

# SECTION 235 OF THE CONSTITUTION: TOO SOON OR TOO LATE FOR CULTURAL SELF-DETERMINATION IN SOUTH AFRICA?

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## ABSTRACT

Section 235 of the Constitution acknowledges the right of cultural groups to self-determination. Giving practical effect to s 235 is a task to be undertaken by a future Parliament. This article explores the concept of non-territorial, also called cultural autonomy, whereby culture groups can establish a legal person clothed with public law powers as an organ of government to make decisions about the protection and promotion of their culture, language and customs. Several case studies where cultural autonomy is applied are referred to and recommendations are made for future consideration in South Africa.

**Key words:** bills of rights, community rights, constitutional principles, Constitution of the Republic of South Africa, 1996, cultural and minority rights, language

## I INTRODUCTION

The Constitution of the Republic of South Africa, 1996 acknowledges in s 235 the right of any community that shares a common language and culture, to obtain 'self-determination' in a manner to be determined by legislation. Section 235 provides as follows:

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 to 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.<sup>1</sup>

Section 235 is, potentially, a powerful and far-reaching provision. Self-determination of a cultural community is referred to as a 'right' – not a mere principle, an objective or a promise. The practical application of this s 235-right so far remains unexplored.

This article investigates the possible meaning of the right to self-determination in s 235 and the way in which it may be given practical content in the South African context, especially when read with the

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1 Author's emphasis.

potential establishment of cultural councils as envisaged in s 185(1)(c) of the Constitution.<sup>2</sup> It is contended in this article that cultural councils with public law powers could be established as organs of government pursuant to s 235 so as to give effect to the right of self-determination.

The Constitution is silent in regard to many questions arising from s 235, for example *when* a community can apply for self-determination pursuant to s 235; *which* communities may apply for self-determination; *how* a community would apply for self-determination; the *requirements* a community must satisfy to qualify for self-determination; the *structures and institutions* that would give effect to self-determination; the typical *powers and functions* that could form part of self-determination; and *when* Parliament is required to enact enabling legislation to give effect to s 235. Most importantly, the Constitution does not *define* what is meant by self-determination.

The practical effect of s 235 remains a legal and political mystery. In fact, it is not clear whether the opportunity to activate s 235 is past, or whether the time to explore it is yet to arrive.

If recent international constitutional developments are anything to go by, the time to explore s 235 is yet to come. There is, internationally, a greater (and increasing) awareness than a few decades ago of the rights of culture groups to some form of self-determination, self-government or cultural autonomy.<sup>3</sup> It is especially since the democratisation processes that started in the early 1990s in central and eastern Europe, which were followed by events in many African, Asian and the Middle Eastern emerging democracies, that the topic of collective cultural rights and self-decision-making of culture groups have gravitated towards the spotlight.

The aim in this article is to explore potential answers to some of the questions raised above. The article comprises six parts: after the introduction I briefly consider the inadequacy of individual rights to protect the 'right' to self-determination of culture groups; I then pay attention to the concept and meaning of 'cultural autonomy'; in part IV, I provide a brief background to s 235; thereafter, I consider questions posed in my introduction in light of the experiences of selected case studies; and finally, I make concluding remarks about the possible relevance of international experiences to the development of ss 235 and 185(1)(c).

## II INDIVIDUAL RIGHTS AND THE 'RIGHT' TO SELF-DETERMINATION

Following World War II there was a presumption in international law that the aspirations of culture groups for some form of collective rights could

2 Section 185(1)(c): '185. Functions of Commission- (1) The primary objects of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities are- (a)...; (b)...; (c) to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.'

3 SC Roach 'Minority Rights and an Emergent International Right to Autonomy: A Historical and Normative Assessment' (2004) *Int J on Minority and Group Rights* 411.

be entirely accommodated via individual rights as contained in a bill of rights.<sup>4</sup> It was argued that if individual rights were properly protected, the collective needs of culture groups are also, in effect, well taken care of. The conventional wisdom at the time was that the protection of culture groups under international law, in ways similar to those prevailing prior to World War II,<sup>5</sup> was no longer relevant since individual rights were enshrined in bills of rights and groups did not have any collective rights. Most importantly, they had no collective right to self-determination or autonomy. This assumption has been shown to be weak since important as individual rights are, those rights do not recognise or protect collective rights such as self-determination or autonomous decision-making of culture groups. The International Covenant on Civil and Political Rights<sup>6</sup> attempts, through art 27,<sup>7</sup> to establish a basis for recognising the cultural rights of minorities as individual rights. However, in doing so the covenant fails to define what a minority is; whether minorities are entitled to collective rights; and whether minorities are entitled to any form of self-determination.<sup>8</sup>

It is not surprising that Francesco Capotorti, in a ground-breaking report for the United Nations on the protection of cultural groups,<sup>9</sup> observed as follows about how incorrect it was to presume that questions about the protection of collective rights of culture groups were entirely disposed of by bills of rights:

For quite a long time after the end of the Second World War, it was thought – and stated in writing – that the question of the international protection of minorities was no longer topical. During the past few years however, that view has proved to be mistaken.<sup>10</sup>

The irony is that it especially in Europe, the home of the preverbal nation-state, the debate on the effective protection of minorities has become more relevant than ever. The 1992 UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (the Declaration)<sup>11</sup> expands the intended operation of art 27 of the International Covenant on

4 N Lerner 'The Evolution of Minority Rights in International Law' in C Brolmann, R Lefeber & M Zieck (eds) (1993) *Peoples and Minorities in International Law* 77; and TD Musgrave *Self-determination and National Minorities* (1997).

5 F Ermacora *The Protection of Minorities before the United Nations* (1983) 345.

6 UN 'International Covenant for Civil and Political Rights' (opened for signature 16 December 1966) UNTS 171 (entered into force 23 March 1976).

7 Ibid art 27 provides 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.'

8 For a discussion of the strengths and shortcomings of art 27 refer to P Thornberry *International Law and the Rights of Minorities* (1991) 14; M Shaw 'The Definition of Minorities in International Law' in Y Dinstein & M Tabory (eds) *Israel Yearbook of Human Rights* (1991) 14; P Thornberry 'Is there a Phoenix in the Ashes? – International Law and Minority Rights' (1980) 15 *Texas Int LJ* 421; JC Heunis 'Volkeregtelike Beskerming van Minderheidsgroete' (1981) LLM thesis, University of Johannesburg; V Van Dyke 'Self-determination and Minorities' (1969) 13 *Int Studies Quarterly* 223.

9 F Capotorti *Study of the Rights of Persons Belonging to Ethnic, Racial and Linguistic Minorities* (1977); UN-Doc E/CN.4Sub.2/384, rev 1 para 568.

10 Capotorti *ibid* para 38.

11 GA res 47/135; UN GAOR, 47th Session (19 December 1992).

Civil and Political Rights by requiring states to take positive action to assist minorities. The Declaration is not legally enforceable, but it sets a new standard for the protection of minorities, for example, in the way it recognises the rights of minorities to ‘participation’ and to ‘mother-tongue education’.

Arguably the most important contemporary regional instrument aimed at the protection of minorities is the European-wide Framework Convention for the Protection of National Minorities (FCNM).<sup>12</sup> The FCNM is the first legally binding charter solely aimed at the protection of minority rights within international law.<sup>13</sup> The FCNM is solely dedicated to the rights of minorities and it acknowledges in the preamble that within the context of Europe, ‘the protection of national minorities is essential to stability, democratic security and peace’. The FCNM contains general principles to which respective member states must give practical content through their constitutional and political arrangements. The FCNM is therefore prescriptive in terms of its general principles, but not in terms of the way in which those principles must be complied with in practice.

These developments in international law informed the South African constitution-drafting debate and it is therefore not entirely surprising that the South African Constitution contains such detailed provisions about the rights of minorities.

The drafters of the South African Constitution acknowledged, through the inclusion of s 235, s 185(1)(c) and the chapter 2 Bill of Rights that some scope had to be created in the Constitution for future generations to regulate, by way of special legislation, the possible self-determination of culture groups and establishment of cultural councils *in addition* to the individual rights that are recognised in the Bill of Rights. The inclusion of ss 235 and 185(1)(c) were important olive branches to minority groups in South Africa particularly, but not limited to, the Afrikaans-speaking community. The purpose was to give minority groups the assurance that their current or future quest for a form of collective self-decision-making was recognised by the Constitution, albeit only in the form of an embryonic provision as contained in s 235.

Section 235 is, potentially, a far-reaching provision that could, in time to come, become a source of mobilisation, controversy, and litigation in South Africa. Some may regard it as a potential time bomb; others may describe it as an olive branch that is yet to sprout its roots; while others may see it as a relic of the negotiations process that has now all but lost its relevance to contemporary South Africa.

In proposing answers to some of the questions raised in my introduction, I contend in this article that options for territorial forms of self-determination in South Africa have for all practical purposes been exhausted. The demarcation of provincial and local governments as well as the arrangements to recognise

12 Opened for signature on 1 February 1995, ETS no 157 (entered into force 1 February 1998). For a discussion see P Thornberry & M Estebanez *Minority Rights in Europe* (2004).

13 See generally M Weller (ed) *The Rights of Minorities in Europe A Commentary on the European Convention for the Protection of National Minorities An Introduction* (2005).

and accommodate traditional leaders and their laws and customs, arguably occupy the full spectrum of territorial self-determination that is practical, financially affordable and sustainable within the context of the Constitution. The demarcation of the South African provinces already reflects, to some extent, the distribution of the main language groups. One of the criteria that had been taken into account by the commission that demarcated the provinces was those of language patterns.<sup>14</sup> Although some adjustments to provincial boundaries can occur, South Africa ought not to open itself to a province-creation exercise such as has happened in Nigeria, where demands by cultural minorities for their 'own' states have caused the number of federal states to explode from three at the time of independence of Nigeria, to 30, with demands for at least ten more states to be created. The experience of Nigeria with state-creation highlights the futility of attempts to accommodate all minorities by way of territorial arrangements.

The premise of my article is that if any other self-determination mechanisms were to be developed, it would principally have to be within the domain of non-territorial, cultural autonomy. The provisions of s 235 may therefore be read with s 185(1)(c) in which the possible establishment of cultural councils for one or more communities is foreshadowed. As I show in this article, cultural autonomy by way of a public law cultural council as an organ of government may be a credible, legitimate and practical way to grant a form of self-determination to culture groups in South Africa.

Cultural autonomy on a non-territorial basis, which was first raised in democratic theory in the late 19th and early 20th centuries as an option for recognition and protection of cultural rights in the formation of new states in Europe, has recently made a strong comeback. The motivation for the increased relevance of cultural autonomy is the realisation that it is not feasible to create multiple nation-states in central and eastern Europe (or in other parts of the world) where each culture group enjoys a form of territorial, sovereign self-determination. It is also not possible to create regions and local governments for each culture group. Territorial competition between culture groups could have disastrous consequences, whereas non-territorial solutions may protect

14 For a discussion refer to B De Villiers 'Creating Federal Regions – Minority Protection versus Sustainability' (2012) 72 *Heidelberg J of Int Law* 310. See the 2001 breakdown of dominant language groups per province was as follows: Eastern Cape – isiXhosa (83.4%), Afrikaans (9.3%); Free State – Sesotho (64.4%), Afrikaans (11.9%); Gauteng – isiZulu (21.5%), Afrikaans (14.4%), Sesotho (13.1%), English (12.5%); KwaZulu-Natal – isiZulu (80.9%), English (13.6%); Limpopo – Sesotho (52.1%), Xitsonga (22.4%), Tshivenda (15.9%); Mpumalanga – siSwati (30.8%), isiZulu (26.4%), isiNdebele (12.1%); Northern Cape – Afrikaans (68%), Setswana (20.8%); North West – Setswana (65.4%), Afrikaans (7.5%); and Western Cape – Afrikaans (55.3%), isiXhosa (23.7%), English (19.3%). Read more on <<http://www.southafrica.info/about/people/language.htm#ixzz1VExMTp9g>>. Refer to <<http://www.statssa.gov.za/census2001/digiAtlas/index.html>> for an overview of the 2001 census; and for a map that demonstrates the residential patterns of the main language groups refer to <[http://www.salanguages.com/languagemaps/south\\_african\\_language\\_map.gif](http://www.salanguages.com/languagemaps/south_african_language_map.gif)>. For a discussion of the Volkstaat proposals during the process of provincial demarcation refer to Y Muthien & MM Khosa 'The Kingdom, the Volkstaat and the new South Africa: Drawing South Africa's new Regional Boundaries' (1995) 21 *J of Southern African Studies* 303.

and enhance national unity, promote liberal democracy, and allow for cultural self-determination within the borders of existing states. Examples of countries that have been experimenting with different forms of cultural autonomy are Finland, Belgium, Germany, Russia, Estonia, Hungary and Kosovo.

In this article I give consideration to the way in which these countries have granted non-territorial autonomy to culture groups (in addition to adopting bills of rights) and what possible lessons may be drawn by South Africans should they wish, now or in the future, to explore the practical application of ss 235 and 185(1)(c).

### III THE RISE OF NON-TERRITORIAL, CULTURAL AUTONOMY

It is obvious, for philosophic, economic, financial and practical considerations, that self-determination within the context of s 235 cannot be held to be a guarantee or promise to each culture group in South Africa as a form of territorial autonomy. South Africa is not dissimilar to other countries where the direct or indirect accommodation of culture groups by way of territorial arrangements is subject to many limitations. It was neither the intent of the Constitutional Assembly nor within the broadest possible interpretation of s 235 to promise a form of territorial autonomy to each of South Africa's culture groups.

However, within the context of s 235, self-determination may include non-territorial arrangements for those culture groups that seek a form of self-government in regard to matters that directly impact on the protection and promotion of their culture regardless of where the members of the culture group reside. What makes cultural autonomy attractive is that it obviates the need for territorial dominance or control, or for all members of a culture group to live within the same geographical area. Cultural autonomy, which may in practice be applied in various ways, refers in essence to the 'right of self-rule, by a culturally defined group, in regard to matters which affect the maintenance and reproduction of its culture'.<sup>15</sup>

Cultural autonomy moves beyond the practice where only those culture groups that form the majority in an area have the benefit of a form of indirect, self-government. Cultural autonomy can make the emphasis on territorial dominance redundant and as a result cultural autonomy has the potential to sidestep the competition – often violent – for territorial control that so often defines the relationship between culture groups in emerging and even in established democracies.

The concept of non-territorial, cultural autonomy is based on the premise that the members of a culture group may establish a legal entity, which has the status of an organ of government. Powers and functions can be decentralised

15 A Eide 'Cultural Autonomy: Concept, Content, History and Rile in the World Order' in M Suski (ed) *Autonomy Applications and Implications* (1998) 252. Also refer to the schematic demonstration of various forms of autonomy in M Tkacik 'Characteristics of Forms of Autonomy' (2008) 15 *Int J on Minority and Group Rights* 369, 372.

to the cultural council in similar vein to the decentralisation<sup>16</sup> of powers and functions to regions and local governments in federations and decentralised unitary systems. In the case of cultural autonomy the nature and scope of the powers that are decentralised are directly associated with the protection and promotion of the culture, language and traditions of the culture group. The jurisdiction of such a cultural legal entity is personal and not territorial. This means that only those persons who associate with, attend and participate in the activities of the culture group are affected by the decisions of the legal entity.

The origin of the modern-day understanding of cultural autonomy can be found in the philosophical debates of central Europe in the late 19th and early 20th centuries. Prior to the formation of the modern nation states of contemporary Europe, questions arose at the collapse of the Austro-Hungarian Empire about what should constitute the basis of the modern state. Two leading Austro-Marxist ideologists, Karl Renner and Otto Bauer, contended that the modern nation comprised of culture groups who lived intermingled, and that those groups could be given the status of self-governing, corporate entities with their own powers and functions, within the same state.<sup>17</sup> They proposed that regardless of the integrated way in which the members of culture groups lived, each group could have its own legal mechanism and institutions by way of which decisions were made that affected the culture, language and traditions of the group. Renner and Bauer anticipated that by recognising culture groups as legal entities, the competition for control of territory between culture groups could be averted. Multiple culture groups could therefore inhabit the same national territory while each had some degree of autonomy or self-determination over matters that affect their culture. They did not believe that the recognition of culture groups in this way would undermine national unity. In fact, they intended to strengthen national unity by recognition of the culture groups.

In 1917 the concept of cultural autonomy was further developed and explained as follows:

Each national group would create a separate movement. All citizens belonging to a given national group would join a special organisation that would hold cultural assemblies in each region and a general cultural assembly for the whole country. The assemblies would be given financial powers of their own: either each national group would be entitled to raise taxes on its members, or the state would allocate a proportion of its overall budget to each of them. Every citizen of the state would belong to one of the national groups, but the question of

16 In this article 'decentralisation' refers to the 'transfer of authority and responsibility for public functions from the central government to intermediate and local governments or quasi-independent government organisations and/or the private sector'. World Bank 'Different forms of decentralisation' (2001) <<http://www1.worldbank.org/publicsector/decentralization/what.htm>>. It is acknowledged that within the generic term 'decentralisation' there are several ways to unbundle powers that include devolution, deconcentration, delegation and privatisation, but those sub-categories of decentralisation are not the subject of this study. Use of the term 'decentralisation' for purposes of this article will suffice.

17 K Renner *Staat und Nation* (1899) reprinted as K Renner 'State and Nation' in E Nimni (ed) *National Cultural Autonomy and its Contemporary Critics* (2005) 13.

which national movement to join would be a matter of personal choice and no authority would have any control over his decision. The national movements would be subject to the general legislation of the state, but in their own areas of responsibility they would be autonomous and none of them would have the right to interfere in the affairs of the others.<sup>18</sup>

The ideas of Bauer and Renner were given practical effect in countries such as Estonia where, between World Wars I and II, cultural autonomy arrangements were put in place. These were described as being the most advanced example of minority protection in Europe at the time.<sup>19</sup>

With the advent of World War II and the atrocities that were perpetrated against members of minority groups, the post-World War II approach of international law and liberal democracies was to emphasise the protection of individual rights as the sole mechanism for the protection of culture groups. The notion of some form of collective rights to culture groups as groups, lost its attraction in the aftermath of World War II. However, today it is widely recognised in contemporary constitutional theory and practice that special measures, be they direct or indirect,<sup>20</sup> may be required for the adequate protection of culture groups.<sup>21</sup>

Section 235 is indicative of the acceptance by the Constitutional Assembly of South Africa that different forms of self-determination may be developed over time and that those may have to be accommodated in addition to the individual rights as guaranteed in chapter 2 of the Constitution.<sup>22</sup>

Section 235 was, in many respects, ahead of its time. Alexander Osipov describes cultural autonomy as follows:

Generally speaking, the term National Cultural Autonomy and similar notions encompass a broad range of institutional setups which envisage self-organization and self-administration of ethnic groups for the fulfilment of *public functions* in the ways other than territorial dominance and administration of a certain territory.<sup>23</sup>

A self-governing or autonomous cultural council, which has the status as an ‘independent public authority’,<sup>24</sup> is not a non-governmental organisation (NGO) or a private club, but is a statutorily created institution of governance that is empowered to make binding decisions (with the effect of laws or

18 Vladimir Medem quoted in H Minczeles *Histoire générale du Bund* (1995) 279–80.

19 E Nodel *Estonia Nation on the Anvil* (1963) 176.

20 Refer, for example, to specially designed electoral systems; minority vetoes in legislatures; decentralisation of powers to regional and local governments; power-sharing arrangements in the executive; quotas in the civil administration; and special provisions in bills of rights.

21 For a useful overview of mechanisms to protect minorities refer to JA Frowein & R Bank ‘The Participation of Minorities on Decision-making Processes’ (2001) 61 *Heidelberg J of Int Law* 1.

22 See the discussion by K Henrard *Minority Protection in Post-apartheid South Africa Human Rights, Minority Rights, and Self-determination* (2002) 124–9.

23 Emphasis added. A Osipov ‘Non-territorial Autonomy during and after Communism: In the Wrong or Right Place?’ (2013) 12 *J of Ethnopolitics and Minority Issues in Europe* 7, 8.

24 ‘A non-territorial jurisdiction [cultural autonomy] exists when independent *public* authority is exercised in respect of certain individuals throughout the state irrespective of the fact that those individuals are residing in territorial jurisdictions in which other individuals are subject to similar public authority from territorially delineated jurisdictions.’ M Suski ‘Personal Autonomy as Institutional Form – Focus on Europe against the Background of Article 27 of the ICCPR’ (2008) 15 *Int J on Minority and Group Rights* 157, 162.



by-laws) and to administer decisions about matters that affect the language, identity and culture of the community.<sup>25</sup> The application of cultural autonomy is therefore particularly ‘adequate for minorities who live dispersed in the country but have a strong political will for self-government and articulate their claims as such’.<sup>26</sup>

In the South African context, the first serious attention that was given at a scientific level to the concept of cultural autonomy in contemporary constitutional law was by Fanie Cloete in 1981.<sup>27</sup> After an overview of historic and contemporary mechanisms to accommodate the rights and interests of culture groups, Cloete concluded that the demands of cultural minorities usually focus on two constitutional remedies, first to secure a form of autonomy or self-determination over matters that affect their culture, and second to obtain some form of participation in general decision-making. Cloete proposed that cultural autonomy could be granted to ‘substantial’ culture groups that expressed a clear desire for a form of autonomy. He emphasised that no culture group should be forced to pursue or accept any form of autonomy and that no individual should be forced to belong to a culture group or be discriminated against for associating or not associating with a culture group.<sup>28</sup>

Bertus De Villiers developed a framework in 1989 for the protection of the rights of culture groups. He concluded that although there is no right in international law to guarantee the autonomy of culture groups, there were examples in the constitutional law of states where culture groups had been afforded the opportunity to establish a legal entity with decision-making powers over matters that were of direct relevance to the culture, language and traditions of a group.<sup>29</sup> After an analysis of the theory and application of cultural autonomy, he proposed the following principles as a guide to develop a framework to recognise and protect cultural autonomy:

- The Constitution or an Act of Parliament may recognise the right of a culture group to establish a legal entity for purposes of its domestic self-determination;
- The principle of freedom of association must be the backbone of cultural autonomy. Any attempt to force individuals to exercise cultural rights would fail in international law;

25 R Hofmann ‘Political Participation of Minorities’ (2006/7) 6 *European Yearbook of Minority Issues* 11 says that at a practical level cultural autonomy offers to a minority group the opportunity to exercise ‘some kind of self-government – usually through representative bodies, the members of which are elected by and from the members of the minority concerned’.

26 K Gal ‘Minority Governance on the Threshold of the Twenty-first Century’ in K Gal (ed) *Minority Governance in Europe* (2002) 8.

27 GS Cloete ‘Etnisiteit en Groepsverteenvoording in die Staatskunde – ‘n Vergelykende Studie’ (1981) PhD, University of Stellenbosch 364.

28 Ibid 365–7.

29 B De Villiers ‘Die Staatsregtelike Beskerming van Outonome Besluitneming van Minderheids-groep’ (1989) LLD, Randse Afrikaanse Universiteit, 409.

- Cultural autonomy is particularly relevant to culture groups that do not live concentrated in specific geographical areas;
- Cultural autonomy should not be seen as a substitute for individuals to participate fully in the national affairs of a country;
- Cultural autonomy should not be used as a mechanism to achieve or perpetuate political, economic or social inequality between individuals or groups;
- The typical powers of cultural councils are matters that relate directly to the protection and promotion of the culture, language and traditions of a culture group; and
- Cultural councils must be subject to judicial oversight similar to the oversight of national, provincial and local governments.<sup>30</sup>

Four key elements arise from these descriptions of cultural autonomy: first, a legal persona is created by way of the Constitution or Act of Parliament for a cultural community; second, powers of government are decentralised to the legal entity which gives it the status of an organ of government rather than a private law entity; third, the jurisdiction of the legal entity is not territorial but personal; and fourth, the powers of the legal entity are exercised pursuant to public law in the same way as a regional or local government.

#### IV BACKGROUND TO SS 234 AND 185(1)(C) OF THE CONSTITUTION

South Africa had some limited, albeit very controversial, experience with a form of non-territorial autonomy under the 1983 Constitution (the Tricameral Constitution). The Tricameral Constitution contained elements of non-territorial autonomy for racial groups (not culture groups) but as a result of the discriminatory nature of the Tricameral Constitution, the concept was doomed from its inception.<sup>31</sup> The Tricameral Constitution recognised three communities, which were defined by race; the white, coloured and Indian communities. Individuals were classified, without them having any choice, into one of the three communities on the basis of their race. There was no option for individuals to move from one group to another or not to belong to a group at all. Black people were completely excluded from the Tricameral Constitution since it was envisaged that they would exercise their democratic rights through various so-called 'homelands'.

All governmental functions were divided into two general categories, being general affairs and own affairs.<sup>32</sup> General affairs were those matters that affected each of the communities,<sup>33</sup> while own affairs were those matters that were particular to each of the communities separately.<sup>34</sup> Parliament comprised three chambers, one for each of the white, coloured and Indian

30 Ibid 144–6.

31 Act 110 of 1983, see <<http://www.info.gov.za/documents/constitution/83cons.htm>>.

32 Schedule 1 of the 1983 Constitution. Examples of 'own affairs' were education; welfare services; arts, culture and recreation; health services; and community development.

33 Tricameral Constitution s 15.

34 Ibid s 14.

communities.<sup>35</sup> The size of each chamber was in proportion to the numerical size of the community. The chambers had authority to enact legislation in regard to the ‘own’ matters of each of the groups, while considering ‘general’ matters the three chambers exercised joint authority<sup>36</sup> – hence the reference to ‘Tricameral’ Parliament. The executive comprised the cabinet for general affairs and ministers’ councils for own affairs.<sup>37</sup>

The exclusion of black people from the Tricameral Parliament; the lack of legitimacy of the Tricameral Constitution and the forced classification of individuals into racial groups, brought the Tricameral Constitution to its knees and it was ultimately replaced with the 1993 (interim) Constitution, which, for the first time allowed all South African citizens to participate in democratic elections.

The Tricameral Constitution left a deep negative legacy, antagonism and suspicion in South Africa to any form of minority or culture group protection. Therefore, it was most surprising when, as part of 1992–1996 constitutional negotiations, agreement was reached to allow scope for collective cultural self-determination, as expressed in s 235, especially when read with s 185(1) (c).

The current Constitution came into being in three steps.<sup>38</sup> The first step entailed the implementation of the interim Constitution of 1993, with the first democratically elected government. The second step culminated with the Constitution of 1996, as negotiated and approved by the Constitutional Assembly under the interim Constitution. The third step was for the Constitutional Court to certify that the current Constitution complied with the constitutional principles contained in the interim Constitution.<sup>39</sup>

An important characteristic of the three-step process was that the interim Constitution, which was negotiated by political leaders prior to the first democratic election, included essential constitutional principles that bound the elected Constitutional Assembly.<sup>40</sup>

One of the key constitutional principles in the interim Constitution dealt with the right to self-determination of a community that shares a common cultural and language heritage.<sup>41</sup> 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 of self-determination

35 Ibid s 37.

36 Ibid s 32.

37 Ibid ss 20 & 21.

38 B De Villiers ‘The Content and Significance of the Constitutional Principles’ in B De Villiers (ed) *Birth of a Constitution* (1994) 37.

39 Refer to the certification decision *Ex parte Chairperson of the Constitutional Assembly In re Certification of the Amended text of the Constitution of the Republic of South Africa* 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC).

40 Section 1(2) of the 1993 Constitution of South Africa. *Ex parte Chairperson of the Constitutional Assembly* *ibid*.

41 Constitutional principle XXXIV (1).

by any community sharing a common cultural and language heritage, whether in a territorial entity within the Republic or 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.

This constitutional principle opened the door for territorial and non-territorial autonomy for cultural and linguistic communities.<sup>42</sup> No practical effect has, however, been given to the notion of non-territorial autonomy.<sup>43</sup> The potential of a cultural council for the Afrikaans community (and other communities that were interested to pursue the option) was raised at the time of the negotiations for the final Constitution, but the idea was not actively pursued. This can be attributed to three main reasons: first, the National Party was unenthusiastic of the idea of cultural autonomy for the Afrikaans community since it had the belief that it could expand its mainly white racial support basis to a non-racial base and was concerned that the image of the National Party as a non-racial party could be damaged by insisting on cultural autonomy for the Afrikaans community; second, since the right-wing Afrikaans parties had the (mistaken) belief that territorial autonomy through a ‘Volkstaat’ was the only way to give effective protection to their group, they did not view a cultural council as a serious option; and third, the concept of cultural autonomy did not get any support from other cultural groupings.<sup>44</sup>

Sections 235 and 185(1)(c) leave the door ajar for the concept of non-territorial self-determination by way of cultural councils to be introduced through legislation. Self-determination is, after all, a dynamic concept of which the evolutionary development has not yet been concluded.

In summary, the constitutional basis for self-determination by way of non-territorial arrangements in South Africa exists by virtue of ss 235 and 185(1)(c), but whether the concept would in time to come be politically pursued

42 Refer, for example, to the *Accord on Afrikaner Self-determination between the Freedom Front, the African National Congress and the South African Government/National Party* (23 April 1994) which opened the door for negotiations about the possible creation of a *Volkstaat* for Afrikaners as well as ‘the possibility of local and/or regional and other forms of expression of self-determination’ (author emphasis) <<http://www.nelsonmandela.org/omalley/cis/omalley/OMalleyWeb/03lv02039/04lv02103/05lv02120/06lv02123.htm>>.

43 P Labuschagne refers to the cultural council-concept provided for in s 185(1)(c) as ‘a very limited form of self-determination’ that ‘falls short of the idea of a territorially based enclave’. P Labuschagne ‘*Uni Possidentis* versus Self-determination: Orania an Independent “Volkstaat”’ (2008) 33 *J of Contemporary History* 78, 85. Labuschagne is at risk of underestimating the potential of cultural autonomy as a form of self-determination. He seems to suggest, in contrast to Renner & Bauer, that ‘true’ self-determination can only be achieved through territorial dominance. International experience suggests, however, self-determination may also be achieved in non-territorial ways – hence the case study analysis offered in this article.

44 Kristin Henrard observes that although s 235 came about principally as a result of pressure by the right wing of the Afrikaans community, ‘it is clear that all parties realized and underscored its broader potential, namely for all population groups in South Africa that have a distinct identity and a wish to preserve that’. K Henrard ‘Post-apartheid South Africa’s Democratic Transition Process: Redress of the Past, Reconciliation and “Unity in Diversity”’ (2002) 1 *Global Review of Ethnopolitics* 18, 32.

and whether enabling legislation would be enacted to give practical effect to ss 235 and 185(1)(c) remain to be seen.

## V QUESTIONS ARISING FROM S 235

As mentioned in my introduction there are many questions arising from s 235. In this part I consider four of the more pertinent ones.

### (a) What is meant by self-determination?

The most obvious question arising from s 235 is what is the meaning of 'self-determination'?

The concept self-determination is often used in international law to refer to the sovereignty of nations, but the concept suffers from a lack clarity and specificity.<sup>45</sup> There is no settled definition in international law of self-determination.<sup>46</sup> When reference is made to self-determination within the context of domestic constitutional arrangements, great care should also be exercised so as not to create unrealistic expectations, encourage secessionist movements, or undermine national unity.

The Constitution is silent about the meaning of self-determination. This silence is surprising, especially since self-determination in the South African context is such a loaded and controversial concept. It can be assumed that the drafters of the Constitution knew that a definition of self-determination would not be achievable within the confines of the negotiations at the time and they therefore decided to leave definitional questions to future generations to resolve by way of legislation.

Section 235 should not be viewed by proponents of self-determination as a potential basis for secession of territory out of the Republic to form a new, independent state. This is in contrast with the recent developments in Kosovo, South Sudan and East Timor where self-determination gave rise to new, independent countries.<sup>47</sup> It also contrasts with the position in Canada, Ethiopia and the United Kingdom, where it is acknowledged that self-determination may involve the secession of part of the territory of an existing country for the purpose of forming a new country.<sup>48</sup> The form of self-determination referred to in s 235 must be read within the context of the entire Constitution which emphasises the unity and territorial integrity of South Africa. The promise of self-determination in s 235 should not and cannot be equated to sovereignty rights being promised to culture groups.

45 H Strydom 'Rehabilitering van die Reg op Selfbeskikking' (2000) 2 *TSAR* 346, 347.

46 DH Doyle (ed) *Secession as an International Phenomenon* (2010).

47 See in regard to the recent declaration of independence of Kosovo the following: H Quane 'Self-determination and Minority Protection after Kosovo' in J Summers (ed) *Kosovo – a Precedent?* (2012) 181.

48 See B De Villiers 'Secession – the Last Resort for Minority Protection' (2012) *J for African and Asian Studies* 81.

Self-determination within the meaning of s 235 clearly purports to be a form of self-government that is to be exercised *within* the current boundaries of South Africa and within the framework of the Constitution.

Although there is no settled definition of the concept self-determination in international or constitutional law,<sup>49</sup> the term is often used in a descriptive, socio-political sense as a reference, at the international level, to secession and, at the municipal level, to self-government and decentralisation of powers to institutions of government that are established to accommodate the rights and interests of culture groups. In the context of cultural groups, including indigenous people, the term is also used as a reference to groups being afforded the opportunity to make decisions about matters that affect their culture, language and identity.

Self-determination may take place by way of secession (although this is not encouraged by international law and is seen as an option of last resort to protect cultural minorities); by way of decentralisation to regional and/or local governments (for example in federations and decentralised unitary systems); or by way of decentralisation to non-territorial, culturally autonomous legal entities (as discussed in this article, with reference to the examples of Belgium, Estonia and Hungary).<sup>50</sup>

The meaning and practical application of self-determination depend to a large extent on the particular circumstances of the country concerned. However, an essential element of self-determination is that it includes the decentralisation of legislative powers to regions, local governments, and/or legal entities established by culture groups. Self-determination must therefore be distinguished from non-governmental arrangements whereby private clubs and civil organisations conduct their own business or where such private organisations may enter into service contracts with governmental bodies to deliver services to the public on behalf of a government department. An NGO is, in contrast with a cultural council, not an organ of government. Self-determination inherently implies a form of *government* whereby autonomous decisions, with the status of law, are made by institutions established by a culture group.

‘Autonomy’ in the context of self-determination derives from Greek and means to ‘own’ (auto) and ‘judicial’ (nomos) thereby indicating the legal capacity of an entity to act at its own discretion.<sup>51</sup> This emphasises that the organ that discharges self-determination powers and functions has the capacity to make laws that are binding on the subjects over which it exercises

49 See M Sterio *The Right to Self-determination under International Law* (2012) 18 who explains that self-determination in international law can be effected in several ways of which secession is an ‘extreme case’. Internal or domestic forms of self-determination are self-government, autonomy, and free association. Refer also to M Weller *Escaping the Self-determination Trap* (2008).

50 For an overview of some recent experiences refer to B De Villiers ‘Protecting Minorities on a Non-territorial Basis – Recent International Developments’ (2012) 3 *Beijing LR* 170.

51 Eide (note 15 above) 252. Also refer to the schematic demonstration of various forms of autonomy in Tkacik (note 15 above) 369, 372.

jurisdiction. In the case of sovereign states self-determination refers to the capacity of states to act in accordance with sovereign rights subject to international law. In the case of domestic constitutional arrangements, self-determination refers to the authority of a sub-national entity, be it a territorial or cultural government, to make decisions subject to the limitations imposed by the constitution or legislation.

It is not entirely surprising that in international law and constitutional law reference to the ‘right to autonomy’ or the ‘right to self-determination’ is not keenly pursued. The socio-political use of the word ‘self-determination’ often gives rise to concerns about challenges to national unity; *apartheid*-like divide-and-rule policies; and threats of secession. There is, generally speaking, a concern that any recognition of a ‘right’ to self-determination may undermine the integrity of the state and nation.<sup>52</sup> These concerns make the inclusion of s 235, which refers to a ‘right’ to self-determination in the post-apartheid Constitution of South Africa, so much more remarkable.

Many countries, without relying on the concept self-determination, experiment with various techniques within their respective constitutional arrangements to protect culture groups,<sup>53</sup> but there is not (yet) any synergy in international law to bring certainty and predictability to the concept of self-determination, nor is there a set of standard principles or institutions associated with the concept.<sup>54</sup> The task of giving effect to the meaning of self-determination in the context of s 235 will be dependent on South African circumstances; the specific rights that are sought to be protected; and the associated institutions that may be established by way of special legislation.

For purposes of this article I propose the following meaning of self-determination for purposes of s 235: *self-determination pursuant to s 235 refers to the statutory recognition of the right of a culture group to establish institutions for purposes of self-government in regard to matters that directly impact on the protection and promotion of the culture, language and traditions of the culture group.*

### **(b) Which cultural communities can apply or qualify for self-determination?**

Section 235 provides no guidance as to which cultural communities may potentially qualify for self-determination or what is meant by the description of ‘any community sharing a common cultural and language heritage’. It is presumed that whatever legislation flows from s 235 would also have to address definitional questions about the identification of culture groups.

52 W Kymlicka ‘The Internationalization of Minority Rights’ (2008) 6 *Int J of Constitutional Law* 23.

53 Refer to UN Human Rights *Promoting and Protecting Minority Rights a Guide for Advocates* (2012); UN Human Rights *Minority Rights International Standards and Guidance for Implementation* (2010) 12.

54 Roach (note 3 above) 411.

The concepts ‘community’, ‘cultural’, ‘language’ and ‘heritage’ find their origin in socio-political discourse, but from a legal perspective there is no settled meaning to these fluid and vague terms.<sup>55</sup> Even in instances where constitutions contain the concept of ‘minorities’, as in the case of the Constitution of India, the courts have been reluctant to give an exact definition to it.<sup>56</sup> International law has also been challenged to find a universally applicable definition of the concept of ‘minority’ groups.<sup>57</sup>

Legislation that seeks to give practical effect to s 235 would have to clarify the meaning and content of these concepts before any practical effect could be given to self-determination. Unfortunately, dealing with such definitional issues may prove to be so controversial and divisive as to constitute a strong disincentive to any future legislative initiative aimed to give legal effect to s 235 or s 185(1)(c).

In their current form, ss 235 and 185(1)(c) are essentially not much more than very general statements of intent, with the proverbial devil hiding in the detail. Any attempt to particularise self-determination of a culture group pursuant to s 235 would have to recognise, as a point of departure, the chapter 2 rights of free association of individuals and the protection of individuals against discrimination. International law and the equality provisions of the South African Constitution demand no less. The principle of freedom of association entails that the individual’s choice with whom they associate is fundamental to a free and democratic society. Any form of cultural self-determination must be based on the right of freedom of association and must not restrict the right unjustifiably. It is ultimately the choice of an individual whether or not they associate themselves with a particular culture group; whether they attend and participate in the activities of the culture group; and whether they wish to be bound by decisions of a legal entity established on behalf of a culture group. Any attempt to force membership of a group onto a person; obligatory classification of individuals into groups; exclusion from a cultural council of individuals from a group on grounds of race; or any other discriminatory consequences would be in breach of international law and in breach of the equality provisions of the South African Bill of Rights.

In light of South Africa’s history of apartheid and forced racial classification, any scheme of community or cultural recognition would have to be non-

55 Refer, for example, to the complexity of constitutional adjudication when it comes to concepts such as ‘religion’ and ‘culture’ in C Rautenbach, F Jansen van Rensburg & G Pienaar ‘Culture (and Religion) in Constitutional Adjudication’ (2002) paper delivered at the 5th *Colloquium on Constitution and Law* 16, under the auspices of the Konrad Adenauer Foundation.

56 In India there is often reference to the lack of definition as ‘constructive ambiguity’ since certain concepts are best not defined. The Supreme Court has also emphasised that the term ‘minority’ is best defined on the basis of particular facts, rather than by way of a generic definition. See *DAV College v State of Punjab* AIR 1971 SC 1737, 1742; (1971) 2 SCC 269.

57 The Minority Rights Group has observed as follows about the many efforts to develop an appropriate definition for ‘minority’: ‘Thus the definitions [of minority] will differ from state to state and the defining process *within* the state will differ according to specific circumstances, usually relating to the state’s perception of the political power of groups under discussion. Even the definitions upheld by international organisations are subject to similar forces and will change over time, leading to further redefinition.’ C Jones *Education Rights and Minorities* (1995) 8.



racial; based on free association; supported by the vast majority of the persons who form part of the cultural community that is seeking self-determination; approved by Parliament; and would be subject to the equality and non-discriminatory provisions of the Constitution.

International law does not offer any assistance as to how culture groups in specific countries can be identified or defined. It is accepted in international law that the specifics of the protection of culture groups is a matter for the constitutional law of each country. Article 27 of the UN's International Covenant on Civil and Political Rights provides as follows as far as the freedom of association of individuals who wish to associate with culture groups is concerned:

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 other members of the group, to enjoy their own culture, to profess and practice their religion, or to use their own language.<sup>58</sup>

The International Covenant does not offer any guidance as to the definition of 'ethnic, religious or linguistic minorities'; the role of the state in the endeavours of such groups to protect and promote their identity; or collective rights, if any, to which such groups may be entitled.

In the domain of constitutional law, the experiences of Belgium, Hungary, Germany, Estonia and the Russian Federation may be instructive as to how culture groups can be identified or qualify for self-government. In Belgium, Hungary, Germany and Estonia, the culture groups that may qualify for self-government are identified by law. This prevents any uncertainty about the identity of the culture groups. The culture groups that qualify for self-determination are listed in a legal instrument and other communities that are not explicitly mentioned do not have similar rights to self-government. This is unlike the Russian Federation where culture groups may form their own cultural associations but, as a consequence, multiple and often competing associations have been formed for the same culture group. In Russia there may only be one national association per culture group, but it is not infrequent that at a local and regional level multiple (and competing) associations are established for the same culture group.

In Belgium, non-territorial, cultural autonomy for cultural communities is only available in the capital city, Brussels. The rest of the country is comprised of typical regional autonomy as is found in federations. It is the non-territorial arrangements of Brussels that may be of relevance to the development of the rights under s 235. The population of Brussels is a mixture of French, Dutch, German and other nationalities. The largest community in Brussels is the French, but since Brussels is situated in Flanders, the geographical area of the Dutch, special arrangements have been implemented to grant both cultural communities autonomy over their cultural affairs in Brussels. No other community in Brussels, be it the sizeable German community or any other

58 UN General Assembly res 2200A (XXI) (16 December 1966).

immigrant community, have the same rights to cultural autonomy in Brussels as the Dutch and the French.<sup>59</sup> The French and Dutch communities of Brussels each has the equivalence of a cultural council that make decisions over the ‘personal’ matters of their respective community, for example aspects of education, language, culture and media. The principle of free association is respected since citizens living in Brussels may vote for candidates of either of the language communities, which means that no individual is required to make known with which community, if any, he or she associates. Individuals also can attend any of the services on offer by both cultural councils provided they accept that the language in which the service is offered is that of the specific community. In addition, no individual is classified into any cultural community.<sup>60</sup>

The Hungarian Constitution recognises 13 cultural communities for purposes of self-government.<sup>61</sup> No other cultural community can qualify for self-government. The 13 communities are those that have been resident in Hungary for many years – at least for a century or more. They have an automatic right to self-government, but no individual is obliged to attend the services of a specific community or to register to vote for community elections. Those individuals who wish to vote in community elections, must register as a member of the community voters’ roll. Registration as a voter for community elections does not disenfranchise a person to vote in national or local elections. Any person may access the services on offer by a cultural community provided that, in the field of education, first priority is given to members of the specific community and, if capacity is available, other individuals may also attend the educational facilities of a specific community.<sup>62</sup>

In Estonia a multi-pronged approach has been adopted in the identification of culture groups that may qualify for self-government. After World War I, Estonia exemplified the ideas of Bauer and Renner when it enacted cultural autonomy arrangements that were the first of its kind in scope and detail.<sup>63</sup> Estonia recognised certain culture groups for purposes of autonomy; but it also provided that other culture groups who were not recognised could request to be recognised. Autonomy was only given to a culture group that sought self-government.<sup>64</sup> This meant that even if a group qualified for autonomy,

59 For general reference: K Deschouwer ‘Kingdom of Belgium’ in J Kincaid & GA Tarr (eds) *Constitutional Origins, Structure and Change in Federal Countries* (2005) 48; A Lecours ‘Belgium’ in AL Griffiths *Handbook of Federal Countries* (2005) 58.

60 In practice an individual can attend a Dutch-speaking hospital and a French-speaking school. There is no limitation on an individual accessing services of their choice provided the individual accepts that the language in which the service is offered will be that of a specific community.

61 Article 2 of the Law on Rights of National and Ethnic Minorities, Act LXXVII of 1996 <[http://www.minelres.lv/NationalLegislation/Hungary/Hungary\\_Minorities\\_English.htm](http://www.minelres.lv/NationalLegislation/Hungary/Hungary_Minorities_English.htm)> and Act CLXXIX of 2011 on the Rights of Minorities (Hungarian Act on the Rights of Nationalities).

62 Hungarian Act on Rights of Nationalities *ibid* art 28.

63 JG Jackson *Estonia* (1941); and RT Clark ‘The Constitution of Estonia’ (1921) 3 *J of Comparative Legislation and Int Law* 241, 250.

64 The system of minority protection was regarded as one of the most successful in Europe. It was said at the time that ‘the pride of the Estonian nationhood was its treatment of national minorities’. Nodel (note 19 above) 176.

it had to seek autonomy by way of a referendum before a cultural council for the community could be established. Russians, Germans, Jews and Swedes automatically qualified for autonomy as culture groups.<sup>65</sup> This arrangement, together with the Constitution of Estonia, was abolished as a result of the Marxist occupation of Estonia in 1939. After the fall of the Berlin Wall a second phase of cultural autonomy, with similar characteristics as the first phase, was enacted.<sup>66</sup> Under the current arrangements Russians, Jews, Germans and Swedes automatically qualify for cultural autonomy should they seek it.<sup>67</sup> Other culture groups that may wish to qualify for cultural autonomy must demonstrate that they have at least 3,000 members before they can apply for autonomy.<sup>68</sup> Autonomy in Estonia entails that a culture group may register a legal person,<sup>69</sup> in the form of a cultural council, to make decisions on behalf of the group in areas such as education, language, culture, symbols and place names.

The essence of this type of autonomy arrangement is the recognition of the right of national minorities to protect, promote and preserve their identity, language and culture.<sup>70</sup> 'Cultural autonomy' is defined as 'the right of individuals belonging to a national minority to establish cultural autonomy in order to achieve the cultural rights given to them by the constitution'.<sup>71</sup>

In Germany there is a form of limited 'functional autonomy' granted to the Danish cultural minority pursuant to private law arrangements. Members of the Danish minority may elect to attend Danish-run schools without individuals being classified in any way as being members of the Danish community for any other purpose. The Danish School Association, an NGO established and managed by the Danish community, manages several schools for the Danish community; the schools are jointly funded by the governments of Germany and Denmark; teaching occurs in Danish and German; and the examinations applied are recognised in both countries.<sup>72</sup> The arrangements are limited to education and do not extend to other cultural spheres. The Danish School Association has input regarding the curriculum that is taught at its schools, but the association does not have any law-making powers similar to those of cultural councils in Brussels, Hungary or Estonia. Danish-speaking persons are under no obligation to attend the schools managed by the Danish School Association.

65 V Raud *Estonia Reference Book* (1953) 41.

66 V Poleshchuk (ed) *Chance to Survive Minority Rights in Estonia and Latvia* (2009).

67 National Minorities Cultural Autonomy Act 1996 (Estonian Act on Cultural Minorities) art 2(2) <<http://www.regione.taa.it/biblioteca/minoranze/estonia2.pdf>>. The Russian community is the largest of the national minorities and has an extensive network of schools and cultural activities to service the needs of their community. 'Cultural autonomy in Estonia – bane or boon for indigenous cultural survival' (21 January 2010) <<http://www.eesti.ca/?op=article&articleid=26937&lang=en>>.

68 Estonian Act on Cultural Minorities *ibid* art 2(2).

69 *Ibid* art 26 determines as follows: 'Institutions of cultural autonomy are independent legal persons, may own real property and are liable for their financial obligations.'

70 *Ibid* art 5.

71 *Ibid* art 2(1).

72 Frowein & Bank (note 21 above) 24.

In response to the question which culture groups may qualify for self-determination pursuant to s 235, the experiences of the above-mentioned case studies suggest that an enabling Act promulgated pursuant to s 235 could, by way of options:

- a) Explicitly name or identify the culture groups that automatically qualify for self-government.
- b) Allow culture groups to conduct a referendum for members of the community to express their view about self-government, provided that the request for a referendum is supported by a petition of a sizable number of persons based on the most recent census from the community.
- c) Combine (a) and (b) whereby certain communities who clearly wish to exercise self-government are identified in the enabling Act, but with the option being open for other communities to also seek self-government by way of a referendum.

**(c) What institutions can a community establish pursuant to cultural autonomy?**

Section 235 is silent as to the institutions that may be established to give effect to cultural self-determination. Section 185(1)(c) refers to the formation of ‘cultural councils’. It appears that several case studies may be relevant to the question of what kinds of institutions may be envisaged. Since cultural autonomy within the sphere of public law is a relatively scarce phenomenon, useful insight can be gained from countries where it has been implemented. Existing systems in Belgium, Estonia, Russia, Finland and Hungary give an indication of the options available in terms of the type of electoral system used for cultural councils; the composition of legislative institutions; the composition of the executive; and the separation of powers.

As far as voter registration and related matters are concerned, in Belgium there is no requirement for a voter to register on the voters’ roll of a specific community in order to vote for cultural council elections. Any Belgian citizen who is resident in Brussels may participate in cultural council elections. However, a voter must cast a vote for one of the two language community candidates. In order to register as a candidate for a cultural council a person must submit a petition with 500 signatories to demonstrate that he or she is accepted as belonging to the language community he or she wishes to represent. No candidate may appear on more than one community list. Voters are not obligated to make known their community affiliation; a voter may only vote once in an election; and a voter may vote for a different community in a future election. The principle of freedom of association is therefore strongly endorsed by this arrangement, with self-identification forming the backbone of the cultural council elections.

In Estonia and Hungary voters who wish to participate in elections for a cultural council must register on the voters’ roll of such a community. In Estonia the National Electoral Commission is responsible for the conduct of all elections, including those of cultural councils. Registration on a voters’

roll does not affect the right of a person to participate in other elections at local, regional or national levels. In Hungary the electoral arrangements were initially similar to those of Brussels where any voter could vote for any community list, but the system met with resistance and was amended to require registration as a voter for a community list.

The same applies to Finland, where members of the Sami community must register on the Sami voters' roll to qualify to participate in elections for the Sami assembly. Finnish legislation establishes the legal basis upon which the Sami are identified. The first requirement is 'self-identification', which entails the subjective expressions and intentions of an individual to associate with the Sami people. The second requirement is more objective, and is determined by the question of whether one or both of a person's parents spoke the Sami language, or learnt Sami as their first language.<sup>73</sup> Any Sami on the Sami Electoral Register can stand for election in the Sami Parliament and participate therein.<sup>74</sup>

In the Russian Federation cultural associations are treated as NGOs and not as organs of government and, as a result, the election of office bearers is a private matter. There is no limit in Russia on the number of associations that can be established for any cultural group, provided that there may be only one national association per culture group.<sup>75</sup>

As far as institutional development in these jurisdictions is concerned, a distinction is drawn between cultural councils, which are organs of government, and private NGOs, which are not. A cultural council therefore has legal status similar to that of an organ of regional or local government, albeit that the jurisdiction of the council is personal rather than territorial. The institutional arrangements of cultural councils must therefore be designed to meet the constitutional requirements of democratic representivity and accountability. While private NGOs, such as the cultural associations in Russia, may determine their own institutions and procedures, organs of government are accountable to the public and are subject to judicial oversight. Therefore, as a general principle, the democratic standards that apply to cultural councils should not be less than the standards that apply to local and provincial government.

In Hungary and Estonia cultural councils are the equivalent of a legislature with an executive arm responsible for daily issues of government and administration. The Estonian culture groups can develop their own institutions provided that such institutions comply with the national Electoral Act. The same applies to Belgium, albeit that the arrangements are slightly more complex. Although both communities have the equivalent of a cultural council for Brussels, the French community of Brussels elects a separate

73 Finish Official Gazette SSK 17/7/1995/974.

74 L Hannikainen 'Autonomy in Finland: The Territorial Autonomy of the Aland Islands and the Cultural Autonomy of the Indigenous Sami People' (2002) 2 *Baltic Yearbook of Int Law* 175, 189.

75 Osipov (note 23 above) 7, 11. See also A Osipov 'National Cultural Autonomy in Russia: A Case of Symbolic Law' (2010) 35 *Review of Central and East European Law* 27.

cultural council, while the Dutch community uses the regional council to conduct business within the domain of cultural affairs.<sup>76</sup> The Sami Parliament in Finland is popularly elected by members of the Sami community and its business is administrated by an executive. Although the Sami Parliament does not have general legislative powers, it nevertheless makes decisions on the allocation of grants; it submits recommendations to the national Parliament; and it administers Sami cultural affairs, including aspects of education. The Sami Parliament comprises 21 members and it has a territorial and non-territorial jurisdiction.

In response to the question of what institutional arrangements could be contained in an enabling Act pursuant to s 235, the experiences of the above-mentioned case studies suggest the following options:

- a) The enabling Act could contain a standard Cultural Council Constitution similar to the standard arrangements in the Constitution about legislative and executive institutions for the provinces.
- b) The enabling Act could, in the alternative, allow cultural communities to register a legal persona for their culture group and to develop their own constitution, provided that basic principles of democratic governance as set out in the enabling Act are complied with in similar vein as the provinces when they draft their own constitutions.
- c) A cultural council could be established for the entire country or a community may wish to establish a cultural council only for a part of the country.
- d) Arrangements could be put in place to ensure that a candidate who wishes to be elected to represent a specific community, is accepted as a member of the community, and any disputes arising about membership of a candidate to a community could be disposed of by the judiciary.
- e) In terms of the voter registration process for purposes of elections for a cultural council no person should be obliged to register as a voter, and those who wish to register should not be subject to any form of discrimination that would breach the equality provisions of the Constitution.
- f) Any disputes about voter registration could be adjudicated by the judiciary.

**(d) What are the typical powers that can be decentralised to a cultural community?**

The nature and scope of powers decentralised to a cultural council depend on the circumstances of each country and of each culture group. The powers of a cultural council generally refer to those policy areas that are of direct relevance to the protection and promotion of the culture, language, and identity of a culture group. It may include aspects of education; public use of language; arts and culture; historic days; emblems and symbols; and

76 K Deschouwer *The Politics of Belgium: Governing a Divided Society* (2012).

media. The way in which powers are decentralised to cultural councils may not be dissimilar to the way in which decentralisation to provincial and local governments is organised under the South African Constitution. Although the drafters of the Constitution had the benefit of international experiences with decentralisation and federalism, functions that were appropriate to the South African circumstances were allocated to provincial and local governments.

As a general principle symmetry may apply to cultural councils, meaning that the councils have exactly the same powers; or provision may be made for asymmetry between cultural councils, where some may have more expanded powers than others. In Brussels the powers that form part of the cultural autonomy of the two communities are referred to as ‘personal’ matters and include aspects of education, language, culture, health care and welfare.<sup>77</sup> The services arising from these powers are provided in the language of the specific community although, as mentioned above, any individual may access those services. The exercise of cultural autonomy is subject to the provisions of the Constitution of Belgium.

In Finland, ‘culture’ is given a wide expression by the Constitution of Finland as including the traditional livelihoods of the Sami, fishing, hunting, the use of their language and the promotion of their lifestyle.<sup>78</sup> The Sami Language Act<sup>79</sup> is a key mechanism to protect and promote the Sami language and culture across the whole of Finland. Some of the key provisions of this Act are as follows: the right to use the Sami language in dealings with public authorities;<sup>80</sup> promotion and teaching of the Sami language;<sup>81</sup> publication of government announcements in the Sami language if it affects the Sami community,<sup>82</sup> and registration as a Sami.<sup>83</sup> More elaborate language rights exist within the Sami homeland.<sup>84</sup> An important obligation is placed on the state to make available funds and resources to promote and protect the Sami language.<sup>85</sup> The core of its jurisdiction is what is known as the Sami-homeland, but its decisions about culture, language and education are also applicable to the Sami where ever they live in sufficient concentrations in Finland.<sup>86</sup> The Sami Parliament does not have a formal legislative function although it is responsible for attending to the interests of the Sami and for allocating the funds set aside by the national Parliament of Finland, for specific projects to promote the Sami identity, such as the production of language materials,

77 Constitution of Belgium art 127 <[http://www.dekamer.be/kvvcr/pdf\\_sections/publications/constitution/grondwetEN.pdf](http://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/grondwetEN.pdf)>.

78 Constitution of Finland art 17 <<http://www.finlex.fi/en/laki/kaannokset/1999/en19990731.pdf>>.

79 Act on the Use of the Sami Language when dealing with Authorities (Finish Official Gazette SSK 8/3/1991) (Sami Language Act).

80 Ibid arts 1, 4–6.

81 Ibid chapter 5.

82 Ibid arts 8 & 9.

83 Ibid art 7.

84 Ibid chapter 3.

85 Ibid art 31: ‘An appropriation shall be included in the State budget for purposes of State support to municipalities, parishes, herding cooperatives within the Sámi homeland and private entities referred to in section 18 for covering the specific additional costs of applying this Act.’

86 Tkacik (note 15 above) 375.

interpretation services, the publication of books and teaching material, and other cultural needs. The Sami Parliament has the potential for influencing other authorities in that there is a statutory obligation on the national, regional and local authorities in Finland to negotiate with it ‘on all far-reaching and important measures which may directly and in a specific way affect the status of the Sami as an indigenous people’ in regard to community planning; management of public lands; mining; culture; teaching and education of and in the Sami language; and any other matter that impacts on the status of the Sami language and culture.<sup>87</sup>

The Constitution of Slovenia provides that communities are entitled to establish ‘autonomous organizations in order to give effect to their rights’ and, in addition, that the state may authorise these autonomous organisations to undertake state-functions that would normally be within the responsibility of the state.<sup>88</sup> These communities can therefore be clothed with the formal powers of government by way of decentralisation. They have a public law and governance function in contrast to other community organisations that serve their members under civil law for purposes of social activities.<sup>89</sup> The Self-Governing Ethnic Communities, as they are called, are ‘public legal entities’<sup>90</sup> which means they have a different status from mere private associations that tend to the interests of their members. As a ‘public legal entity’ the communities have the status of a ‘government’ and the decisions are legally enforceable under public law and not as a mere contract under private law. Any law or regulation that affects the constitutional rights of either of the communities can only be passed with the support of the community.<sup>91</sup>

In the Russian Federation, under the Russian Law on National and Cultural Autonomy<sup>92</sup> the powers of cultural associations do not equate to a right to ‘national-territorial self-determination’.<sup>93</sup> They may receive financial and other support from government agencies; make representations to legislative and executive organs of government in regard to matters that affect the community; preserve and enrich their culture and heritage; practice and follow their customs, folklore and practices; create and manage educational institutions; participate in international organisations; and maintain contacts with citizens and NGOs of other states.<sup>94</sup> The Russian Law anticipates that ethnic minorities may establish private associations for the purpose of pursuing their culture, language and identity and that the Russian Federation may financially support such associations.<sup>95</sup> There is, however, no obligation

87 Act of the Sami Parliament art 9.

88 Constitution of Slovenia art 64(3) <[http://www.pf.uni-mb.si/datoteke/janja/Angleska%20PT/anglesko-slovenska\\_urs.pdf](http://www.pf.uni-mb.si/datoteke/janja/Angleska%20PT/anglesko-slovenska_urs.pdf)>.

89 Ibid art 145.

90 Law on Self-Governing Ethnic Communities (1994) art 2.

91 Constitution of Slovenia art 64.

92 See <<http://cis-legislation.com/document.fwx?rgn=1431>>.

93 Russian Law on National and Cultural Autonomy art 4.

94 Ibid.

95 B Bowring ‘Legal and Policy Developments in the Russian Federation in 2007 in Regard to the Protection of Minorities’ (2007/6) 6 *European Yearbook of Minority Issues* 35.



on the Federation to support the associations. The lack of state financial support is often a serious constraint on the ability of the associations to function properly.<sup>96</sup>

In light of the above experiences, the following practical guidelines can be identified for purposes of giving effect to the potential powers of cultural councils:

- a) The powers of cultural councils should relate to matters that are of direct relevance to the protection and promotion of the culture, language and identity of the culture group.
- b) The typical powers associated with cultural councils include those relating to aspects of education; the use of language in public office, symbols, cultural days; music and literature; and the media.
- c) The exact powers of a cultural council should be the subject of negotiation within each country and each culture group.
- d) Different cultural councils may all be clothed with the same powers (symmetry) or different cultural councils may have different powers (asymmetry).
- e) There is an important distinction between cultural councils that operate in the public-law sphere, and those that operate in the private-law sphere as NGOs: the former are organs of government, with governmental powers and functions, and their decisions have legal effect as the decisions of an organ of government.

## VI CONCLUSION

In this article I have demonstrated that the self-determination of culture groups by way of autonomous cultural councils on a non-territorial basis can be a legally sound, practical and feasible option to give effect to s 235 of the South African Constitution. The constitutional basis to establish cultural councils exists pursuant to s 185(1)(c) and the right of a cultural group to self-determination is recognised in s 235. The right to self-determination referred to in s 235 is not limited to territorial options. Non-territorial self-determination by way of cultural councils has international and comparative precedent and could be usefully explored in South Africa.

The comparative precedents examined in my article show that cultural councils may be used to protect the rights of culture groups in circumstances where geographical intermingling renders territorial forms of autonomy impractical or not feasible. Cultural councils can be created in public law as organs of government clothed with powers and functions to make decisions that have the status of laws in respect of issues that are of relevance to the protection and promotion of the culture, language and identity of a culture group.

96 D Wirda 'Legislation of the Russian Federation concerning ethnic minorities and its shortcomings' <<http://www.eawarn.ru/EN/pub/Projects/TacisProject/Widra.htm>>.

In the South African context, ss 185(1)(c) and 235 of the Constitution are indicative of the mood of the Constitutional Assembly at the time when the Constitution was adopted. Time will tell whether flesh will be added to the bones of ss 185(1)(c) and 235. I submit that, as time progresses, it is more likely than not that demands will be made for legislation to be enacted to give practical effect to the right to self-determination that is so eloquently recognised by the Constitution. I submit further that those demands could be accommodated by way of non-territorial, cultural autonomy. While the composition and powers of any institution established through such legislation will have to be consonant with the provisions of our own Constitution, useful lessons may be drawn from the experiences of other countries such as those discussed in the body of my article.