

The Constitutionalisation of Diversity: An Examination of Language Rights in South Africa after the *Mikro* Case

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It is better to draw a clear distinction between the oppressive policies of a dominating racial group and the language in which those policies are enunciated. We fight the former and not the latter.

Nelson Mandela¹

Introduction

Is it constitutional for a South African public school to teach exclusively in Afrikaans? That question arose in the most important case on language rights in South Africa to date, *Western Cape Minister of Education v Mikro Primary School*.²

The above question is not only of legal significance but also of great public interest. At the start of each academic year exclusively Afrikaans medium schools come under pressure to admit English speaking pupils.³ Emotions run high. Accusations of anti-Afrikaans bias are traded.

It will be argued here that although the reservations regarding the possible discriminatory effects of Afrikaans single medium public schools should be taken seriously, the Constitution does provide space for Afrikaans medium public schools. This means that such schools can claim state funding provided that they do not have racist admissions policies or act in a racist manner. The desire to create an Afrikaans medium public school should not in itself be interpreted as a desire for racial segregation.

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¹ Extract from N. Mandela, *Wither the Black Consciousness Movement? An Assessment*, in: Mac Maharaj (ed.), *Reflections in Prison*, (2001).

² SCA 140/05.

³ See in this regard *Matukane and Others v Laerskool Potgietersrus* 1996 (3) SA 223 (T); *High School Carnarvon and Another v MEC for Education Training Arts and Culture of the Northern Cape Provincial Government and Another* [1999] JOL 5726 (NC); *Laerskool Middelburg en 'n Ander v Departementshoof, Mpumalanga Departement van Onderwys en Andere* 2003 (4) SA 160 (T). The independent power of a school governing body as against a head of department was vindicated in *Settlers Agricultural High School and Another v Head of Department: Department of Education, Limpopo Province and Others* [2002] JOL 10167 (T).

Some believe that the actions of the Western Cape Education Department in the leading *Mikro* case were purely politically motivated. They were interpreted as an attempt to silence Afrikaans. Cameron Dugmore, the Minister of Education of the Western Cape arrived at Mikro Primary School, an Afrikaans single medium school in Kuils River, a mixed race suburb about 30 kilometres outside Cape Town, on the first day of an academic year. He told the school principle that 21 pupils whose parents wanted them to be taught in English must be admitted. As it happened, all 21 were not white, a fact that made the matter potentially politically explosive.

Various provincial education departments have resorted to measures to induce schools such as Mikro to admit pupils to be taught in English.⁴ In the *Hoërskool Ermelo* case the Education Department in Mpumalanga displaced the governing body of a school unwilling to change the language policy of the school.⁵ The old governing body was replaced with a body more sympathetic to the policies of the Education Department.

The 1996 South African Constitution contains several provisions protecting language rights. It prohibits both public and private discrimination on the basis of language.⁶ It also accords an individual right to use a language of choice⁷ and protects the rights of linguistic minorities.⁸ The Constitution also guarantees that all pupils have a right to receive, where practicable,⁹ an education in the official language of their choice.¹⁰

The legitimacy of single medium private schools is constitutionally uncontroversial and provided for in section 29 (3) of the Constitution. It will be argued that although the Constitution does not expressly provide a right to single medium public schools, it may nevertheless be unconstitutional to interfere with the language policy of a school by pressuring a school to admit pupils speaking a different language.

Some have argued that those who seek to be educated in Afrikaans should resort to private educational institutions. Section 29 (2) of the Constitution however seeks to protect language rights in the context of public educational institutions. This is especially clear if the Constitution is read together with and in the context of the state's new education policy.

⁴ The word "learner" is often used for pupils. For purposes of this article I will use the term "pupils".

⁵ It is well known that Afrikaans is the primary language of the coloured community. According to the 1996 census more than 5 800 000 South Africans speak Afrikaans as their first language compared to 3 457 0000 who speak English as a first language. Statistics South Africa available at <www.statssa.gov.za/publications/statsdownload>.

⁶ Sections 9 (3) and (4) of the Constitution of the Republic of South Africa, Act 108 of 1996.

⁷ Section 30, *ibid.*

⁸ Section 31, *ibid.*

⁹ As we shall see the meaning of this term was central to the *Mikro* decision.

¹⁰ Section 29, *ibid.*

Clearly, the language provisions in the South African Constitution are not merely decorative. They should be understood as a response both to the subordination of African languages by European tongues, and the imposition of English, first by British colonialism and then, a century later, by the imperatives of globalisation.¹¹

It will be argued here that the constitutionalisation of language rights in South Africa has important consequences. The coercive interference by education authorities infringe upon the constitutional values of equality and dignity. Moreover, minority language rights are fundamental rights and that as fundamental rights they should enjoy protection even if such protection infringes upon majoritarian interests. It will be argued that a correct interpretation of the language provisions in the 1996 Constitution determines that a school should be given wide latitude in designing and defending its language policy. Such interpretation is also supported by the state's current formal education policy that will be discussed.

The constitutional provisions on language rights in South Africa will first be examined. The focus will be on the *Mikro* case but the *Hoërskool Ermelo*¹² judgement will also be examined. The movement to respect and encourage minority language education is a movement that is winning ground internationally. Some comparisons will be made with the constitutional protection of language rights in Canada. The right to minority language instruction is entrenched in the Canadian Constitution and has been described as integral to human dignity. The concept of a linguistic minority (as used in international instruments) will also be analysed.

The dispute in the *Mikro* case once again highlights the great historic divide between Afrikaans and English. Although understandable, it is unfortunate that the language debate in South Africa is too often characterized by tension or conflict between Afrikaans and English. The relationship between the promotion of Afrikaans and Apartheid is well known. There can be little doubt that the current tension in school governance and composition is a legacy of the past. The discriminatory policies of Apartheid were particularly damaging in the area of education¹³ In this regard Nelson Mandela's plea to separate a language from its manipulation for political purposes is apt. Since English and Afrikaans were both privileged languages during Apartheid I argue that the language question (as far as it concerns a choice between Afrikaans and English education) is not constructively resolved by

¹¹ A strong argument can be made that the coercive imposition of English reinforces already-dominant cultural institutions in South Africa. There are many signs in public life and the media that English is colonising public discourse. In an article in "Die Burger" Dr N. Alexander has observed that strategies to opposing the hegemony of English needs to be considered. See *Mikro* Heads of Argument for the Respondent, para. 93.

¹² *Hoërskool Ermelo v Departementshoof van Onderwys, Mpumalanga en ses andere*, 3062/07.

¹³ S. Wilson writes that in 1994 the state expenditure *per capita* was R5403 for white children, R4687 for Indian children, R3961 for colored children and R1715 for African children. These amounts were provided by the Department of Education Report of the Committee to Review the Organisation, Governance and Funding of Schools. See his article, Taming the Constitution: Rights and Reform in the South African Education System, (2004), 20 SAJHR, 246.

focusing on the previously advantaged position of Afrikaans. Although I will focus on the *Mikro* and *Ermelo* cases, my comments have broader application to the nine historically disadvantaged official languages.¹⁴ The struggle for a language policy that is not only tolerant but progressively realises language rights as socio economic rights, is an inclusive struggle.¹⁵

The Legislative Framework: The Schools Act

The constitutional language provisions cannot be interpreted in isolation. These provisions should be interpreted purposively in the context of the state's language policy as a whole. The current language policy is stated in the South African Schools Act of 1996 (Schools Act), an Act that was passed shortly after the Constitution came into effect. The *Mikro* judgement makes frequent reference to the provisions of the Schools Act.

The Schools Act itself states that the reason for its existence is that:

This country requires a new national system for schools that will redress past injustices in educational provision ... advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance ..., protect and advance our diverse cultures and languages, uphold the rights of all pupils, parents and educators, and promote their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State.

Section 12 of the Schools Act provides that the Member of the Executive Council responsible for education in a province must provide public schools out of funds appropriated by the provincial legislature. The Schools Act further provides that the governance of every public school is vested, subject to the Act, in its governing body that may perform only such functions and obligations as are prescribed in Art. 16 of the Act. The Act therefore makes it clear that subject to the limitations contained in the Act, the governance of a public school is the responsibility of the governing body of the school. The Act also provides for the composition of a governing body. A governing body should consist of parents of pupils at the school, educators at the school and other members of staff at the school.¹⁶ One of the functions of the governing body of a school is stated in section 6 (2):

The governing body of a public school may determine the language policy of the school subject to the Constitution, this Act and any applicable provincial law.

In terms of section (1) of the Act, the Minister of Education may, subject to the Constitution and the Act, determine norms and standards for language policy in public schools.

¹⁴ Section 6 of the Constitution states that the official languages of South Africa are Sepedi, Sesotho, Setswana siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

¹⁵ M a t e l a makes the powerful point that a one-language policy will render the constitutional language dispensation a "paper tiger" and will leave South Africans with "a feeling of being constitutionally defrauded". See S. M a t e l a, Language Rights: A Tale of Three Cases, (1999), 15 SAJHR, 392.

¹⁶ See *Mikro* (note 2), para. 6.

One of the innovations of the 1996 Act is that it affords parents a more significant role in the governing of schools than was the case in the past. A Department of Education publication has referred to the Act as “providing for democratic school government through school governing bodies”.¹⁷ In the Cape High Court judgment Judge Thring stated that a public school’s governing body is intended by the legislature to be independent of the state. He stated further that “[n]o machinery is to be found in the Schools Act for the control of a governing body by the state”.¹⁸

The Education Department made the false assumption that it follows from the fact that a governing body is subject to the Act that it is for the Head of Department (HOD) to enforce compliance therewith.¹⁹ This assumption fails to grasp the special place of the school governing body in the system of school governance. A school governing body is not the servant or agent of the HOD. According to the Act a governing body is an autonomous representative body, accountable on democratic principles to the parents and other stakeholders of the school and not the HOD.²⁰

But what can the South African education authorities do when faced with a recalcitrant school governing body? The SCA acknowledged that it would be unfortunate if the education authorities have no remedy in the event of an unreasonable refusal by a governing body to change its language policy.²¹ The SCA stated that the refusal of a school to change its language policy is an administrative action that is subject to review in terms of sections 1 and 6 of PAJA.²² Alternatively, section 22 of the Act states that the HOD may on reasonable grounds withdraw a functioning of a governing body.²³ This was done in the *Hoërskool Ermelo* case that will be discussed below.

¹⁷ *Education in South Africa: Achievements since 1994*, (May 2001), (ISBN 0-970-3911-2), <<http://education.gov.za/content/documents/294.pdf>>, cited in: Respondent’s Heads of Argument.

¹⁸ The School Governance Report states that the government has among its objectives “restoring a sense of community ownership of schools” and “investing parents with rights of ownership”. The Report further states that “at the core of these broad objectives is the ideal of institutionalising the presence of parents at the core of the schooling system”. Respondent’s Heads of Argument, para. 132.4.3. See also the Keynote Address of Prof. K. A s m a l, Minister of Education, School Governing Body Conference, Eskom Conference Centre, Midrand, 15 April 2000 <<http://www.info.gov.za/speeches/2000/000419355p1005.htm>> in that he stated that the elections of school governing bodies were to be treated as “an extension of national, provincial and local government elections”. He described it as “another tier of representation”.

¹⁹ Head of Argument for the Respondent, para. 6.1.

²⁰ Ibid.

²¹ *Mikro* (note 2), para. 35.

²² Ibid., para. 36. The SCA stated that if the decision was so unreasonable that no reasonable person would in the circumstances have refused to change the language policy it may be reviewed and set aside in terms of s 6(2) (h) of PAJA.

²³ See *Mikro*, ibid., para. 37. “If the HOD determines on reasonable grounds that a governing body has ceased to perform one or more such functions, he or she must appoint sufficient persons to perform all such functions ... for a period not exceeding three months.”

The *Mikro* Case

(i) Facts

Because of the centrality of the *Mikro* case it is important to set out the facts in considerable detail: Mikro Primary School (“Mikro”) is an Afrikaans medium public school in Kuilsriver near Cape Town. In accordance with the Schools Act, the governing body of Mikro adopted a language policy. This language policy stated that all teaching in the school (except for the subjects of English and Xhosa) would take place through the medium of Afrikaans. The governing body of the school refused to comply with a request by the Western Cape Education Department to change the language policy of the school so as to convert it to a parallel medium school (a school that teaches both in Afrikaans and English).²⁴

The Western Cape Department of Education tried since 2002 to persuade the Governing Body to change its language policy and to admit English pupils to Mikro. The governing body has refused to do so. The parallel medium public school in Kuilsriver, De Kuilen Primary School, could no longer accommodate all the pupils who applied for admission. De Kuilen contended that it was full and could not accommodate 40 grade 1 pupils. The department held a meeting with the governing bodies of Mikro and De Kuilen. After various unsuccessful attempts by the governing body to persuade Mikro to admit the pupils, the head of Education of the Western Cape Education Department issued a directive to the principal of Mikro Primary School to admit 21 black²⁵ pupils and to have them taught in English. The principal was advised that failure to implement the directive may constitute grounds for disciplinary action.²⁶ This gave rise to an urgent application by the school to the Cape High Court for an order setting aside the directive and the decision on appeal. The Cape High Court interdicted the Western Cape Minister of Education from instructing officials of the Education Department to unlawfully interfere with the governance or the professional management of Mikro. The Court ordered that the 21 pupils who had been admitted by Mikro be placed by the appellants at another suitable school or schools.²⁷

In the morning of 19 January 2005 Mr Caroline, the Director of the Education Management and Development Centre of the Western Cape Education Department, his deputy Mr Saunders together with three other officials of the department and 19 of the 40 pupils and their parents, and two other pupils, arrived at Mikro Primary school. Mr Caroline informed Mr Wolf, the chairman of the

²⁴ Ibid., para. 2.

²⁵ The fact that the pupils were black was not stated in the SCA decision but in press reports. The question of their race is important in light of the argument made by the appellant that not admitting the pupils amount to segregation.

²⁶ *Mikro* (note 2), para. 10.

²⁷ The judgement in the Cape High Court is reported as *Governing Body of Mikro Primary School v Western Cape Minister of Education*, [2005] 2 All SA 37 (C).

governing body that he was there to assist the principal with the admission of the English pupils and to ensure that they were admitted. Wolf then contended that Caroline's instructions were unlawful. Caroline said that he would implement the instructions unless instructed to the contrary. He then took the children and their parents to the hall where the assembly took place. Mikro approached the Cape High Court for urgent relief.

The Cape High Court decided in favour of Mikro. The court held that the actions of the Head of Education were unlawful since they rode roughshod over the second respondent's language policy by converting the School from a single medium into a parallel medium school while it had no right to do so.²⁸

When the case reached the Supreme Court of Appeal (SCA), the Western Cape Minister of Education and the Head of Education of the Western Cape (respectively the first and second respondents) argued that section (29) (2) of the Constitution should be interpreted to mean that everyone has the right to receive education in the official language of his or her choice at each and every public educational institution where this was reasonably practicable.²⁹ The SCA stated that if this was the correct interpretation of section 29 (2) it would follow that a group of Afrikaans pupils would be entitled to claim to be taught in Afrikaans at an English medium school immediately adjacent to an Afrikaans medium school that has vacant capacity provided they can prove that it would be reasonably practicable to provide education in Afrikaans at that school. This would similarly entail that boys have a right to be educated at a school for girls if reasonably practicable.³⁰ Judge Streicher stated that in his view this was not the correct interpretation of section 29 (2). The section empowers the State to ensure effective implementation of the right to education by providing single medium educational institutions.³¹ Section 29 (2) does not entail the right to be instructed in an official language of one's choice at each and every public educational institution subject only to it being reasonable practicable to do so.³² According to Streicher it follows that even if it was reasonably practicable to provide education in English at Mikro the pupils did not have a constitutional right to receive English instruction at Mikro.³³

The SCA emphasised that it is the function of a governing body, and a governing body alone, to determine the language policy of a school.³⁴ The admission pol-

²⁸ At 48 a-b and 52 a-b (my emphasis).

²⁹ *Mikro* (note 2), para. 30.

³⁰ *Ibid.*

³¹ *Ibid.*, para. 31.

³² *Ibid.*, (my emphasis).

³³ *Ibid.*

³⁴ According to the Schools Act the Minister of Education is authorised to determine norms and standards for language policy in public schools. The SCA disagreed with the statement of Bertelsmann J in *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys*,

icy of a school is similarly determined by the governing body.³⁵ By instructing the principal to admit pupils contrary to the admissions policy of the school, the department was substituting its own admission policy for that of the school. This amounted to unlawful action on the part of the department.

The parents of the 21 pupils relied on section 28 (2) of the Constitution (the section protecting the best interest of the child) and said that it would not be in the best interest of the 21 English pupils to be transferred to another school during their primary schooling.³⁶ The SCA held that there was no reason to believe that they would not be happy at another school.³⁷ It was also unknown whether or not Mikro could cater adequately for their educational needs if they remain such a small group.

The SCA dismissed the appeal. The court condemned the actions of the Education Department and stated that “the placement of the children at another school is to be done taking into account the best interests of the children”.³⁸

(ii) Analysis

a) Constitutional Provisions

The extensive South African constitutional provisions on linguistic and cultural rights reflect the high premium the drafters placed on diversity. Section 29 (2) of the 1996 Constitution contains the right to minority language education. Section 29 (3), dealing with private or independent educational institutions, also sheds light on section 29 (2). Sections 30 and 31 illustrate the connection between language and culture. For purposes of convenience the sections are provided here:

Section 29 is entitled “Education”

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.

2003 (4) SA 160 (T) that the Norms and Standards provided for a mechanism for the alteration of the language policy of a public school.

³⁵ *Mikro* (note 2), para. 43.

³⁶ *Ibid.*, para. 47.

³⁷ *Ibid.*, para. 48. The court also stated that the “fact that they are happy at present does not guarantee that they will in future years be happy as a very small minority in a school that is otherwise an Afrikaans medium school”. *Ibid.*

³⁸ *Mikro* (note 2), para. 59.

Everyone has the right to establish and maintain, at their own expense, independent educational institutions that –

- a. do not discriminate on the basis of race;
- b. are registered with the state; and
- c. maintain standards that are not inferior to standards at comparable public educational institutions.

Section 30 entitled “Language and Culture” states:

Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision in the Bill of Rights.

Section 31 (1) headed “Cultural, Religious and Linguistic Communities” provides:

- (a) persons belonging to the cultural, religious or linguistic community may not be denied the right, with other members of that community –
 - to enjoy their culture, practice their religion and use their language
 - to form, join and maintain cultural, religious and linguistic organs of civil society.

b) Equality and Dignity

The South Africa Act of 1909 (the first Constitution of the Union of South Africa) required English and Afrikaans to be placed on an equal footing. By contrast, the phrase “parity of esteem” in the 1996 Constitution is not a synonym for equality. Indeed, the Constitution carefully avoids any language that might give rise to a claim that official languages must be treated equally.³⁹ Whereas the interim Constitution of 1993 at least provided for prospective equality, section 6 (4) of the 1996 Constitution simply requires that “all languages must enjoy parity of esteem and must be treated equitably”.

The phrase “parity of esteem” is rather obscure and it is difficult to determine its legal significance. Since the Constitution does not insist on substantive equality, it seems acceptable that some languages enjoy greater rights and status for reasons of economy and practicality, for example. The purpose of including the “parity of esteem” clause could have been to indicate that, in contrast to states that have given official status only to the former colonial language, South Africa would not elevate one language to the official language of government.⁴⁰ The purpose of awarding official language status to eleven languages was to encourage speakers of all languages to participate in political life and to press for the use of their languages in the business of government.⁴¹

Although parity of esteem does not mean equality, the general guarantees of equality in section 9 (1) and (3) of the Constitution still apply. Section 9 (3) pro-

³⁹ I. Currie, *Official Languages and Language Rights*, in: T. Roux/S. Woolman (eds.), *Constitutional Law of South Africa*, 65-66.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

hibits discrimination on a number of grounds. These grounds include language, culture and religion. Since language has been included as a prohibited ground of discrimination irrational treatment or discriminatory treatment on the basis of language is clearly unconstitutional.⁴²

But while one might argue that recognising minority language rights promotes equality, the opposite argument has also been made: that, given the large overlap between mother-tongue and race, single medium schools segregate. Interestingly, the appellants in *Mikro* at no point alleged discriminatory intent or effect associated with Mikro's language and admission policy.^{43 44} However, the *sotto voce* hint on the part of the applicants that it is racism that animated the respondents and that it is in the interest of transformation to change the language policy of the school cannot be ignored. In *Laerskool Middelburg*⁴⁵ Judge Bertelsmann referred to the phenomenon that the Department of Education in Mpumalanga tried to dispose with Afrikaans single medium schools. In his opinion the action by the Education Department was not motivated by practical considerations but by the principle that schools should be transformed.^{46 47} This led Bertelsmann J to impose punitive costs on the Mpumalanga Education Department.

The respondents in *Mikro* made the point that there is nothing self-evidently transformative about forcing schools to teach in English. The imposition of English tends to reinforce an overwhelmingly dominant cultural position.⁴⁸ By contrast, Constitutional Court Judge Albie Sachs has described Afrikaans as "possibly the most creole or 'rainbow' of all South African tongues".⁴⁹ The respondents in *Mikro* disagreed with the suggestion that the reference to single medium education in section 29 (2) could be unconstitutional since it has the effect of segregating

⁴² M. Reddi, *Minority Language Rights in South Africa: A Comparison with the Provisions of International Law*, (2002), CILSA 337.

⁴³ Indeed, nowhere in the record is there any indication of the racial make-up of Mikro, De Kuilen, or of the race of any of the 21 pupils.

⁴⁴ At oral argument in the High Court, the Appellants' counsel interrupted the presentation of the Respondents' argument in reply to heatedly deny that it was the Appellants' case that Mikro's policies were racist. In light thereof, counsel withdrew his argument that the Appellants were in fact illegitimately alleging racism on the part of his clients.

⁴⁵ *Laerskool Middelburg* (note 3).

⁴⁶ *Ibid.*, at 175. Statements confirming the view of Bertelsmann have been made by the media officer of the Minister of Education. 2 February 2005, *Die Burger*.

⁴⁷ At 175. "It would appear that the respondents decided in principle to do away with single medium schools in Mpumalanga in spite of the provisions of section 29 (2) of the Constitution and the National Language Policy. This behaviour does not seem to be motivated by the demands of practical necessity but to a far greater extent by the principle that these schools should be transformed." (author's translation) It is of note that the Minister's media officer, Mr Witbooi, said the following in connection with the *Mikro* case in *Die Burger* of 2 February 2005 that the Minister is determined to transform the educational system. Record vol. 4, 355.

⁴⁸ *Mikro* Heads of Argument of the Respondent, para. 90.

⁴⁹ *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, 1996 (3) SA 165 (CC), at para. 49.

pupils.⁵⁰ De Varennes, an authority in the field of language rights, writes that “one attitude that should be dispelled is that linguistically-based schools are a form of segregation. On the contrary it is long recognised in international law that this point of view is wrong.” In support of his argument he refers to Art. 2 (b) of the UNESCO Convention against Discrimination in Education that provides for separate educational systems.⁵¹ The question of whether non-admission amounts to segregation should be assessed on a case-by-case basis. In the case of *Matukane v Laerskool Potgietersrus*, for example, the facts indicated that the black students who were denied admission to the parallel medium Laerskool Potgietersrus were unfairly discriminated against.⁵² In this case the school’s admissions policy explicitly excluded non-white pupils. The case can therefore be distinguished from *Mikro* and *Hoërskool Ermelo*.

As stated above, one should not automatically assume that the desire to maintain a single medium school is also a desire for segregation. The desire for Xhosa or Zulu single medium public schools will not be susceptible to the same reservation or cynicism. Woolman and Fleisch suggest that the creation of single medium public schools can only be justified in very limited circumstances.⁵³ They provide the example of Khoi San schools. Because of the historical disadvantage of the Khoi San people, they argue, it would be appropriate to establish Khoi San single medium public schools.⁵⁴ They say it is “ironic” that section 29 (2) is now being used by historically privileged communities. I submit that Woolman and Fleisch read the language sections of the Constitution too restrictively. Whereas section 29 (2) (c) states that past discrimination should be taken into account (together with equity and practicability) this consideration does not bar communities who were not subject to past discrimination from using the section. One can also not describe all Afrikaans speakers as “previously advantaged” – this label clearly does not apply to the coloured Afrikaans community, a community substantial in size.⁵⁵

It is clear from the constitutional jurisprudence on equality, as reflected in the standard setting *Harksen* case,⁵⁶ that differentiation or discrimination *per se* is not

⁵⁰ *Mikro* (note 2), para. 86.

⁵¹ See F. De Varennes, *Languages, Minorities and Human Rights*, (1999), 207.

⁵² See *Matukane* (note 3). It was felt that admitting black students to the school would threaten the “dominant character” of the school. In addition it was clear that the neighbouring school, Akasia, was full and could not accommodate any more pupils.

⁵³ S. Woolman/B. Fleisch, *On the Constitutionality of Single Medium Schools*, (2007), (23) SAJHR, 50. Woolman and Fleisch support the views of Janse, who says that those who argue in favour of single medium schools suffer from a “lack of graciousness”. It is submitted that it is not constructive or conducive academic freedom to resort to name calling in this regard.

⁵⁴ *Ibid.*, note 53.

⁵⁵ Afrikaans is the home language of the majority of coloured people. Afrikaans has approximately sixteen million first and second language speakers. See M. H. Smit, *Language Rights and the Best Interests of the Child*, *Journal for Contemporary Roman-Dutch Law*, February 2008, 44.

⁵⁶ *Harksen v Lane NO and Others*, 1998 (1) SA 300 (CC), para. 50-53.

unconstitutional. The Constitution prohibits only unfair discrimination. Unfair discrimination has been defined as discrimination on the basis of the listed grounds in section 9 (3) (the equality clause) and as unequal treatment that impairs human dignity, or affects somebody in a comparably serious manner.⁵⁷ While section 9 (3) stipulates both language and race as prohibited grounds of discrimination it is also recognised that discrimination on racial grounds is particularly pernicious, in light of South Africa's history. The demographic reality is that ethnicity and mother tongue overlap to a large extent. The implication is that language rights will be worthless if they may be enforced only where their assertion will have no discriminatory (in the sense of differentiating) effect.

On the one hand, given South Africa's demographics, the Constitution's provision for single medium education would be negated if a school could never refuse to admit pupils who wish to be taught in another language. On the other hand, refusing to teach in a language other than Afrikaans as a pretext for racial discrimination is constitutionally unacceptable.

The conception of substantive equality demands that we recognise that, despite the past, Afrikaans is now in some respects a subordinated language, relative to the dominant English-speaking culture. If that is true, the equality rights of Afrikaans speakers must be given special protection. That becomes clear once one interprets the substantive right to equality in light of the equally important value of dignity. Cultural identity (of which language is an essential component) is a necessary component of dignity.⁵⁸ Dignity has assumed a critical position in South African constitutional jurisprudence.⁵⁹ The right to be educated in one's own language should be respected because it is integral to human dignity.⁶⁰

c) The Significance of the Constitutionalisation of Language Rights

Leslie Green writes that language rights are often perceived as being based on constitutional accord and that this makes them seem less powerful than rights that are perceived to be seminal or fundamental human rights.⁶¹ Green argues that be-

⁵⁷ *Prinsloo v Van der Linde*, 1997 6 BCLR 708 (CC); 1997 3 SA 1012 (CC), para. 33.

⁵⁸ C. Dlamini, Culture, Education and Religion, in: B. de Villiers/D. Davis/J. Dugard (eds.), *Rights and Constitutionalism*, (1996), 579. See also R. Clements, *Misconceptions of Culture: Native Peoples and Cultural Property under Canadian Law*, (1991), 48 University of Toronto LJ, 4.

⁵⁹ Many prominent Constitutional Court cases have emphasised the centrality of dignity including *S v Makwanyane*, 1995 (3) SA 391 (CC); *Dawood and Another v Minister of Home Affairs and Another*, 2000 (1) SA 997 (C); *August and Another v Electoral Commission*, 1999 (3) SA 1 (CC); *S v Jordan*, 2002 (6) SA 642 (CC); *Carmichele v Minister of Safety and Security*, 2001 (4) SA 938 (CC), para. 56; *National Coalition for Gay & Lesbian Equality v Minister of Justice*, 1999 (1) SA 6 (CC), para. 29; *Minister of Home Affairs v Fourie and Another*, CCT 10/05, 1 December 2005.

⁶⁰ See *Law v Canada (Minister of Employment and Immigration)*, 1 SCR 497 (1999), para. 53. Chaskalson CJ quoted this passage in: *The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of Our Constitutional Order*, (2000), (6) SAJHR, 193, 203 n 44.

⁶¹ L. Green, *Are Language Rights Fundamental?*, (1987), 25 Osgoode Hall Law Journal, 646.

cause language rights include moral rights among their justifications (and not merely considerations of general public policy) they can be regarded as fundamental rights.⁶² According to Green a moral right to X exists if some person's interest is sufficient reason to hold others to be under a duty to provide X.⁶³ Green illustrates his point by referring to tax policy. Decisions about tax policies are often made by referring to aggregate policy considerations and answers to consideration such as the common good.⁶⁴ In the case of the right to vote or the right not to be assaulted, on the other hand, the individual's interest is powerful enough to warrant holding many other people to be under duties.⁶⁵ He writes:

[I]n the case of fundamental rights interests meet each other one by one, in a distributive way. When a person's share of the common good is itself a ground of others' duties, then that person has a right.⁶⁶

In Green's view language rights are fundamental rights⁶⁷ and as a result, the argument for providing services in terms of this right is not aggregative (or dependent on majoritarian interests) but distributive.

Constitutional rights are rights that should be defended even in the face of pressure to yield to majoritarian interests. In the context of protecting the right to freedom of expression it has often been acknowledged that this right demands the protection of unpopular, controversial speech.⁶⁸ Rights cannot only be protected when it is convenient or uncontroversial to do so.

(a) Section 29 (2)

The interpretation of section 29 (2) has been the subject of much academic debate. Malherbe is of the opinion that section 29 (2) provides a strong guarantee that publicly funded single medium schools can be created.⁶⁹ By contrast, Woolman and Fleisch are of the view that section 29 (2) provides no right to single medium schools. They write: "At best [section 29 (2)] places an obligation on the state to justify any refusal to recognise and support single medium public schools."⁷⁰ I am of the view that the section clearly does not provide a right to single medium public schools. However I disagree with Woolman and Fleisch on the nature of the state's obligation. Whilst there is no right to single medium education, the reference to single medium education in section 29 (2) of the Con-

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid., 648.

⁶⁵ Ibid., 649.

⁶⁶ Ibid., 650.

⁶⁷ Ibid., 669.

⁶⁸ D. Meyerson, *Rights Limited*, (1997), 89, 90.

⁶⁹ R. Malherbe, *The Constitutional Framework for Pursuing Equal Opportunities in Education*, (2004), 22 *Perspectives in Education*, 9.

⁷⁰ Woolman/Fleisch (note 53), 53.

stitution puts pay to the faintly articulated suggestion that a single medium school is presumptively unconstitutional, because it has the effect of segregating learners. There is no basis for that proposition in the Constitution or case-law. Where a single medium public school is not racist in its admissions policies, the state must support such a school as far as possible. Future (non-Afrikaans) minorities who choose to make use of the section will be grateful for a liberal interpretation of section 29 (2).

The legitimacy of single medium private schools is constitutionally uncontroversial and provided for in section 29 (3) of the Constitution. In the *Gauteng School Education Bill* case Krieglner J expressed the view that those who wish for single medium education should establish or turn to private institutions.⁷¹ As stated previously, it is my argument that it does not follow from the fact that one supports Afrikaans single medium schools that one also supports exclusively white institutions. This does not mean that racism will never be the unexpressed (or expressed) motive for advocates of single medium schools. I am of the view that it is better to evaluate the question of whether a language policy amounts to racism on a case by case basis and to accept that the wish for single medium public schools could express a sincere non-racialist desire for mother tongue education. There should be no tolerance or constitutional space for privately funded racism. Furthermore, since the right to education is a universal fundamental right, it should not be dependent on one's economic status. Poor students should have equally strong access to mother tongue education.

As stated before, the purpose of awarding official language status to eleven languages was to encourage speakers of all languages to participate in political life and to press for the use of their languages in the business of government. This allows for the progressive realisation of the rights to language and culture. As far as language rights pertain to education, they can be regarded as socio-economic rights. As is the case with other socio-economic rights, it is a right that imposes an obligation on government regarding the use of resources. The realisation of these rights will therefore often be a question of political will.

To the extent that the right to minority language education is a socio-economic right do we not expect the state to support and develop positive liberties?⁷² In ad-

⁷¹ See the statement made by Krieglner J in *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*, 1996 (3) SA 165 (CC), (Gauteng School Education Bill), paras. 39-42: "A common culture, language or religion having racism as essential element has no constitutional claim to the establishment of separate educational institutions. The Constitution protects diversity, not racial discrimination. Secondly ... [the Constitution] ... keeps the door open for those for whom the State's educational institutions are considered inadequate as far as common culture, language or religion is concerned. But there is a price, namely that such a population group will have to dig into its own pocket." It is not clear what Krieglner means with a common language "having racism as an essential element". It is submitted that Afrikaans can certainly not be described in this way.

⁷² According to Gromacki language rights may be defined negatively and positively. Language rights might be defined positively to include the right to use one's own language in the course of one's personal experience. The full implementation of such a right can place a burden on a state in the way

dition, since Afrikaans is one of the country's indigenous languages⁷³ the state has a duty under section 6 (2) of the Constitution "to take practical and positive measures to elevate the status and advance the use" of Afrikaans.

The interpretation that section 29 (2) protects minority language rights specifically in the context of public institutions is also supported by the negotiating history of the education clause. The fact that it was the National Party who fought for the right to single medium schools may lead many to believe that the clause is of questionable pedigree.⁷⁴ But whatever its pedigree the clause is constitutionally entrenched and can only be changed through a constitutional amendment. In any event, the clause is consistent with foreign and international law on language rights. The Canadian Charter, for example, makes similar provision for minority language rights in the context of education and is discussed below.

More fundamentally, although the litigation involving section 29 (2) has usually pertained to the desire of Afrikaans language schools, the word "Afrikaans" does not appear in section 29 (2). Previously disadvantaged language schools and other cultural institutions will certainly be invoking the clause in future. It is expected that the right to Muslim cultural practices in South African schools will soon be the subject of litigation.⁷⁵

The Concept of Linguistic Minority

To answer the question of whether Afrikaans is entitled to the protection afforded by international instruments and the Constitution one needs to answer the following question. Does Afrikaans qualify as a minority language?

all socio-economic rights place burdens on the state for its realisation. On the positive dimensions of minority language rights see J. P G r o m a c k i, *The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights*, 1992, (32) *Virginia Journal of International Law*, 515.

⁷³ International Journal of the Book, K. De Wet, *Publishing and Afrikaans Poetry* (abstract) <[http://bookconference.Publisher-Site.com%2FProductShop%2F%3Fstart%3D1](http://bookconference.publisher-ite.com/ProductShop/view_product9540/20362?c2c_OrderFrom=http://bookconference.Publisher-Site.com%2FProductShop%2F%3Fstart%3D1)>. Prof. A. C. Cilliers, Stellenbosch "Tale en die Grondwet", *De Rebus*, March 2003. In his article on *Litnet* "Taaldiversiteit in 'n Geglobaliseerde Samelewing", Prof. K. du Toit describes English, Portuguese and French (not Afrikaans) as the languages of the colonisers. <<http://www.litnet.co.za/taaldebat/dutoit.asp>>.

⁷⁴ The most important difference between the position of the ANC and the position of the NP was that the ANC insisted on the inclusion of the consideration that the education policy must redress the results of past racially discriminatory laws and practice and the NP's insistence on a right to single medium institution. The ANC ultimately did not agree with the inclusion of a right to single medium institution and the NP was also not successful in resisting the inclusion of the consideration regarding redressing the results of past discriminatory laws. See P. A n d r e w s / S. E l l m a n n (eds.), *The Post-Apartheid Constitution: Perspective on South Africa's Basic Law*, (2001), 173.

⁷⁵ See W. J. van Vollenhoven / S. B l i g n a u t, *Muslim Learners' Religious Expression Through Attire In Culturally Diverse Public Schools In South Africa: A cul-de-sac?*, (2007), 35 *Journal of Family Ecology and Consumer Sciences*, 5, 6.

It is not easy to define the concept of a linguistic minority. Section 27 of the International Covenant on Civil and Political Rights uses the expression “linguistic minorities” but there is no consensus yet on a precise and acceptable definition of a minority.⁷⁶ In spite of this reality, Henrard points out that there is a measure of agreement regarding certain elements of such a definition.⁷⁷ A distinction is made between objective and subjective elements of such a definition. The objective elements a “minority” group must satisfy include the following: having ethnic, religious or linguistic characteristics differing from the rest of the population; being a nondominant, numerical minority; and having the nationality of the state concerned. The subjective components include the existence of a sense of community and a collective will to preserve the separate characteristics or identity of the group.⁷⁸ Who does one measure the objective criteria against? It has been suggested that the “rest of the population” is the correct reference point.⁷⁹ It is also important that the “rest of the population” does not have to refer to a monolithic bloc but can consist of various religious and linguistic groups.⁸⁰

In terms of satisfying the above requirements, Afrikaans certainly has characteristics that are distinct from other South African languages. Afrikaners have a collective will to preserve Afrikaans and the identity of Afrikaners as a group. This is evidenced by the debate (both in the popular media and in intellectual circles) about the survival of Afrikaans.⁸¹

Henrard points out that there is no clear majority group in a “plural society” such as South Africa. In her view all the various ethnic, religious and linguistic groups could be minorities if they satisfy the relevant conditions.⁸² It is however improbable that English speaking South Africans could regard themselves as a linguistic minority in light of the dominance of English as a language of business and government. I argue that this is the case despite the fact that English speakers (certainly mother tongue English speakers) might be in a numerical minority in many parts of South Africa. Henrard writes that nondominance is widely considered an essential element of a definition of “minority”.⁸³ Afrikaans can certainly be considered to currently be in a nondominant position. I therefore

⁷⁶ K. Henrard, *Minority Protection in Post-Apartheid South-Africa*, (2002), 4.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* These subjective and objective factors are also proposed by F. Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, United Nations (1991), 7.

⁷⁹ *Ibid.*, 12.

⁸⁰ See K. Henrard, *The Definition of “Minorities” and the Rights of Minorities Regarding Education in International Law*, in: J. de Groot/J. Fiers (eds.), *The Legal Status of Minorities in Education*, (1996), 45.

⁸¹ The test for proving the subjective requirement is not onerous. Capotorti argues that only when a group has assimilated to the point of relinquishing its traditions, customs and use of language one can say that the subjective requirement is not fulfilled. Capotorti (note 78), 42.

⁸² *Ibid.*

⁸³ *Ibid.*, 5.

argue that Afrikaans satisfies most of the objective and subjective criteria mentioned above and can be considered a minority language.

It is not clear whether the term “minority” refers to a racial, ethnic, linguistic, religious or other group. The following definition has been suggested:

A language group becomes a minority in terms of history and of political philosophy only when it achieves a certain size. However, size is not all. The group must have some sense of community, rooted in history or ideology, to achieve the status of a minority, even in the popular meaning of the word.⁸⁴

It seems to follow that a linguistic minority is not recognised only because of its size. A certain degree of historical continuity and ideological unity must also be present. A group must share a feeling of linguistic identity and a desire to conserve such an identity (the subjective factors mentioned above). If members of a minority group accept assimilation they will lose linguistic specificity.⁸⁵ The geographical situation of a minority will also be considered. A minority may be a minority only in a provincial context (the English speaking minority in Quebec for example). French speaking Quebecers may constitute a minority at the national level but constitute a majority on provincial level.⁸⁶ Although Afrikaans speaking South Africans can be considered a majority in the Western Cape, I believe that for the purposes of the law they can be viewed as a minority in this province as well as in South Africa as a whole. The position of Afrikaans has shifted from a dominant minority not requiring protection to a non-dominant minority requiring protection.

International Protection of Language Rights

Since language is a necessary instrument for the expression of the identity of a minority language group, it is entitled to special protection. Although language rights have become a part of international human rights law, the content of these rights is currently at a relatively primitive stage of development.⁸⁷ One reason for this is that from the international legal perspective, language is still largely considered a political battlefield and not the object of universally applicable legal standards.⁸⁸ Various international instruments however contain provisions concerning the language rights of minorities.⁸⁹ This article does not seek to exhaustively treat

⁸⁴ F. Chevrete, Les concepts de droits acquis, de droits des groupes et de droits collectifs dans le droit québécois, in: Rapport de la Commission d'enquête sur la situation de la langue française et sur les droits linguistiques au Québec, (1972).

⁸⁵ Note 1, 8.

⁸⁶ Ibid.

⁸⁷ L. Mälksoo, Language Rights in International Law: Why the Phoenix Is Still in the Ashes, (2000), 12 Florida Journal of International Law, 465.

⁸⁸ Ibid.

⁸⁹ The Universal Declaration of Human Rights is based on the principle of non-discrimination. Art. 2 (2) of the Declaration states that everyone is entitled to fundamental rights and freedoms with-

the various language provisions in international instruments but to highlight some of the most significant.

As “the first internationally accepted rule for the protection of minorities”⁹⁰ Art. 27 of the International Covenant on Civil and Political Rights (ICCPR) is the most important provision in international law on minority rights. South Africa ratified this Convention in 1994. Art. 27 states:

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

The fact that the article is formulated negatively means that there is no positive duty on the state to protect minority groups. Art. 27 affords states discretion when it comes to the choice of protective measures that has to be adopted to preserve communities in that cultural or linguistic rights can be enjoyed. One of the most important points of criticism against this article is that Art. 27 does not explicitly recognise minority groups as collective entities that are endowed with legal personality and rights.⁹¹ The article favours individual rights over collective rights. Non-discrimination between individuals is not sufficient for the protection of minorities.⁹²

After the collapse of the communist regimes in Eastern Europe it was felt that there is a need to improve the protection of minorities on the regional level.⁹³ An initial proposal was to supplement the ECHR with a new additional protocol on the rights of minorities, including linguistic rights. In the end it was decided that a separate legal instrument was needed. The Committee of Ministers adopted the European Charter for Regional and Minority Languages that entered into force on 1 March 1998.⁹⁴ This is the first international instrument that is solely devoted to the issue of the protection of minority languages.⁹⁵

out discrimination and in particular, without discrimination. The International Convention on the Elimination of all Forms of Racial Discrimination that was adopted on 21 December 1965 and came into force on 4 January 1969 affords special measures for the purpose of securing the satisfactory advancement of certain racial or ethnic groups.

⁹⁰ Caporoti (note 78), 101.

⁹¹ Reddi (note 42), 342.

⁹² In response to this criticism the United Nations Human Rights Committee has expressed the opinion that the exercise of the right depends on the ability of the minority group to enjoy its culture, religion or language. See General Comments Adopted by the UN Human Rights Committee under Art. 40 para. 4 of the ICCPR no. 23 (Art. 27) UN Doc. CCPR/C/21/Rev.1/Add.5 (26 April 1994). Reddi, *ibid.*, 343.

⁹³ Mälksoo (note 87), 456.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*, 457. At this stage however only a small number of countries have ratified the Convention. Some provisions on language rights are also contained in the Framework Convention of the Council of Europe for the Protection of National Minorities. State parties to this Convention oblige themselves to refrain from policies or practices aimed at assimilation.

One should also take note of Art. 30 of the 1989 Convention on the Rights of the Child. This article is couched in analogous terms to Art. 27 but applies specifically to children. It therefore reinforces the importance of Art. 27.

There is a clear connection between the preservation of language rights and preserving cultural rights. The concern that the survival of Afrikaans is tied to its recognition as a language of education is not exaggerated. The capacity of a linguistic group to survive as a cultural group is critically dependent upon their use of the minority language in education.⁹⁶ Some believe that education is the chief instrument for preserving and protecting a minority language or culture.⁹⁷

Many international instruments bear testimony to the international recognition of cultural rights. Art. 27 of the Universal Declaration of Human Rights of 1948 provides that everyone has the right to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. The purpose of this article is to protect cultural diversity and to support the evolution of a common culture.⁹⁸ Art. 15 of the International Covenant on Economic, Social and Cultural Rights of 1996 provides that the state recognises the right of everyone “to take part in cultural life”.⁹⁹

The *Hoërskool Ermelo* Case

In contrast with the judgement in the *Mikro* case, the Pretoria High Court in the recent *Hoërskool Ermelo* case came to the conclusion that a traditionally Afrikaans public school in Mpumalanga province should admit English pupils. The court initially ruled in favour of an application by the school to maintain the school as a single-medium Afrikaans school.¹⁰⁰ However, the court subsequently ruled in favour of the application by the Department of Education that an order to have the school as a dual medium should be upheld.¹⁰¹ In this case the court ordered the High School Ermelo to open its doors to English speaking pupils. This order was then appealed by the school. The school’s governing body felt that the matter was politically driven and that government wanted to silence Afrikaans. The body was

⁹⁶ The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights, (1992), 32 Virginia Journal of International Law, 544.

⁹⁷ Dlamini (note 58), 578.

⁹⁸ Ibid., 574.

⁹⁹ The ILO Convention on Indigenous and Tribal Populations of 1957 seeks to protect the cultural values of indigenous and tribal populations. The International Convention on the Elimination of All Forms of Racial Discrimination enjoins states which are parties to the convention to recognise the right of every person to equality before the law as regards cultural rights.

¹⁰⁰ *Hoërskool Ermelo v Departementshoof van Onderwys Mpumalanga*, Case No. 3062/07, Unreported Decision of the Pretoria High Court, 2 February 2007.

¹⁰¹ This case received considerable media attention. See for example “Hoërskool Ermelo Ordered to Admit English Pupils”, 17 February 2007, <SABCnews.com>; Hoërskool Ermelo Fights for Afrikaans, 28 February 2007, <<http://iafrica.com/news/sa/640969.htm>>.

concerned about the intervention of the Minister of Education, Naledi P a n d o r , in the matter.

In the first *Hoërskool Ermelo* case Judge P r i n s l o o examined the use of Art. 22 by the Head of Department to withdraw the functions of the governing body. In terms of section 22 (1) the Head of Department needs to provide the governing body with reasons for his actions and must grant the body a reasonable opportunity to make representations regarding the intention to withdraw its functions.¹⁰² According to Judge P r i n s l o o the Head of Department did not take the steps prescribed in section 22. The judge objected to the fact that the respondent acted unfairly and with undue haste when it took the language policy out of the hands of the governing body and it also failed to give the required notice. The judge stated that in light of the fact that room did seem available at Ermelo Combined and Reggie Masuku (neighbouring schools), the intimidating actions of the Head of Department are suspect.

It was argued on behalf of the Minister that the school had “more than enough space” for English pupils while other schools in the area had no more space. It was argued that if people want to entrench their language at a school they could do this at a private school. On behalf of the school the argument was made that if this is correct then all public schools would have to offer more than one language of instruction and single-medium schools would have no right of existence.

In the second *Hoërskool Ermelo* decision, made in February 2007, a full bench of the Pretoria High Court (consisting of Judges N g o p e , S e r i t i and R a n c h o d) ruled that Hoërskool Ermelo must admit English-speaking pupils. In a five-minute ruling the court set aside the earlier order that suspended a decision that the school had to admit English-speaking pupils.¹⁰³ The full bench focused on the fact that the school was “under subscribed”. The court stated that given that the school was operating at only half-capacity, the full bench found that it was “reasonably practicable” for the school to accommodate the 113 pupils who sought admission.¹⁰⁴

It can be asked why the Pretoria High Court disposed of the matter in five minutes. In light of the fact that the SCA in *Mikro* decided the matter differently, one would have expected more thorough deliberation.

Minority Rights in the Canadian Charter

South African constitutional lawyers have often turned to Canadian constitutional jurisprudence for guidance on interpreting the South African Constitution. In the context of language rights this is once again instructive. The Canadian Char-

¹⁰² Art. 22 (2) (b).

¹⁰³ *The Minister of Education and Others v Hoërskool Ermelo*, 3062/07, 13 February 2007. See also “Ermelo Must Admit English Speaking Pupils”, 13 February 2007, <www.iol.co.za>.

¹⁰⁴ Since the judgement has not been reported I am indebted to W o o l m a n and F l e i s c h for the outcome of this case. W o o l m a n / F l e i s c h (note 53), 64.

ter of Rights and Freedoms (the Charter) makes special provision for the right to minority language instruction. Education plays a crucial role in the preservation of culture and the survival of linguistic minorities in Canada.¹⁰⁵ The drafters of the Charter understood the relationship between language and cultural survival. The relationship has been described as follows:

Minorities, whether English or French, inevitably give priority to their own language.

If the majority is the sole language of instruction in the provincial schools, the survival of the minority as linguistic group is menaced. ... The school must counterbalance this environment and must give priority to the minority language if the mother tongue is to become an adequate instrument of communication.¹⁰⁶

The right to minority language instruction in the Charter is contained in section 23 that reads as follows:

23. (1) Citizens of Canada

a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.¹⁰⁷

According to Green, Canada (like Belgium, India and possibly South Africa) might be guilty of over-constitutionalising language rights.¹⁰⁸ Whereas the liberal-democratic freedoms such as freedom of conscience, religion, expression and opinion are squashed into one section (section 2), ten provisions protect language rights.¹⁰⁹ The South African Constitution follows the same trend. While it is clear that these extensive provisions reflect political sensitivities, the centrality accorded to these rights will only be justified if it is a product of politics and principle.¹¹⁰

¹⁰⁵ M. Bastarache (ed.), *Language Rights in Canada*, (1987), 257.

¹⁰⁶ Report of the Royal Commission on Bilingualism and Biculturalism, Vol. II, Education, Ottawa, 1968, Queen's Printer, at 8.

¹⁰⁷ (2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

¹⁰⁸ Green (note 61).

¹⁰⁹ These are sections 16-22 (Official Language Rights), section 14 (Right to an Interpreter in Trials), section 23 (Minority Language Educational Rights) and section 27 (Preservation of Multicultural Heritage).

¹¹⁰ Green (note 61), 641.

The early position on minority school rights was that minority language instruction was made possible only in areas where the number of students choosing instruction in that language was sufficient to warrant the creation of schools.¹¹¹ This is known as the numbers requirement.

Concerning the numbers requirement, numerical considerations will affect such questions as the distance the child must travel, the location of classes or schools and the methods of management. But it has been argued that to tie the existence of a right to the presence of a given number is to destroy the liberal, remedial and egalitarian aspects of section 23.¹¹² Whereas the existence of the right is not dependent on its numerical or collective aspect, the implementation of the right strongly depends on it.¹¹³ The inclusion of the words “reasonably practicable” in section 29 (2) of the South African Constitution indicates that practical considerations such as numbers may influence the viability of a claim for state support.

The Supreme Court of Canada stated its position on language rights in the *Reference re Manitoba Language Rights*.¹¹⁴ In this case the court clearly associated language rights with human dignity, with the needs of life in society and with equal access to the law, the courts and the legislature for both Anglophones and Francophones.¹¹⁵ The Canadian courts have agreed that section 23 should be given a broad and liberal interpretation. This meant that section 23 should play a real role in guaranteeing constitutional rights. The Canadian approach of granting language rights a liberal interpretation has also been followed in India.¹¹⁶

The Court in *A.G. Quebec v. Que. Assn. of Protestant School Boards* pointed out that section 23 was unlike other provisions usually found in a constitution guaranteeing rights and freedoms. Section 23 has a special meaning and purpose for Canada since its aim was to ensure that the children of French-speaking parents and children of English-speaking parents would have a right, if numbers make it feasible, to be educated in their mother tongue in all the provinces of Canada.¹¹⁷

¹¹¹ Bastarache (note 105), 260. This was the position in the white paper entitled “The Constitution and the People of Canada”, Ottawa, 10, 11, 12, February 1969.

¹¹² Bastarache (note 105), 274.

¹¹³ *Ibid.*, 275.

¹¹⁴ 1985 1 SCR 721.

¹¹⁵ *Ibid.*, at 744 - 747.

¹¹⁶ Art. 30 of the Indian Constitution guarantees religious and linguistic minorities the right to establish and administer educational institutions of their choice. In its granting of aid to educational institutions, the state is precluded from discriminating against any educational institution on the grounds that it is under the management of a (religious or linguistic) minority. In cases where minorities have challenged attempts to violate minority rights guaranteed in Arts. 29 and 30 of the Indian constitution the judiciary has consistently upheld the rights of minorities. As a general principle, the Indian courts have avoided the watering down of minority rights by narrow judicial interpretation. See for example the decisions in: *DVA College Bhatinda v State of Punjab*, AIR 1971 SC 1731; *Headband St Xavier College Society & Others v State of Gujarat*, AIR 1974 SC 1389 and *State of Bombay v Bombay Education Society & others*, AIR 1954 SC 561.

¹¹⁷ See the summary of the case in K. H. Fogarty, *Equality Rights and their Limitations in the Charter*, (1987), 313, 314.

In a similar way to the language provisions in the South African Constitution, Section 23 was intended as a corrective measure. It seeks to remedy the many humiliations experienced by the Francophone minority in the course of Canadian history. This was recognised in *Re Minority Language Educational Rights* when the Ontario Appeal court declared:

What history reveals ... is that rights or privileges to determine language use in educational facilities, which the French-speaking minorities had at the time of entering into the federation, was later denied ...¹¹⁸

The Supreme Court of Canada recognised in cases such as *Quebec Association of Protestant School Boards v The Attorney General of Quebec*¹¹⁹ that the earlier as well as the more recent histories of linguistic minorities should be taken into account.

The scope of the guarantee contained in section 23 is unclear. Section 23 is considered to be a social right that requires state intervention for its implementation.¹²⁰ The right is without any real impact unless the state consents to provide funds, equipment and human resources for its realisation. In general, social rights are rights that can only be realised over a long period of time.

The court in *Reference re Manitoba Language Rights* reinforced the relationship between the preservation of minority language rights and the intention to preserve culture.¹²¹ The right to minority language instruction has been interpreted to include the “living environment” that protects and enhances the minority culture.

Conclusion

In light of South Africa’s past, lily white educational institutions do not represent the educational environment that should be encouraged to create a multi-racial democracy. At the same time a presumption that a school’s decision to stay Afrikaans equals a desire to stay white shows great insensitivity to the importance of language rights in a democracy and assumes racism where there might be none. Whereas some instances of a school’s refusal to admit pupils may amount to racism (as in *Laerskool Potgietersrus*), this cannot and may not always be assumed to be the case. The 1993 and 1996 Constitutions have moved language out of the realm of pure politics into the realm of rights.

If a school has to change its language policy whenever English students seek admission, it seems that Afrikaans single medium schools simply have no right of existence. The right to minority language education would have no substance if a

¹¹⁸ 1984 10 DLR (4th) 491, 530-531.

¹¹⁹ *A.G. of Quebec Association of Protestant School Boards*, 1084 2 SCR 66, 79.

¹²⁰ Bastarache (note 105), 274.

¹²¹ 1985 1 SCR 721, 744. The cultural and social dimensions of minority schools were also reinforced by the Ontario Court of Appeals in *Re Minority Language Educational Rights*, 1984 10 D.L.R. (4th) 491, 533.

school can only stay Afrikaans if it is never confronted with non-Afrikaans speaking pupils seeking admission.

Whereas language and culture rights should not be used to cloak racist agendas or obstruct transformation, the language of pragmatism should not be used to cloak the political agenda of the provincial education departments to erode the future existence of single medium schools. It will usually also be in the best interest of the child to receive education in his or her mother tongue.¹²²

Ultimately the triumph of Mikro over the Western Cape Education Department is a triumph of autonomy (and therefore dignity) over political force. The legislature has strongly affirmed the independence of school governing bodies in the Schools Act. It is to be hoped that the matter will soon be clarified by the Constitutional Court and will be treated with the seriousness it deserves.

¹²² See section 28 (2) of the Constitution.