Language Rights in Education: South Africa (2005)

Rassie Malherbe

1. Background

Official multilingualism

The South African Constitution recognises eleven official languages,[1] whereas 15 others, including sign language, are mentioned in the Constitution,[2] and many more are spoken in South Africa.[3] Being not only a multilingual, but also a multicultural and multi-religious country,[4] it is no wonder South Africa is called the "rainbow nation". In such a diverse environment, language is a sensitive issue requiring careful treatment. Particularly in education, tolerance, mutual respect, and flexibility is needed to ensure fairness to all. At stake is the harmonious co-existence of South Africans within a multilingual environment in a way that will recognise and respect the constitutionally entrenched language rights of people, while ensuring quality education for all learners.

The socio-political context

Looking beyond the formal constitutional arrangement, there is actually a huge discrepancy between the constitutional recognition of multilingualism and what is happening in practice. It is simply a fact in contemporary South Africa, English enjoys preferential treatment from the state and that all other languages are more or less being sidelined. The reports of the Pan-South African Language Board provide irrefutable confirmation of this state of affairs.[5] In all complaints of the violation of language rights by public institutions, the Board found in favour of the applicants.[6] Strangely enough, very little litigation has so far been instituted against this blatant disregard for the constitutional language rights, although a few important cases have been decided in the field of education.[7]

An overwhelming perception has developed in education, mainly caused globalisation, and it has been consciously encouraged in the public sector, that English is primarily the language which offers access to educational and job opportunities. This viewpoint has been fuelled by the resistance against Afrikaans, the other important academic language, regarded for a long time as the apartheid language. The bias towards English has actively been propagated by the government, and has put tremendous pressure on institutions providing education in other languages. Despite the formal power of the governing body of a public school to determine the language policy of the school,[8] the national and provincial education departments actively discourage instruction in the mother tongue and even order schools to adopt English as the medium of instruction.[9] As a result, most people in South Africa today

[1] S 6 of the Constitution of the Republic of South Africa, 1996. The languages are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.
[2] Apart from sign languages, the languages mentioned are the Khoi, Nama and San languages, German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu, and Arabic, Hebrew, Sanskrit and other languages used for religious purposes (s 6(5) of the Constitution).
[3] Legal and illegal immigrants from various parts of Africa bring in several more languages.
[4] Various other provisions of the Constitution recognise the diversity to be found in South Africa, eg the Preamble and ss 15(3), 29(2), 30-31, 35(3)(k), 185-186, 211-212 and 235.
[5] See in particular Pansalb's report *Language Use and Language Interaction in South Africa* (2000). This statutory Board is constitutionally recognised (s 6(5)) and is supposed to monitor and promote the status and use of all official, as well as a number of other, languages.
[6] See also the comprehensive study conducted by Van Rensburg FIJ (ed) (2004) *Afrikaans: Die Taal van Miljoene* Van Schaik, Pretoria. See also Giliomee H (ed) (2001) *Kruispad: Die Toekoms van Afrikaans as Openbare Taal* Tafelberg Kaapstad.
[7] See below.
[8] S 6(2) of the SA Schools Act 84 of 1996.
[9] Litigation ensuing from these actions are discussed below.

are educated through the medium of English (which is the first language of less than 10% of the population), and do not receive education in their first language or mother tongue. Specific educational objections can of course be raised against this.[10] In addition, this trend causes the alienation of particular language communities, and amounts to a violation of their human dignity.[11] The national Minister of Education appears to have recently become aware of the negative consequences of the neglect of mother tongue education and makes regular public statements to the effect that this trend should be arrested. The language policy of the national Department of Education also declares itself in favour of a multilingual approach,[12] although, so far, not much has been achieved in practice. A complicating factor is that the indigenous black languages have never developed into academic languages and it is impossible in the near future to employ them as medium of instruction above the most basic level of education.

Compulsory and non-compulsory education

Neither in the Constitution nor in practice, is a distinction made between compulsory and non-compulsory education. The preferential treatment of English in education is encouraged irrespective of whether it relates to compulsory or non-compulsory education, or for that matter to education for citizens or non-citizens.[13] The trend is simply continuing across the board and even universities are under tremendous pressure to accept an English-only policy. Most universities in South Africa have indeed done so, and only five universities still lecture in Afrikaans, mainly on a parallel medium basis. The pressure being put on these universities is not only inconsistent with the constitutional language rights; it is also in conflict with the Higher Education Act which provides that the council of every public institution of higher learning, with the concurrence of its senate, must determine its language policy subject to the policy determined by the national Minister of Education.[14] Of course, neither the policy made by the Minister nor that determined by the relevant institution may be inconsistent with the Constitution.[15]

2. The relevant provisions of the constitution

Despite the above developments, language rights in education should be considered within the constitutional framework, particularly the underlying values of the Constitution, the provisions dealing with the official languages, the general language rights, and the equality principle, which prohibits unfair discrimination *inter alia* on the basis of language. The Constitution is after all the supreme law and constitutes the norm for measuring the lawfulness of all government policies and actions in respect of language.

Underlying values

The Constitution can be constructed properly only by taking into consideration its underlying values. When interpreting the Bill of Rights, the values underlying an open and democratic society based on

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[10] See eg Heugh "Bilingual and multilingual education in South Africa", paper read at a parliamentary conference on multilingualism held on 23 February 2004 in Cape Town (report of the proceedings in my possession). See also Finlayson's paper "Challenges of multilingualism in higher education" read at the same conference.

[11] The Pansalb Report (n 5) 11-12 points out that the government's communication with the citizenry is understood by less than half of South Africans.

[12] See eg "Norms and Standards for Language Policy in Public Schools" Government Notice 1701 GG 18546 of 19 December 1997, issued in terms of section 6(1) of the SA Schools Act 84 of 1996. See also "Language Policy for Higher Education" Ministry of Education November 2002.

[13] According to s 3(1) of the South African Schools Act 84 of 1996, education is compulsory until the age of 15 or the ninth grade, whichever comes first.

[14] S 27(1) of Act 101 of 1997.

[15] See the discussion in this regard by Malherbe R (2005) "Die taalbeleid van 'n universiteit as 'n uitdrukking van grondwetlik-beskermde diversiteit" *Tydskrif vir Suid-Afrikaanse Reg* (to be published).

human dignity, equality and freedom must be promoted.[16] These values constitute the basis for the protection of human rights. The Constitutional Court elevated human dignity above all other rights and values,[17] and further held that the meaning of the prohibition on "unfair discrimination" in section 9(3) should be determined against the background of the past unequal treatment in which people's inherent dignity was denied. The Court stated that "in our view unfair discrimination … principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity."[18] All rights entrenched in the Constitution therefore derive from these values and any violation of rights must be measured for the extent to which such violation affects these underlying values. The language rights also relate to the values of human dignity, equality and freedom, and in *S v Pienaar* it was held that anybody, including the government, who belittles, ignores or disregards another's mother tongue violates that person's human dignity.[19]

The values of human dignity, equality and freedom cannot be pursued in isolation from one another. Equality is closely related to human dignity and freedom. Equality can never mean uniformity, and should be interpreted to mean "of equal worth".[20] People have to enjoy the freedom to be themselves in order for everybody's dignity and equal worth to be respected and upheld. The quest should therefore be to balance and harmonise the values of human dignity, equality and freedom,[21] to respect and accommodate people's "otherness", and to build the South African nation *on* and not separately from its diversity.[22]

Section 6: the official languages

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[16] S 39(1)(a). These values are set out in the Preamble, section 1 and ch 2 (the Bill of Rights).

[17] *S v Makwanyane* 1995 6 BCLR 665 (CC), 1995 3 SA 391 (CC) par 144: "The rights to life and dignity are the most important of all human rights and the source of all other personal rights in Chapter 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others." In *President of the RSA v Hugo* the Court quoted with approval the following from a Canadian case: "Equality … means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity" (1997 6 BCLR 708 (CC), 1997 4 SA 1 (CC) par 41, quoting from *Egan v Canada* (1995) 29 CRR (2d) 79 at 104-105). See also *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 1 BCLR 39 (CC) par 42; *Government of the RSA v Grootboom* 2000 11 BCLR 1169 (CC), 2001 1 SA 46 (CC) par 83.

[18] *Prinsloo v Van der Linde* 1997 6 BCLR 708 (CC), 1997 3 SA 1012 (CC) par 31-32. This view was confirmed in *Harksen v Lane NO* 1997 11 BCLR 1489 (CC), 1998 1 SA 300 (CC) par 50-53; see Van der Walt J and Botha H (1998) "Coming to grips with the new constitutional order: critical comments on *Harksen v Lane NO*" *SA Public Law* 17-41. See also the comments by Rautenbach IM (2001) "Die Konstitusionele Hof se riglyne vir die toepassing van die reg op gelykheid II" *Tydskrif vir Suid-Afrikaanse Reg* 329 334; and Cowen S (2001) "Can dignity guide our equality jurisprudence?" *South African Journal for Human Rights* 34.

[19] *S v Pienaar* 2000 7 BCLR 800 (NC) par 10.

[20] Tribe L (1988) *American Constitutional Law* 1515-1516 states: "The core value of this principle is that all people have equal worth. When the legal order that shapes and mirrors our society treats some people as outsiders, or as though they were worth less than others, those people have been denied the equal protection of the laws … The goal of the equal protection clause is … to guarantee a full measure of dignity for all." In *Law v Canada (Minister of Employment and Immigration)* 1 SCR 497 (1999) par 53 the Canadian Supreme Court stated: "Human dignity means that an individual or group feels self-respect and self-worth."

[21] Cheadle H, Davis D en Haysom N (2002) *South African Constitutonal Law: The Bill of Rights* Butterworths Durban 14-15 also argues that the values of human dignity, equality and freedom should not be assessed separately, but should be regarded together as the conceptual framework within which the Bill of Rights must be applied. With reference to the judgment of the Constitutional Court in *Ferreira v Levin NO; Vryenhoek v Powel NO* 1996 1 BCLR 1 (CC), 1996 1 SA 984 (CC) they state: "This compartmentalised approach to dignity and freedom represents bad law and worse philosophy" (15).

[22] This was at least conceded by Sachs J in *In re: The School Education Bill of 1995 (Gauteng)* 1996 4 BCLR 561 (CC), 1996 3 SA 165 (CC) par 52: "The objective should not be to set the principle of equality against that of cultural diversity, but rather to harmonise the two in the interests of both. Democracy in a pluralist society should accordingly not mean the end of cultural diversity, but rather its guarantee, accomplished on the secure bases of justice and equity." Sien ook Venter F (1998) "The protection of cultural, linguistic and religious rights: the framework provided by the Constitution of the Republic of South Africa, 1996" Konrad Adenauer Stiftung *Seminar Report: The Constitutional Protection of Multiculturalism* 19-20.

Language in education relates to the constitutional recognition of multilingualism alluded to above.[23] In section 6(1) of the Constitution the eleven official languages of the Republic are designated and entrenched. All the official languages must enjoy parity of esteem and must be treated equitable.[24] On the meaning of this expression Currie states:[25] "The parity of esteem requirement insists that, considerations of practicality aside, a sincere attempt must be made to ensure that particular languages do not dominate while others are neglected." Although full equality is therefore not required, and the provision allows a measure of flexibility, a particular language or languages may not, at present, dominate completely at the cost of others, or be neglected in favour of others. The status and use of the historically disadvantaged languages must as a matter of fact be promoted.[26] Taking factors such as usage, practicability, costs, regional circumstances, and a balance between the needs and preferences of the population into account, the national and provincial governments may select official languages to use for government purposes, but they may not choose less than two languages.[27] Government purposes include all official communication, as well as internal communication by the government and administration. Municipalities must take into account the use and preferences of their residents in deciding which language or languages to use.[28] The factors to be taken into account in determining which languages to use, indicate the possibility of differentiation on a regional basis, but also point to the possible development of a sliding scale in terms of which the concentration of speakers of a particular language, as well as the importance of a particular public service, may determine the extent to which the authorities should communicate with the public in that particular language.[29] The national and provincial governments must monitor their use of the official languages through legislative and other measures.[30] The Pan-South African Language Board must promote the development and use of all the official and other languages used in South Africa.[31]

The prohibition on government's use of a single language seeks to prevent or counter the domination of English, and promotes the parity of esteem and equitable treatment of the other languages. The use of a single language, or a so-called anchor language while the other languages are rotated, derogates from this principle.[32] Currie denounces the custom not to promulgate legislation in all official languages, on the ground that it may be unconstitutional for the state not to communicate with the public in languages that they are able to understand.[33] After all, the official languages of a country are those languages that must be used for official communication by the authorities, also with the public.[34] The government acts inconsistently with the Constitution by restricting such communication to certain languages only. De Varennes also points to the discriminatory effect of such conduct.[35]

The Constitution, the supreme law of the Republic, evidently allows no room for unilingualism in the public sector. It acknowledges that multiple languages are used in South Africa, and prescribes that such usage must be promoted and extended. A flexible approach is followed and the use of less languages, taking into account the factors mentioned, is allowed. All public institutions and organs of

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[23] See the explanation by Rautenbach IM and Malherbe EFJ (2004) *Staatsreg* Butterworths Durban 105-108. See also Du Plessis T en Pretorius L (2000) "The structure of the official language clause: a framework for its implementation" *SA Public Law* 505.
[24] S 6(4).
[25] Currie I (1998) "Official languages" in Chaskalson *et al Constitutional Law of South Africa* Juta Cape Town 37.6.
[26] S 6(2).
[27] S 6(3)(a). See the comments by Cheadle *et al* (n 21) 552-554.
[28] S 6(3)(b). See also Strydom H and Pretorius L (1999) "Language policy and planning – how do local governments cope with multi-lingualism?" *Tydskrif vir Regswetenskap* 24.
[29] See the views of Henrard K (2002) *Minority Protection in Post-Apartheid South Africa: Human Rights, Minority Rights and Self-Determination* 184. This is eg the approach followed by the SABC, the national public broadcasting corporation.
[30] S 6(4). The legislation to regulate this matter is still anticipated.
[31] S 6(5).
[32] Rautenbach and Malherbe (n 23) 106.
[33] Currie (n 25) 37.8. See also the findings of the Pansalb report to which reference has been made above (n 5) 11-12.
[34] Cheadle *et al* (n 21) 551 states expressly that the official languages are those languages in which the government must communicate.
[35] De Varrenes F (1996) *Language, Minorities and Human Rights* 176. It is for this reason that the *European Charter for Regional or Minority Languages* (1992) contains extensive provisions to protect minority languages. Art 11, for example, prescribes that government and administrative institutions must be able to communicate with the public in such minority or regional languages, and that the public may use these languages in their communication with the authorities.

state are subject to these provisions of the Constitution, and must give effect to them within their respective spheres of competency. In short, there is a constitutional duty on an organ of state to give content and effect to the language provisions of the Constitution, and specifically in their use of languages to respect the parity of esteem of the official languages and to treat those languages equitably.[36] The spirit and purport of the Constitution is not to follow a minimalistic approach aimed at using as few languages as possible, but to regard language in a multilingual environment as an instrument for empowerment and to increase the ability of the state and citizens to communicate in more languages.

Section 30: general language rights

Section 30 of the Constitution guarantees everybody's right to use the language of their choice. This is standard protection in international law.[37] Everybody has the right (freedom) to use the language of their choice everywhere, privately as well as publicly, and also in education, where it applies to the language rights of students as well as staff members. Public institutions must respect and protect this right, because when such institutions fail to recognise people's language, for example by refusing to serve them in their language, by favouring another language, or even by refusing their freedom to use the language of their choice, it impedes their effective communication and participation in public life, and may obstruct their access to and exploitation of public services and opportunities. Currie also argues that public authorities should actually encourage the use of minority languages, as it will promote the equality of speakers of different languages.[38] Section 30 is therefore concerned with the empowerment of people.[39] In education as a sensitive area in which knowledge is imparted and acquired, and language is therefore used intensively, this view is even more valid.

Section 29(2), discussed below, specifically protects the language rights of learners, and it can be argued that due to the general nature of the provision, section 30 protects the right both of learners and of teachers to use the language of their choice. Section 30 therefore also affects the administrative language of an educational institution, and the policies in that respect must comply with section 30. Limitations imposed on the right must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[40] Such limitations may also not restrict people's right of access to education. Practical considerations such as needs (number of people involved), costs, availability of facilities, and the present position, should determine whether it is reasonably practicable for example to use more than one administrative language.

Section 9: the equality principle

All other constitutional rights are often closely related to the right to equality, specifically to the prohibition of unfair discrimination.[41] There is thus a close relationship between the equality clause and sections 29(2) and 30, in that the violation of the express language rights will almost certainly amount to a violation of the non-discrimination clause as well. If it is established objectively that it is

[36] Rautenbach and Malherbe (n 23) 106.
[37] S 30 derives eg from section 27 of the *International Covenant on Civil and Political Rights* – see the discussion by Currie I "Minority rights" in Chaskalson *et al* (25) 35.11 ev. There is after all a movement internationally to emphasise people's language rights as an instrument of empowerment (see eg Cheadle *et al* (n 21) 547). Reference can also be made of the various instruments of international law for the protection of minorities and their language and cultural assets – see in general Dinstein Y and Tabory M (eds) (1992) *The Protection of Minorities and Human Rights* Martinus Nijhoff The Hague. See also Dunbar R (2001) *International and Comparative Law Journal* 90-120.
[38] Currie (n 37) 35.22.
[39] In the Ministry of Education's Language Policy for Higher Education (n 12) the following significant statement is made: "The role of language and access to language skills is critical to ensure the right of individuals to realise their full potential to participate in and contribute to the social, cultural, intellectual, economic and political life of South African society" (par 4).
[40] S 36, the general limitation clause – see n 48 below.
[41] S 9(3), which provides that nobody may be discriminated against unfairly on a number of mentioned grounds, including their language (Rautenbach and Malherbe (n 23) 333).

reasonably practicable for an institution to provide education in a particular language, and the institution then refuses to do so, the affected learners should, in addition to the violation of their right to education in the language of their choice,[42] be able to advance that they are also being prejudiced in a way that amounts to unfair discrimination on the ground of language. Enforced unilingualism in the administration could probably be opposed on the same basis by teaching and administrative staff. It should be noted that once discrimination is established on one of the listed grounds, such as language, the presumption is that the discrimination is unfair, and the onus on the institution to refute that presumption will be very difficult.[43]

3. Language rights in education

General scope

Section 29(2) of the Constitution represents another significant recognition of the multilingual nature of the South African society, and broadly provides that everyone has the right to receive education in the language of their choice in public educational institutions where it is reasonably practicable.[44] Like the other language rights, this provision aims at enabling people to use the language of their choice as far as is reasonably possible. In a multilingual educational environment it means that no language should be enforced on learners, and that nobody should be refused the right to use their preferred language in an unusual way. The full provision reads as follows: "(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account –(a) equity; (b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices."

The same arguments apply in respect of section 29(2) as in the case of section 30, because the same right is involved – in section 29(2) only in particular, because here the right is being particularised for the purposes of education. The right must also be assessed in view of government policy to eliminate inequalities in education, and to promote access to educational opportunities. The medium of instruction fulfils a key role in this, because the more languages used in instruction, the more educational opportunities are created for the multilingual South African community. At the same time, the fear of some people that the exercise of the right may keep learners from other language groups from educational opportunities should be appreciated. This fear is largely unfounded, however. It is mainly directed at the 1% Afrikaans medium public schools in South Africa, which usually provide high quality education, but which are so few in number that it cannot be argued with conviction that they keep the large black community from enjoying quality education. What does the right therefore entail?

(a) Section 29(2) applies to all public educational institutions, including institutions of higher education, and to compulsory education (education up to the ninth grade[45]), as well as all further education. The provision imposes a duty on the state as well as on a particular school, university or college to provide education according to the choice of learners in any official language in which it is reasonably practicable for the institution to do. In this respect, the right goes further than Article 2 of Protocol I of the *European Convention for the Protection of Human Rights and*

[42] S 29(2).
[43] Section 9(5). See *Prinsloo v Van der Linde* 1997 6 BCLR 708 (CC) par 28.
[44] See the discussion by Malherbe R (2004) "A constitutional perspective on equal educational opportunities" *Tydskrif vir Suid-Afrikaanse Reg* 427 438-442. See also Foster W, Malherbe R and Smith W (1999) "Religion, language and education: contrasting constitutional approaches" *Education and Law* 211 223-226; Malherbe R (1997) "Reflections on the background and contents of the education clause in the South African Bill of Rights" *Tydskrif vir Suid-Afrikaanse Reg* 85.
[45] S 3(1) of the SA Schools Act 84 of 1996.

Fundamental Freedoms (ECHR) as applied in the *Belgian Linguistic Cases*, where it was held that the right does not necessarily impose such a positive duty.[46]

(b) The right does not provide for a right to mother tongue education as such, and rather refers to any official language of the learner's choice. For some that can be their mother tongue, but they may also choose to receive instruction in another official language.[47] Mother tongue education is a powerful instrument to extend educational opportunities,[48] and research has indicated a correlation between mother tongue education and the optimal progress of learners.[49] Section 29(2) also provides for a right to education in any official language and not in any of the many other languages used in South Africa. In terms of section 29(3), members of other language groups have the right, however, to establish educational institutions on the basis of a common language.

(c) The right is not limited to existing facilities and may require the establishment of new facilities when necessary to give effect to the right. It befalls primarily the state to provide education in the languages of people's choice, and the state has the duty to ensure that people's needs in this regard are met as far as is reasonably practicable. In particular cases, as mentioned, the responsible authority could be an individual institution.

"Reasonably practicable"

The right is qualified to the extent that it must be reasonably practicable for the state or for the relevant institution to provide such education. This qualification has not yet been interpreted authoritatively to any significant degree. A few recent judgments are discussed briefly below, but these cases do not shed much light on the qualification, because they were mainly decided on other grounds. The interpretation of section 29(2), explained below, has nevertheless largely been confirmed in those cases. Due to the lack of South African precedents in this respect, then, the meaning of the expression "reasonably practicable" in the South African context is explained below with reference to relevant Canadian case law.

Before dealing with the qualification, the second sentence of section 29(2) should be mentioned. It reads as follows: "In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account (a) equity, (b) practicability, and (c) the need to redress the results of past racially discriminatory laws and practices." This provision is not a limitation of the right in section 29(2) as such, and only influences the alternative ways in which the right to education in the language of one's choice may be given effect. Whenever it is established that it is indeed reasonably practicable for the institution to give effect to the right, the provision prescribes that the best alternative, which may include single medium institutions, must be selected, taking into account the considerations of equity, practicability, and the need to redress racial discrimination.[50] The factors carry equal weight and must be balanced. What is equitable may not be educationally practicable, or what is practicable may perhaps not contribute to the redress of historical inequalities.[51] It could be stated that the reference to practicability does not differ from the practicability test in the first sentence of section 29(2). Here, however, the emphasis is on which alternative for giving effect to the right would be the most suitable, whereas in the first sentence it refers to the question of whether giving effect to the right is at all reasonably practicable. Once the latter is established, one still needs to determine whether a particular alternative would be a more practicable way in which to give effect to the right than another. Also

[46] 1 EHHR 241. It was held within the Belgian context that French speaking pupils resident within the Dutch speaking Flanders do not necessarily have a claim against the state for state funded education in French. See the comments by Van Dijk and Van Hooft (1990) *Theory and Practice of the European Convention on Human Rights* 467.
[47] Kriel R "Education" in Chaskalson *et al* (n 25) 38.12.
[48] See the discussion by the SA Law Commission (1991) *Project 58: Group and Human Rights: Interim Report* 189*ff*.
[49] See the recent contributions by Heugh and Finlayson referred to above (n 10). See generally Heugh K (1995) *et al Multilingual Education for South Africa*.
[50] Cheadle *et al* (n 21) 540-541.
[51] Sien die ooreenstemmende kommentaar van Cheadle *et al* (n 21) 540-541.

significant in this provision is the phrase "in order to ensure the effective access to, and implementation of, this right", which emphasises how seriously the right to education in the language of one's choice has been regarded during the constitutional negotiations. What is also clear from the provision is, however, that there is no right in section 29(2) to single medium institutions, but that it is an alternative which must always be considered in deciding how the right should be given effect. In the *Middelburg* case it was suggested *contra* that there is indeed a right to single medium institutions, but that interpretation is not borne out by the wording of section 29(2).[52]

Back to the phrase "where reasonably practicable". This amounts to a specific or internal limitation provision which qualifies the general limitation provision in section 36 of the Constitution[53]. The qualification must therefore be applied together with section 36 on any limitation on the right in order to determine whether the limitation is lawful, bearing in mind that the application of section 36 is qualified in this single respect. The qualification relates to the purpose of a limitation that may be imposed on the right to education in the language of one's choice. The qualification requires in essence that practical considerations for any limitation of the right should be taken into account in answering the question how important is the purpose of such limitation. The following additional comments may be made about the qualification:

(a) The state or the relevant institution (depending on the circumstances) must fulfil the right, unless it is not reasonably practicable, or the state or institution can show on other grounds that its refusal or inability to provide such education complies with the general limitation provision.[54]
(b) The qualification indicates that the right does not apply absolutely and that practical considerations may in a particular case cause the right not to be fulfilled. The qualification thus indicates a practical approach, which immediately gives rise to the question which practical considerations may be taken into account.
(c) It is important to note that what is reasonably practicable is an objective test. If it is reasonably practicable, the institution in question does not have any further choice – then it must act to give effect to the right. Otherwise, the right in section 29(2) has no real meaning. In the *Mikro* appeal, discussed below, the Supreme Court of Appeal did state that where a school has a particular language policy, the right in section 29(2) does not necessarily confer on learners who desire instruction in another language a right of access to that school.[55] The statement must be assessed against the background of the availability in the case in question of a neighbouring school that could indeed provide education in that other language to that group of learners. The Court would probably also have approached the matter differently if it was a parallel medium school intending to switch to single medium instruction. In that case there would have been learners with vested interests who suddenly would have had to find refuge elsewhere, and it would probably have been difficult for the school to show that it was not reasonably practicable to give effect to the right.
(d) Which considerations should then be taken into account to give practical meaning to the qualification? In *Mahe v Alberta*[56] the Canadian Supreme Court identified specific factors that could be considered in determining whether the right can be fulfilled. According to section 23(3)(a) of the Canadian Constitution, French speaking learners enjoy a right to French schools only in Quebec, and provision for French mother tongue education in other provinces must be

[52] *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T) 173B, 173F.
[53] S 36 reads as follows: "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."
See De Waal J, Currie I and Erasmus G (2005) *The Bill of Rights Handbook* Juta Cape Town 163*ff* on the application of s 36.
[54] S 36.
[55] *Western Cape Minister of Education v Governing Body of Mikro Primary School* SCA 140/05 (unreported) par 31.
[56] *Mahe v Alberta* 1 SCR 342 (1990). See the comments by Hogg PW (1992) *Constitutional Law of Canada* 1224-1225.

made in accordance with learner numbers. The question in this case was how many learners were required to enforce the provision of such education. According to the court, the extent of the provision that must be made, depends on certain factors. The factors include learner numbers (as mentioned in the Constitution), but also costs, availability of teachers and other facilities, and the distance to the nearest similar institution that is able to provide instruction in the desired language. From the reference to learner numbers the court inferred a sliding scale of steps to be performed by the state to give effect to the right. The greater the numbers are, the more extensive the provision that the state must make.

It is suggested that the phrase "where reasonably practicable" in section 29(2) of the South African Constitution justifies a similar approach as in Canada, and that the factors that were identified in *Mahe v Alberta* may be applied to give practical content to the phrase. Learner numbers (and their preferences), costs, availability of facilities and teachers, as well as the distance to the nearest other institution that can teach in the desired language, may thus be employed in a similar way as relevant factors to determine which provision the institution must make to give effect to the right. A few remarks may be made about the application of these factors.

(a) In respect of learner numbers, the national Minister of Education, as a guideline for determining whether provision should be made to teach in a particular language, determined a threshold of 40 learners for grades 1 to 6 and of 35 learners for grades 7 to 12.[57]
(b) In respect of costs, it should be noted that the relevant public educational institution as well as the state (national or provincial governments) are bound by the right.[58] The state already funds public institutions quite heavily, and when a particular institution should be unable by itself to give effect to the right, the state should not be allowed to argue that it does not have any responsibility to assist that institution to comply with the right.
(c) The fact that a particular institution has provided previously, or still provides, instruction in a particular language would in all probability also be a relevant factor, because it may indicate that the institution is already or still capable of doing so.
(d) The extent to which education in a particular language may deny access to education to persons preferring other languages may also be a factor, although, as has been indicated above, very few schools or institutions can be said to be in a position to keep others from educational opportunities.
(e) In general, educational considerations should also play a role, for example, what would be educationally in the best interest of the learner. The burden on teachers to teach separate classes in different languages could for example be weighed against the advantages of mother tongue education.
(f) Note finally that the above factors must be considered together. They carry equal weight and no single factor can determine the outcome on its own.

In order to comply with section 29(2) one need not treat a particular institution in a uniform way, and especially in the case of an institution of higher learning it should be possible to differentiate per campus (in the case of a multi-campus institution), and also per program or course. Student numbers and available lecturers and facilities may differ per program and course. Put differently, the application of any relevant factors need not lead to the same result at every institution, on every campus or in every faculty or programme. The question is what is reasonably practicable, and reasonableness in itself requires flexibility and common sense. The phrase therefore leaves room for differentiation. What it does not allow is that the right as such be stripped of any content. The factors may therefore not be treated unreasonably in a way that leads to the adoption of a general policy that denies completely people's fair and legitimate claims to education in the language of their choice.

[57] See "Norms and Standards for Language Policy in Public Schools" Government Notice 1701 GG 18546 of 19 December 1997, issued in terms of section 6(1) of the SA Schools Act 84 of 1996.
[58] The rights in the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all organs of state (s 8(1)).

Case law

As mentioned, the language rights in education have not been dealt with extensively by the courts yet. Although more litigation is sure to come, there are so far only a few cases worth mentioning. These cases, however, demonstrate the pressure being put by the state on institutions to switch to English as medium of instruction. In the *Middelburg* case,[59] the Mpumalanga provincial department of education ordered an Afrikaans medium school to admit learners who preferred to be instructed in English. The school refused, whereupon the department withdrew the school's power of admission,[60] and registered the learners at the school. After some delay, the school approached the court to set aside the department's actions. The court's view was that there was a right to single medium institutions and that a single medium school could not summarily be changed into a parallel medium institution,[61] but in the circumstances the court was not prepared to set aside the department's decision. The learners attended the school for about nine months already, and the court argued that as it would not be in their best interest to move them to another school, the interests of the school should yield before those of the learners.[62]

More recently, the Western Cape department of education forced the Mikro Primary School, an Afrikaans medium school, to admit and teach a number of learners in English. The school's appeal to the department was refused, and the school approached the court for relief. The court *a quo*[63] held that the power to determine a language policy for the school was conferred on its governing body, and that the provincial Minister of Education had no authority to enforce a language policy upon the school.[64] The school's language policy was not inconsistent with the Constitution or any other statutory provision. The court found that contrary to the misrepresentations of the department,[65] the closest other school that could instruct the learners in English did indeed have room for them.[66] The court also held that although the learners were already enrolled in Mikro, it could not be argued that it would not be in their best interest to move them to another school that could accommodate them. The court accordingly found in favour of Mikro.

The *Mikro* case went on appeal to the Supreme Court of Appeal, which upheld the decision of the court *a quo* and dismissed the appeal, mainly on the ground that the provincial Minister of Education was not allowed to override a valid language policy adopted by the school governing body.[67] As mentioned, the court held that section 29(2) did not confer a right to be instructed in the language of one's choice at every institution where it is reasonably practicable.[68] It has been pointed out above that the court probably took this view on the basis of the proximity of another school where the learners could be accommodated. In effect, it applied by implication at least one of the factors identified above to determine whether it is reasonably practicable to provide education in a particular language. Still, the jury is still out on section 29(2) and the final word will probably have to be spoken by the Constitutional Court.

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[59] *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T).
[60] See s 5(5) of the SA Schools Act 84 of 1996.
[61] 173G. The court's view that s 29(2) contains a right to single medium institutions is not the correct construction of the provision.
[62] 178D.
[63] *Governing Body of Mikro Primary School v Western Cape Minister of Education* 2005 2 All SA 37 (C).
[64] S 6(2) of the SA Schools Act 84 of 1996.
[65] The court described the actions of the department as highly reprehensible and stated: "In my view the first and second respondents must bear a heavy burden of public opprobrium for their conduct, and that opprobrium will be reflected in the costs order which I propose to make."
[66] Officials of the department falsely alleged that certain prefabricated classrooms at the other school, the De Kuilen Primary School, were unfit to use, and that the only other school where the learners could be accommodated was a school for mentally handicapped children.
[67] *Western Cape Minister of Education v Governing Body of Mikro Primary School* SCA 140/05 (unreported).
[68] Par 31.

4. Conclusion

The policies of the state and individual institutions in respect of language stand or fall by the language provisions of the Constitution and must be tested against those provisions. The language provisions are directed at protecting people's language rights. They are at the same time flexible and allow practical considerations to be taken into account to ensure their effective implementation. The fact remains, however, that South Africa is a multilingual society which cannot be served effectively by one language only. Unilingualism can be achieved only by force, as is evident from the examples mentioned above, which in principle is inconsistent with the Constitution, and is causing great dissatisfaction and injustice. Instead, a multilingual approach would be consistent with the Constitution, and although it has particular practical implications, this is the course of action that will recognise people's human dignity and will make a constructive contribution to peaceful co-existence. Even if it may not be possible overnight to make all the necessary provision, and if it should be accepted that the right will have to be given effect progressively, the key is that nobody should ever be forced into unilingualism, or should feel that they may not use the language of their choice. It is the responsibility of the state and all public educational institutions to create an accommodating, multilingual culture and to empower people in the process. That is how the letter and spirit of the language provisions of the Constitution should be given effect in education.