language between whom interaction can take place. By far the greatest value of a cultured society, says Réaume quite correctly, inherently involves the presence of others who have similar interests and with whom one can interact and share that culture.⁴² The exercise of the right therefore presupposes a community of people, in this case of people sharing the same culture. It is never an exclusively individual matter. Emphasising the collective element of cultural (and other rights), Rodolfo Stavenhagen stated:

“However, when we refer to cultural rights, as well as to many social and economic rights, a collective approach is often required, since some of them can only be enjoyed in community with others and that community must have the possibility to preserve, protect and develop what it has in common. Beneficiaries of these rights may be individuals but their content evaporates without the preservation and the collective rights of groups. The rights pertain to persons belonging to specific cultures and shaped by these cultures, who engage in collective action, who share common values, and who can only be the bearers of these common values by joining with other members of their group.”⁴³

Culture is an interactive and *participatory*⁴⁴ good/asset *par excellence*, involving a multitude of active and passive participants who simultaneously produce and consume, create and utilise the products and qualities of culture. The practising of culture (that is, the exercising of cultural rights) is not directed towards the achievement of some final result. Its value lies in the fact that it is a continued process in community with others. In the absence of others the essential element of the right simply falls by the wayside. The *sharing with others* of the cultural experience is a vital aspect of cultural practice and thus an important element of the exercise of cultural rights.

Culture, the object of cultural rights, Réaume reminds us

“consists in participating in the production of those artefacts which constitute a cultural society. But there is no end product because in a sense, those artefacts are never completed but are continuously reinterpreted and recreated by each generation. This process is the essence of the cultured society and can only take place through, not simply because of, the involvement of many”.⁴⁵

In the case of political rights, a collective dimension is once again essential. Political rights, like language rights and freedom of expression are also dependent upon (interactive) communication and therefore come to nothing in the

40 Réaume “Individuals, groups and rights to public goods” 1988 *Univ Toronto LR* 16.

41 See the illuminating observations on language and religious rights by the eminent South African philosopher Johan Degenaar “Nationalism, liberalism and pluralism” in Butler *et al* (eds) *Democratic liberalism in South Africa: Its history and prospect* (1987) 247.

42 Réaume 10.

43 Stavenhagen “Cultural rights and universal human rights” in Eide *et al* (eds) *Economic, social and cultural rights: A textbook* (1995) 68.

44 Réaume 10.

45 *Idem* 10–11.

absence of a political community. Moreover, the existence and maintenance of political rights presuppose structures and procedures provided to everyone within the political community. Political rights which are kept intact by these procedures and structures are often not reducible to particular individuals, to the exclusion of others and if those structures and procedures are ineffectual everyone forming part of the political community simultaneously suffers. The conclusion is once again that when the right is exercised, a multitude of people are instantaneously and similarly benefiting and when it is violated the resulting prejudice in the same way strikes at a multitude of interdependent people and it is not limited to a single person.

The above rights – and the list can be extended considerably⁴⁶ – never protect the individual interests of a single person to the exclusion of others. These rights always protect shared goods and assets from which never only one, but always a multitude of persons simultaneously benefit.⁴⁷

All these rights are of value only when there are collective contexts within which they can be exercised and have a meaningful content only when shared with others and when others are involved in the enjoyment thereof. Their value lies in shared enjoyment without which they are completely meaningless or at least severely impoverished and infringed.⁴⁸

Since these goods and assets are shared by a community of interdependent people and the rights pertaining to them are therefore of a collective nature, it is impossible to force them through the straitjacket of individual reductionism and thus to reduce them to separated and free standing (private) individuals. These goods and assets can only be reduced to a multitude or a collection of people, having shared interests in these goods, who together and in a relationship of mutual dependence exercise the rights pertaining to them. These goods and the rights pertaining to them vest in the totality of the community in question and never in separation or separately in one individual.

A crucial factor that further underscores the collective nature of the above rights and which makes it even more impossible to reduce them to separate individuals is that no individual can fully dispose of or do away with the goods protected by these rights. The goods and assets to which these rights pertain are in themselves a piece of (cultural – political) *tradition* which is more durable than the individual's own life span. Precisely this is one of the important reasons why these goods cannot be disposed of or dispensed with by any single individual. At birth these goods and assets – language, religion, political structures etcetera – already exist and on death they remain behind. The individual is, as it were, born into these legal goods and when she or he dies she or he leaves them – albeit possibly in changed form – behind.

46 It would be a worthwhile undertaking to analyse all constitutional rights against the above backdrop. It is most likely to show that the collective dimension is part of many more rights than might have appeared at first glance and that individual reduction has much less application. In short, it might show that individual rights are after all not that individual.

47 See eg Green 321; Hartney 298 and Réaume, esp 18–19.

48 Stavenhagen 256 stated that we have certain values related to the dignity and worth of human beings which can only be enjoyed within a collective setting, that is within a historical, structural cultural context.

4 2 Institutions and facilities

The well-being of language, religion, culture, education and democratic politics, etcetera is materially dependent upon institutions and facilities. Without appropriate institutions and facilities it would be difficult and often impossible to enjoy language, religious, cultural, educational, political rights, the right to freedom of expression and a host of other rights. Appropriate cultural, language, religious and other institutions and facilities discharge an infrastructural function in relation to the goods to which they pertain. Institutions and facilities safeguard, bolster and strengthen the goods which are indispensable for the exercising of rights relating to culture, language, politics, education, freedom of expression, etcetera and so enable, promote and expand the enjoyment of rights. This may be demonstrated by the following examples.

The right to mother tongue education (a right that simultaneously pertains to language, education, freedom of expression and equality) cannot be exercised in the absence of institutions that provide mother tongue education. Without such educational institutions where the functions of the language of instructions can be employed, developed and cultivated, such language is impoverished and downgraded. It remains or is relegated to the private domain of the household where the higher educational and specifically public functions of that language are not used. In the absence of appropriate educational institutions and facilities, supplying and promoting the infrastructure, such language is deprived of the opportunity to develop and cultivate its higher public functions. It is destined for an impoverished existence where its vocabulary and the broader lexicology are devoid of the opportunity to develop or where through disuse the existing faculties of that language are neglected and allowed eventually to vanish completely. This clearly works to the direct detriment of the members of the linguistic community of the language in question because the fewer functions the language is capable of fulfilling, the more limited is the ambit of the rights pertaining to it. The absence of institutions and facilities impair the legal position of the members of that language community since, without them, educational and academic language can barely be practised.⁴⁹

In the absence of courts where a particular language (among other languages) serves for the recording of court proceedings (courts and language of record being the institutions and facilities in this case) legal practitioners cannot conduct arguments therein, neither can judgments be given in that language. The legal register – the legal lexicology, vocabulary etcetera – of that language can, in the absence of institutions and facilities, not be practised and cultivated. When a particular language cannot be used as language of record in court, that language is delivered to a state of neglect and deterioration in that particular field, again to the detriment of the members of the language community in question. This will happen in spite of the fact that witnesses might still testify in the language of their choice since that has no bearing upon the legal register of the language. That – the legal register of the language – can be practised and come to its right only if that language also serves as the language for the recording of the proceedings, that is, as the language of legal argument and judicial judgment.

⁴⁹ See also the De Villiers 211 who observes that the protection of mother-tongue education can amount to but little if individuals do not have the necessary funds or means to finance such education. This clearly underscores the need for facilities as a prerequisite for the enjoyment of individual rights.

It stands to reason that the rights to freedom of expression and language rights among others are materially impoverished in the absence of facilities such as publishers, theatres, radio stations, television channels, newspapers and a host of other institutions enabling and facilitating communication and thus the exercising of these rights. As in the previous examples these rights are once again materially dependent upon facilities and institutions serving as the infrastructure without which they cannot be meaningfully exercised.⁵⁰

These and many more examples that might be cited show that institutions are essential prerequisites for meaningful enjoyment and exercising of rights. But, institutions and facilities – schools, universities, courts, electronic media, news papers and so on – obviously cannot be claimed by and established and made available for a single individual. Institutions that provide services and sustain spaces and opportunities for certain activities and thus for the exercising of rights, are always to the benefit of a collection of people sharing certain characteristics and/or commonalities, needs, interests and objectives.

Even though it is possible to use a particular facility on an individual basis, this never happens in such a way that it excludes other individuals. The benefits emanating from the using of the facility always accrue to a collectivity and never only to a single individual. These facilities, even though some of them might be in private control, are the supporting facilities of *public goods* – public goods which have the distinctive feature, as Hartney stated that:

“[T]hese are goods that are inexcludable and non-rival in consumption: if they are available for some then there is no convenient way to prevent others from also receiving them, and the quantity consumed by one person does not perceptibly limit the level of consumption of others.”⁵¹

Particularly in a pluralist society these public goods are often *group goods*⁵² and particularly the goods of and for a minority community.

It may convincingly be stated that the most important goods are *collectively available goods*.⁵³ This includes assets such as self-determination of a community which is collectively available for all the members of that community. These collectively available group goods (or group assets) include educational institutions that provide tuition in a particular language, courts where the proceedings are conducted in a particular language or languages, business ventures where people of a particular group, sharing certain common features are brought together for purposes of the empowerment of that particular community, etcetera.⁵⁴

Institutions and facilities can only be established and exist when a community of persons shares the need for an institution. Even though individuals – in interaction with each other – benefit from the utilisation of an institution, the establishment and sustenance thereof for two reasons cannot be accommodated by an individualist paradigm that reduces all rights to the individual person distinguished and/or separated from others.

50 See in this regard the observations made by Taylor 48–49.

51 Green 321.

52 Hartney 298.

53 In the words of Hartney 298.

54 The transformation drive of the present South African government contained in legislation such as the Employment Equity Act 55 of 1998, the Promotion of Equality and Elimination of Unfair Discrimination Act 4 of 2000 and numerous Black Economic Empowerment charters for various trades and industries are particularly directed towards group empowerment.

In the first place the presence of a community is a precondition for the establishment of institutions and facilities. Only a community (of a number of people) can realistically claim to be provided therewith. The community is as it were the origin and the most elemental precondition of a right that cannot separately be claimed by individuals.

Secondly, the enjoyment of a right emanating from well-functioning institutions and facilities is never limited to a single individual separated from others. The logics of scarcity caused by the individual claims and exercising of rights and which cause individual rivalry do not feature in this setting. To the contrary, the utilisation of the facilities provided by institutions is precisely dependent upon the continued existence of a community of whom the members in order to sustain those facilities are mutually dependent upon, in stead of competing with one another.⁵⁵

4.3 The legal subjectivity objection (the subjectivist approach)

The legal subjectivity objection (the definition argument) is based upon the premise – let us call it the subjectivist approach – that both problems of legal science as well as issues concerning legal practice must be approached from the point of view of the legal subject. According to this tenet, all questions relating to the recognition and conferring of rights must begin with a clear definition of the legal subject to whom rights might possibly be granted. Exact definition of the legal subject is an absolute precondition for the granting of rights. Only once clear definition has been achieved, can the question of the possible granting of rights to the subject in question be considered. This approach provides for an inexorable discipline of sequence in terms of which the legal inquiry must as of necessity always commence with the (legal) subject. If the attempt to pure definition therefore fails, all further questions simply lapse and the possible expansion of rights evaporates with it.

This approach proceeds from a typically and rather limited private law conception of the law and feeds on traditional nineteenth century liberal notions and its concomitant individual reductionism as discussed *supra*. To a large extent the individual person and private law are two sides of the same coin. Private law is there in the first place for individuals and for regulating individual relations. Hence, the individual is prototypical for legal subjectivity and for the recognition and enforcement of rights. The individual legal subject provides the notion in terms of which criteria for legal subjectivity are set. Stated differently, when the question of legal subjectivity is considered, the very first question that is raised is whether that which seeks to be recognised as a legal subject can be defined in a similar way as the individual person. The individual legal subject and the procedural rules which are applied to enforce individual rights therefore provide the normative framework in terms of which the broad question of legal subjectivity and the enforcement of rights are conceived of.

It almost speaks for itself that the individual legal subject is precisely defined. In terms of time and space it is accurately demarcated: it starts to exist at a specifically defined moment and its existence terminates at an equally precisely defined moment. Moreover, it is clearly distinguished from other legal subjects and consequently the difficulty of vague and uncertain boundaries between them

⁵⁵ See Hartney 298; Raz *The morality of freedom* (1986) 198–199 and Réaume 1ff.

never arises. Thanks to clear definition, the individual legal subject is easily accommodated by both substantive and procedural law.

The individual person is, as it were, the classically ready-made legal subject and the obvious bearer of rights and duties lending her- or himself to easy accommodation by private law (and law of civil procedure). The one or two problems relating to the moment of the origin of the individual legal subject that might arise can be resolved quite easily by for example invoking the *nasciturus* fiction.

Proceeding from this subjectivist premise, the legal protection of a collectivity is summarily dismissed: the collectivity, unlike the individual, cannot be delineated with precision. Hence, it is unclear precisely *who* is claiming legal protection and how the rules of civil procedure would be dealing with it.⁵⁶

This however does not conclude the matter because a (private law) subjectivist approach does not provide a comprehensive framework for dealing with the entire social reality that law has to deal with, nor does it provide the sole conceptual framework for accommodating legally protectable claims and interests. It provides a traditional, but one of various juridical approaches, and overlooks (and disregards) considerable fields of human life that call for legal accommodation.

5 LAW AS A SET OF RESOURCES/FACILITIES

It is crucially important also to regard *law* as a set of dynamic facilities enabling people to realise their needs and interests.⁵⁷ When the focus shifts to these facilities, juridical reality is approached from the perspective of the legal objects instead of the subjects of law.

Among the facilities that law provides, can be counted rules, procedures, legal figures, powers, protective measures, institutions and a host of other institutions through which people can pursue and realise their wishes, needs and interests. Some of these facilities are available for all people, some can be utilised only in a given set of conditions and some are available only to certain categories of people.⁵⁸

It is rather trite that law does not take the lead in the social reality; to the contrary, the law responds to changing social reality by adapting existing and creating

56 See the objection raised by Olivier fn 12 above. Most of these objections have been obviated by procedures relating to class actions. Moreover, in terms of s 38(c) and (e) of the South African Constitution classes or groups of persons can now also enforce constitutional rights. Rights can also in terms of s 38(d) be enforced in the public interest.

57 Hart *The concept of law* (1961) 27. The view of law as a set of changing facilities directed at satisfying the needs of people has in fact become so common that it cannot be ascribed exclusively to only one school of thought. It is eg as much an axiom of modern legal positivism as it is one of the cornerstones of sociological jurisprudence.

58 The right to life, dignity, privacy, etcetera vests in all natural but not in juristic persons. The rules pertaining to the conclusion and enforcement of contracts are available to all people but the manner of application differs if the individual contracting party is a minor. The rights of accused and arrested persons are in principle available to all, but find application only in circumscribed circumstances, namely when a person is arrested or is an accused in criminal proceedings. Certain rights accrue exclusively to certain classes of persons such as children or persons falling within the so-called designated group for purposes of affirmative action. The latter legal facilities cannot be applied without prior racial and gender categorisation.

new and relevant facilities. When the law is incapable of accommodating changing needs and phenomena, uncontrolled social disruption may follow. Once the law surrenders its social functionality through its inability to provide facilities, law as such is failing. Thanks to the work of the pioneers of legal instrumentalism, such as Rudolph von Ihering and Roscoe Pound and expanded by American Realism, a static formalist conception of the law that views law as a given and completed whole (insensitive for changing societal needs and almost existing for its own sake) is hopefully no longer cherished.

While it is incumbent on law as a set of practical facilities effectively to accommodate changing social reality, the focus of legal science (among others) is to systematise and explain but also to analyse and critique positive law and to conceive explanatory conceptual frameworks including – very importantly – conceptual frameworks for the legal and just accommodation of changing needs within social reality. When legal scientific work shows that a particular aspect of the social, economic or political reality is not known to the existing repertoire of legal conceptualism (and the existing positive law does not satisfactorily accommodate it) it reveals an inadequacy in the existing legal science – a terrain on which legal scientific work is called for. The most unsuitable and rather unbecoming response to such a scenario would be to say that the situation or phenomenon is not known to legal science and then to refuse to attend to the matter. Such a response would reduce legal science to a crude formalism and an extremely positivist dogmatism that regards legal science as having reached its final end sometime in the past, that it is finished business, incapable of further development. This boils down to announcing the failure of legal scientific endeavour for its inability (and/or unwillingness) to legally accommodate evolving social reality. Such formalism also serves as an instrument of a conservative ideology that seeks to safeguard the existing socio-political order and to insulate it from change.

It has been emphasised above that the enjoyment of rights is fully dependent upon the availability of objects (corporeal and non-corporeal goods and assets) in respect of which the rights can be exercised. Facilities must therefore be created in order to maintain, stabilise and strengthen these assets. Without that it would be impossible for people either individually or collectively to exercise the rights that pertain to these objects.

It has also been indicated that the enjoyment of language, cultural, association, expression, religious and many other rights are inexcludable rights. They cannot be enjoyed by a single person to the exclusion of others and are instead enjoyed in community with others sharing the same language or culture, etcetera. The exercise of these rights is therefore dependent upon the existence of collectivities – language, cultural and, depending upon the rights in question, various other communities. It is crucial to understand that these cultural and language communities are themselves the very goods and assets – the resources with respect to which language, cultural, association, expression rights and so on are exercised. The well-being of these communities must be secured as this is the essential legal goods and assets without which the enjoyment of these rights comes to nothing.⁵⁹ But the well-being of cultural and other communities – the sources

59 See in this regard the illuminating observations by Stavenhagen 66–67. See also Malan “Perspektief op die regsbeskerming van kollektiwiteite” 2003 *THRHR* 2003 67ff.

and goods for the enjoyment of rights – is not a given. To the contrary, communities are dependent upon various forms of institutional maintenance. Communities need institutions that provide and demarcate the social boundaries and define the spaces of social relationships by which membership is attributed⁶⁰ within which individual identity takes a particular form,⁶¹ and within which the rights can practically be enjoyed. In other words, communities need various forms of structured organisation:

- Cultural communities need educational institutions and facilities, within which language and educational rights (also the association, cultural and expression rights) can be practically enjoyed. They also need the competence to decide autonomously on culturally sensitive matters which are of importance to the well-being of that community.
- Religious communities need religious institutions for the enjoyment of religious, associational, expression rights etcetera.
- Language and cultural communities need means of organised communication, such as mass media etcetera enabling the enjoyment of cultural language and expression rights etcetera.
- The gay community needs legal facilities recognising and legally stabilising (long-term) gay relationships in the same way as heterosexual people need legal facilities for heterosexual relationships.

The examples are numerous. The truism common to all these instances is that communities need institutions and facilities serving as their concrete embodiment and securing and stabilising the continued existence of communities. Communities provide the raw resources/goods/assets for the enjoyment of rights. Institutions and facilities refine and organise these communities and once that has happened and, as long as this is happening, meaningful enjoyment of rights becomes and remains a reality.

6 APPROACH FROM THE PERSPECTIVE OF THE OBJECTS OF RIGHTS

The discussion brings to light that communities, be they of a cultural, religious, language, national, gay, or whatever nature, are not (legal) subjects at all. To the contrary, being the goods, assets or resources in respect of which rights are exercised and without which individual identity is restricted and rights cannot be enjoyed, they are the exact opposite: they are in fact the objects of rights. If the collectivity – the community – is left without any institutions and in consequence is allowed to fade away, the very legal objects (resources and goods) upon which the rights to culture, language, expression, religion, individual identity and many other rights depend upon are allowed to vanish resulting in the large-scale violation of individual rights.

Once it is understood that communities are the objects, not the subjects, of rights it becomes quite obvious that the insistence of the traditional subjective approach on neat subject definition as a precondition for the awarding of rights

⁶⁰ *Ibid.*

⁶¹ See in general on the communitarian view of individual identity and how individual identity is defined within the spaces occupied by communities Gardbaum “Law, politics and the claims of community” 1992 *Michigan LR* 701–705; Van Blerk *Jurisprudence: An introduction* (1998) 196–198.

and for legal protection is neither right nor wrong. It is simply irrelevant since it proceeds from an erroneous premise as to the juridical nature of cultural (and other) communities. Precise subject definition required by the traditional approach is a precondition only if legal science is approached from a specifically restricted dogmatic perspective, namely one that feeds on traditional nineteenth century liberalism and which is entrapped in individual reductionism. The insistence on neat subject definition as a precondition for rights protection has nothing to do with legal science (let alone legal philosophy). It is rather the outgrowth of an ideologically-driven error.

It has been established that communities are the objects of rights but also that the well-being of those objects depends on an infrastructure of institutions and facilities keeping those objects alive, stabilising and strengthening them and in so doing enables the enjoyment of rights. The identification of the need for the establishment of institutions and facilities is a socio-political matter. Once law has positively responded to that by providing appropriate community institutions and facilities anyone wishing to make use thereof can do so. When it is an institution or facility for a non-hegemonic (minority) community, it will obviously set certain boundaries and define the spaces for the enjoyment of rights by those belonging to these communities. Members of a minority community – those regarding themselves as belonging to that community or those who associate with it – will be making use of those spaces: they will utilise the benefits and enjoy the rights ensuing from the relevant institutions and facilities created for that community. Those making use of the institutions and facilities define themselves *into* that community and those who do not define themselves *out of* it. In this way the community is defined on a continuous basis. It will have certain basic and long-term characteristics of a cultural nature, or whatever the nature of that community is. Its exact boundaries will however never be exactly defined. It will never be possible to determine precisely which and how many individuals are belonging to it. Its boundaries will always be vague and changing in terms of those who do and those who do not belong to it. Exact definition will never be possible. However, since we are not dealing here with communities as subjects of rights – which they are not – the absence of exact definition is legally entirely irrelevant and of no consequence at all.

This perspective of the juridical reality proceeding from the objective side of law and focusing on institutions and facilities underscores the vital importance of institutions and facilities for individual rights. Hence, it also brings to light something that would otherwise have remained largely unnoticed if the traditional approach is followed, namely that individual rights may come under attack not only by way of a direct assault on the interests of an individual bearer of rights, but also indirectly and almost by stealth when governments fail to provide, maintain and allow these facilities, thus debilitating and eventually destroying the very goods and resources without which individual rights are not possible, thus causing large-scale violation of rights. This approach is therefore particularly important from a human rights point of view since it casts light on the vulnerable areas where human rights are often unnoticed, yet comprehensively under attack.

7 INSTITUTIONS IN HEGEMONIC CONTEXTS

The legal recognition of the state (that is, of the collectivity of the national population) as the only rights-bearing collectivity in contradistinction to minority communities more often than not promotes the interests of dominant majorities

and hegemonic cultures while causing undue injury to minority communities and non-hegemonic cultures. In the absence of express protection for minority communities such communities are often subjected to forced homogenisation by ruling majorities, thus jeopardising the very existence of these minorities.⁶² Governing majorities in a heterogeneous territorial state often promote their partial interests to the disadvantage of minorities and impose their own hegemonic majority culture upon minorities almost as if there is only one common culture. Majorities, in the words of Joseph Pestieau as it were claim to see a homogeneous nation where homogeneity exists only in their mind.⁶³

It is for that reason that, even though all communities – both majority hegemonic and minority non-hegemonic – need institutions and facilities, minority/non-hegemonic cultures, communities and life-styles are much more dependent on the stabilising safeguard of community institutions and facilities. If no institutions and facilities are reserved for minority non-hegemonic communities, all institutions assume the character of the hegemonic culture and all facilities become majority facilities.

If 80% of the population in a particular area prefers English as the language of instruction and 20% Afrikaans and all schools are compelled on the flawed basis of the right to equality to admit all potential pupils while none is specifically designated for instruction in Afrikaans, all schools will obviously be English and none Afrikaans.

If in an area where 80% of the population prefers English and 20% Afrikaans there is an Afrikaans radio station, newspaper or television channel or educational institution beside English ones, and all institutions including the Afrikaans ones are on the basis of the right to equality and equal job opportunities prevented from applying cultural specific requirements with regard to employment, all Afrikaans institutions are inevitably bound to become English.

If in a state of which the population is clearly divided between a (culturally, racially or linguistically) large majority and a small minority, all institutions are required to reflect the national population profile and a policy is followed in terms of which the population profile must be reflected in the work force of

62 The activities of the UN Sub-commission for the Prevention of Discrimination and the Protection of Minorities illustrate the need for minority protection in order to combat discrimination and to attain equality. See in this regard the discussion by Thornberry *International law and the rights of minorities* (1991) 124–132. He amongst others quoted (127) Capotorti, UN special rapporteur for minorities, who said: “It is generally accepted that the effective implementation of the rights of persons belonging to ethnic, religious or linguistic minorities to enjoy their own culture, to profess and practice their own religion and to use their own language, requires as an absolute pre-condition that the principles of equality and non-discrimination be fairly established in the society in which those persons live.” The interdependence between the individual right to equality and equality and the need for minority protection has thoroughly been elucidated and is firmly established. See eg *The declaration of liberal democratic principles concerning ethno-cultural and national minorities and indigenous peoples* of the Liberales Institut der Friedrich Neumann-Stiftung of May 2000 compiled by Kymlicka and others; Barrie “Group rights: Legal rights or mere social utilities” 1990 *TSAR* 664; Pestieau “Minority rights: Caught between individual rights and peoples’ rights” 1991 *Canadian J Law and Jurisprudence* 269–372; Malan “Oor gelykheid en minderheidsbeskerming na aanleiding van *Rylands v Edros* en *Fraser v Children’s Court Pretoria North*” 1998 *THRHR* 300ff.

63 Pestieau 368.

public and private institutions and work places, that will obviously result in all institutions assuming a homogeneous character, namely one that is dominated by the majority segment of the population, while none will have a minority character.

This shows that if minority communities do not have institutions and facilities that demarcate and define their own communities and safeguard the spaces within which their members can enjoy their rights, the hegemonic (usually also the majority) culture simply enforces its own identity and preferences upon minority non-hegemonic communities, thus leaving members of these communities devoid of the resources they depend upon for the meaningful enjoyment of their rights. All institutions become the same, assuming a homogeneous majority hegemonic character, leaving none for the non-hegemonic minority. This reveals that a constitutional dispensation in a pluralist society without institutions and facilities for minority communities is not really as individualistic as it might pretend to be. To the contrary, it produces and entrenches its own system of preferential treatment for communities, namely one in which the majority and hegemonic culture receives preferential and rather favourably discriminatory treatment through the institutions they possess as opposed to minority prejudice since the minority is denied the institutions and facilities upon which the enjoyment of their rights depend. Such a constitutional order is therefore not without preferential group protection. To the contrary, it produces its own system of preferential group protection, namely protection only for the majority.

It should therefore be clear that the right to equality and the principle of non-discrimination are materially ineffectual in plural societies if they are not bolstered by institutions and facilities particularly for non-hegemonic minority communities.⁶⁴ That is why Stavenhagen convincingly argues that the enunciation of the principle of non-discrimination is not sufficient within the framework of present-day societies to provide all individuals with equal access to all human rights and adds that, even if non-discrimination were a reality for everybody (which it is not) this would not necessarily ensure the enjoyment of cultural rights.⁶⁵ Stavenhagen emphasises that it is necessary to develop procedures and mechanisms for the affirmation and enjoyment of specific cultural rights of peoples. Unless such mechanisms are developed, cultural rights will not be fully enjoyed and guaranteed for everybody, notwithstanding the principle of equality and non-discrimination.⁶⁶ This shows that the protection of minority rights through the safeguarding of institutions and facilities for minority communities is a prerequisite for safeguarding individual equality and non-discrimination. The right to equality and non-discrimination is dependent upon such protection of minority communities and without it equality and non-discriminations are sacrificed.⁶⁷ Collective protection of minorities is therefore fundamentally an egalitarian measure aimed to remedy the disadvantageous inequality of minorities in a heterogeneous order. Viewed against this background, the insistence on

64 Equal individual rights and formal equality do not offer a cure for this, since as Parekh *Rethinking multiculturalism: Cultural diversity and political theory* (2000) 192 reminds us, when different communities have different needs and are not alike in relevant aspects, it is unjust to insist on treating them alike.

65 *Idem* 68.

66 *Ibid.*

67 See Malan (1998) 300ff.

clear definition as a prerequisite for the legal protection of minorities and other communities appears to be not only an ideologically-driven error but also a stratagem through which dominant majorities enforce homogenisation in heterogeneous states.⁶⁸

From this it is also clear that there is not necessarily a tension between individual rights and collective rights (or rights with an inherently collective element) and that individual rights are not necessarily jeopardised by collective rights. It is quite true that community rights – specifically peoples’ rights – might endanger individual rights.⁶⁹ This will occur however only when collective rights and claims are applied in a totalitarian way – a way that subjects both individuals as well as sub-groups and non-hegemonic communities to unqualified claims of a larger over-arching community. However, a totalitarian approach is certainly not the only approach on offer. On the contrary, the discussion thus far has clearly demonstrated the intense reliance of individual rights on the collectivity – on communities of interdependent people. Hence, whereas it is true that a totalitarian application of a collective approach might jeopardise individual rights, it is as true – and in contemporary pluralist societies of vital importance to understand – that neglect of the communities and the failure to maintain, stabilise and strengthen communities through community institutions and facilities are not only gravely dangerous to individual rights, but constitute a large-scale violation of individual rights of all those who find themselves within minority ranks. There is a dialectic and reciprocal relationship between life in certain kinds of communities and the rights of individuals. Unless communities are recognised, individual rights cannot be fully enjoyed.⁷⁰ It is for that reason that Stavenhagen states with regard to collective rights:

“If we look at these rights in this way, then we will find that the conceptions of individual and collective rights are not exclusive of each other; they are not contradictory, but rather, in my opinion, they turn out to be mutually reinforcing. Consequently, collective rights, and particularly the collective rights of cultural groups are defensible, when they reinforce the enjoyment of individual rights.”⁷¹

The existence and maintenance of a number of cultural communities is an essential prerequisite for individual identity also in another sense. In the absence of a variety of communities dependent for their well-being upon institutions, an autonomous individual choice in relation to which community/communities a person wants to join or associate with would be impossible. Free individual decision-making depends upon the individual’s capacity to exercise choices. This subjective competence is however not enough for meaningful individual autonomy. The second essential prerequisite is the availability of a number of objects from which choices can be made. If facilities and institutions are not provided or permitted and if in consequence communities are left to perish and specifically to succumb to the pressure of hegemonic culture, individual choice-making is made impossible and all the individual rights that go with it are nullified. As Kymlicka puts it: “Cultures are valuable . . . because it is only through

68 See Pestieau 367.

69 See Sieghart fn 15 above.

70 Hence Stavenhagen 255 stated that certain collective rights even though they pertain to groups must be accepted as human rights.

71 *Idem* 258.

access to societal culture that people have access to a range of meaningful options.”⁷²

The South African Constitution contains a comprehensive set of individual rights in its Bill of Rights.⁷³ This includes the individual rights to freedom of religion, belief and opinion, freedom of expression, association, to use the language and participate in the cultural life of the rights bearer’s choice.⁷⁴ It also provides that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to enjoy their culture, practise their religion and use their language and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society, provided that these rights may not be exercised in a manner inconsistent with any provision of the Bill of Rights.⁷⁵ The latter provision is important in the present context as it underscores the importance of institutions – *associations and other organs of civil society* in the words of the provision – for the enjoyment of individual rights. Of even more importance however are the following:

Firstly, the Constitution does not earmark any institutions or facilities for a specific community or communities. Secondly, it is submitted that the principle of representation (representivity) has assumed the character of a pivotal (written and unwritten) constitutional principle in the South African constitutional order, trumping any other contender, even though contending principles might ring in the phrases of the text of the Constitution. The principle is contained in legislation, but, even more importantly, it is consistently practised and enforced by government and, at the insistence of government, also by the private sector and in many quarters in civil society, and is regarded as fundamental to the ruling party’s transformation drive and a pivotal principle of the South African constitutional order. This principle prescribes that all institutions and all organised spheres of activity, whatever their nature, must as far as possible reflect the composition of the national population. It produces comprehensive and pervasive homogenisation, pressuring all organised spheres and institutions towards assuming a character dominated by the hegemonic culture, leaving hardly anything for the minority and non-hegemonic communities and cultures, thus also producing systemic inequality between members of the majority as opposed to members of the minority. Whereas majorities often have the tendency to impose the culture that appeals to it⁷⁶ and so press towards homogenisation in a state with a culturally and linguistically plural population, the representivity principle amplifies and reinforces that tendency in the South African constitutional order. As argued above, this obviously unjust state of affairs can be remedied only by the constitutional recognition and protection of institutions that provide and demarcate the social boundaries and mark out the spaces of social relationships by which community membership of minority communities is attributed. In a plural society, individual rights such as the right to equality and the prohibition of unfair discrimination taken on their own are ineffective if they are not bolstered by institutions and facilities particularly for non-hegemonic minority communities.

72 Kymlicka *et al* *Multicultural citizenship: A liberal theory of minority rights* (1997) 83; Also *idem* *Liberalism, community and culture* (1989) 164 ff.

73 Ch 2 of the Constitution of the Republic of South Africa, 1996.

74 Respectively ss 1, 16, 18 and 30.

75 S 31.

76 Pestieau 367.

8 CONSTITUTIONAL ARRANGEMENTS; PLURAL STATE

Self-determination for a state with a heterogeneous population in practical terms often means no more than self-determination for only the hegemonic majority. For minorities on the other hand, delivered to the grace and goodwill of the majority and subjected to policies of homogenisation, there is neither self-determination nor equal recognition. Majority rule cannot remedy this situation,⁷⁷ neither as demonstrated above, can individual rights prevent homogenisation and secure equal recognition and justice. A federal constitution – territorial or functional – responding among other things to the multicultural reality and allocating power also to minority communities in relation to questions vital to their well-being is an important instrument to fend off homogenisation and help to secure justice. The provision and safeguarding of institutions and facilities for minorities (alongside the majority) is also an appropriate instrument for the promotion of justice and equal recognition and treatment. Both these vitally important constitutional instruments for justice and equality in plural societies are absent from the South African constitutional order. Bertus de Villiers pointed out that “[t]he protection of cultural groups on a purely territorial basis or by means of negative individual rights is not necessarily offering any hope to deeply divided societies where groups live in a highly integrated way”.⁷⁸ This is particularly true for South Africa whose rather moribund system of quasi-federalism⁷⁹ was precisely not designed to equally accommodate minority communities in a heterogeneous state by providing for regional (or corporate forms of) governments for cultural, ethnic and linguistic minority communities.⁸⁰ Neither does the South African constitutional order provide for the protection of minority institutions and facilities, particularly given the homogenising effect of the representivity principle.

In order to pursue a just constitutional dispensation, minority communities must be recognised on an equal footing with the hegemonic majority by the constitutional safeguard of the institutions and facilities needed for their continued well-being and for fending off the homogenising pressure of the majority. Moreover, the sovereignty of a state need not consist of a single and unitary system of authority as most political theorists since Hobbes have insisted, and might on the contrary involve several centres of authority, exercising overlapping jurisdictions and reaching decisions through negotiations and compromise.⁸¹

77 Lewis *Politics in West Africa* 64 (quoted with approval by Lijphart *Democracy in plural societies: A comparative exploration* (1977) 145) stated that majority rule may be acceptable in consensual societies, but in plural societies it is totally immoral, inconsistent with the primary meaning of democracy, and destructive of any prospect of building a nation in which different peoples might live together in harmony.

78 De Villiers 231.

79 See eg *ibid.*, Malan “From a quasi federal constitution to centralist command” 2006 *De Jure* 150ff.

80 See Simeon and Murray “Multi-sphere governance in South Africa: an interim assessment” 2001 *Publius* 71.

81 Parekh 194.