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Title	Freedom of association in South Africa: Democratic pluralism and the interplay between collective interests and individual flourishing
Authors	Nankan, Sahara
Publication date	2024-01-01
Original Citation	Nankan, S. (2024) 'Freedom of association in South Africa: Democratic pluralism and the interplay between collective interests and individual flourishing', Societās Working Paper 07/2024 (17pp). Cork: School of Law, University College Cork.
Type of publication	Working paper
Link to publisher's version	https://brill.com/view/journals/ejcl/12/1-2/ejcl.12.issue-1-2.xml
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Download date	2026-10-17 23:49:21
Item downloaded from	https://hdl.handle.net/10468/15443

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Societās Working Paper 07/2024 February 2024

Global Perspectives on Freedom of Association: South Africa

Sahara Nankan

Societās
Exploring the Value of Freedom of Association

IRISH RESEARCH COUNCIL
An Chomhairle um Thaighde in Éirinn

Societās Working Paper Series

Global Perspectives on Freedom of Association Collection

The Global Perspectives on Freedom of Association collection is presented under the auspices of "Societās: Exploring the Value of Freedom of Association". The project is generously funded as a Laureate project of the Irish Research Council and hosted at the School of Law in University College Cork.

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Freedom of Association in South Africa: Democratic Pluralism and the Interplay between Collective Interests and Individual Flourishing

Dr. Sahara Nankan[*]

I. Introduction

This article examines, as a foundational touchstone, the nature, scope and rationales that undergird the right to freedom of association in South Africa enumerated under Section 18 of the Constitution.[1] It aims to inform, demystify and map the underpinnings and justifications of this right as it has been understood, interpreted and developed by (primarily though not exclusively) the Constitutional Court's jurisprudence. This article is divided into two interlinked thematic parts. Part I outlines the development, nature and scope of the right. The socio-legal and historical development of Freedom of Association is explained within the contextual framing of interrelated core values of freedom, equality, dignity and democratic pluralism. It explores the normative content of the right including the right to associate, the right to dissociate (to join or not to join), justifiable limitations and how a distinctive wider regulatory framework supports these key elements and highlights the relationship with other rights. It further explores the applicability of international law, and how the Court draws on foreign case law to interpret Section 18 (indeed the Court since its inception has always employed a comparative lens to support its insights and interpretation of rights). Part II then surveys the jurisprudence of the Court in terms of the types of cases that have come before it which both directly or indirectly evoke and have implications for how freedom of association is respected, protected and promoted.[2] This includes where the right stands in relation to other inter-dependent rights, disputes and interpretative contestations that have arisen predominately the freedom of religion, the right to language and cultural life and the right to privacy. The aim

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[1] Constitution of the Republic of South Africa [Act 108 of 1996] 10 December 1996.

[2] Whilst judgments of lower courts are considered where relevant, the focus of this condensed article lies with the judicial findings of the Constitutional Court.

of this endeavour is therefore not to provide a critical account of the freedom as a contested concept nor is it a comprehensive critical examination of the field - rather its aim is to highlight the core rationales that lie behind associational freedom drawing from primarily adjudicative interpretations, as well as key strands of academic discourse that justices refer to, in order to shed light on its basic purposes and potential. In order to safeguard the mandate of democratic pluralism and the autonomous development of society, the pursuit of a wider group of rights to form and maintain communal relations arguably takes precedence, but this does not negate the need to protect individual freedoms also essential for the fulfilment of these aims. The interplay of individual flourishing and collective interests necessitates a constant tension calling for further refinement, coherency and interpretative consistency. This article therefore leaves plenty of room for further exploration of major themes, challenges and avenues of reflection going forward.

II. Development, Nature and Scope of Freedom of Association

Section 18 of the Constitution states that, 'everyone has a right to freedom of association.' The wording of the provision is expressed in broad terms and is, *prima facie,* couched as a positive right with individualistic aims. In order to understand how this right, so textually open, has been construed it is first important to consider briefly the socio-political and legal historical context within which it has developed before going on to then outline its normative content.

(i) Socio-Legal and Historical Development

One may, within reasonable terms, describe the history of South Africa as encompassing a socio-legal history of competing and contested associational freedoms, relations and legacies. Given the centrality of association for both the creation and maintenance of identity and indeed a national identity, forming associational relationships has long been a social, economic and political good engaged by the range of peoples that have called South Africa their home. From the Dutch East Company's settlement established in Algoa Bay in 1652, and the later splintering off of boer-farmers (*voortrekkers,* later Afrikaaners), to different local tribal groupings each with their own ethnic, linguistic and organisational structures[3] and the later

[3] For example, the Khoi initially lived in bigger villages along Table Bay, the Bushman of the interior were smaller groups of hunter-gatherers, whilst Bantu/Nguni speaking peoples from central Africa, such as the Zulu, forged the Zulu Empire in the wake of the *Mfecane* ('the crushing', also known by the Sesotho names *Difaqane* or *Lifaqane* - a period of military conflict and conquest that resulted in the largest displacement of indigenous peoples from the region).

expansion of the British Empire creating the Union of South Africa in 1910,[4] it is evident that the pursuit of association (socially, economically, militarily and politically) has been ever dominant. Significantly, in 1948 earlier enacted legislation[5] precipitated the minority National Party government to form what might be described as a wholesale rejectiontism to the principle and right of association under the Apartheid regime - literally translated as 'apartness' (or what might be described here for descriptive purposes as a legal system of enforced *associativeness* and *dissociativeness*). One of the key methods of the Apartheid government in its aim to limit resistance was to impose severe restrictions on engagement from areas of residential settlement, small gatherings, associational membership and industrial action, to large-scale protests and assembly.[6] Despite these laws, 48 years of national struggle encompassed mass association and assembly that were either directly and/or indirectly against Apartheid. This included the Black Sash organisation (1955), the South African Council of Churches (1968), Federation of South African Trade Unions (1979) and later Congress of South African Trade Unions (1985), the South African National Civics Organisation (1992) and United Democratic Front (1983). Resistance eventually led to the historic unbanning of key political parties and organisations in 1990 such as the African National Congress, South African Communist Party and Pan Africanist Congress. Indeed association and assembly both played pivotal roles in not only ending Apartheid but also in establishing the new Constitutional order. The Convention for a Democratic South Africa (CODESA) 1 and 2 brought together 19 political groups in support of the Declaration of Intent to begin drafting the present day Constitutional framework through the MPNP (multiparty negotiating process) and brought about the country's first multi-racial democratic elections held in 1994. Indeed, the historical deprivation of freedom of association provided significant impetus for the two years of intensive consultations that encompassed the largest public participation programme ever carried out in South Africa.[7] Mired in contests and struggles for associational freedom linked to power, voice, legitimate participation, assembly,

[4] British settlement brought another wave of associational relations along with new influxes of peoples, allowing for, for example, the establishment of the British Indian Association under Mahatma Ghandi in 1903 in order to prevent proposed evictions of Indians in the Transvaal.

[5] This includes for example, the Immorality Act 1927 which forbade extramarital sex between white people and black people and the Mines and Works Act 1911 which established an employment 'colour bar' and facilitated labour practices, informal trade union practices, government regulations and further legislation based exclusively on racial segregation.

[6] Such laws included the Group Areas Act No 41 of 1950, Public Safety Act of 1953, Industrial Conciliation Amendment Act of 1956, Riotous Assemblies Act No 17 of 1956 and the Unlawful Organisations Act No 34 of 1960.

[7] See, A Hudson, 'Political Parties and Public Participation in Constitution Making: Legitimation, Distraction or Real Influence' (2021) 53(3) Comparative Politics 501. For an earlier account see, T Madima, 'Freedom of Association and the Bill of Rights' in E Kalula (ed) *Labour Relations in Southern Africa* (1993) 116.

protest, unionisation and democracy, the enactment of the 1996 Constitution sought to place this freedom on a justiciable rights-footing within the Bill of Rights and wider aims of the Preamble.[8] The Constitution is therefore to be understood as one composite 'living' whole, and this encompasses a reading of Section 18 not only as a stand-alone right but also as a reflection of the shared rights values of freedom, equality, dignity that support democratic pluralism and diversity (see below). Indeed were the latter two to exist in a legal and rights-based vacuum they would be rendered meaningless or be utilised to drive away from constitutional purposes. It is unsurprising that there is then a greater emphasis placed by the Court on rebalancing group rights to free association with individual interests (thereby also triggering Section 8 on horizontal application). The provision must be further read in conjunction with the overall purpose and scope of the Bill of Rights, which supports greater judicial interpretation, specifically from the Constitutional Court where the Constitution is, as noted, considered in its entirety to inform the Court's approach to all rights including Section 18.

(ii) Nature and Scope

This right is thus from the onset a, *prima facie*, core tenet of South Africa's constitutional democracy and is a key right for accountability and the advancement of other rights (see below). In its traditional sense, as noted above, Freedom of Association is related more with the positive than the negative element, i.e. the right of an individual to be free to form an association with whomsoever she or he wishes for whatever purpose deemed worthy of protection under Section 18. It permits the establishment of a wide variety of associations and associational relations: formal and informal, voluntary or ascriptive, public, private or a hybrid between the two. The early domestic case of *Tloubatla* (1999)[9] affirms that Section 18 also protects the right to refrain from associating – and the court saw no reason to restrict the meaning of the clause only to its literal positive reading in light of the constitutional aim to grant freedoms and not to restrict them. The Court has however specifically utilised Section 39(1)(b) of the Constitution requiring it to consider international law in all interpretations of

[8] The Preamble aims to, *inter alia*, '…heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law and; Improve the quality of life of all citizens and free the potential of each person'.

[9] *Law Society of the Transvaal v Tloubatla*. [1999] 4 ALLSA 59(D). Van Dijkhorst J held: '[T]here is no reason in my view to restrict the meaning of our clause on the freedom of association merely to the positive. The Constitution was intended to grant freedoms, not restrict them.' For an earlier academic account including a negative right see C Albertyn, 'Freedom of Association and the Morality of Closed Shop' *(*1989) 10 Industrial Law Journal 981, 985.

the Bill of Rights[10] to answer the question whether Section 18 also protects a negative right. In the recent precedent of *New Nation Movement* (2020) the Court drew, in particular, on the European Court of Human Rights jurisprudence, noting that Article 11 of the European Convention 'compares better' with Section 18 of the Constitution than the African Charter because, like Section 18, it does not have an express proscription of coerced association *ex abundante cautela* (out of extreme caution).[11] It drew particularly on how the matters of *Young*[12], *Sigurjonsson*[13] and *Chassagnou*[14] were settled by the Court to find for a negative right in order to guide its own equivalent recognition.[15] It noted that whilst Article 11 did not have the equivalent clause contained under paragraph 2 of the UDHR (that no one may be compelled to join an association), the European Court of Human Rights nevertheless recognised a negative right in the context of 'compulsion of a particular type; presumably heightened compulsion.'[16]

Remarking on *Tanganyika Law Society*,[17] a judgment of the African Court on Human and Peoples' Rights (ACHPR),[18] the Court endorsed the ACHPR's approach of drawing an implication from the notion of freedom of association without recourse to paragraph 2 of Article 10 when it stated that, '*freedom of association implies freedom to associate and freedom not to associate*.' It further stressed the '*free exercise of choice'* and that the right is negated if

[10] Drawing on Sections 231 and 232, South Africa's hybrid monist/dualist system allocates that customary international law is directly enforceable before a domestic court whilst treaty law must first be incorporated into legislation before it becomes enforceable in municipal law. This is why the nature of South Africa's approach can be described as one of 'harmonisation', as it is primarily aimed at harmonising public international law and domestic law. South Africa is further obligated to implement a range of international soft and hard law instruments relevant to Section 18 and is state party to a number of human rights treaties that either directly or indirectly provide for associational freedom. This includes but is not limited to Article 22 ICCPR (state party 1998); Article 15 CRC (state party 1995); Article 5 ICERD (1998); as well the 1996 ratification of 2 ILO Conventions - No 87 (1948) concerning Freedom of Association and Protection of the Right to Organize, and No 98 (1949) concerning the Application of the Principles of the Right to Organize and to Bargain Collectively.

[11] *New Nation Movement NPC v President of the Republic of South Africa* [2020] ZACC 11 [42]. This case found the system of election for the National Assembly and for provincial legislatures, which was conducted by closed list proportional representation to be in violation of Section 18 and unconstitutional. The unanimous judgment exemplifies the Court's interpretative approach to Freedom of Association.

[12] *Young, James and Webster v The United Kingdom* App no 7601/76; 7806/77 (ECHR, 13 August 1981).

[13] *Sigurdur A Sigurjónsson v Iceland* App no 16130/90 (ECHR, 30 June 1993).

[14] *Chassagnou v France [GC]* App nos 25088/94; 28331/95 and 28443/95 (ECHR, 29 April 1999).

[15] *New Nation Movement* (n 11) [42]: 'We do not have the apparent hurdle of the *travaux préparatoires* that appears to have informed the circumspect approach of the ECHR in *Young*. If the ECHR could reach the conclusion that it did notwithstanding that evidentiary material which seemed to point in the opposite direction, it follows more strongly that we too must come to the same conclusion.'

[16] ibid [33].

[17] *Tanganyika Law Society v United Republic of Tanzania; Mtikila v United Republic of Tanzania* no 009/2011, ACHPR 2011.

[18] Article 10(2) of the African Charter equivalent to Article 20(2) UDHR states no one may be compelled to belong to an association and proscribes coerced association *ex abundante cautela* (out of extreme caution). South Africa is one of 32 states that have also ratified the Protocol and subject to the Guidelines on Freedom of Association and Assembly enacted by the African Commission on Human and Peoples' Rights.

an individual is forced to associate with others or correspondingly if people are forced to join up with the individual.[19]

In terms of foreign law, the German and Canadian positions are of particular relevance to Section 18 as they also do not have equivalents to Article 10(2) of the ACHR and Article 20(2) of the UDHR.[20] The Court, in emphasising constitutional protection of 'choices that implicate the very notion of freedom which the right to freedom of association is about'[21] endorsed the Canadian *Lavigne* threshold per La Forest J - that certain associations are accepted because they are 'integral to the very structure of society'.[22] Concerning the case at hand, it held that being coerced to form or join a political party is an issue that may fundamentally 'touch one's inner core; a matter that goes to one's conscience' thereby violating Section 15(1) of the Constitution.[23] The right requires particular protection from the state and other third parties given that associations are vulnerable to 'capture' in the identification and pursuit of attaining certain goals.[24] In other words, associations must be able to exercise control through selective membership policies, the manner in which they order their internal affairs and the discharge of members or users. This mitigates the risk of outside parties distorting the purpose, character, function and in extreme circumstances the very existence of the association. Indeed, the above examples illustrate how the Constitutional Court's use of comparative constitutional law is both unique and innovative, arguably going further to aid rights interpretation than those jurisdictions do themselves.

The scope of Section 18 further applies to 'arational choices' to associate or dissociate.[25] This becomes relevant in the context of, for example, socialisation such as being born into a particular religion and certain cultural practices. The Court has drawn on academic scholarship in many instances to support its interpretation of Section 18 and in this context relied on

[19] *New Nation Movement* (n 11) [43].
[20] Article 9(1) of the German Basic Law provides that '[a]ll Germans shall have the right to form societies and other associations'. Section 2(d) of the Canadian Charter of Rights and Freedoms guarantees to everyone 'freedom of association'.
[21] *New Nation Movement* (n 11) [48].
[22] ibid [50].
[23] ibid [52]. Section 15(1) provides that '[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion'.
[24] *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe) and Others* (CCT 172/19) [2020] ZACC 7; 2020 (6) BCLR 725 (CC); [2020] 7 BLLR 645 (CC); (2020) 41 (ILJ) 1846 (CC) (26 March 2020) [33].
[25] *New Nation Movement* (n 10) [54].

Woolman's iterations on restricted autonomy and agency that often accompany our choices of associational relations.

Importantly in the domestic context, Freedom of Association does not only seek to protect the rights of majorities but must be used in some instances to secure the legitimate interests of minorities.[26] Moreover it was recognised in the early case of *Gauteng Provincial Legislature*, that preserving 'pluralism and diversity' are important objectives (the latter echoed in the Preamble of the final Constitution) concomitant with a general 'right to be different'.[27] This emphasises the need to safeguard, by means of Section 18, the wishes of those who do not want to be, '…assimilated into the dominant culture or forced to live their lives according to dominant norms'.[28] However beyond this, the content of the 'right' remains ill-defined.

The relationship between the non-derogable right to dignity under Section 10 further encompasses the core of the right - as *Dawood*[29] earlier explained, Section 10 informs constitutional adjudication and the interpretation of all other rights. Dignity is particularly implicated by coercion in the context of Section 18; 'who one associates with or whether one associates at all are so close to the inner self that it is an affront to who one truly is and, indeed, an assault on one's dignity, to be told who to associate with or to associate when you do not want to.'[30]

Where Section 18 conflicts with other Constitutional rights, the *Doctors for Life* and *UDM I* harmonisation principle applies: (1) to examine them to ascertain whether they can reasonably be reconciled; (2) they must be construed in a manner that gives full effect to each and (3) they should be construed in a manner that harmonises them.[31]

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[26] ibid [61].
[27] See *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC); (10) BCLR 1348 (CC) [147] and *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) [134].
[28] See *Gauteng Provincial Legislature: In re Dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill of 1995* [1996] ZACC 4; 1996 (3) SA 165 (CC); 1996 (4) BCLR 537 (CC) [66]. The Interim Constitution Act No 200 of 1993 applied to this case wherein Freedom of Association was enumerated under Section 17.
[29] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) [35].
[30] *New Nation Movement* (n 11) [60].
[31] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) [48]; *United Democratic Movement v President of the Republic of South Africa* [2002] ZACC 21; 2003 (1) SA 495 (CC); 2002 (11) BCLR 1179 (CC) (UDM I) [83].

Freedom of Association may be subject to limitations if it is deemed reasonable and justifiable in terms of Section 36 of the Constitution.[32] Some associations are, however, arguably subject to categorical exclusions when determining the content of the right, which the Court has at the time of writing left unsettled. Where the purpose of the association is criminality or directly threatens the constitutional order, it may be deemed unconstitutional from the onset thereby justifying their categorical exclusion[33]. Another possible approach is more expansive at the limitation stage but more restrictive regarding the two instances under the Section 36(1) justification exercise.[34] The former would put these two types of associations beyond the remit of *prima facie* protection that may be subject to the justification exercise and once again align Section 18 closer with Article 9(2) of the German Basic Law and the Canadian *Lavigne* threshold. Notwithstanding this, Woolman acknowledges that, '[t]he eclectic grounds for associational freedom should strongly suggest that there are very few kinds of association which enjoy no constitutional protection.'[35] As the Court noted in *S v Manamela*, what Section 36 requires is an overall assessment that will vary from case to case.[36] In essence, in an open and democratic society based on dignity, equality and freedom, the Court must engage in a context-sensitive balancing exercise and arrive at a global judgment on proportionality - the more serious the impact on the right, the more compelling justifications must be made with no absolute standard for determining reasonableness.

Finally, Section 18 is supported by a series of enabling legislation and freedom of association is framed in the positive and embodies a first principle (that of a *prima facie* presumption in favour of the right) and then secondarily sets out situations in which the right is curtailed.[37]

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[32] Section 36(1) provides: 'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.'

[33] See, S Woolman, 'Freedom of association' in S Woolman and others (eds), *Constitutional Law of South Africa* (Cape Town: Juta and Co, 2014) 45-46 and S Woolman, 'Association' in I Currie and J de Waal (eds), *The Bill of Rights Handbook* (6th ed, Cape Town: Juta and Co, 2018) 401-402. This view was directly referenced by the Court in its judgment at [22].

[34] See, N Haysom, 'Freedom of Association' in H Cheadle and others (eds), *South African Constitutional Law: The Bill of Rights Service 27* (2019).

[35] Currie and de Waal (n 33) at 401-402.

[36] *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (5) BCLR 491 (CC) [32] and [33].

[37] Related regulatory frameworks include Regulation of Gatherings Act No 205 of 1993 (affirms the right to assemble); Labour Relations Act 66 of 1995; Non-Profit Organisations Act 2 No 71 of 1997 ('NPO Act') and The Companies Act 3 No 71 of 2008 ('CA'). The Gatherings Act defines 'organisation' as 'any association, group or

Section 39(2) declares that courts, tribunals and other decision-making bodies when interpretating legislation must promote the spirit, purport and objections of the Bill of Rights.

III. Rationales for Protecting and Promoting Freedom of Association

(i) Types of Cases and Degrees of Review

The Constitutional Court as of its most recent case[38] has handed down 961 decisions. Of these, 53 directly invoke Section 18 thereby making up 5.5% of the total number of cases heard before the Court.[39] 6 cases sorted by database relevance generated a relevance of 40% or more between the years 2017-2020, which displays the growing invocation and relevance of the provision. The vast majority of Section 18 cases concern the activities of trade unions. This is predictable given that Section 18 and Section 17 are considered to be intrinsically connected. Yet whilst the freedom to associate and form groups and organisations for a common purpose forms the foundation for the freedom to assemble and gather, they remain distinct rights.[40] Other cases concern a varying mix of claims regarding language and cultural life (Section 30) and right to form, join, maintain culture, religion, linguistic associations and communities (Section 31), and freedom of religion, privacy, education, and political representation. Interpretation should be '…prudently undertaken so that appropriate constitutional analysis can be developed over time in the light of the multitude of different situations that will arise.'[41]

(ii) Rationales, Purposes and Functions

The linkages between Freedom of Association and safeguarding against repetition of injustices of the past have been emphasised from early on. Indeed, the right functions in part to serve the 'right to autonomous development in society' - for peoples to advance their interests as members of linguistic, cultural and religious communities.[42] Freedom of Association must be read with, in particular, 'freedom of speech, expression and artistic creativity… this guarantees

body of persons, whether or not such association, group or body has been incorporated, established or registered in accordance with any law.'

[38] 24 August 2023 at the time of writing.

[39] By comparison to other closely linked rights, there have been 14 cases invoking Section 17 assembly, demonstration, picket and petition; 127 cases that invoke Section 16 freedom of expression; 37 cases pertaining to Section 15 freedom of religion, belief and opinion; 71 cases concerning the right to privacy and 157 cases invoking Section 10 the right to dignity.

[40] Some literature unhelpfully conflates the two as the 'right to freedom of association and assembly.'

[41] *Christian Education South Africa v Minister of Education* [2000] ZACC 11 (4) SA 757 (CC) [27].

[42] *Gauteng Provincial Legislature* (n 28) [75]. For example, marriages concluded under a system of religious law, or any tradition, is expressly provided for in sections 15(3)(a)(i) and (ii); the right of everyone to establish independent educational institutions is acknowledged in section 29(3); section 30 recognises the right to use a language and to participate in the cultural life of one's choice; and section 211(3) recognises customary law.

the development of language free from interference by the state'.[43] Associational freedom in education, where practicable, is equally essential, given that the State actively discouraged and prohibited the formation of private educational institutions through its Bantu education system which led to the, 'invasion on the right of individuals in association with one another to establish and continue, at their own expense, their own educational institutions based on their own values'.[44] The right supports the wish to maintain basic, constitutive attachments as well as emotional, cultural, religious and social-psychological security (the integrity of communal relations). Indeed, where Section 31(1)(b) references the 'organs of civil society' it is to be understood as 'the private and unofficial associations of the citizens of a state' - serving as an 'intermediate structures' between the citizens and the state.[45] As alluded to prior, minorities are especially reliant on constitutional protection (as larger groups can more readily rely on the legislative process), yet nevertheless, the interest protected by Section 31 read in conjunction with Section 18 is fundamentally qualitative in nature. As noted by the Court the question is, '…not a statistical one dependent on a counter-balancing of numbers, but a qualitative one based on respect for diversity.'[46] Section 31(2) ensures that the concept of rights of members of communities that associate on the basis of language, culture and religion does not create an immunity to be 'used to shield practices which offend the Bill of Rights'.[47] Associational rights cannot effectively ''privatise' constitutionally offences group practise … to achieve exclusivity, privilege and domination' (abusing the notion of pluralism) and cannot further 'oppressive features of internal relationships' (Section 8 regulates horizontal application in this regard).[48] These rationales were, in part, employed to rule, in the seminal judgment of *Christian Education SA*, that the prohibition on corporal punishment in schools intended to promote the respect for dignity and physical and emotional integrity of all children, which trumped independent schools' individual, parental and community rights to freedom of religion and consequently association. Freedom of Association is therefore, in large part, designed to protect - in line with the overall supremacy of the Constitution and Bill of Rights - the rights of members of communities by furthering the, 'constitutional value of acknowledging diversity

[43] ibid.
[44] ibid [8].
[45] *Christian Education South Africa* (n 41) [24]. See as referenced by the Court, I Currie 'Minority Rights: Education, Culture, and Language' in M Chaskalson and others (eds), *Constitutional Law of South Africa Revision Service 5* (Cape Town: Juta, 1999) 35-23; MA Glendon 'Comments on Part 4' in P Kirchof and DP Kommers (eds), *Germany and Its Basic Law: Past, Present and Future - A German-American Symposium* (BadenBaden: Nomos Verlagsgesellschaft) 286 - 287.
[46] ibid [25].
[47] ibid [26].
[48] ibid.

and pluralism in our society and give a particular texture to the broadly phrased right to freedom of association.'[49]

This leads to a deeper corresponding function of Freedom of Association to ensure that the Court, in effect, respects associational rights to govern themselves and furthers the interplay of collective interests whilst also guaranteeing individuals' personal rights. In the recent case of *De Lange*,[50] the Court considered the question of competing rights with, *inter alia*, Section 18 and the extent of judicial reach into our most private choices based on religious and other commanding preferences. This case concerned the suspension and discontinuation of a Methodist Minister from the Church following the announcement of her intended marriage to her same-sex partner, in light of breaching their policy of only recognising heterosexual marriages. The case largely revolved around the Church's right to resolve the dispute via arbitration and laws relating to jurisdiction. The Court found against the Minister. In seeking to answer these questions it considered whether there could be a 'constitution-free' space in a constitutional democracy under the rule of law or, conversely, does the Constitution itself permit a 'free area'? And if so, where does it start and could people ever operate 'outside' the law when their conduct affects others? The Constitution has a tripartite function; it allocates powers to the state, enshrines fundamental rights and also, crucial to Section 18, states the collective shared *values* of the country. But it noted that this does mean that courts are the best instruments to balance competing rights and values in intimate contexts where personal emotions and convictions determine choices and association.[51] The Court has on several occasions employed the notion of a 'doctrine of entanglement' to explain its avoidance stance yet arguably leaves it somewhat legally unrefined.[52] The doctrine, at best, can be seen 'a series of concentric circles' which ranges from the 'inner sanctum' of personal/intimate spheres (the most protected realms of privacy and autonomy) to the 'outer rings' of communal relations and activities (business and social interactions). The further one moves outward the more the scope of personal space may justifiably yield to the collective interests and the rights of others. Per Ackermann J in *Bernstein*;

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[49] ibid [22].
[50] *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and Another* [2015] ZACC 35.
[51] ibid [79].
[52] See, *Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC) (*Magajane*) [42] which quotes *Bernstein and Others v Bester and Others NNO* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) (*Bernstein*) [67].

> '[E]ach right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society.'[53]

The Court's approach intends to overcome the critique of unenforceable law by affirming that the Constitution is both a legal and moral framework that must guarantee space to exercise diversity, pluralism and personal expression in accordance with human dignity - giving rise to a 'constitutionally permitted free space'.[54] This, it reasons, can be distinguished from the contention that there are areas of constitutional democracy that are 'beyond the reach of the Constitution or constitution-free.'[55] Therefore when freedom of association competes with, for example, the right to equality, the closer the claim gets to the inner core of privacy, autonomy and intimate relations, the less likely the Court is to intervene in pronouncing the balancing of these rights. In these instances, they are more likely to yield to the arbitration processes of the association and other avenues of dispute resolution. In this sense, despite questions around judicial clarity of the doctrine, one may regard an added rationale behind Freedom of Association as ensuring democratic pluralism by protecting the complex interplay between varying degrees of entanglements that arise between collective interests and individual flourishing.

Indeed, academic discourse on Freedom of Association in South Africa led by the work of Woolman reflects the Court's interpretation of Section 18 by rejecting the traditional primary/secondary/tertiary schematic that offers limited heuristic value to the types of cases that arise. In other words, no single analytical framework can address the complexity of choice, involuntariness, intimacy, recreation, inclusion and participation that encompass the right to associate. Rather the *leitmotif* is that of associational freedom as 'social capital'.[56] As noted at

[53] *Bernstein* (n 52) [67].
[54] *De Lange* (n 49) [83].
[55] ibid.
[56] See, S Woolman, 'Freedom of Association' in Woolman and Bishop (eds), *Constitutional Law of South Africa* (Juta 2014).

the outset of this article, the history of South Africa is rooted in the exchange of and disputes that arise from association, as primarily, a set of social goods and values. It is worth noting that beyond the scope of this present article, Woolman has extensively analysed four basic grounds for associational freedom: the correlative, the constitutive, capture and dissociation.[57] In particular, he critiques the judicial reasoning in three cases to the model of the rational moral agent and asserts that associations are constitutive of self as the basis for associational freedom. This echoes the Court's previously noted acceptance of the arationality of choice in the sphere of identity construction. Woolman argues thus;

> 'Eliminate the notion that individual Rastafarians 'choose' to smoke an elicit substance and supplant it with the assessment that Rastafarians simply engage in a marginal, but not especially dangerous, form of life. The result should be that we are willing to take more seriously the need to create a space for what many in our society view as aberrant practices. Exemptions for other ways of being in the world supplant the desire to sanction non-conformist or non-dominant forms of behaviour. Judicial solicitude for rational individual choice - a stance that often inclines toward the belief in a single justifiable form of behaviour - is displaced by judicial solicitude for the arational, constitutive attachments that form the better part of our identity.'

This reasoning has several merits - ensuring greater respect for non-conforming behaviour especially as attitudes of acceptable behaviour change over time. Indeed, it perhaps arguably makes little sense to permit the use and possession of alcohol and tobacco but criminalise cannabis. However, beyond these examples, there is an ever present risk that if we were to shift our constitutional approach to one in which we dislodge the centrality of autonomy (and by extension) agency in self-defining choices of association then we might lose sight of the very forms of oppressive behaviour that Section 18 properly understood seeks to deter. We might immunise individuals and groups who do engage in associational objectives that affront the constitutional order and Bill of Rights. Nedelsky's concept of relational autonomy is perhaps helpful in deepening our understanding of the inter-relationship between the values that Freedom of Association seeks to foster and the Court's approach to ensuring individual privacy and autonomy in social relations pertaining to associational freedom. The value of autonomy,

[57] ibid.

according to Nedelsky, will at some level be inseparable from the relations that make it possible, as she discusses:

> 'Autonomy is a capacity that exists only in the context of social relations that support it and only in conjunction with the internal sense of being autonomous. Autonomy is a capacity, but it is unimaginable in the absence of the feeling or experience of being autonomous. The capacity can be destroyed by being subjected to the arbitrary and damaging power of others. Power relations are, in that sense, an external "objective" reality. To be autonomous a person must feel a sense of her own power (which does not mean power over others), and that feeling is only possible within a structure of relationships conducive to autonomy.'[58]

There is then a social dimension to autonomy, yet the presence of a social component does not mean that the value cannot be threatened by collective choices. Hence, there continues to be a need to identify autonomy as a separate value, to take account of its vulnerability to collective interests that does not abandon the liberal ideal of individualism but recognises the social context within which the individual comes into being and, in this manner, it does not deny the liberal tradition but rather qualifies it.

The significance of and grounds for Freedom of Association is therefore clearly constitutive of and foundational to maintaining South Africa's democratic society. Whilst the Court avoids, properly, delving into extended philosophical discussions, De Tocqueville is directly referenced in this regard, notably that the right is '…as inalienable in its nature as the right of personal liberty. No legislator can attach it without impairing the foundations of society.'[59] His perspective is endorsed given the dual recognition (albeit differently worded) found in the domestic traditional isiZulu maxim also invoked by the Court, '*umntu ngumnty ngabantu'* (we are stronger with the support of other people). We rely on the nature and purpose of association;

> 'For succour, solace, emotional support and sharing joy, pain and confidences, one may need no more than association with one person, an intimate partner or

[58] J Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 Yale Journal of Law and Feminism 7, 24-5. See also generally, J Nedelsky, *Law's Relations* (Oxford University Press, 2016) 232.
[59] *New Nation Movement* (n 11) [23].

> friend; or one may need a small group of people, like one's family. Why the circle of association is small is understandable. That is dictated by the nature of the underlying reason for the association. And personal relationships of this nature are less likely to attract justifiable state interference.'[60]

Section 18 must foster and facilitate the proper, coherent interaction and expression of diverse communal goods. It is also needed for individual fulfilling one's individual potential and capabilities. As expounded by Haysom, there is a need to protect freedom of association;

> '…in order to realise fully one's humanity - to interact, combine, make common purpose and enjoy life with other persons sharing one's cultural, personal, political or economic interests. The second perspective emphasises the necessity to a functioning democracy of such a freedom, for a proper and coherent expression and interplay of collective interests. Both perspectives are, however grounded on the same understanding that a person alone is an atomised, powerless, lonely being without a foundation for developing an identity or the capacity to influence or change his or her physical environment or social world.'[61]

In outlining the parameters of how freedom of association is justified and interpreted, this article does not seek to critically examine the individual merits of each ground or case decision. It does however seek to find the common overarching purposes of the right and whether there are any coherent and consistent themes that undergird it. Whilst the pursuit of democratic pluralism and group rights dominate the need for Section 18, there are clearly far more nuanced rationales that are working to support the *ratios* and *dictums* of disputes that fundamentally pertain to intimate, personal and apolitical values and aims, including individual flourishing and the protection of minority rights. Equally so, the precise limitations on the right, the possible types of categorical exclusions that might exist, and when the court chooses not to intervene in the balancing out of competing rights, need further examination, clarification and coherency.

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[60] ibid [25]. Compare as noted by the Court, *Roberts v United States Jaycees* 468 US 609 (1984) 618. *Minister of Justice and Constitutional Development v Prince* [2018] ZACC 30; 2018 (6) SA 393 (CC); 2018 (10) BCLR 1220 (CC) [44] quoting *Bernstein v Bester NO* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC).
[61] *New Nation Movement* (n 11) quoting Haysom (n 34) para 27.