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**The right to mother tongue education:
A multi-disciplinary, normative perspective**

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ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
African Charter	African Charter on Human and Peoples' Rights
CESCR	Committee on Economic, Social and Cultural Rights
CDG	Care Dependency Grant
Copenhagen Declaration	Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE
CRC	Convention on the Rights of the Child
CSG	Child Support Grant
ECHR	European Convention on Human Rights
Framework Convention	Framework Convention for the Protection of Minorities
General Comments	General Comments and General Recommendations [of the United Nations Human Rights Committee] Adopted by Human Rights Treaty Bodies
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDASA	Institute for Democracy in South Africa
Limburg Principles	Limburg Principles on the Implementation of the ICESCR
Maastricht Guidelines	Maastricht Guidelines on Violations of Economic, Social and Cultural Rights
SADTU	South African Democratic Teachers' Union
SASA	South African Schools Act
SAUVCA	South African Universities Vice-Chancellors' Association
UDHR	Universal Declaration on Human Rights

UNDP

UNGA Minorities Declaration

United Nations Development Programme

United Nations General Assembly Declaration
on the Rights of Persons Belonging to National
or Ethnic, Religious and Linguistic Minorities

1. INTRODUCTION

The post-apartheid South African Constitution guarantees the children of this country “the right to receive education in the official language or languages of their choice in public education institutions where that education is reasonably practicable” (The Constitution of the Republic of South Africa, Act 108 of 1996, Section 29 (2)) (*Juta’s Statutes* 2003). Yet ten years into the new dispensation nothing significant has been done to alter a situation in which the majority of children are obliged to access their basic education largely through the medium of a second or even a third language — English. In contravention of both the intentions and the specific provisions of numerous legislative measures and policy statements, Government has made no serious or effective attempt to promote the use of any language other than English in South African schools nor to encourage language practices most conducive to the cognitive development and academic success of millions of non-English speaking pupils.

To make matters worse, most of the children who enter the school system with very little knowledge of English and are expected to make an abrupt transition to that language as a medium of instruction after a totally inadequate three years are from impoverished households and communities still suffering the gravest effects of the discrimination and oppression of apartheid. They are often underprepared and seriously disadvantaged by their background circumstances when they enter the culturally strange and intimidating western-style education system. To heap on top of these disadvantages the burden of language practices in the classroom that hinder rather than facilitate their access to education is indefensible. When Macdonald asks, “ Are our children still swimming up the waterfall?” (Macdonald 2002: 111) she is not exaggerating. In these circumstances and if ineffective language teaching and inadequate use of the mother tongue as a medium of instruction can be shown to bar effective access to basic education of an acceptable standard, there are far more serious and far-reaching implications in terms of human rights than just the right to choice of language medium.

Linguistic research into medium of instruction has tended to be isolated from evaluative legal approaches to minority language rights, children's rights, education rights or other fundamental human rights. Insufficient attention has been given to the interrelationship between the various rights and the importance of local conditions and circumstances in any assessment of their relative weight and enforceability. Human rights cannot be seen out of context, and theory from various disciplines, such as politics, economics and linguistics may be invaluable in forming a fresh perspective on the right to mother tongue education and, indeed, to basic education in general.

The principle of non-discrimination in education is generally recognised, to be sure, as is the importance of ensuring access to and quality of education (Strydom 1992/93:139), but the dependence of these factors on the most appropriate medium of instruction within the education system does not merit much attention in the literature. The right to basic education tends to be seen as separate from any possible right to choice of medium of instruction and the latter often merely as a question of convenience or preference, at best a qualified right (Oosthuizen and Rossouw 2001: 666), dependent on feasibility, numbers and available finance (Motata and Lemmer 2002: 111). In fact, the case for regarding the right to mother tongue education as a strong positive right in many contexts and countries does not appear yet to have been made.

This study is theoretical in nature and constitutes an attempt to fill this gap by examining the findings and views of experts from various disciplines within the framework of current thinking on human rights issues. The development of a coherent framework within which to view the right to mother tongue education and government obligations in connection therewith might be of some value to policy makers in their efforts to plan improvements within the education system.

The synthesis and possibly, to a limited extent, the development of theory from the relevant disciplines will be undertaken by means of a survey of the relevant literature, an analysis of not only local but also international legislation and policy

documents and the weighing and balancing of conflicting evidence and contrasting viewpoints. Sources and contributions in each area will be discussed under the headings outlined in Chapter 3. First, however, I should like to provide an overview of the educational, political and economic context in which mother tongue education must be considered.

2. CONTEXT OF STUDY

As has been intimated, the strength and validity of any right to mother tongue education would derive primarily from its dependence on the right to education. Fons Coomans writes in his *“In Search of the Core Content of the Right to Education”*:

The right to education may be characterized as an ‘empowerment’ right. Such a right provides ‘the individual with control over the course of his or her life... Education is an empowerment right because of its links with other rights: the key role of social action in defence of rights... is an educated citizenry, able to spread its ideas and to organize in defence of its rights. Civil and political rights such as freedom of expression, or the right to political participation, obtain substance and meaning only when a person is educated. The same holds true for the right to take part in cultural life. For ethnic and linguistic minorities, the right to education is an essential means to preserve and strengthen their cultural identity. Education enhances social mobility and helps to facilitate escape from discrimination based on social status. Furthermore, education promotes the realisation of other social and economic rights such as the right to work, the right to food or the right to health: an educated person will have a greater chance of finding a job, will be better equipped to secure his or her own food supply and will be more aware of public health dangers. In general, the right to education promotes the fulfilment of the right to an adequate standard of living; it guarantees people access to the skills and knowledge needed for full membership in society. In short, the right to education contributes in an important way to the essence of promoting human rights, that is, living in dignity (Coomans 2002: 160–161).

I quote extensively from this interpretation so that it can clearly be seen how many other basic human rights may be engaged by any violation of the right to basic education. Moreover, dignity is the first of the three foundation values in terms of which the provisions of the Bill of Rights must be interpreted. The rights to equality and human dignity are the first two basic human rights bestowed, even before the

right to life, by the Bill. Language rights in general may not form part of the Bill of Rights (though they are part of the founding provisions of the Constitution and therefore of considerable importance), but the right to dignity, equality (and education) certainly are. Indeed, the values of equality and non-discrimination on the one hand, and dignity on the other, run like vivid threads not only through our constitution and constitutional judgements but through international human rights instruments (International Covenant on Civil and Political Rights [ICCPR], Article 2 and throughout; Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies [General Comments], Article 13. 4, 6 (b), 31-37, 41, and 59; Universal Declaration of Human Rights [UDHR], Preamble; African Charter on Human and Peoples' Rights [African Charter], Articles 2, 3 and 5; International Covenant on Economic, Social and Cultural Rights [ICESCR]).

Bearing in mind the section of the population most at risk and Government's commitment and obligation to redress past injustices, remove all discriminatory policies and practices and "[i]mprove the quality of life of all citizens," (Constitution of the Republic of South Africa, Preamble), the relatively meagre progress in eradicating inequalities and improving standards of education for the majority of less privileged pupils is very disappointing. And the lack of attention to the languages issue is inexplicable. In his otherwise impressive assessment of the challenges to be met in education (including the problem of quality) MaLlele PeTjé, CEO of the Gauteng Department of Education, does not mention language or medium of instruction even once (PeTjé 2002). A transcription of the address of Naledi Pandor, Minister of Education, at the opening of the debate on the education budget on 18 June also contains only one (very controversial) paragraph on language policy. One might conclude that she is ignorant of the influence the medium of instruction can have on pupils' academic progress but for the fact that she says that the home language can be "n kragtige middel vir die ontwikkeling van grondslagkonsepte vir toekomstige onderrig" (Pandor 2004). Nevertheless, and in spite of her exculpatory communication in *Die Burger* three days later, the impression created by her remarks is that a) she is perfectly satisfied with a minimal three years of mother tongue education and b) the only change she deems necessary is a strengthening of

English language skills. In spite of all policy instruments to the contrary it appears that current practices are coming to be universally regarded in government circles as official policy.

An ongoing determination to maintain the status quo in this regard is very difficult to reconcile with evidence that many government officials and policy makers have been aware for the past decade of the probable detrimental effects of too early a transition to a second or third language as medium of instruction. The drafters of the 1997 Norms and Standards for Language Policy in Public Schools, in terms of Section 6 (1) of the South African Schools Act, 84 of 1996 (Norms and Standards 1997) were not unaware of the large body of research over the past more than twenty years indicating that, especially in third world countries, extended or extensive mother tongue instruction with quality language tuition in both first language and any future medium of instruction are essential. They speak disapprovingly of “these discriminatory policies” (of the past) which “have affected either the access of the learners to the education system or their success within it” (Norms and Standards IV.A.2). They acknowledge cognisance of expert opinion “in favour of the cognitive benefits and cost-effectiveness of teaching through one medium (home language) and learning additional language(s) as subjects” and understand that “most learners benefit cognitively and emotionally from the type of structured bilingual education found in dual-medium ... programmes” (IV.A.5). They go on to announce that it is “the Department’s position that an additive approach to bilingualism is to be seen as the normal orientation of our language-in-education policy” (IV.A.5) and to express laudable intentions “to counter disadvantages resulting from different kinds of mismatches between home languages and languages of learning and teaching” (IV.C.5) and ensure that “[a]ll language subjects shall receive equitable time and resources allocation” (IV.D.3), and so on. *PanSALB’s Position on the Promotion of Multilingualism in South Africa: A Draft Discussion Document*, besides dwelling extensively on the desirability of promoting multilingualism in this country, also warns of the probable “link between the failure of Africa “to develop” and the implementation of Western orientated language policies, which ignore the multilingual reality of the continent” (PanSALB 1999:

6.4). This mistake is now being repeated in spite of warning, evidence and understanding.

The ostrich-like behaviour of Government luckily does not extend to the urgency and economic necessity for radical improvements in educational outcomes and quality of education. These factors are addressed by Ms Pandor in her speech on the 18 June (Pandor 2004) and emphasized by MaLele PeTjé (PeTjé 2002). The latter goes on to acknowledge that “[i]n order to create conditions for sustainable growth and development in South Africa and in a competitive international environment, a highly skilled well-educated work force is undeniably essential. Education is a key activity in South Africa’s economic and social development” (2002: 9). In fact, the backlog to be made up in terms of an under-educated, largely unskilled workforce is the first of many obstacles to economic progress with which the government must grapple. Other interdependent factors include:

1. Unemployment levels of (according to the United Nations Human Development [UNDP] Report on South Africa 2003) between 30% and 42% (United Nations 2004).
2. Rising levels of poverty and inequality. South Africa has one of the most unequal distributions of income in the world, and the number of people (of all ethnic groups and in all provinces) who are living in extreme poverty (as defined by the report) has risen from 9.5% to 10.5% of the population between 1995 and 2002 (2004: 6). According to the UNDP report, too, the Gini coefficient (which measures inequality in societies), where 0 is absolute equality and 1 is absolute inequality, has risen from 0.596 in 1995 to 0.635 in 2002 (2004: 6). Sechaba Pitso, in his *Impact of HIV/AIDS in the Workplace*, even claims that it has been estimated as high as 0.68, which is one of the highest Gini coefficients ever to be registered in the world (Pitso 2004: 5). The poverty gap, indicating the depth of poverty, has also increased since 1995 (United Nations Report 2004).

3. AIDS. Jansen and Taylor consider that there can be “little question that HIV/AIDS constitutes the most immediate and comprehensive threat to educational reform in Southern Africa”, contributing heavily to the high rates of educator attrition and to the decline in Grade 1 enrolments (Jansen and Taylor 2003: 13). It is also bound to have a massive negative impact on development in South Africa. Not only will the education system and the economy apparently have to cope with in the vicinity of two million orphans in 10 years time (De Klerk 2004), but economic growth will be hugely affected by increased expenses, reduced consumer spending and loss of human capital and productivity (Pitso 2004).
4. The predicted and badly needed increase in GDP of 6% has failed to materialize, partly due to the volatility of the global economic climate and partly due to the deficiencies in the Government’s microeconomic policies (Hosking 2003 (b)), (Parsons 2004).

In such an economic environment misguided economic policies, as Parsons points out, can do a great deal of harm (Parsons 2004: 7, 9). We need to get things right and preferably get them right the first time. The same goes for education. It is undeniable that present Government has dealt successfully with a number of the challenges that faced it (PeTjé 2004: 2 and 3) and achieved a number of notable successes (Jansen and Taylor 2003: 2). Some very promising initiatives have also been taken and mechanisms put in place to improve efficiency at site level and at administrative level (PeTjé 2004), but how successful they will be at improving the efficiency and effectiveness of the system remains to be seen. At this point, Jansen and Taylor conclude, after a thorough and extensive survey, that “there is every indication that basic education in South Africa remains one of the most inefficient and ineffective in Africa.” (Jansen and Taylor 2003: 4). We have had our first chance and not got enough of it right. With the AIDS crisis looming and unemployment escalating, time is running out. We can afford no more mistakes. Although many interrelated and interdependent factors are responsible for the lack of quality education in many schools and the frighteningly low levels of academic

achievement, one of the most telling involves ill-advised and most damaging language practices. Immediate pressure must be put on the authorities to rethink their stance and rectify the situation as speedily as possible.

There is a need, in the public interest, to publicize the facts concerning media of instruction and educational outcomes — facts derived from research in language and education and facts about language rights and language-in-education rights. Ideally, the issue should to be broached from many different angles and sources simultaneously, both in academic circles and in the media. From an educational point of view and on economic grounds, a convincing argument can be developed in favour of the use of the mother tongue as a medium of instruction, wherever feasible, for a minimum of six to nine years and for at least a substantial part of the curriculum. Combined with an understanding of the human rights issues involved, this may then be used to support and inform a sound legal perspective on the subject.

3. FRAMEWORK OF STUDY

This investigation falls naturally into five parts:

3.1 A study of educational research and practices in bi- and multilingual contexts

A clarification of key concepts and terminology in this field will be followed by an outline of the essential elements of the principal alternative systems available to educators in multilingual countries. A review will be made of the literature and research on the subject from the fields of linguistics and education. It is important that research results are assessed with reference to their specific contexts, since a policy which is effective in one set of socio-economic, political and ideological circumstances may be completely inappropriate or ineffective when imported into a country in which a completely different set of circumstances prevail. Within these limitations, however, I shall try to assess what sort of arrangement might be most beneficial in the types of community most common in South Africa. Of course, within a diverse and multilingual country such as this, one is certain to find a wide range of varying circumstances and community types and it is therefore probable that different policies and methods may suit different broad categories of situation type. Further tailoring to suit the needs of specific locales would be advantageous.

I shall then look briefly at other deficiencies in the South African education system to determine the main causal factors. Since these factors and language difficulties are likely to be interdependent, improving one factor without simultaneous attention to the others is likely to result in very modest gains at best. Reforms across the board, on the other hand, will be mutually supportive and might well result in substantial and speedy improvements in educational outcomes.

Some thoughts and a few tentative suggestions on the practicalities of implementation will follow, though I do not feel qualified to address this issue in any depth. The initial and follow-up costs of implementing alternative solutions are,

however, of vital importance, since the availability of adequate resources, human, material and financial, is crucial to an assessment of the feasibility of any plan or system.

Establishing the desirability and feasibility of such reform is only the first step. It will dispose of many objections to the proposed changes, but it will not motivate Government to take action. In the presence of a distinct “lack of political will” (Alexander 2001: 11) a clear uncompromising case must be made in terms of language rights and governmental obligations.

3.2 The case for claims in terms of human and language rights

This will form the largest section of my study, since what we lack most at present are cogent legal arguments that can be brought to bear publicly and, if necessary, in our courts to bring an end to the current tendency to ‘inertia’ (Alexander 2001: 11).

Any investigation from a legal perspective must first consider the question of whether rights or entitlements necessarily entail governmental obligations and, if they do, what sort of obligations. Is it possible that the state may have obligations beyond the legitimate specific claims of its citizens? Within what framework of distributive justice should a modern democratic state assess the rights and claims of its citizens?

Language or other rights claims can be made from the perspective of group or minority rights, or in terms of individual rights. Even within the context of individual rights certain groups, such as children, may be accorded special rights. The principles of justice and non-discrimination do not require that everybody be treated equally, merely that people in similar situations be treated similarly (De Waal, Currie and Erasmus 2001: 198). It may often be fair to treat people in unlike situations very differently. One of the characteristics of a civilized, humane society is how it treats its more vulnerable members — its children, its elderly and its underprivileged.

Rights can also be divided into:

a) Civil and Political Rights

b) Socio-economic and Cultural Rights

and within these groupings into positive and negative rights. Negative rights roughly correspond in the language arena with tolerance- (as opposed to promotion-) based rights, and, in terms of state obligations, with the obligation to respect. The obligations, where they exist, to protect, provide or fulfill usually involve positive action and often considerable expense. They have very different implications in any political arena, where a multitude of conflicting claims vie for precedence in the allocation of scarce resources. This is why criteria must be established to gauge their relative weight and urgency.

3.2.1 International human rights law

I shall examine these distinctions and the different categories of human and peoples' rights in international law, in an effort to determine the degree of support that can be mustered for language and, in particular, language-in-education rights in a context such as our own. If a strong case can be made for either through an examination of the various International Human Rights instruments, what does this entail in the way of governmental obligations?

Dunbar's masterly overview of minority language rights in both regional and international treaties, and his assessment of their weight and implications for individual states merit particular respect and attention in this regard.

I have also considered the views of numerous other writers on the various aspects of human rights law relevant to my topic, such as Sandra Liebenberg (2001), Managay Reddi (2002), Margaret Beukes (1995), Najma Moosa (2002) and Julia Sloth-Nielsen (1996), and have consulted Ozmanczyk's *Encyclopedia of the United Nations and International Agreements, 3rd edition, 2003* for many of the necessary international human rights instruments

Rights may be based on universal human rights or on rights specifically granted to citizens or groups by the constitution and/or legislation of a particular country.

Section 39 (1) of the South African Bill of Rights directs that:

“When interpreting the Bill of Rights, a court, tribunal or forum —

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

A careful examination of these two bodies of evidence is therefore indispensable in any evaluation of language or education rights or in any other assessment of the impact the withholding of these may have on other contingent and more fundamental human rights.

As a matter of fact, South Africa has ratified all but one of the major human rights treaties (Liebenberg 2001: 2), (South African Cyber Treaty Series). It has signed but not ratified the International Covenant on Economic, Social and Cultural Rights [ICESCR] (Liebenberg 2001: 2). It may be intriguing and even enlightening to speculate on the reasons for this surprising omission, but even being signatory to such a treaty incurs “an international obligation not to act contrary to the object and spirit of the treaty” (Human Rights Brief 4004). Or, in Sandra Liebenberg’s words, a signatory “is bound to refrain from acts that would defeat the object and purpose of the ICESCR” (Liebenberg 2001: 2). This treaty covers education and many other interrelated socio-economic rights. Furthermore the satisfaction or otherwise of education rights influences, as we shall see, the degree to which other basic human rights are attainable. South Africa has ratified :

- 1) The International Covenant on Civil and Political Rights (ICCPR)
- 2) The African Charter on Human and Peoples Rights (African Charter)
- 3) The Convention on the Rights of the Child (CRC)
- 4) The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

5) International Convention on the Elimination of All Forms of Racial Discrimination.

Consequently, South Africa is obliged both directly and indirectly (in terms of her own constitution) to observe the provisions of the instruments of international human rights agreements unless she has extremely good reason to do otherwise.

3.2.2 South African law

Finally, from a legal perspective, I shall attempt to determine what non-English speaking children, particularly those from disadvantaged backgrounds, are entitled to in terms of our Constitution, legislation and policy documents.

All unrepealed South African Acts of Parliament passed before the end of 2003 are available, inclusive of amendments, in *Juta's Statutes of South Africa, 2003-4*.

Legal opinion will be examined respecting the various rights and categories of rights and especially regarding recent constitutional developments. How the Constitutional Court has interpreted the Bill of Rights and dealt with other claims for the provision of basic socio-economic rights is very relevant in predicting how they might deal with any question which involves, even indirectly, the right to effective access to quality basic education.

The only important constitutional case concerning language-in-education (In re: The School Education Bill (Gauteng) 1996 (4) BCLR (CC)) was decided with reference to the fundamental principles of equality and non-discrimination enshrined in the Bill of Rights. It was, however, decided very differently than would be the case could it be shown in a different context that the medium of instruction constituted a substantial barrier to access to education. I shall look at the extent to which the above principles and the incontrovertible right to human dignity have guided the Constitutional Court in its judgements in recent years.

The right to freedom, also dear to the hearts of South Africans, may also be engaged and extended by the application of the liberal principles of the right to self-determination and self-realization. These may be shown to be largely dependent on the effective provision of basic education of an acceptable standard.

3.3 Economic growth and the allocation of scarce resources

Finally, even when one has established the validity of certain rights and decided on criteria to determine their relative weight, they have to be seen in the fiscal and economic context in which one is operating. They must be seen in the context of competing claims and scarce resources. The same criteria must be applied to other needs and rights in order to assess their relative importance, and must also take into account the immediate and long-term economic effects of satisfying one set of demands rather than another. The promotion of economic growth within a country impacts on the welfare of all its citizens and on that of future generations. I take it as axiomatic that the maximizing of aggregate welfare is one of Government's primary mandates, but not necessarily at the cost of serious infringement of individual rights. Similarly, the overgenerous immediate gratification of some rights might severely limit the financial resources Government has available to direct into more productive channels. Also, welfare cannot always be computed entirely in terms of material benefits. The views of Grin (1999) and Grin and Vaillancourt (2000) have been of particular value in clarifying these highly complex questions. They point out, for example, that it is often easier to justify minority language policies "not because [they are] (distributively) *fair*, but because [they are] (allocatively) *efficient*" (Grin and Vaillancourt 2000: 108).

But specifically at issue here are language-in-education rights. Would the allocation of additional resources to the implementation of extensive mother tongue instruction in our schools impact negatively in the economic realm? Would it benefit or impoverish the lives of future generations? And are there any additional hurdles to be overcome before such reforms could be implemented? Is there, in fact, a

potential conflict between the goal of increasing aggregate welfare and undertaking a fairly radical reform of our school language policies?

3.4 Future developments

In this chapter I consider briefly the possibility that at some time in the future an applicant may come forward wishing to take legal action to secure Government support for mother tongue education. Who would such an applicant likely to be and who would have sufficient standing to bring a constitutional matter of this kind before the courts? Should such an action be successful, or should the Government take the initiative and institute language reforms within the education system, what measures would be most likely to succeed? I provide here a brief overview of the probable requirements for the effective implementation of extended mother tongue or bilingual education in South African schools.

3.5 Conclusion

A return to an economic perspective highlights the cost benefit approach to mother tongue education and emphasises the gravity of the issue in terms of South Africa's future development.

4. EDUCATION IN BI- AND MULTILINGUAL CONTEXTS

Although South Africa is a multilingual country, the most we can hope for initially is a system involving English (or Afrikaans where it is already firmly entrenched and widely spoken) and the primary African language of the area (either the immediate locality or the region, whichever seems appropriate). When I discuss models of bilingual education it is therefore not because I am unaware that there will be many children in classrooms who, in fact, speak a third language at home. Neither do I despair of expanding the system in the future to accommodate the language needs of speakers of less widely spoken languages or smaller language groups within areas where a different language predominates. Bilingual systems can be expanded or adapted into multilingual systems.

Models:

- The Immersion Model, which may involve partial or complete, early or delayed immersion, has only ever been successful in first world countries with students from upper socio-economic, dominant language speaking communities. It involves teaching through the medium of a second (or third) language from the beginning or very early on in childrens' school careers. I shall examine the Canadian immersion experiments to justify my assertion that the adoption of this model would be fatal in the South African context. In third world or developing countries this model is usually adopted when priority is given to the acquisition of the language of wider communication. It is almost inevitably imposed to the detriment of the mother tongue, cognitive development and academic achievement, and is appropriately termed 'submersion'.
- The early or late Transitional Model has been attempted in a variety of different contexts with differing degrees of success. Tuition is initially through the mother tongue with the transition to the language of wider communication occurring after a set period of time. Where the transition is gradual and takes place at the end of the primary or in the early secondary phase of schooling, and

where both languages are taught expertly as subjects throughout, it can be very effective. The student has time to develop the higher order thinking skills so necessary to academic achievement in the only language eminently suitable for the purpose, his/her mother tongue, while at the same time acquiring CALP (Cognitive Academic Language Proficiency) in a second language. The latter takes five to seven years to develop in ideal circumstances, and as many as nine years under the adverse conditions that so often prevail in developing countries (Cummins 1998: 2).

- Bilingual education is the third option. The term ‘bilingual education’ can be used to describe any system in which more than one language is employed to any degree. It could, at a stretch, be used in connection with ‘submersive’ systems where the home language is the language of instruction for an initial three or four years only (early transition) and thereafter only briefly and intermittently for purposes of elucidation. It is more appropriately employed to describe systems where both languages are used extensively and concurrently as media of instruction, and preferable to the term ‘dual medium’ as this can be used of arrangements which divide classes into two groups with different media of instruction. Bilingual education systems can be usefully combined with the late transition model in that during the transition period some subjects may continue to be taught in the mother tongue while the second language is employed in other content areas. The main advantage of bilingual education proper is that it combines extended periods of exposure to the second language with natural meaningful and purposeful language learning. Students are obliged to negotiate meaning and language is acquired almost incidentally, while attention is focused on the real and important task at hand. At the same time the first language continues to be used and developed. This is important from a point of view of the child’s conceptual development, but also because the value and instrumentality of the home language is recognized and affirmed. All models function best if accompanied by continued good quality instruction in both languages.

As we shall see, various combinations and permutations of these models have been attempted throughout the world with a number of educational, political and ideological goals in mind. First, however, I should like to address the question of why education through the medium of the mother tongue for an extended period of time is so crucial.

4.1 The importance of the maintenance and development of the mother tongue

Many multilingual countries all over the world are plagued by the poor results, high dropout rates and general academic underachievement of second language students (Dutcher 1995). The work of Jim Cummins (1998) and others, such as Macdonald, Ramirez and Snow et al (Heugh 2002 (a): 179), over the last twenty odd years, have shown conclusively that the neglect of the mother tongue is one of the primary causes. Cummins mentions that there are now well over 100 empirical studies reporting “a positive association between additive bilingualism [involving maintenance and continued development of the mother tongue] and student’s linguistic, cognitive, or academic growth” (Cummins 1998: 3). Literacy and basic cognitive skills are best acquired through the medium of the mother tongue and if this process is disrupted at an early stage, while children “are still learning the mechanics of their native language” (Thompson-Green (n.d.)), they may never be adequately developed. What is often not grasped is that these skills transfer relatively easily to a second language, so that, in fact, proficiency in the second language is in no way prejudiced by the continued development of or greater allocation of time to the first language. Cummins goes so far as to insist that the ‘time on task’ theory is a fallacy, that there is “no relationship between the development of students’ [in this case] English proficiency and the amount of time spent through English in the program.” (Cummins 1998: 8). Certainly it has been shown in a number of contexts and programs that the second language skills of children in bilingual programs equal or exceed those of children taught through a second language, in spite of the amount of time spent in that language. (Cummins, 1998, 1981).

Cummins postulates a 'common underlying language proficiency'. Put another way, language systems have a lot in common and thoroughly grasping how one system functions facilitates an understanding of a second. Just as there is a transfer of linguistic knowledge (largely subconscious), there is a transfer of conceptual knowledge developed in the mother tongue. The mastering of complex, abstract or academic concepts in an inadequately known second language is always problematic, but, once mastered in the mother tongue, both concepts and vital cognitive skills transfer readily and are available for use in intellectually demanding contexts.

Academic contexts are far more demanding than the more concrete, contextually supported circumstances in which ordinary everyday conversations take place, and the degree and type of skill required are very different. Cummins distinguishes between Basic Interpersonal Communication Skills (BICS) and Cognitive Academic Language Proficiency (CALP). Many studies have found that, even with top quality language teachers (often not available in developing countries), Cummins minimum of five years for the acquisition of CALP (Cummins 1998: 2) may often be extended to as much as ten years (Cummins 1998: 17). The socio-economic backgrounds or particular circumstances of students can also be influential. Children from non-western backgrounds or essentially oral traditions, for example, frequently have difficulty acquiring literacy skills in an uncongenial, culturally strange environment. Extreme poverty often involves deprivation in the form of a cognitively unstimulating, print-impooverished environment and cultural deprivation due to a lack of adult-mediated interaction (Feuerstein 1979 and 1980). Such underprepared learners frequently require specially trained teachers and appropriate teaching methods and take much longer to acquire CALP. The cognitive deficits incurred by a premature switch in language of instruction can be fatal to any chance of their closing the gap between themselves and their more privileged compatriots. Many of our township and rural schools are filled with children who fit this profile, and their only hope of flourishing is through good quality tuition in their mother tongue for as long as possible. As James Crawford says in the American context: "when minority

students fail, it is more likely to be from too little instruction in their native language than too little English” (Thompson-Green (n.d.)).

The underachievement of minorities taught through a language other than their home language is a common phenomenon. Their minority status itself seems to exacerbate the more direct disadvantages of instruction through a second language, since it is often accompanied by lower socio-economic levels, psychological disadvantages and cultural incompatibilities which impede progress within the education system. In South Africa the learners most frequently taught in a second language (and, partly in consequence, radically underachieving) are usually black. From a racial and political point of view they cannot strictly speaking be called a minority. From a linguistic point of view, however, they constitute a collection of minorities which are distinguished from other South African minorities by the fact that, except for a small political elite possessed of the cultural capital of outstanding English skills, they still occupy the non-dominant, disadvantaged position in society typical of minorities: they have been “singled out ... for differential and unequal treatment and ... therefore regard themselves as objects of collective discrimination” (Wirth in Yinger, in Mothata and Lemmer 2002: 1). There is a lack of consensus over what constitutes a minority (Mothata and Lemmer 2002: 106), but, wherever minorities occupy a non-dominant, lower socio-economic position in society, such as the Navajo Indians at Rock Point or the Spanish in the USA, the problems of learning through a second language will be intensified, especially where that language carries the power and prestige that English wields. The vast majority of our African language speaking students are thus handicapped by the most telling disadvantages characteristic of minority status.

4.1.1 Contexts of reform worldwide

The situation is further worsened where cultural differences are extreme or poverty widespread. Yet reform can be undertaken with some hope of success, even countrywide reform, such as that currently in progress in Bolivia, provided it is accompanied by simultaneous and equally strenuous attempts to upgrade and

revolutionize teaching practices, teacher training, administration, provision of materials, etc. It is, however, an enormous undertaking. Nadine Dutcher (1995) and Cenoz and Genesee (1998) together provide a comprehensive overview of attempts at educational reform in varying contexts throughout the world, and in many of these the importance of the role language plays can clearly be seen.

In the Phillipines reforms were less than successful partly because the language being promoted educationally, Pillipino (based on Tagalog), was not, in fact, the first language of children in many areas, but, significantly, most success was achieved where there was a coincidence of three factors: Pillipino (or Tagalog) was the first language, socio-economic levels were higher and quality of education was superior. Reforms in Haiti, where poverty and literacy levels were abysmal, also met with indifferent success, partly due to inadequate attention to quality issues but also to popular resistance to the adoption of Creole as a language of teaching and learning.

The most notable successes in developing countries are to be found in Nigeria and Guatemala. Both are very poor countries and the Ife-Ife and PRONEBI programs were initiated on a limited scale and later extended, but in both cases considerable care was taken to ensure quality, especially quality of teaching. In Guatemala teacher training was prioritized with special attention to bilingual methodology. The cultivation of positive attitudes on the part of parents helped, and the status of the local language improved substantially in a climate where Spanish had been as psychologically and politically dominant as English is in South Africa. In both countries, though, one of the most important deciding factors was the fact that the mother tongue was retained as medium of instruction through to Grade 6. The researchers in Nigeria may be considered to have proved all three of their hypotheses: that their experimental students would not be disadvantaged in the acquisition of English or worse off academically and that they would be “better adjusted, more relaxed, enterprising and resourceful.” (Dutcher 1995: 12) From Grade 4 onwards the experimental class outperformed the control classes in English and in most academic areas (1995: 13). Moreover, on sociometric tests they were

found to score higher in terms of social acceptability and leadership qualities. Those who went on to secondary school also experienced higher achievement levels (1995 13-14). Reform is feasible but depends on many things, including parental, community and political support. And therein lies the rub. In South Africa energetic political and parental support must be enlisted, and the funds required of government for the purpose.

Funding is often difficult to obtain in South Africa, with the many different demands on the government purse, but in the United States this should not be a problem. Yet there, too, the tendency is still to mainstream Spanish speaking students in America too early with inadequate support for their home language. Kate Thompson-Green gives a very convincing, indeed touching, account of the detrimental effects of neglecting the first language in favour of supposed promotion of facility in English. She points out, for example, that “The ability to speak a language does not enable students to write or fully understand the language” (Thompson-Green (n.d.): 2), and that failure to fully develop literacy skills in the mother tongue “results in students that are not only illiterate in English, but in their native language as well.” ((n.d.): 3). We have the same problem in South Africa. Esther de Jong (2002), on the other hand, gives a detailed and impressive account of the successful implementation of a Two-Way Bilingual Education (TWBE) Program in Framingham, Massachusetts. The emphasis in these programmes is on “the importance of both strong native language literacy skills for learning a second language and high levels of proficiency in two languages in additive bilingual settings” (2002: 2). The first language is maintained and developed in a psychologically and culturally propitious environment utilizing theories that view language as a socio-cultural phenomenon. In the Framingham setting this approach is supported by attention to other important facets, such as the nurturing of learners’ cultural identity, the promotion of interaction between majority and minority language speakers, the gradual phasing in of the second language for minority students alongside their mother tongue, the integration of language and content subjects and the provision of competent, largely bilingual staff. The programme was able to meet its goals in terms of academic achievement and language proficiency, with Spanish learners approaching the

average grade level norm in English (2002: 11) and surpassing it in Mathematics (2002: 10). It behoves us to take cognisance of this notable achievement in view of the frighteningly low levels of performance in maths and science in this country. In view of the success of this two-way bilingual model, it is worth mentioning that in Guatemala the decision was taken to change from a transitional to a bilingual and bicultural model.

But transitional models can be successful, too, provided they are late exit versions and provided they involve a progressive transition (Thompson-Green (n.d.): 5) to the second language as medium of instruction. The Ramirez study (Dutcher 1995: 32) of US bilingual programmes found that students in late exit transitional programs who had received mother tongue instruction through to grade five or six did considerably better than students in early exit or structured English programs (brief explanatory periods in the first language). Moreover, results indicated that the gap widened and the advantages became more evident in higher grades. In fact, due probably to the better acquisition of higher thinking skills and superior cognitive development which it has become increasingly clear can accompany high levels of bilingualism, they learned “mathematics, English language and English reading skills as fast or faster than the normal population used in this study”. In effect, they appeared “to be gaining on students in the general population” (1995: 33). The intellectual advantages bilinguals may have over their monolingual fellows is a very valid reason in itself for the effective implementation of the stated policy of promoting multilingualism in South Africa. Ramirez also concluded that even in these relatively advantageous conditions learning a second language takes six or more years.

There is much more evidence, for example from Rock Point Community School in the USA (Dutcher 1995: 28-32), to support the maintenance and extensive use of the mother tongue in education whether it be via the late transition model or some variation on a bilingual theme. I think it has been shown conclusively to the satisfaction of most linguists that immersion simply does not work in developing countries or with groups who show any of the characteristics of minorities.

It has, however, worked extremely well in the Canadian setting. All variations on this model, the partial, delayed and double immersion programs included, have resulted in “high levels of functional proficiency in the second language” (Genesee 1987: 47) without any adverse effects on academic achievement or the acquisition of English language skills. Early immersion, in fact, proved preferable as it resulted in an increased likelihood that the student would achieve native-like proficiency in French, especially in production (1987: 61). This is totally contrary to what one would expect from a cursory overview of the large collection of data from the developing world and minority situations. Not only are English students in Canadian immersion programs more successful at learning French than ordinary French second language students, but “*in general* students in bilingual programs outperform students in non-bilingual programs on measures of language and academic development administered in English or in the native language” (Willig 1985 in Genesee 1987: 196). And the Canadian programs are examples of additive bilingualism, as Dutcher is careful to point out. Although schooling usually begins in the second language, and sometimes as early as Kindergarten, the first language is “added subsequently, so that by grade four about 60% of the instruction is in the first language” (Dutcher 1995: 35). They are not submersive, since unusually there is no detrimental effect on the development of the mother tongue. There may be an initial lag in ‘literacy based language skills’ in early immersion programs, but this has almost disappeared by grade three (Genesee 1987: 34), and even in “super-immersion” programs there are no lasting ill-effects. Interestingly, the double immersion in French and Hebrew in Montreal produced exactly the same findings: no adverse effects on English language achievement or academic performance and the early version preferable to the delayed.

Does this negate the findings of all the research emphasizing the importance of thorough early (and continued) mother tongue education for academic success, cognitive development and even second language learning? Genesee put the success down largely to quality of instruction and the superiority of a “student-centered, activity based pedagogical approach” (1998: 252). But these advantages have

occasionally been achieved in minority immersion (or submersion) contexts. While quality of education in general, superior methodology and highly trained teachers (none of which are abundantly available in South Africa) are undoubtedly vital, there is more to it than that. These students are uniquely situated in comparison with most students in South Africa. English Canadian children are part of a high socio-economic, dominant language speaking community and enjoy “linguistic security” (1998: 253) and social and psychological advantages entirely lacking in most minority contexts, let alone in, for example, our rural and township areas. The incalculable effects of generations of racial discrimination, prejudice and poverty render circumstances here very different from those in Canada. In comfortable middle-class Canadian homes children receive support for their first language and cognitive development from a print-rich, mentally stimulating environment in which they are read stories, hear reasoned logical arguments and intellectually challenging discussions, play numeracy-based games and generally experience an ideal preparation for the easy, natural acquisition of academic and language skills. And their first language continues to receive support throughout their schooling, which compensates quite adequately for the reduced use of the mother tongue for instruction purposes.

In contrast, African children often come from cultural backgrounds incompatible with Western type schooling and live in underprivileged, print-impooverished homes. They lack the necessary first language support, and require mother tongue education, cognitively enriched professional language instruction (preferably content-based) and enlightened teaching methodology to make up the deficiencies. In other words, our children need mother tongue education together with enriched input in content and language areas from well trained teachers proficient in the languages they are teaching or which they are using as media of instruction. This might compensate to some extent for the handicap of backgrounds that are not conducive to academic achievement or the acquisition of literacy skills.

4.2 The cognitive benefits of bilingualism

Apart from the direct academic advantages of mother tongue education, high standards of bilingualism or multilingualism, attainable through expert tuition and enlightened teaching methodologies, are worth pursuing for other reasons. Language skills constitute valuable economic assets in a country with serious skills shortages. Moreover, the development of such skills appears often to involve cognitive advantages that enhance the capacity to learn further skills and grapple with complex conceptual and academic material. According to Baker (2001: 167) the Cummins' Thresholds Theory predicts possible "negative or detrimental cognitive effects" below the first threshold where there is a low level of competence in both languages. Once age-appropriate competence is reached in one of the languages these effects disappear, and when high levels of proficiency are achieved in both languages cognitive advantages may be expected.

I am not convinced that the evidence is conclusive in all respects. In the first place there are too many variables for which it is impossible to be sure one has effectively allowed. Secondly, most of the studies that have been done have usually involved comparisons between monolinguals and balanced bilinguals (Baker 2001:158). Rafael Diaz's study (1985) is still of particular importance, since it involved a longitudinal comparison between two groups of bilingual Spanish children, one in the early stages of acquiring English and the other far more advanced. This first noteworthy discovery Diaz made was that the difference in level of bilingualism of the two groups corresponded with distinct differences in socio-economic situation and level of parental employment. This underlines the importance of matching groups with regard to socio-economic status, academic ability etc, as most more recent studies have attempted to do. But, as Diaz emphasizes, "bilingual and monolingual children differ in a large number of variables" and, "[i]n the real world, whether one ends up being bilingual or monolingual "is determined by sociolinguistic facts that are, as would be true of most sociolinguistic facts, related to a wide range of social variables"" (1985: 1377). For example, socio-economic level is usually determined by referring to paternal characteristics, whereas, in assessing

cultural, attitudinal and intellectual influence, the attributes of the mother are probably more relevant. Many differences in background circumstances and inherent abilities may be instrumental in determining both the level of bilingualism attained and the speed and characteristics of cognitive development and academic progress. These factors are very important in establishing a causal relationship. In other words, both bilingualism and any advantages bilinguals may exhibit in terms of superior general intelligence or other cognitive skills may be the results of factors whose effects are very difficult to quantify. Causality has been a very thorny problem for linguists. Which came first — the chicken or the egg? Are more intelligent people, or people with particular mental attributes, more likely to develop high levels of bilingualism or do bilinguals acquire the capabilities as a result of their bilingualism?

Significantly, Diaz found that “English ability at time one was a far better prediction of cognitive performance at time two than cognitive ability at time one was of second-language variability at time two” (1985: 1384). Over a hundred studies over the past thirty years “have reported a positive association between additive bilingualism and students’ linguistic, cognitive or academic growth” (Cummins 1998: 3). It seems probable, however, that there is a two way process, that “language learning and cognitive development work hand in hand: one both promotes and stimulates the other.” (Baker 2001: 159). Yet, Diaz’s findings present the most telling evidence thus far that “if there is a particular direction in the relationship, it is more likely to be bilingualism positively affecting ‘intelligence’ rather than ‘intelligence’ affecting bilingualism.” (2001: 141).

In any event, it is fairly widely accepted today that substantial benefits do accrue in the course of learning a second language well. Diaz goes on to attempt to discover at what stage in the development of bilingualism these benefits manifest themselves. Contrary to expectation (which is always comforting) he discovered, via “a battery of cognitive tests measuring verbal and spatial abilities” (1985: 1378) administered to both groups of subjects separately at two points in time, that “[d]egree of bilingualism is a strong predictor of cognitive variability for children of relatively

low second-language proficiency” (1985: 1384). The low English proficiency group showed “no negative consequences as a result of an early bilingual experience”, indeed appeared to be “catching up” (1985: 1387) to the advanced group in cognitive development. Diaz speculates that “participation in an additive bilingual education experience might compensate for the unfortunate cognitive deficits that often accompany poor socio-economic conditions” (1985: 1387). This is a very significant possibility in the South African context.

Though this is only one study, Diaz’s explicit challenge to Cummins’ Threshold Theory (1985: 1386), which maintains that cognitive benefits accrue predominantly and increasingly as age-appropriate levels of proficiency in the second language are approached, still requires further investigation. His findings do not at all conflict with the possibility that the maximum degree of advantage is experienced in the latter stages, especially if benefits are not temporary but permanent and cumulative. It is perfectly possible that positive effects vary according to the varying cognitive demands of different stages in the acquisition of the new language. This is all very speculative, as are many of the explanations of precisely why bilinguals tend to experience cognitive advantages and perform better on a range of intelligence tests encompassing both verbal and non-verbal abilities. Nevertheless, there may well be general cognitive abilities, like “selective attention”, that “transfer across spatial cognitive and linguistic domains” (Baker 2001: 155) and help explain “bilinguals’ advantages on divergent thinking, creative thinking, metalinguistic awareness, communicative sensitivity, Piagetian tests on the Embedded Figures Test”, as Bialyslok claims (2001: 156). It seems feasible, for example, that a greater capacity to comprehend symbolic representation or think analytically, both part of what is commonly regarded as general intelligence, may assist in language learning and be enhanced thereby. Baker concludes that “[a]n overview would suggest that general academic ability can be substantially related to the acquisition of a second language in a formal classroom setting” (2001: 122). Both probably depend on the type of common cognitive abilities that make up general intelligence.

All this adds up to a strong argument for a policy that favours the development and use of languages within our education system. Grounded on a firm basis of mother tongue education, such a policy should promote communicative goals, increase the marketable skills of individuals and enhance their ability to function successfully in formal education environments and beyond.

4.3 The South African situation

4.3.1 Historical background

Since the nineteenth century the language question has been part of the struggle between the English and the Afrikaner people for influence and political power. British imperialism and the oppressive measures (for example the Education Act of 1865) used against the Afrikaans community were instrumental in hardening attitudes and strengthening the “powerful Afrikaans identity which would provide the emotional drive for the acquisition of political and economic power” (Hartshorne 1992:191). The Afrikaans language is still of tremendous importance as a symbol of Afrikaner culture and separate group identity.

At the time of Union in 1910 English and Afrikaans were both made official languages on a footing of equality, but English had already achieved a position of considerable preeminence in educational circles. Black education was not a controversial issue at this stage or ever of much importance to either of the protagonists, but here, too, “English was firmly entrenched as the dominant language in black schooling”. (1992: 190). The nineteenth century missionary schools, though they insisted on the mother tongue in the early primary years, had established a tradition of English medium education. This was not so much a part of the drive to anglicize, but rather of a mission to ‘civilize’ and ‘evangelize’ the indigenous peoples of Africa. (1992: 189). But Smit traces the current attitude of the “majority of all population groups in South Africa” towards English as “the language of education, science and economic improvement” back to impressions created by these early missionary efforts. (Smit 1995: 72). Up until 1955, English

continued to be the medium of instruction in almost all black schools after the first two to six years (depending on province). The vernacular languages were, however, taught as a subject, often throughout secondary school, as well as in teacher training colleges. (Hartshorne 1992: 193).

With the Nationalist accession to power in 1948 and the adoption of the principles of Christian National education (trusteeship, no equality, and segregation) ominous changes were in store. The recommendations of the Eiselen Commission were imposed by the Bantu Education Act of 1953. Starting in 1965, mother-tongue instruction was to be extended to the first eight years. In fact, the language policy after 1955 went even further than the Commission's report had prescribed. Both English and Afrikaans were to be introduced as compulsory subjects from the first year of schooling, taught as subjects in secondary school and used as media when the transfer from mother tongue occurred (1992: 198). The Commission had recommended that one of the official languages (the one most prominent in the neighbourhood of the school) be introduced in the second year of schooling, with the other following not later than the fourth year, and only one was to be compulsory in secondary school. Afrikaans was imposed on teachers and training colleges too, in a blatant attempt to reduce the influence of English and substitute Afrikaans as the dominant language in black education. And these measures were to be strictly enforced with "no compromises" (1992: 198). The "new spirit of doctrinaire inflexibility" (1992: 198) and what was seen as a deliberate attempt to deprive them of the language of aspiration and opportunity could not fail to inspire antagonism and resentment in the African population. In fact, of course, extended mother tongue education and the concomitant programme to develop African languages could only be advantageous from an educational point of view, but this was not realized. Only the arrogance of the imposition and the apparent maliciousness of the motivation behind it were registered. Hereafter, unceasing attempts were made to get the Government to reduce the number of years of mother tongue education. In 1973 expectations were raised that, in some areas at least, where English had a strong presence, schools might be able to choose only one official language as medium of instruction, but the Minister of Bantu Education decided to remove the

possibility of an option when it became obvious that too many schools would choose English. In May 1972 it was agreed that mother tongue instruction could be limited to the first six years of schooling, but, since this meant that, with the reduction of years spent in junior school, pupils would be writing their public-primary school leaving examination at the end of standard five in English and Afrikaans, after only one year's experience of the dual medium, this did not mollify public opinion. In June 1976 the situation culminated in the Soweto riots; thereafter it was only a matter of time before the government was forced to capitulate. In 1983 they reluctantly agreed that education through the vernacular need not proceed beyond the end of standard two (i.e. for the first four years), to be replaced by only one of the official languages in a gradual transition programme. But the stigma attached to mother tongue education remains.

The ill-will and distrust that originated during these years have not dissipated. Kamwangamalu argues that “mother-tongue education will not appeal to black communities because of the stigma with which it was associated during the apartheid era” when “it was synonymous with inferior education”, “perceived as a lure to self destruction and as a trap by the apartheid Government to prevent the oppressed majority from achieving higher education”. He maintains that this stigma has lingered on and “hindered efforts to promote African languages as languages of learning and teaching” (Kamwangamalu 2002: 6) The preference for English over Afrikaans and over African languages remains (2002: 6)), together with a simultaneous, almost contradictory, emphasis on language rights and freedoms, and is directly attributable to these years of conflict. Kamwangamalu talks of the need to advance the status of and change the “negative perceptions that the different communities have about [African] languages” (2002: 7). In contrast, English is perceived as the language of power and prestige, “of erudition and success” (2000: 7); it symbolizes freedom from oppression, progress and modernity, equality of opportunity and economic advantage.

Our constitution grants us the right to an education (Constitution of the Republic of South Africa, Act 108 of 1996, Section 29) (Juta's Statutes 2003), to a choice of

language through which to access that education (Section 29 (2)) and to equality of status for our various home languages (Section 6). And these rights are important, since they are part of the democratic ideal so long anticipated and of a future secure from oppression. Yet the exercising of these rights does not seem as important to many as the opportunity to participate in the global economy, seize career opportunities for which English proficiency is necessary and claim the rewards which this sophisticated international language offers. Understandably, having been barred for so long from so many avenues of achievement, blacks place command of English, the language of access and success, above the need to promote and develop their own languages. After years of struggle and deprivation they cannot afford to put a sentimental attachment to language and culture above economic advancement and the “tangible material gains” (Kamwangamalo 2000: 10) which English provides. For historical reasons and because the “symbolical domination” (Bourdieu 1991: 51) of English is so overwhelming, competence in the language has become a matter of utmost priority. This is why pressure on the Government to “elevate the status and advance the use” (Constitution of the Republic of South Africa, Section 6 (2)) of other official languages (outside and within the education system) is so conspicuously absent from the most obvious source. And this is why there are huge gaps between what the constitution promises and what the population demands or the Government is prepared to provide.

The ANC’s own policy officially supports additional bi- or multilingualism (Heugh 2002: 458), (Murray 2002: 436), yet the incentive to make the considerable efforts necessary to implement such a policy is lacking. Pool mentions the frequent disposition of political elites to “manipulate the language regime to promote their political purposes” (1990: 246). Many ANC members spent years in English speaking countries. They bear the ‘distinction’ (Bourdieu 1991: 60) of being highly proficient in English and may also still regard it as the language of liberation. It is probably closer to their natural inclination to let English have its way in South Africa. Besides, the elite are always best served by the maintenance of the status quo. Alexander, too, refers to “the fact that proficiency in the languages of power, however acquired, comes to represent cultural capital for the select group of

individuals who break through the constraints of poverty and lack of opportunity (Alexander 2001: 11). The value of any “given linguistic capital” (Bourdieu 1991: 57), in this case English proficiency, is maintained by the scarcity of the resource. The implementation of a really successful language-in-education policy and an effective policy for the promotion of multilingualism, on the other hand, would result in an increase in the English skills of a large proportion of the population, a general improvement in academic standards and added status for other languages. It would, however, simultaneously devalue English proficiency as ‘linguistic capital’ by reducing both its scarcity and the edge of distinction it confers. Alexander acquits “the post-colonial elites” of Africa of “deliberately using their knowledge of the dominant European languages in order to oppress and exploit their peoples”, but points out that it is “convenient for the new governing groups, i.e. the political class, simply to perpetuate the inherited colonial language”. He considers that this “represents one of the main sources of what we call the ‘lack of political will’ to implement the progressive and even radical policies that adorn the constitutions and statute books of many independent African states”(Alexander 2001:11).

Certainly, it cannot be denied that English is being deliberately and systematically advanced by government practices. While it makes sense in terms of costs and efficiency for state organs to function predominantly in one language, there is no reason why that language should be used almost exclusively on public occasions. The status of African languages could be substantially advanced at very little cost by their use in a number of spheres, such as health and education, and by politicians on prestigious occasions. The essential thing is to create a market for these languages by increasing their value and encouraging their use in all appropriate domains. What we should not do is precisely what the new South African Languages contemplates, i.e. pour money into government departments for the purpose of having every document and every oral communication available in six languages, not to mention the proliferation of probably useless and certainly expensive language units to police this extravaganza (South African Languages Bill of 24 April 2003: Sections 5, 6, 7). We have very limited resources. With a large proportion of

our population under-educated and under-productive, we cannot afford not to prioritize education and language in education.

We also can unfortunately not afford, in the interests of a diverse and multilingual future, to initiate expensive measures to promote the smaller, less viable indigenous languages. We can, however, provide a permissive environment and hopefully, at some time in the future, mother tongue education. But even the larger languages may one day be threatened if the inexorable advance of English is permitted to continue. Skutnabb-Kangas says: "Schools can kill in one generation languages which, in situations without western type of formal schooling, were maintained for hundreds or even thousands of years or more" (2002: 9). We are aware of the process: the first generation of bilinguals taught through the medium of a dominant, high-status, often imported language bring their children up with the new language as their mother tongue, under the mistaken impression that they are advancing their interests. "[A] language is threatened if it has few users and a weak political status, and, especially, if children are no longer learning it" (2002: 3). Two of these conditions are already met. The provision of mother tongue education, an unavoidable cost if we are to improve our results in this department, would do much to halt the downward spiral of decreasing status and diminished use of African languages.

The situation is, however, often not clearly understood by those closely concerned in the matter. Skutnabb-Kangas says: "parents do not have enough reliable information about the long term consequences of the various choices." (2002: 9). The direct and wide dissemination of information by researchers, educationalists and linguists concerning the best educational methods and choices and the most effective direction for language policy to take might do much to enlighten them and generate support for mother tongue education. It is unlikely that parents would choose to stand by once they understood what lay in their children's best interests, once they were aware, as Heugh says, that they could have both: instruction through and the prominence of their own languages in their schools AND English (Heugh 2002 (1): 193).

It is axiomatic that English possesses tremendous advantages. It is eminently suited as a lingua franca, since it is a language of international business and communication. It is the language least limited territorially and thus can serve as a means of economic and social mobility. It also plays a vital role in tertiary level education: it is the only language acceptable and accessible to everybody, as well as the language in which most textbooks and research is published and most information available. Universities serve wider areas than schools, occupied by different language groups, so that it is convenient if many, though not necessarily all, of them function in the lingua franca. This also facilitates mobility of academicians and students and the stimulating exchange of views and information. Consequently, it is essential that by the final years of schooling pupils possess sufficient proficiency in English to function and be assessed predominantly in that language. But not in primary school.

As a result of the laissez-faire policy and unofficial encouragement of Government, however, School Governing Bodies (SGBs), with whom the responsibility lies, under Section 6(2) of the South African Schools Act 84 of 1996 [SASA] (*Juta's Statutes* 2003: Vol. 3 1-226) and in line with the Norms and Standards for Language Policy in Public Schools, Section C, (itself in terms of Section 6(1) of the SASA) (Norms and Standards 1997), where they have devised a policy at all, tended to maintain the status quo. In fact, “ in response to economic and political pressures and the introduction of the new curriculum” many schools are introducing English as medium of instruction a year earlier than before at the end of Grade 3 to coincide with the end of Foundation Phase, and the overall use of English in primary school consequently increased from 33% in 1991 to 42% in 1997 (Probyn et al 2002: 30). In all English schools, of course, it is English from Grade 1, whether or not the child has sufficient knowledge of the language to cope.

4.3.2 The current crisis in education

Let us look at the present situation in education, for which this ‘all English’ or ‘English mainly’, policy is largely responsible.

The urgency of the situation could hardly be more apparent. Alexander considered, several years ago, that unless the opportunity to “undertake educational and other innovation” was seized “within the next decade or so, the outlook for most of the rest of Africa [would] continue to be bleak” (Alexander 2001: 18).

As I have mentioned, the Government’s early policy documents exhibit an understanding of the benefits, academic and otherwise, of promoting languages (and especially the mother tongue) in education and a commitment to the principle of additive bilingualism. They also seem to display a determination to promote multilingualism as a resource and cultural diversity as a valuable national asset (PanSALB 1999). Multilingualism is viewed in the Language in Education Policy as “the global norm today” and the development of languages through education intended to “facilitate communication across the barriers of colour, language and region” (Norms and Standards 1997, IV A.3), thereby strengthening the goal of national unity and helping to forge the bonds of common citizenship.

In spite of these ideals and stated intentions the Government has, in fact, followed an assimilationist course of unofficially promoting the growing hegemony of English. The eloquent desire to foster languages other than English, consider “the needs and preferences of the population as a whole” (PanSALB 1999: 2.3) and “stimulate the empowerment of language communities to recognise both the sentimental and instrumental value of their languages” (1999: 8) requires translating into action. The implementation of such policies would obviously begin in the classroom. This is where individuals could develop high multilingual competencies. From an economic point of view education produces consumers of languages. Instruction in and through threatened languages can provide a bulwark against their extinction and a deceleration of the process of language shift. Yet there have been no efforts to achieve any of these objectives and no sign that the populace is anything but content with the situation.

The very healthy debate sparked off particularly in the Afrikaans media by the new

Minister of Education Naledi Pandor's statement that she intends to put more emphasis on the teaching of English as a subject to ensure that pupils are able to use it after the first three years of mother tongue instruction (Pandor 2004: 20) has also served to concentrate attention on the totally unacceptable quality of education. Pandor herself chose "let us share a passion for quality education for all" as a battle cry during the budget vote in Parliament on 28 April (2004: 20). She, and a number of the responses, mention the particularly poor achievement levels in maths and science and the loss, partly due to emigration, of thousands of teachers. Gerrit Brand connects the two: "Tog lyk dit ná 10 jaar se voortrek van wetenskap en tegnologie nog nie of dié beleid vrug dra nie" (Brand 2004: 15) and "Die probleem kan egter van die ander kant beskou word: Die tekort aan wiskunde- en wetenskaponderwysers is die gevolg van swak prestasie in dié vakke op skool" (2004: 15). A situation in which in the Western Cape only thirty black matriculants passed maths on the higher grade and "te min swart en bruin leerlinge slaag matriek met universiteitsvrystelling" cannot, he feels, be rectified by increasing funding for teacher training. "Die sleutel is moedertaalonderwys. Die manier van dink, doen en praat wat die wiskunde, wetenskap en tegnologie kenmerk, moet deel gemaak word van leerlinge se alledaagse leefwêreld. Solank leerlinge dié vakke in Engels leer, maar die res van die tyd in ander tale lééf, sal wiskunde en wetenskap nie deel van hul 'kultuur' — hul leef-en-sienswyse — word nie." (2004: 15).

Pandor prioritizes the need for increased funding, but also the necessity to make the system work (Pandor 2004: 20). The concern over quality and poor educational outcomes is everywhere apparent. PeTjé, CEO of the Gauteng Department of Education, tries to establish "why the quality of our education, even though we are spending more, is lagging behind in relation to the other countries with similar resourcing levels". (PeTjé 2003) Actually, South Africa's allocation of almost six percent of GDP (Jansen and Taylor 2003: 23) is not unacceptable and the main reasons this does not translate into better standards of education are :

- 1) Poor levels of productivity among educators (PeTjé 2002: 9)). This encompasses lack of commitment, inadequate grasp of subject content and an

inability to communicate it through what is frequently the teacher's second language, and outdated ineffective teaching methods.

- 2) Internal inefficiencies. There are administrative problems and inefficiencies at all levels. PeTjé highlights the issues of
 - a) institutional performance
 - b) spending choices and
 - c) management capacity. (PeTjé 2002)

In his briefing of the Education Portfolio Committee on "Financial, Resourcing and Costs of Education in Public Schools" the Deputy Director of the Department of Education, Prof Soobryan, addresses (among other things) the problems of

- a) poorly informed budget processes
- b) the need to carefully monitor and track the implementation of national policies
- c) the low quality of the average educator, relative to cost
- d) wastage of funds through ill-advised procurement policies
- e) deficiencies in the capacity to manage finances and resources, particularly at school and district level. (Soobryan 2003)

Funds are just not getting through. In Soobryan's words: "[S]chools experience a range of problems in translating their allocations into goods and services. These are caused by difficulties in school-level governance and/or management and insufficient PED-level use of accounting and budgeting tracking systems and skills in creating and using linkages between budgeting and procurements within PEDs" (Soobryan 2003:2) Any improvements in funding, quality of teaching or language policy must be accompanied by a radical overhaul of administrative and financing procedures. I think this is appreciated by education authorities and strenuous attempts to ameliorate the situation appear to be underway (PeTjé 2002).

What are not understood are the problems experienced by teachers at grassroots level. These come through very poignantly in Plüddemann's description of a salutary and apparently fairly effective attempt to implement a dual medium (bilingual) system in two township schools in Cape Town, (Plüddemann 2002) and

are related to the language issue and to situational factors. Plüddemann mentions, for example, the acute shortage of reading materials, especially in Xhosa, “given the pivotal importance of stories in the development of emergent literacy” (Plüddemann 2002: 51). Dr David Rose of Sydney University, Australia, also underlined at a recent workshop the emphasis that needs to be placed on cultivating an enjoyment of and familiarity with print as a mode of communication (Rose 2004). Plüddemann says categorically that most teachers are not proficient in English and that “very little reading and even less writing takes place in foundation phase classrooms at both schools. A major obstacle to developing a culture of reading and writing seems to be teachers' own literacy approaches and their underlying assumptions about print (cf. Koopman, 1997). Stories were often used as an overt didactic tool to teach phonics, or life skills, and were seldom fully exploited for their reading and writing potential” (Plüddemann 2002: 51).

Plüddemann found that continuous hands-on support and advice were necessary to alter such practices and guide implementation of his bilingual system. This could be costly on a large scale but is probably essential. Teachers had to be ‘sold’ on the idea initially and at the time of writing no one had yet been brave enough to try and enlist the support of parents (Plüddemann 2002: 52). Plüddemann says that “[t]eachers experience enormous pressure from parents to use English” (2002: 51). Probyn et al report a similar attitude in the schools they worked in (2002: 34, 36, 37). This constitutes, perhaps, the single largest hurdle to be overcome before pressure can be exerted in favour of mother tongue education. Educators of all ranks must cease to condone by their silence the illusion that all is well on the language front. They must, as was done in the recent media debate, forthrightly ascribe learner’s problems and low achievement rates to difficulties with language when this is the root cause. Probyn et al maintain that “as long as parents and teachers [in many cases] equate English acquisition with time on task and therefore English LoLT, they are unlikely to make decisions about school language policy that include a stronger role for home language as LoLT, as suggested in the literature and the LiEP. Therefore a prerequisite would be thorough and accessible information on the

literature and research underpinning such proposals and a careful consideration of both theory and context to develop an appropriate policy” (2002: 45).

Pandor condemns the inability to teachers to instill within five years the foundations of basic educational skills and literacy, but she ignores the most important cause (Pandor 2004: 20). Our entire system is geared primarily to cultivate an ability to learn through reading and this ability is indispensable in further education, yet both literacy and numeracy levels are dropping. This is clearly indicated by results from the recent survey in the West Cape which found frighteningly low levels of both at the end of grade three and six. Only one in six pupils were found to have acceptable levels of numeracy and one in three of literacy (*Moeders van Taal* 2004). The most economically valuable skills and qualifications increasingly require a strong numeracy base — South Africa was last out of thirty-eight countries in the Third International Maths and Science Study Repeat in both maths and science (Jansen and Taylor 2003: 25 – 26).

Jansen and Taylor’s “*Educational Change in South Africa 1994 – 2003: Case Studies in Large-Scale Educational Reform*” presents a comprehensive and devastating indictment of our education system and the policy changes in the last decade. “[N]ot only is efficiency low, but so is effectiveness of the schooling system. Despite ... comparatively high levels of funding ... every major cross-national study has placed South Africa very low in the international league tables (Jansen and Taylor 2003: 23).

I include copies of some of these tables:

Table 12 Analysis of the Literacy Task at National Level According to the Different Domains, MLA 1999						
Type of Analysis		Descriptive Analysis				
Level of Analysis		National				
Result of Analysis		Number of cases (%)	Mean Score (%)	S.D.	Max (%)	Min (%)
Competencies and domain	Literacy (total)	100	48.1	21	100	0
	Word recognition		67.7	11.9	84.6	56.4
	Detail content		43.4	6.2	52.1	35.7
	Writing skills		23.8	8.3	38.5	18.6
	Spelling & grammar		47.2	2.6	49.9	44.6
	Info retrieval		47.5	12.1	69.5	31.8
	Info provision		65.5	26	87.1	34

Source: Strauss (1999).

Table 13 Analysis of the Numeracy Task According to the Different Domains, MLA 1999						
Type of Analysis		Descriptive Analysis				
Level of Analysis		National				
Result of Analysis		Number of cases (%)	Mean Score (%)	S.D.	Max (%)	Min (%)
Competencies and domain	Numeracy (total)	100	30	15.7	100	0
	Number and numeration		29.8	8.5	45	17.7
	Measurement		28.6	9.5	47.2	14.1
	Geometry/shapes		32.2	18.3	58.5	16.1
	Everyday stats		30	11.9	42.1	18.3

Source: Strauss (1999).

Table 14 Analysis of the Life Skills Task at the National Level According to the Different Domains, MLA 1999						
Type of Analysis		Descriptive Analysis				
Level of Analysis		National				
Result of Analysis		Number of cases (%)	Mean Score (%)	S.D.	Max (%)	Min (%)
Competencies and domain	Life skills (total)	100	47.1	17	96.7	0
	Health and nutrition		42.3	14.7	67.9	22.3
	Civic sense		52.2	10.1	69.9	33.8
	HIV/AIDS		46.7	4.8	52	42.8
	Science and technology		36.4	5.3	43.7	32.5
	Pre-vocational skills		60.7	.8	61.3	60.1

Source: Strauss (1999).

“This poor performance extends into tertiary education with poor graduation and retention rates and high drop-out rates [which] represent high wastage of resources” (2003: 23). Resources are also wasted on an unprecedented scale by the increasing necessity for “learning programmes aimed at addressing the needs of underprepared

learners” (*SAUVCA Press Statement: 30 December 2003: 3*), (underprepared learners whose difficulties should have been addressed in early primary years). Universities were obliged to “increase their intake of alternatively admitted first degree students and more in particular, those admitted on the senate’s discretionary admission (SD) basis” (2003: 3). The SAUVCA also express concern regarding the drop in enrolments in 1997 to a level of less than half what was projected by the former National Commission for Higher Education (2003: 3). In connection with matriculation results, while applauding apparent improvements especially in the number of mathematics passes, they deplore the “drift from Higher Grade to Standard Grade” (2003: 2) and the “alarming tendency to select the lower grade levels of assessment for the final examination in order to get higher marks, a selection that is often to the detriment of the school-leaver but gives a false impression by inflating the distinctions from the centre!” (2003: 6). They pointedly mention the introduction of the compulsory continuous assessment component (CASS) making up 25% of the final mark (2003: 2), (which together with other alterations, may account for the increased percentage of successful matriculants, on which the previous Minister of Education complimented himself (Asmal 2003). They are also very disturbed by the high dropout rates: based on the 2001 Grade 9 enrolment figures and Grade 12 results these are running at 70%, with only 7% obtaining matriculation endorsements. The 2001 throughput rate from Grade 1 to Grade 12, according to Jansen and Taylor, was only 19.3%, with under 5% matric passes. (Jansen and Taylor 2003: 23).

Level	1982-93	1986-97	1990-01
Grade 1	100	100	100
Grade 8	56.8	68.5	69.9
Grade 12	41.3	44.7	n/a
Matric pass	19.8	20.6	19.3
Matric exemption	5.6	5.4	4.7

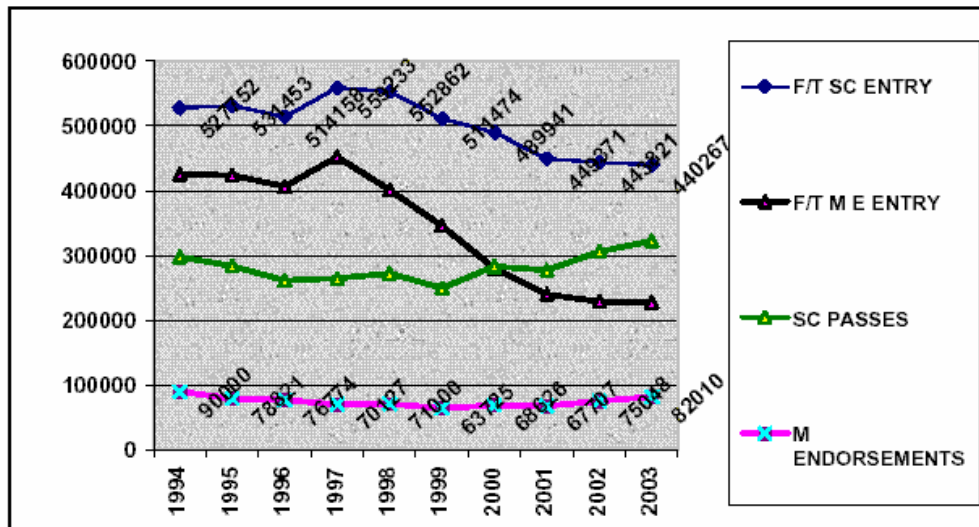
Source: Calculated from Strauss, Plekker, and Strauss (1997; 1998; 2000; 2001).

This table is interesting, as the increase in throughput to Grade 8 is clearly reversed in the last three more cognitively demanding years of schooling, to give an overall slight decrease over the past twenty years. The percentage of originally enrolled pupils obtaining matric exemption shows a small but steady decrease. This might be partly due to an increased percentage of the juvenile population enrolling in school, but I think we can safely conclude that there has been no improvement in the situation.

The SAUVCA statement also comments on a “31% ‘grade creep’ in the A and B aggregate intervals of first time entering students at UCT over the period 1997 to 2001 but with a simultaneous increase in the proportion of students who only meet the minimum pass mark requirements (50 – 55%) in their first year degree studies” (SAUVCA 2003: 5). The results of an investigation into this phenomenon of ‘grade creep’ or ‘grade inflation’ are apparently reported in an unpublished investigation by Yeld and Hendry, and a report back from the SAUVCA General Meeting of 21 – 22 June 2004 ominously warns that it will “have implications for admissions” (*Report Back from SAUVCA General Meeting 21-22 June 2004*).

In light of the clear skepticism and disapproval (Report back SAUVCA 2) of this eminent body I think it is safe to assume that the end of 2003 results and any future upward trends are indicative not of any real improvement but of an attempt to camouflage the continued downward trend in standards. This trend can be seen in the following graph from the *SAUVCA Press Statement* (2003: 3):

Decline in senior certificate entries & passes: 1994 to 2002



Quality of education has not improved at the top end of the scale because literacy standards, basic foundations of education and cognitive development are not being attended to at the other end. It is probable that no attempt to improve educational outcomes will succeed unless the language question is addressed simultaneously and effectively. A developing country with high levels of poverty and inequity, high unemployment, unsatisfactory levels of economic growth and a looming AIDS crisis simply cannot afford not to get its education system in order.

4.3.3 Cost and feasibility

Kathleen Heugh staunchly maintains the feasibility of implementing ‘multilingual education’, her definition of which would cover both late transitional or bilingual models. She insists that the costs of upgrading the ‘English mainly’ system of education so as to “give African language speaking students an even chance” (Heugh 2002 (a): 192) would be far more expensive, involving “an additional two years of schooling for L2 students, with expert English language tuition” and the upgrading of the English proficiencies of up to 95% of teachers (2002 (a): 192). What is more, the poor success rate in other countries “indicates that this would not guarantee literacy or academic success. The expectation of a positive return on

investment is zero” (2002 (a): 192). On the other hand, multilingual education, though it would require careful planning and implementation and involve materials development and in-service training, etc., would (according to World Bank and other studies) provide “a reasonable expectation of a positive return on investment” (2002 (a): 193). Heugh points out that recent studies by Vawda and Patrinos for World bank show that “the development and printing costs of bilingual teaching materials and books as well as the necessary teacher training to accompany the materials are not nearly as costly as claimed” (2002 (a): 192). There would be a 10% cost increase on materials, which, since less than 10% of the education budget is devoted to materials, would constitute a 1% increases in the total education budget (2002 (a): 192). Moreover, her investigation with Babazile Mahlalela-Thusi found that suspicions regarding previous work of language committees appointed by the Bantu Language Board in apartheid days are unfounded (Mahlalela-Thusi and Heugh 2002). Substantial efforts were made to codify and standardize African languages and develop the necessary terminology for their use as media of instruction, and the standard of existing textbooks and readers is impressive. Colleagues of Babazile were “amazed at the content and scope of these, particularly in comparison with contemporary textbooks” (2002: 252). These could be added to and early work expanded on at very reasonable cost. Initiatives such as that undertaken at the University of the North (Ramani and Joseph 2002) and other universities could supplement the work of cadres of regionally-based educational and language experts to produce storybooks, readers and textbooks on a year by year basis as the system was progressively implemented.

Bearing in mind Plüddemann’s observations concerning the mindsets and classroom practices of teachers, teacher training may present more of a problem. One of the difficulties with the initiation of the New Outcomes Based Curriculum, which, incidentally, Macdonald sees as having contributed to the “attrition of literacy over the last few years” (Macdonald 2002: 134), was that even these teachers who understood the principles had very little idea how to translate them into practice. “[T]hey had never been trained in the implementation of the new ideas” (2002: 120). They were very taken with the new terminology, practiced the “Educational

Newspeak” (2002: 113) and probably showed the same ineffectual “tendency to intellectualize and discuss” of which PeTjé’ complains (PeTjé 2002: 1), but any influence on teaching practices appears to have been counterproductive. It is also doubtful whether the administrative capacity exists in education departments to undertake nationwide reform of this magnitude. A series of pilot projects initiated and stringently monitored by each province would probably be far more effective, though this would decrease the benefits and postpone the economic effects so urgently needed. Such schemes would need to be properly supplied, carefully staffed and supported by hands-on advice and assistance, but they would supply incontrovertible evidence of the possibility of success and allow for adaptations and practical adjustments when and where necessary.

Such projects, properly supported, might prove more costly than Heugh envisions, but not impossible to fund. The Government’s tax base has been broadened considerably in recent years, particularly by the institution of capital gains tax. Real growth in provincial education budgets, however, is marginal over the medium term and negative in two provinces (Cassiem and Streak 2001: Information sheets 36 and 49). Moreover, according to this report, produced under the auspices of the Children’s Budget Unit of the Institute for Democracy in South Africa [IDASA], only one of the provinces from which statistics were available had not underspent considerably in 2000 (2001: Information sheet 42). This indicates that even what is allocated is simply not reaching schools in many areas. But, in spite of the apparent generous nominal increases in spending on education in past years, in real terms, the average annual increase has been only 1%. Most critically, the per capita expenditure has actually declined at an average annual rate of 1.2% between 1997 and 2002 and the share of Governments total expenditure allocated to education also declined from 19.2% in 1995 to 18.4% in 2002 (*United Nations Report Highlights Growing Inequality in South Africa* 21 May, 2004: Education).

While there are obviously massive demands on the government purse for increases in public expenditure in other areas, many of which affect the welfare of children, such as the provision of basic services, housing and social security, expenditure on

education is the only one in which input may be regarded as constituting an investment. Government has an obligation to look to the future. Since just under 60% of South Africa's children live in the 40% of the poorest households (Cassiem and Streak 2001: Information sheet 47), not to prioritize the education of these children would, in fact, increase the burden of funding other socio-economic claims and needs in future years. It would involve pouring good money after bad into a bottomless well of poverty and deprivation. Furthermore, the decrease in per capita expenditure and in educational expenditure as a proportion of total government expenditure clearly represent a retrogressive step. Possibly, if adjustments were made to rectify just these two factors, the additional amounts might cover the costs of language reforms. In any event, from a point of view of increasing workforce skills and promoting economic development we cannot afford not to require the funds of Government and insist that they be used for this purpose.

A number of writers emphasize the importance of publicity (Moosa 2002: 40), and of budget analysis as an effective implement to apply pressure in government circles. Diokno points out that the budget is "the most important economic policy instrument of government" (Diokno 1999: 6), reflecting its values, plans and priorities. She insists that Government "is ultimately responsible for any negative impact on ESC rights that may result from its budgeting priorities, policies and development plans" (1999: 13), and that this fact can be very effectively used to pressurize it. Budget monitoring, in fact, "catalyses government into improving its measures" (*The Legal Human Rights Framework Underpinning Child Rights*, Chapter 2: 13). However, while publishing the results of budget analysis may provide a useful means of promoting change, it will be far more effective if combined with solid incontestable legal arguments, if these can be mustered.

5. CLAIMS IN TERMS OF HUMAN AND PEOPLE'S RIGHTS

Before I tackle the question of what South African and international law can offer on questions relevant to language and language in education rights, I should like to consider the theoretical and philosophical framework within which each operates. Various conceptions of what the law is, how it functions in society and how it relates to morality underlie both South African constitutional law and international human rights law.

5.1 Rights and governmental obligations

Is the granting or recognition of rights a necessary part of Government and to what extent do the obligations of Government coincide with such rights? It does not appear that there is a very high degree of coincidence. There are rights that individuals may have in respect of other parties, such as the right to respect and fair treatment by their neighbours or the right of children to affection and nurture from their parents. On the other hand, the obligations of Government may extend far beyond what its citizens may claim in the way of specific rights. A modern democratic government is considered to have obligations in terms of ensuring that the liberal-democratic principles of freedom and equality are upheld in the interests of all its citizens.

Its legitimacy depends partly on the fact that it rules by popular consent. Unfortunately, this means by the consent only of the majority, sometimes a bare majority, such as is often the case in the United States, sometimes by a wide and unshakable majority as in South Africa. More regrettably still, in a multicultural society, such a power base is often established by historical circumstances along cultural or ethnic lines. This means that elections are not won on issues and even the most important government policies may not actually represent the preferences of the majority, let alone the wishes of minorities. Unless 'talk-centric' or 'deliberative' models of democracy (Kymlicka 2003:13-15) can be effectively established and wield more influence than one may foresee, minorities are

effectively disenfranchised within such a system. Any attempt to protect their interests or compel Government to change its policies and meet its obligations is bound to depend on unofficial, indirect and probably less effective methods.

Nevertheless, these may succeed by obtrusively and frankly calling into question what Rubio-Marin calls Government's "general commitments to principles of legitimization" (Rubio-Marin 2003: 76). These include, besides the rule of law and "redistributing notions in the framework of a social state" (2003: 76), obligations to promote the welfare and improve the life circumstances of all citizens by means of policies that eschew all forms of discrimination, direct or indirect. Government obligations are intuitively understood to extend into all these areas and be open to critical evaluation in terms of all these principles. Rubio-Marin goes on to conclude that "[t]his is why the disenfranchisement of large segments of society, or the exclusion of large pools of children from meaningful education by language obstacles, poses a greater legitimacy problem than can be captured by the idea of multiple infringements of individual rights." (2003: 76)

5.2 Law and Morality

The debate about the relationship between law and morality has been raging for centuries. Lon Fuller proposed procedural requirements for a valid law, but Finnis considered that a law was a good or just law if it secured or enhanced the ability of people to obtain for themselves his 'seven basic goods' or 'common good' (Johnson, Pete and du Plessis 2001: 103-104). These were:

- 1) Life meaning not merely self-preservation, but also the capacity for development of potential. [Perhaps 'life' as a primary value in our constitution, should be viewed in this light, which certainly has implications for education, as have some other 'basic goods.]
- 2) Knowledge, not only as a means to an end, but as a good in its own right, which contributes to improved quality of life.
- 3) Play, in essence the capacity for recreational experience and enjoyment as distinguished from life's 'serious' content.

- 4) Aesthetic experience, as a capacity to experience and relate to some perception of beauty.
 - 5) Sociability or friendship, starting at peace and harmony among human beings, and ending in the fruits of full friendship.
 - 6) Practical reasonableness, essentially the capacity to shape one's action and attitudes according to some 'intelligent and reasonable' thought process.
 - 7) Religion, which is not limited to religion in the formal sense of faith..."
- (2001: 103)

A system of human rights, always in compliance with the sixth requirement of 'practical reasonableness' serves to define and clarify both governmental obligations and the requirements of legislation.

It was Patrick Devlin, in the mid 20th century, who insisted on the necessity for a common morality in society. This "revision of natural law theory" (2001:106) has both positive and negative implications in a pluralistic society. In its strict sense, it would constitute an unacceptable circumscription of liberty if minority (in the broadest sense of the word) values and systems of morality were to be constrained to adapt themselves to the value system either of western cultures or of the ruling elite. On the other hand, a limited common morality undoubtedly makes for social cohesion and provides a base for consensus on vital issues. Common morality, however, in the sense of the current condition of popular attitudes and opinion, is not a sound, consistent or reliable foundation for legislation or judicial decisions. It was rejected as such in *S v Makwanyane* in favour of "the values enshrined in the Constitution" (2001: 111): constitutional values take precedence. In a sense they represent a common moral basis for society of a more enduring, if aspirational, nature.

But morality cannot be applied in judicial contexts in a loose or unconsidered way. Cockrell, quoted in Johnson, Pete and Du Plessis, judges that "elements of positive morality may be considered relevant so long as they are subjected to critical scrutiny

and are considered appropriate in terms of second-level principles of critical morality” (2001: 112). Judge Mureinik believed “that legal principles and by extension laws themselves remain subject to certain moral criteria” (2001: 125), that principles must “have a minimum threshold of moral appeal.” (2001: 125). The Constitution contains a core set of principles. Its provisions and those of other legislative measures must be purposively interpreted in the light of these and of the interests it was meant to protect. Because our Constitution is still very new much constructive interpretation will be necessary, but this must be done critically, consistently, and with regard to the integrity of the whole text (following the views of Ronald Dworkin (2001: 121) and Dennis Davies (2001: 127)).

According to Davies, constitutionalism is about moral and political reasoning (2001: 127-28). This echoes Dworkin’s emphasis on the structure of legal argument (2001: 115). He insists on an ‘internal perspective’ on the study of law and refers to his attempt to “grasp the argumentative character of our legal practice by joining the practice and struggling with the issues of soundness and truth participants face” (2001: 115). Other influences on the approaches of our judicial theorists may have been those of the American realists, who tried to understand its functioning in context, “as part of social reality” and Scandinavian realists, who tried to fathom the part law plays in the psychology of a society (2001: 159-77).

But the most important legacies of the development of legal theory are probably the emphasis on

- 1) equality, equality before the law, and non-discrimination, and
- 2) the insistence on the primacy of individual rights over collective rights or community goals.

Dworkin, in particular, regarded individual rights as trump cards which must always take precedence (2001: 117). He regarded the policy making of Government as directed towards community goals, while the role of the judiciary was to protect individual rights through the application of the law. The prime purpose of the law was, in turn, to limit state power (echoed by Robert Nozick in his advocacy of the minimal state (2001: 190-96)). This has uncomfortable implications for our

purposes: insofar as the right to meaningful education is an individual right, its satisfaction may depend on the capacity of a relatively uneducated, disempowered, ill-informed people to effectively utilize the judicial system to enforce its rights. To a large degree such capacity depends on education: in other words, one needs the education in order to get the education. May points out, in connection with the position in Spain of the minority language, Catalan, that “the more gradual, but nonetheless deliberate process of ‘linguistic normalization’ pursued in Catalunya since the death of Franco...was an essential prerequisite for the subsequent acceptance of its higher legal status and institutional reach via the Linguistic Policy Act. In short, informed debate on and acceptance of accommodative language rights is likely to occur only in a political context already conducive to it” (May 2003: 139). This applies, too, to litigants or political pressure groups – low levels of education and a history of economic and psychological oppression are powerful inhibitory factors.

5.3 Distributive justice

The present Government and our Constitution are strongly committed to social justice (Johnson, Pete and Du Plessis 2001: 179), but the elimination of extreme poverty and the meeting of Government and society’s obligations in terms of socio-economic rights are going to be a very expensive undertaking. It is not just the size of the poverty gap that constitutes a problem, but the fact that approximately 48.5% of South Africa’s population (about 21.9 million people) “currently falls below the national poverty line” of the United Nations Development Programme (UNDP) (*United Nations Report Highlights Growing Inequality in South Africa*. 2004: 5). Consequently, the question of the fair allocation of the costs of language-related or language in education measures becomes irrelevant in the South African context for three reasons:

- 1) The huge segment of society most in need of language preservation or promotion policies and mother tongue education is patently not in a position to pay for them.

- 2) Quality education is vital to any program for the economic upliftment or empowerment of this impoverished sector and, consequently, for the future prosperity of the country.
- 3) Most writers and theorists agree that in a situation where economic disadvantage is directly attributable to serious historical injustice and discrimination the usual criteria for fairly apportioning costs are not applicable.

Even Robert Nozick, with his entitlement theory of justice, laissez-faire capitalization and minimal state, allows that “such past injustices might be so great as to make necessary in the short run a more extensive state in order to rectify them” (Johnson, Pete and Du Plessis: 194). Rectification is not, in fact, possible in a short period of time. Moreover, it requires an exquisite balance in economic policy, a balance between the need to improve the condition of and maximize opportunities for the underprivileged and the necessity to stimulate economic growth and increase revenue. Equalization policies must not diminish the spirit of enterprise, the drive to compete or the motivation of highly skilled or talented people to “cultivate their capacities” (Waghid and Le Grange 2002: 7) and devote their energies to projects that will benefit the economy. Taking away resources from advantaged groups on too large a scale would not necessarily enhance the welfare of the disadvantaged (2002: 7) — as Nozick insists, individuals seeking personal enrichment simultaneously enrich society (Johnson, Pete and Du Plessis 2001: 192). Discouraging capable, productive people will only increase the ‘brain drain’ which has already reached terrifying dimensions in recent years. According to *The Economist* more than one million whites have left the country in the last few years (2003), not to mention many highly qualified brown and black South Africans.

Nevertheless, Nozick’s system, while possibly appropriate in rich, first world countries, is totally unrealistic, even inhumane, in impoverished third world environments. (Johnson, Pete and du Plessis 2001: 195).

An alternative, proposed by John Rawls, has much appeal and might serve to achieve the necessary balance. Rawls’ theory of justice as fairness advocates a

system such as would be devised by a hypothetical group of people in rational debate in a hypothetical 'original position'. From behind a 'veil of ignorance' of what position in society it might be their fate to occupy, these people would be forced to devise a system which would maximize the allotment of primary social goods to the most disadvantaged (the maximin principle). For Rawls these goods were made up of:

- a) basic rights, liberties and powers, and
- b) goods related to wealth, income, power and responsibility

Obviously the system chosen would simultaneously be the most advantageous possible, consistent with the 'maximin principle', for people occupying other positions in society. The devisors would cudgel their brains to block loopholes so that no-one could exploit the system and so as to maximize their ability to profit from their assets or endeavors should they draw a long straw and find themselves among of the more privileged or talented members of society.

To Rawls fair distribution must involve:

- 1) the principle of greatest equal liberty compatible with an equal degree of liberty for others. People in the original position would always value individual liberty above collective equality, and
- 2) the 'difference principle': social and economic inequalities are permissible, provided they are arranged so as to provide the greatest benefit to the least advantaged.

This is not inconsistent with capitalism: the producer of the goods should justly benefit most from his labours, provided they also benefit those most in need. Economically this is a most productive system, since the incentive of substantial rewards is necessary to spur the producer on to greater efforts and 'pour encourager les autres' (Voltaire (in an entirely different context): ch 3).

The difference principle itself is qualified by two subordinate principles:

- a) that of fair equality of opportunity and
- b) the 'just savings' principle.

The latter specifies that in order to secure justice between generations it is necessary for each generation to channel a suitable amount of its resources in directions which will secure the well-being of future generations. Speaking of the interim constitution and with cultural rights in mind, Beukes points out that the Bill of Rights is somewhat inadequate in ensuring second and third generation rights. Whether it be for the purposes of preserving languages or cultures or ensuring an environment of opportunity and prosperity, the needs of future generations must be catered for. I would suggest that a system of distribution that prioritizes education would cater admirably for this requirement. The development of the quality of our human resources, because of its far-reaching beneficial effects, would do much to settle the intergenerational account. Although the stated goals of present Government align very satisfactorily with the objectives of Rawls' 'justice as fairness' principles, however, the practical measures which they have thus far undertaken have met with indifferent success:

- a) Standards of living of the majority have not risen.
- b) Affirmative action and black economic empowerment have brought increased levels of prosperity to only a very small proportion of the previously disadvantaged population and had a detrimental effect on economic growth (Hosking 2003). A small economic elite has benefited most from the democratization of South Africa over the last ten years (Johnson, Pete and du Plessis 2001: 89). According to an investigation by Andrew Whiteford and Dirk Ernest von Seventer, reported in the *Mail and Guardian*, the richest 10% of blacks received an average 17% increase in income between 1991 and 1996 while the poorest 40% of households actually suffered a fall in household income of around 21% (Barrell 2000).
- c) Education standards, as we have seen, have dropped and are still dropping. One may be certain that very few of the above 10% are not in possession of the cultural capital of considerable English proficiency and access to quality education in all English schools. Policies clearly need to be altered and implemented to effect a real equalization of opportunity and the observation of Rawls' 'difference principle'. Clearly too, the generous financing of education

and of language in education reforms can be more easily justified on allocative than distributive grounds.

5.4 Normative view of language

Even outside education, however, Grim and Vaillancourt consider that the funding of language policies can be justified on allocative grounds, i.e. in terms of the efficient allocation of scarce resources which have alternative uses (Grin and Vaillancourt 2000: 103). All one requires is agreement that linguistic and cultural diversity is valuable, that it is a public good, to justify its support. This is, however, problematic in a multicultural third world context. There are very urgent claims on the public purse for the funding of health, social security and poverty alleviation, neglect of which may even impinge on the right to life. These, understandably, are given priority in international law over purely cultural or linguistic rights.

Moreover, the number of languages involved in South Africa would make any attempt to subsidize all of them on a grand scale prohibitively expensive. Harry Barker (*The Morass of SA Multilingualism*) regards the mandate of PanSALB “which now embraces no fewer than 26 different languages, 17 of which it must ‘promote’ and for which it must create conditions for their development, and 11 of which it must promote and for which it must ensure respect” (Barker 2000: 26) as a “fantasy” (2000: 27).

Nevertheless, there are moral issues at stake. Stephen May regards the legitimacy of any government as dependent on its having the interests of *all* (my italics) its people at heart. (May 2003: 151). This entails having a concern for their cultural and linguistic heritage even in cases where their own interest in its preservation appears less than enthusiastic. Grin and Vaillancourt say that “when the imperilled position of the minority language is the result of earlier (or, of course, current) oppression — usually at the hand of the holders of power in the majority community ... it cannot be argued that the minority language finds itself in a threatened position just because the community that carries the language has lost interest in it.” (Grin and Vaillancourt 2000: 109). May, too, does not agree that language shift is voluntary:

“[I]t is at best a ‘forced choice’, propelled by wider forces of social, political, economic and *linguistic* inequality and discrimination” (May 2003: 150). The desire “to benefit from the currency of a dominant language” (2003: 151) may outweigh personal preference. May adds that any “claim that ‘English-first’ educational approaches are justified because the public importance of non-English speakers acquiring English outweighs any private claim to maintaining a first language can be seen for what it is: a proposition based on a false and unnecessary dichotomy” (2003: 146). Heugh also deplores this false dichotomy and insists that very often there is no understanding on the part of the people concerned that they can have both (Heugh 2002 (a): 193).

Consequently, the Government’s obligations are not decreased by any lack of motivation by speakers of a language in its favour; rather they are increased by the involuntary and inexcusable circumstances of such a choice. If culture or language appears not to be of great significance to a people at any point in time this is no guarantee that it never will be so. At some future date, when they can afford the luxury, they may come to value it immensely, as has happened with Gaelic languages in Wales and parts of Scotland and Ireland. Language is often, though not invariably, an important and consistent facet of an individual’s identity and culture. Even where it is not, it is the vehicle of that culture and much that is of value may be lost in the waning and especially in the precipitous demise of a language. Again, the intergenerational obligations of Government require it to do whatever is feasible to create an enabling environment even for smaller languages, always bearing in mind Boran’s sensible question about whether “the protection of small languages is a strong candidate for the optimal use of scarce resources” (Boran 2003: 199).

Obligations towards larger and official languages are more exigent since they are dictated (however unrealistically) by Section 6 of the Constitution (Juta’s Statutes 2003 Vol 5 1-145). Nevertheless, Section 6 is not part of the Bill of Rights and these obligations may not take precedence in the allocation of funds over more fundamental or basic human rights mandated therein. Only once the core minimum obligations of other basic rights have been funded and steps taken towards the

progressive implementation of further measures to satisfy most urgent needs may substantial sums be allocated for costly promotional measures.

Not all measures are costly, however, and Government has at its disposal other than financial resources. The wise deployment of human resources, for example within the ambit of tertiary institutions, innovative strategies for the encouragement of the use of indigenous languages in business and other domains and the judicious but firm restriction of the increasing, all-pervasive influence of English may all be undertaken at modest expense. If more extensive programmes are contemplated (especially for smaller languages), Government needs to weigh carefully the following factors:

- 1) cost
- 2) the merits of alternative recipient programs
- 3) the value to language speakers of the benefits to be derived
- 4) the probable benefits to future generations

The “choices and dispositions” (Patten and Kymlicka 2003:47) of speakers are of even more importance regarding the desire to acquire a high degree of proficiency in English, and Government has a clear obligation to provide access to the lingua franca via good quality English instruction within the education system. We know that such access need not in any way interfere with the development of the first language. Moreover, popular high regard for the instrumental value of English is based on valid, clear-sighted and substantial grounds. It may be unjust that “the continued advantages of English language knowledge amplify and exacerbate the illegitimate global [and national] distribution of wealth” (Blake 2003: 225), but it is undeniable that “unequal advantages” (2003: 225) are generously bestowed on fluent speakers of English. I would agree substantially with Weinstock that the instrumental value of a language may, depending on context, reasonably be accorded a great deal of weight (Weinstock 2003: 254-55, 269). And a high regard for the usefulness of English skills need not detract from an appreciation of the intrinsic value of other languages, provided those with influence do not deliberately augment the symbolic value also attached to a global language of this stature.

Nor need it interfere with a desire to forge a unified yet pluralistic society. In line with current thinking, Government has already envisioned such a multilingual, multicultural society (Language Policy for Higher Education 2002), (PanSALB 1999). There is no necessity to countenance assimilationist or homogenizing practices in our schools or elsewhere. People may develop competencies in many languages and cherish multiple identities. The Jews have managed this for centuries, but often with the eventual loss to individuals of their knowledge of Hebrew (or Yiddish). In the absence of a discriminatory environment, however, it may be possible to avoid the necessity for language loss.

Provisions to accommodate the linguistic needs of groups within states do not, of course, always entail the granting of rights. Patten and Kymlicka categorize policy/rights options according to four distinctions:

- tolerance- versus promotion-orientated rights
- norm and accommodation versus official language rights regimes
- personality versus territoriality rights regimes
- individual versus collective rights.

Let us see what international law and, subsequently, the South African Constitution and associated legislation, guarantees in this regard in the line of language, education, and other socio-economic rights and related basic and fundamental human rights.

5.5 International law

4.5.1 Minority rights

I have chosen thus far to regard the broad mass of non-English speaking, predominately black children who suffer most under the present language in education regime as belonging to a minority. Their disadvantaged position was deliberately engineered or constructed historically by a legal, political and social

inequalitarian ascriptive process (Mitnick 2004), which constitutes an extreme example of the way minorities have often traditionally been excluded from the full and equal enjoyment of their rights and of the “opportunities, advantages or benefits that are available to the rest of the population” (Reddi 2002: 343). Moosa, too, emphasizes that “minority status is not always based on number and is sometimes based on inferior social and political position” (Moosa 2002: 41).

The principle of non-discrimination underlies all international provisions in favour of minorities (Dunbar 2001: 100-101). These are essentially aimed at securing the substantive equality of non-dominant minority groups. Since, strictly speaking, South African society is made up of a collection of minorities, it is a little unreasonable of Reddi to complain about the absence of special protective measures (Reddi 2002: 329) for minority groups “additional to those they enjoy by virtue of being part of the population of a state” (2002: 344). She does make the point, however, (emphasized by Dunbar (2001: 99)) that rights accorded to minorities in international law, preeminently under Article 27 of the ICCPR, are not group rights, but rights granted to individuals “by virtue of their membership of a minority community” (Reddi 2002: 345).

Nevertheless, she ably demonstrates that individual linguistic and cultural rights depend to a considerable extent on some form of group rights. These are catered for under Section 31 (1) of the Constitution (*Juta's Statutes* 2003: Vol 5, 1-145), which forms part of the Bill of Rights: “Persons belonging to a cultural, religious or linguistic community may not be denied the right, with members of that community...to enjoy their culture, practise their religion and use their language”. Their right in Section 30 “to use the language and to participate in the cultural life of their choice” also presupposes and mandates the continued existence of linguistic and cultural groups within society. Article 27 of the ICCPR (Ozmanczyk 2003: 944) is not as explicit as our Section 31, but confers on minorities “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”. This “collective dimension” (Reddi 2002: 345) has been acknowledged by the United Nations

Human Rights Committee, which august body concedes in its General Comments that the right granted by Article 27, though an individual right, “depends on the collective ability of the minority group to enjoy its culture, religion or language” (Reddi 2002: 343). Group rights are implied, however, under international law, rather than explicitly delineated. Minority rights remain essentially individual rights.

The African Charter on Human and Peoples’ Rights (African Charter 1981)), a regional instrument to which South Africa became a party on 7 January, 2000 (International Obligations and Access to Remedies), is the first to recognize both the individual and collective dimensions of rights. Here the basis of human rights rests not only on “the attributes of human beings, but on the “reality and respect of peoples rights”. Nevertheless, one notes that here too individual rights provisions (Articles 2 – 17) precede peoples’ rights (Article 19 – 24).

5.5.2 Language rights

Dunbar feels that language rights may be grounded either in the intrinsic value of language itself, as “an interest to be protected which is separate to and possibly in some circumstances at odds with the interests of speakers of minority languages themselves”, (Dunbar 2001: 94 – 95) or, alternatively, in a ‘notion of language as a fundamental constituent element of personal identity” (2001: 93). The latter is probably a more promising avenue of approach because of the recent tendency to adopt a ‘difference aware’ model of equality, involving an “equality of respect and recognition” (2001: 93), an emphasis on dignity, integrity of person and the individual’s fundamental right to autonomy, self-determination and self-development. All these are to a greater or lesser extent related to or dependent on language, “implying, where necessary, positive measures of State support” (2001: 93). Dunbar establishes a close connection between dignity and personal identity and then quotes from an OSCE Report on the Linguistic Rights of Persons Belonging to National Minorities in the OSCE Area: “[b]oth the rights of non-discrimination and of the maintenance and development of identity serve to advance

the primary function of human rights law, respect for human dignity...Linguistic rights, and minority rights in general, help to ensure that minorities are able to realize and enjoy rights that the majority might be able to enjoy on its own” (2001: 95).

Of course it would be preferable to be able to base positive linguistic rights on specific instruments and provisions, rather than indirectly on values and principles, no matter how important or fundamental. In Dunbar’s opinion, however, the Universal Declaration of Human Rights (UDHR) and its instruments, the ICCPR and the ICESCR, and the European Convention on Human Rights (ECHR), though they create binding international obligations enforceable through a system of individual petition, provide (direct) support only for tolerance-based rights. Positive or promotion-orientated linguistic rights depend primarily on four instruments:

1. the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the SSCE (the Copenhagen Declaration),
2. the United Nations General Assembly Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (the UNGA Minorities Declaration),
3. the Council of Europe Framework Convention for the Protection of National Minorities (the Framework Convention), and
4. the Minority Languages Charter.

(Dunbar 2001: 92)

Unfortunately, only the Framework Convention and Minority Languages Charter create legally binding international obligations, but these are not enforceable by way of individual petition and they are both, like the Copenhagen Declaration, regional instruments. The UNGA Declaration is a global instrument, but, like the Copenhagen Declaration does not create fully binding obligations (2001: 92–93). Nevertheless, South Africa is obliged under Section 39 of her Constitution to take full cognisance of all international Human Rights instruments, binding or non-binding (Moosa 2002: 45, 49), (Liebenberg 2001: ch 3).

The non-discrimination principle embodied in the ICCPR (Ozmanczyk 2003: 944) is important in establishing positive rights or governmental obligations in that, if accommodations are made or services provided in one minority language, similar services must be available in other minority languages. In *Waldman v Canada* the Human Rights Committee found that the funding of Roman Catholic schools and not other religious schools violated Article 26 of the ICCPR (Dunbar 2001: 92-93). This means that, even if no direct claim will be countenanced for mother tongue education, as in the Belgian linguistics case (2001: 101), distinctions cannot be made between groups except on 'reasonable and objective grounds' (2001: 101-102). According to these criteria mother tongue education could not, for example, be offered to Afrikaans children and not to Xhosa children. Such grounds might reasonably be found in a lack of immediately available resources, but, I suspect, the onus would be on the state to provide evidence of a detailed plan for the provision and development of such resources and to implement remedial measures within a precise and acceptable timeframe. It is unsatisfactory that most positive language rights should be this derivative, depending on rights to non-discrimination, freedom of expression or assembly, a fair trial, or to education. The last two rights, for example, clearly depend on an ability to understand the language medium.

A perennial difficulty, is that most international and local provisions for minority language rights and accommodations are conditional not only on numbers and concentrations of speakers, but also on demand. The Copenhagen Declaration makes the right to use a minority language in official contexts dependent on 'real need' as well as on request by speakers (2001: 114). In many contexts 'real need' is difficult to prove; in ours the request condition is likely to be more of a problem. Historically disadvantaged communities with low average levels of education are not traditionally in the habit of requesting, let alone demanding concessions, even when they are aware of the benefits to be derived therefrom.

The four instruments (above) which do provide for positive measures and 'special support' on the part of the state also tend to be very unspecific on how their recommendations are to be carried out and even more hesitant about imposing any

kind of financial obligation on states. They give states a wide range of discretion with regard to the choice of measures and Dunbar says “there is no guarantee that states will assume those obligations which are necessary and appropriate for the regional or minority language in question” (2001: 113).

This is particularly evident with regard to language in education or language of instruction: the Copenhagen Declaration, for example, only requires a state to “endeavor” to fulfill the demand “as far as possible” and specifically provides that the financial resources of the state may be taken into consideration (2001: 113). The Minority Languages Charter is most explicit and thorough in detailing the types of measure states ought to undertake, but its provisions “are subject to many of the same qualifications as the provisions in the various recent minority instruments, in particular, the test of demand sufficiency” (2001: 112). The Framework Convention, Article 14 is very definite about the right of every person to learn his or her minority language, since (par 74 of the explanatory report) this right “concerns one of the principal means by which [members of a linguistic minority] can assert or preserve their identity”; yet par 74 goes on to add that this “does not imply positive action, notably of a financial nature, on the part of the State” (2001: 110). Dunbar remarks that it is “again unclear how this right is to be realized” (2001: 110).

The only instrument that specifically and categorically lays down that “[e]very person belonging to a national minority shall have the right to learn his/her mother tongue and to receive an education in his/her mother tongue at an appropriate number of schools and of State educational and training establishments, located in accordance with the geographical distribution of the minority” is the Minorities Protocol to the ECHR, Article 8 (1) (2001: 111). Regrettably, the Minorities Protocol was never adopted by the Ministers of the Council of Europe and therefore creates no binding international obligation.

All in all, the proliferation of conditions, tentative wording, excessive concern for state finances and unenforceability of most provisions in the majority of these instruments make them unreliable bases for any case in favour of minority language

rights. Nevertheless, a more promising climate does exist today in which to broach the needs of linguistic minorities. This is due to the prominence in recent years of linguistic issues in connection with ethnic conflicts in Eastern Europe, vocal national minorities, the European Union / transnational democracy and the integration of large immigrant populations within states (Patten and Kymlicka 2003: 2-10). There is an increasing awareness that accommodations must be made to avoid widespread unrest, and that a regime of linguistic tolerance is not adequate, especially where minorities are significantly disadvantaged by past discrimination or low socio-economic status. Increasingly, the granting of linguistic or socio-economic rights or the allocation of considerable sums to improving the circumstances of minorities and underprivileged sectors of the population is being viewed not only as morally right, but as economically beneficial. The African Charter (1981), Article 22, for example, grants “[a]ll peoples the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind” and, Article 24, to “a general satisfactory environment favourable to their development”.

Of course, in Africa financial and other resources are frequently unavailable for the sort of upliftment and emancipation here envisioned, but, where a state can by any means afford to undertake suitable programmes, there is strong pressure on it to do so. Moreover, a state that prides itself on its commitment to human rights and social justice might be considerably embarrassed if shown to be in clear contravention of important provisions in major international agreements or not to have fulfilled its core obligations in respect of them.

5.5.3 Human rights in general

5.5.3.1 Interrelationship

Let us examine the general and other human rights instruments to see whether support may be gleaned there for mother tongue education. We have observed the complex interrelationship and interdependence of various types of rights and this is

acknowledged not only by many legal theorists, such as Liebenberg (Liebenberg 2001: 3) and Moosa (“ultimately, minority rights cannot be divorced from their socio-economic context” (2002: 38)), but in the international treaties themselves. The Preamble to the African Charter (African Charter 1981) states that “civil and political rights cannot be dissociated from economic, social and cultural rights” while the Preamble to the ICESCR (Ozmanczyk 2003: 952) acknowledges that “the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights”. With regard to education, the Committee on Economic, Social and Cultural Rights’ General Comment (CESCR) 11.2 on Article 14 of the ICESCR says “It has variously been classified as an economic right, a social right and a cultural right. It is all of these. It is also, in many ways a civil and political right, since it is central to the full realization of those rights as well. In this respect, the right to education epitomizes the indivisibility and interdependence of all human rights”. A certain level of education and other socio-economic rights is essential for their effective enjoyment. Similarly, inability to effectively access good quality education is both a cause and an effect of impoverished circumstances. It also impacts detrimentally on a capacity to organize and lobby for a reform of language in education policies. Levy says that the relationships among poverty, lack of power and linguistic vulnerability are complicated, run in each of the possible directions and tend to reinforce one another in spiraling ways (Levy 2003: 239).

5.5.3.1 Classification of rights

The ‘International Bill of Rights’ consists of the Universal Declaration of Human Rights and its two Covenants:

- a) the ICCPR, catering for civil and political rights and
- b) the ICESCR, which addresses economic, social and cultural rights

and an optional protocol to the ICCPR (Moosa 2002: 38-39). Moosa deplores the fact that there are two separate covenants, which she says has “fuelled the notion that civil and political and socio-economic rights are two different sets of rights”

(2002: 39). Beukes also mentions the assumption that civil and political rights are by nature different, less absolute, immediate and justiciable (Beukes 1995: 131). The real difference is that they are much more expensive (1995: 132). But such attitudes and distinctions are used to create an impression that governments have lesser obligations with regard to socio-economic rights. Moosa adds, however, that there is a “growing international consensus that both sets of rights should enjoy equal protection”. (Moosa 2002: 39). Moreover, the South African Bill of Rights has incorporated “a full range of civil, political and socio-economic rights on an equal footing and with the same intensity. They are equally justiciable” (2002: 46).

There are general human rights instruments, global or regional (such as the African Charter (African Charter, 1981)), but the ICCPR (Ozmanczyk 2003: 944) and the ICESCR (2003: 952) are two of the most important global treaties and cover the most important generally recognized human rights. I shall look, where applicable, at these and also at specific international agreements such as the Convention on the Rights of the Child [CRC] (2003: 354) and the African Charter on the Rights and Welfare of the Child [ACRWC] (ACWRC, 1999).

The ICCPR (Ozmanczyk 2003: 944) covers many fundamental and vital human rights such as the right to self-determination (Article 1), to non-discrimination (Article 2) (on listed grounds, including race, colour and language), to life (Article 6), to liberty and security of person (Article 9) to equality before the courts (Article 14), to freedom of expression (Article 19), etc. The ICESCR (2003: 952) includes such issues as the right to work (Article 6) and equality of opportunity (Article 9), to an adequate standard of living (Article 11), to the “highest attainable standard of physical and mental health” (Article 12), education (Articles 13 and 14), culture (Article 15) and various provisions relating to children. It is interpreted and state parties’ obligations under it delineated and elucidated by the General Comments (CESCR) of the Committee on Economic, Social and Cultural Rights [CESCR], 1999, the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1986 (Limburg Principles), and the

Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 1997 (Maastricht Guidelines 1998).

5.5.4 Core minimum obligations of states

Having established that detrimental language policies severely effect the ability of a child to access educational content or acquire the skills and cognitive capacities which an education system should impart, it becomes material to discover precisely what the core minimum obligations of government are in terms of the generally accepted right to basic education and also in terms of other socio-economic rights, non-fulfillment of which may further bar the child from enjoyment of the educational right.

5.5.4.1 Socio-economic rights

In Brand and Russel's illuminating compilation "*Exploring the Core Content of Socio-economic Rights: South African and International Perspectives*", Russell defines the minimum core content of rights as "the nature or essence of a right", "the essential element or elements without which a right loses its substantive significance as a human right and in the absence of which a State party should be considered to be in violation of its international obligations" (Russell 2002: 15). Van Bueren sums up state obligations as follows:

"The duty of a state is twofold. First it must implement the core, and secondly, it must realize progressively the remaining facets of the right. The minimum core of the obligation is the same for developing and industrial states, but the duty of states in implementing the remaining parts of the rights varies from state to state, depending upon resources."

(Van Bueren 2002: 185)

Of course, South Africa has thus far failed to ratify the ICESCR, but, as I have pointed out, she does not escape all obligations in connection therewith. Beukes, quoting Corder and Du Plessis and speaking of the Interim Constitution, claims that

the effect of Section 35 (1) (now Section 39) of the Constitution is essentially “the incorporation for interpretation purposes of all international human rights law into the Bill of Rights” (Beukes 1995: 142). Moreover, many of the provisions of our Bill of Rights are derived from and modeled closely on articles in the ICCPR and ICESCR (Liebenberg 2001: Ch 3), so that any estimates of obligations, minimum obligations or rights in terms of those instruments can usually be taken as fair estimates of what corresponding provisions in the Bill of Rights entail. And, having been incorporated, they are justiciable. This includes the general rights to non-discrimination and equal treatment under the law. Brand and Russell point out that, in fact, South Africa has gone further than most countries in incorporating many of the economic, social and cultural rights listed in the ICESCR into its Constitution along with several that are not explicitly stated in the ICESCR, such as access to water and to a clean, healthy environment (Brand and Russell 2002: 13), and these are certainly justiciable, witness the Grootboom case (2002: 13-14).

The Limburg Principles make it clear that the application of some rights, such as non-discrimination, can be made justiciable immediately while others can become justiciable over time, since their ‘progressive realization’ is permissible in the absence of immediately available adequate funds (Limburg Principles 1987: A. General Observation (8)). The Maastricht Guidelines emphasize, though, that the ‘progressive realization’ provisions in Article 2 of the Covenant cannot be used by states to “justify derogations or limitations of rights” (Maastricht Guidelines 1998: II 8) and that the “minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties” (II 9). In the absence of resources states are obliged to consider alternative measures or seek international assistance. The Maastricht Guidelines insist further that “it is important to distinguish the inability from the unwillingness of a state to comply” (II 13) and that the State has the “burden of proving” that it is unable to carry out its minimum obligations, if this is the case, (II 13). It must show that it has made every effort to satisfy, as a matter of priority, such obligations (General Comment 3 1991). The Limburg Principles (1987) state that “[g]iven the significance for development of the progressive realization of the rights set forth in the Covenant, particular

attention should be given to measures to improve the standard of living of the poor and other disadvantaged groups, taking into account that special measures may be required to protect cultural rights of indigenous peoples and minorities” (A. General Observations (14)), further that “[l]egislative measures alone are not sufficient” (B.18) and that priority must be given to “assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services” (B.28). The “obligation of progressive achievement ... requires effective use of resources available” (B.23), which is certainly not the case within the South African education system, and the development of societal resources (B.24) (the role of education springs to mind here as well). It is dubious whether South Africa has done its utmost in any of these areas to carry out its obligations to “Respect, Protect and Fulfill” (Maastricht Guidelines 1998: II 6) or its obligations of Conduct and of Result (II 7).

Genuine resource constraints must of course limit the ability of a state to supply needs and raise standards of living, especially where a sizable proportion of the population live in poverty and the backlog it has inherited has already assumed daunting proportions. Nevertheless, unless improvements are evident it must accept culpability and retrogressive measures are indefensible. Inefficient and ineffective use of resources is not acceptable and cannot simply be excused by references to administrative incapacity or inability to rectify the deficiencies of the system. More often there is a lack of will and/or preparedness to make the required effort. Appropriate in this regard are remarks made by Prof. Alex Brettigny in his recent inaugural lecture on the speed with which mechanisms were put in place to deal efficiently with the formidable complexity of capital gains tax, an undertaking which had been considered too problematic by the 1986 Margo Commission (Brettigny 25 October 2004).

Russell considers that “[m]any resource problems center around the misallocation of resources: to expensive tertiary-level health care, rather than primary or preventative health care; to university education rather than primary education; to expensive weapons systems rather than food; to the privileges of the governing elite rather than

to low-cost housing. A reordering of priorities will alleviate some of the resource burden in any country. In addition, a country faced with severe resource constraints can begin to meet its minimum obligations by developing a plan for the accomplishment of the goal over time — that is, for its progressive realization. Article 14 of the ICESCR requires exactly that in the area of compulsory free primary education” (Russell 2002: 17).

The obligation of result is particularly onerous. The results of present Government after ten years in office are not impressive in many spheres. The poor, as we have seen, are worse off, the poverty gap greater, equalization of opportunity is largely limited to about 10% of the black population and quality of education and performance levels have in no way improved. It appears that Government is certainly not meeting its obligations of result in these areas.

A report by the Childrens Budget Unit of the Budget Information Service of the Institute for Democracy in South Africa, entitled “*Budgeting for Child Socio-economic rights: Governments Obligations and the Child’s Right to Social Security and Education*” finds progress in some areas and glaring deficiencies in others (Cassiem and Streak 2001). It is not clear, for example, firstly, whether the Child Support Grant (CSG) and the Care Dependency Grant (CDG) are adequately taking the place of the phased out State Maintenance Grant programme (2001: Information Sheet 24). Access to these is still patchy and low in rural areas. Although there has been a real increase in the total fiscal envelope available for spending on public services (2001: Information Sheet 21) and service delivery has improved, costs of delivery seem to have increased correspondingly (2001: Information Sheet 21). Estimates suggest that in September 2001 the Government’s social security programs did not reach 88% of the 10.5 million poor children in the country (2001: Information Sheet 20). Moreover, the value of the CSG and CDG had fallen in real terms between 1998/99 and 2001/02 which might be regarded as a retrogressive measure and retrogressive measures, according to both the Constitutional Court and the CESCR “are prima facie incompatible with the duty of progressive realization” (Liebenberg 2001: 14). (Liebenberg, too, is unhappy in many respects with

governmental performance in connection with child social security). Most significantly “[n]early 30% of children live in households suffering severe deprivation (measured in terms of self-reported hunger)” (Cassiem and Streak 2001: Information Sheet 47).

It becomes a little clearer why the South African Government has ‘inexplicably’ failed to ratify the ICESCR (Ozmanczyk 2003: 952). It would be required to report on progress within two years of ratification, which report might well elicit a censorious reaction. It would also be required to recognize the right to work (Article 6), which would be extremely problematic, given the high and rising unemployment levels. It might even be required to explain how its affirmative action program, which presumably is projected to continue into the indefinite future, will not “lead to the maintenance of separate rights for different groups” (Limburg Principles 1987: B.39 on state parties’ obligations in terms of Article 2) and account for the fact that this and other measures have done nothing tangible to raise standards of living or promote the general welfare (Articles 11 and 4). Though a certain amount has been achieved in some areas, South Africa’s socio-economic grand programme leaves a lot to be desired and has notably had no success in addressing the needs of the ‘poorest of the poor’. It is salutary to remind ourselves at this point that poverty may in numerous complex ways affect the ability to access and benefit from education, exacerbating existing deficiencies in quality and mode of delivery.

5.5.5 Education

The right to education, particularly to free compulsory education, has a solid basis in international law, finding support in numerous instruments (Coomans 2002: 159). The Government is very well aware of the necessity to work towards the free provision of basic education and could probably justify the non-accomplishment of this goal thus far. What cannot be easily justified is the absence of a clear, detailed plan laying out a timeframe for the implementation of free basic education in the not too distant future. In the meanwhile measures have been taken and, according to the new Minister of Education (Pandor 2004), are currently being

tightened up to ensure that the poorest are not discouraged or denied access because of their inability to pay. A greater cause for concern is the quality of what is supplied and its effective accessibility.

In South Africa 'basic education' is seen to include the first nine years of schooling from Grade 1 to Grade 9 (Cassiem and Streak 2001: Information Sheet 34), but there is no consensus on an exact definition of what constitutes 'basic education' for the purposes of establishing rights. In fact, the meaning of the term may vary from society to society, depending on what basic essential skills are required to function satisfactorily in different environments. For our purposes it will be sufficient to note the view of the CESCR (with which Coomans concurs (2002: 170)) that "[w]hile primary education is not synonymous with basic education, there is a close correspondence between the two. In this regard the Committee endorses the position taken by UNICEF: "Primary education is the most important component of basic education"" (General Comment 13 (9)) (CESCR, 1999).

More importantly states are required to give it priority, financial and otherwise (General Comment 13 (51)) (Coomans 2003: 172). This means that whatever other educational obligations a government feels it has in terms of constitutional provisions or policy statements may not receive substantial allocations of funds before the requirements of basic education are fully met. There is also a stern prohibition against discrimination in all spheres of education which "applies fully and immediately" and "is subject to neither progressive realization nor availability of resources" (General Comment 13 (51)) (CESCR, 1999).

Four interrelated and essential features of education are outlined in General Comment 13 (6) and interpreted by Coomans:

- availability: functioning education institutions and programmes have to be available in sufficient quantity in a state;
- accessibility: educational institutions and programmes have to be accessible to everyone, without discrimination; this implies both physical and economic accessibility;

- acceptability: the form and substance of education, including curricula and teaching methods, have to be relevant, culturally appropriate and of good quality; and
- adaptability: education has to be flexible, so it can adapt to the needs of changing societies and communities, and respond to the needs of students within their specific social and cultural context.

(Coomans 2003: 164)

Both the accessibility and quality requirements would preclude the provision of instruction in an inadequately known second language, especially without extensive backup programmes and first class tuition in that language. Coomans says categorically that “[a] state party is under an obligation to provide and maintain this quality” (2003: 173). According to Devenish, quoted in Oosthuizen and Rossouw, “[e]ducation is also essential for citizens to make informed political decisions. Therefore the United States Supreme Court has suggested that the State may indeed be under an obligation to ensure a minimum standard of education in order to avoid inequalities in the right to speak and to vote.” (Oosthuizen and Rossouw 2001: 662).

Quality is mentioned again in General Comment 13 (50) (CESCR 1999). More specifically, primary education must “ensure that the basic learning needs of all children are satisfied”, taking into account “the culture, needs and opportunities of the community” (13 (9)) and must, as defined in Article 1 of World Declaration on Education for All, enable people to “survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning” (13 (Note 5)). All this is quite a tall order and certainly implies comprehensive education of a high standard in a culturally congenial and appropriate milieu. The relegation of one’s home language to a distinctly inferior status and its minimal use in the classroom certainly constitute an affront to dignity as well as infringing the cultural requirement and generally inhibiting intake. The recurrence of the concept of dignity is interesting: Coomans regards it as the point of departure for a core content approach to human rights (2003: 167) and the importance of education in promoting other human rights as closely related to the idea of “living in dignity” (2003: 161).

On a more personal level, the image of a multitude of children groping unhappily in obscurity to access meaning which might dawn so early and gratifyingly through their own tongues is disturbing, to say the least. This, too, is an affront to their dignity and may well undermine confidence and impair their future capacity to cope. Not enough research has been done into the long term psychological damage that may be done by a system which day in and day out engenders and promotes feelings of inferiority. Some degree of mental suffering is inevitable and in many cases this may be severe, which reminds one that the definition of torture under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person ...” Also the WHO definition of health, the highest attainable standard of which state parties to the ICESCR (Ozmanczyk 2003: 952) are obliged under Article 12 to attempt to secure for their citizens, is “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity” (*WHO definition of Health*). Van Beuren gives it her opinion that “some rights that may have been conceptualized historically as economic and social rights in reality mask violations of children’s civil rights, amounting to violations of their right to freedom from torture, and cruel, inhuman and degrading punishment” (van Bueren 2002: 197). Let us less melodramatically agree that the mental and psychological well being of non-English speaking children is not being protected by the current education authorities.

Having noted that ‘accessibility’ does not merely refer to programmes or schools but implies economic access and ensuring the full capacity of the learner to benefit from what is provided in schools, let us see how well the Children’s Budget Unit considers the Government to have met its obligations to provide basic education in South Africa. With regard to the need for more and better spending on child education, the Budget Unit finds that the need is not so much to spend more on public ordinary schooling, but to spend public resources more effectively. “Most notably, the quality of education requires improvement, and equity in access to schooling needs to be established.” Also, “[t]here is a need for more and better

spending on early childhood development and education for learners with special needs” (Cassiem and Streak 2001: Information Sheet 35). Government does give priority to basic services in its budget inputs to education (2001: Information Sheet 46), but provincial education budgets show only small real increases between 2000/01 and 2003/04 and in two provinces allocations have actually decreased in real terms (2001: Information Sheet 36). A slight decline in the share of provincial budgets devoted to education, as a percentage of total expenditure, suggests that they are giving a little less priority to education and more to other service sectors (2001: Information Sheet 37). Such a decline is unacceptable unless compensated for by clear improvements in standards of education, indicating that allocations are being more effectively utilized. Government has also not succeeded in spending the resources allocated in a number of provinces (2001: Information Sheet 46). Some progress has been made in bringing about greater equity, for example through the improvement of learner: educator ratios (2001: Information Sheet 46), but considerably more needs to be accomplished. Various plans have, however, been put in place to “overcome existing hurdles in children’s universal access to education” (2001: Information Sheet 46). Most troubling, and heading the list of ways in which government has not been meeting its obligations, are “education outcomes in the form of matriculation pass and exemption rates”. These are “poor relative to the portion of the Budget dedicated to education service delivery” (2001: Information Sheet 46) — inescapable evidence of poor quality education at lower levels of the system. Quality issues and the essential component of language of instruction must be addressed expeditiously or the government must indisputably be judged to be in violation of its obligations in terms of international law.

5.5.6 Children’s rights

Children, especially young children, are among the most vulnerable members of society. Moreover, on their proper upbringing, development and education depend the future economic welfare of the country and the maintenance of an enlightened, orderly, humane society. Because they do not have a voice, extra care must be taken

to protect their rights, both those that pertain to all members of society and those specially accorded them because of their status as children.

Apart from the general human rights instruments, many of which contain articles particularly addressing the needs and rights of children, there are two principal international agreements, one global and one regional, specifically relating to children:

1) the United Nations Convention on the Rights of the Child [CRC] (Ozmanczyk 2003: 354), which entered into force on 2 September 1990 and was ratified by South Africa on 16 June 1995 (South African Cyber Treaty Series), (Global) and

2) the African Charter on the Rights and Welfare of the Child (ACRWC), which entered into force on 29 November 1999 and was ratified by South Africa in 2000 (Bower 2004: 3.2), (Regional).

Of these the most pertinent provisions for our purposes may be found in the Appendices 1 and 2. The ACRWC reiterates much of what is prescribed by the CRC. To avoid duplication I have included only those provisions of the ACRWC which appear to supplement the approach taken in the CRC or where the wording differs significantly.

Both emphasize the principle of non-discrimination within education and beyond (CRC Article 2, Article 28 (1)), (ACRWC Article 3, Article 11 (1)), and both direct that the views of the child shall be heard and taken into consideration (CRC Article 12 (1)), (ACRWC Article 4 (2)). Both insist on free, compulsory basic education and require that education be directed to the “development of the child’s personality, talents and mental and physical abilities *to their fullest potential*” (my italics) (CRC Article 29 (a), ACRWC Article 11. 2. (a)) to prepare him/her for “responsible life in a free society” (CRC Article 29 (d), ACRWC Article 11 (d)). In addition the ACRWC stipulates that education should be directed to “the preservation and strengthening of positive African morals, traditional values and cultures (Article 11. 2 (c)), and the CRC requires that it promote the development of respect for the

child's parents, his or her own cultural identity, language and values (CRC Article 29. 1 (c)). There are numerous references in the CRC to the child's 'dignity' (e.g. in the Preamble and Articles 37 and 40) and 'well-being', and at least seven to the 'best interests of the child'.

The ACRWC emphasizes the "primary responsibility" and duty of parents for the care and protection of the child (Article 19) and to ensure his/her best interests, but this does not in any way detract from the emphatic statement in the preceding article, Article 4, that the child's best interests shall be "*the* primary consideration" (as opposed to "*a* prime consideration" (my italics) (CRC Article 3. 1), nor from the obligation of states to ensure that this is so. Neither does Article 5 of the CRC, stating that state parties shall respect the "responsibility, rights and duties of parents", detract from the force of the directives contained in Articles 3 and 4. Ultimately responsibility lies with the State to ensure the child's protection development and well-being. There is nothing in either agreement which would permit parents to make decisions which, according to the best scientifically obtained knowledge of the time, is clearly not in their childrens' best interests. It is clear from the relevant articles the State would have the right to override the wishes of parents in serious matters in accordance with its general obligation to protect the child and its specific duty to protect the child in any specific instance.

This could be a highly undesirable necessity with possible grave repercussions if applied consistently. Discontent and resistance might undo the most beneficial effects of measures undertaken in the interests of the children and in some contexts set a regrettable precedent for excessive state interference. In educational matters the guidance and enlightenment provided by a strenuous information campaign would probably make such action in any case avoidable. The consultation of more mature children, under Article 12 of the CRC, would also appear to be mandatory. As Van Beuren says "the participation rights of the child are now included in the core minimum" (Van Beuren 2002: 186). In any event, the results of surveys on childrens' attitudes to mother tongue instruction might be edifying for all parties. Responses to a questionnaire which I administered as part of my honours research

indicated that in a predominantly black Xhosa speaking township school the vast majority of pupils, while valuing English very highly, would prefer to be taught in Xhosa.

In international law, the primacy of the welfare and interests of the child is now universally established and vehemently maintained. When set against the rights of adults, provided the types of rights involved carry approximately the same weight, the rights of children must always take precedence. This has clear implications for funding prioritization. Of course, if the right to life of adults is set against the right to mother tongue instruction of children, the former will carry more weight, so that some services to the general population, e.g. many health services, might deserve greater priority. Even within the realm of language rights the provision of some services to adults, e.g. those provided in the courts by court interpreters, might involve adults' rights to justice, freedom and equality before the law and therefore outweigh language rights in education. But where the rights involved carry similar weight, or those of children carry graver possible implications in terms of their development and future opportunities, children's rights should certainly be given priority. In many areas of public service, therefore, the language needs of adults cannot be considered to justify the allocation of substantial financial resources until the language and basic education requirements of children are adequately provided for.

The principle that the 'best interests' of the child should be the prime consideration is nowhere questioned in the literature reviewed for this study. In family law, particularly in custody battles, this principle is almost invariably applied. The only exception encountered in this area of justice was rather interesting. In *Ignaccolo-Zenide v Romania* Application no 31679/96 ICHR 25 January 2000 (van der Linde 1995: 263-72), the European Court for Human Rights granted custody of two children to the mother after a protracted battle ranging through the courts of California and Europe. The decision was probably primarily motivated by a disinclination on the part of a majority of the judges to allow the father to profit from a series of illicit activities, including the flouting of several court orders, the

repeated concealment of the children and their expeditious removal from country to country, the exertion of undue influence on the Romanian authorities, etc. Nevertheless the views of the dissenting judge, Judge Marusti, are noteworthy (1995: 271-2). He considered that, after such lapse of time and considering the favourable circumstances in which they were living, the children were better off with the father. He insisted that the views and preferences of the children should have been obtained and taken into account, that “the rights and best interests of children should be accorded preference” (1995: 271) and that “they should be the first beneficiaries where the interests of their parents are in conflict and they are mature enough to express clearly their own preferences” (1995: 270

On the same principle the linguistic needs of children should take precedence over those of adults as should their economic, social and cultural rights. Article 4 of the CRC states that “[s]tate parties shall undertake all appropriate legislative, administrative, and other measures...to the maximum extent of their available resources” to implement these rights (Ozmanczyk 2003: 354). The intention of the CRC is obviously that children should be resolutely protected from circumstances which seriously interfere with their physical, mental or psychological well-being or with their ability to develop fully in all their capacities and abilities. As Van Bueren puts it, children’s rights are “holistic” (2002: 196) and children’s social and cultural rights “so fundamental [in terms of the CRC] that no derogations are allowed to their implementation, even in times of emergency that threaten the life of the nation” (2002: 197). States cannot be satisfied either by the attainment of a core minimum. As many authors maintain (Brand and Russell 2002) they are a ‘floor’ not a ‘ceiling’. All “imaginative and constructive approaches need to be fully explored” (Van Bueren 2002: 200), especially in the absence of abundant financial resources to extend and progressively fulfill children’s rights.

5.6 South Africa

Ultimately, we must, of course, turn to our own Constitution, legislation and policy. If we find that less is guaranteed in these than can be construed from international

instruments, then South African courts would be obliged to find weighty and objective reasons for non-conformity, but frequently home-grown legislation in fact goes further than would be required by international law. According to Moosa it “recognizes more (almost too many) rights for all its citizens than almost any other constitutional democracy” (Moosa 2002: 46 – 47). This might be a good thing except where, in this realm of language, rights conferred are so numerous and obligations created so excessive that they become impossible to carry out, providing an excuse for inertia and the non-performance of even the more feasible and essential aspects provided for. Harry Barker is most amusing on the subject. He says that Section 6 of the Constitution (*Juta’s Statutes* 2003: Vol 5 1-145) and the consequent Pan South African Language Board Act 59 of 1995 (2003: Vol 5 1-122), with a “majestic disregard for what is possible”, “have condemned the Language Board to the margins of a bottomless pit of activity” (Barker 2000: 128).

5.6.1 Language and cultural rights

Section 6 creates eleven official languages and prescribes that: “[r]ecognizing the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages” (Section 6 (2)). It further provides that “all official languages must enjoy parity of esteem and be treated equitably” (Section 6 (4)). The Pan South African Language Board (Section 6 (5)), amongst its eleven objectives (Barker 2000: 28), must promote and creating conditions for all the official languages, plus the Khoi, Nama and San languages and sign language.

Section 30 (Language and culture) prescribes as follows:

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 of the Bill of Rights.

And section 31 (1):

Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –

(a) To enjoy their culture, practice their religion and use their language;

Within section 29, educational language rights are provided for by

Section 29 (1):

Everyone has the right-

- (a) to a basic education, including adult basic education; and
- (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

Section 29 (3)

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.

Section 6 is not part of the Bill of Rights, but does constitute one of the founding provisions of the Constitution. There has been an explicit commitment to furthering the goals of multilingualism on the part of the Government but, probably partly because of the unrealistic dimensions of its mandate and partly due to “the absence of further enabling legislation and enforcing powers to PanSALB, precious little was done during the first few years to ensure that the lofty ideals embraced in Section 6 were indeed carried out in practice” (Kotzé 2003: 6). In July 2000 PanSALB was criticized by the National Council of Provinces for not having fulfilled its mandate and having “done nothing to promote multilingualism”, and a suggestion was mooted that it be absorbed into the Commission for the Promotion and Protection of Religious, Linguistic and Cultural Communities (Motata and Lemmer 2002: 111). Kotzé reports, too, a “downward trend” in “the acceptance of multilingual principles by both public and the private sectors, due, according to the Minister of Arts and Culture, Mr. Ben Ngubane, to a lack of tolerance for linguistic diversity and an

approach of ‘multilingualism is a costly problem’” (Kotzé 2003: 6). Multilingualism may well be a valuable resource, but its promotion is also a costly affair.

Commitment to the principle of ‘functional multilingualism’ in the new Languages Bill entails ensuring that communication within the public takes place as far as possible in the language of the citizens choice, that official national documents are made available in at least six (rather than the originally envisaged four (A.M. Beukes 2004: 10)) official languages. The Bill also provides for the setting up of Language Units and a National Language Forum, as well as a South African Practitioners Council which “will manage the training, accreditation, and registration of translators and interpreters to raise the status of the language profession and improve the quality of language products (2004: 11). Apparently, the cost of implementing all this is “sustainable” and not calculated to exceed 2% over 10 years (2004:12) (up from the original 1% for four languages) of national government departmental expenditures!

Although these plans are laudable and, if affordable in the face of claims for poverty alleviation and the improvement of social services and education, desirable, it is difficult to see how languages can be effectively promoted in the long run while they are systematically undermined and marginalized in the sphere of public education. The first step in advancing the use and status of languages is to promote their use and value in the classroom among the youth of the country. At a meeting of the Select Committee on Education and Recreation on 5 August 2003 Prof Ndabandaba was asked what could be done to remedy the lack of Zulu instruction in ex-model C schools in KwaZulu-Natal. He replied that a survey showed that Zulu parents preferred English instruction because of their own disadvantaging experiences if they did not understand English (Education Portfolio Committee 2003). Such attitudes are clearly tacitly encouraged by influential figures, and there is no thought to expose the fallacies on which they are based or move to reform the unofficial language policy in education. Lip service is paid to the unsubstantial notion of elevating other South African languages as languages of privilege but the monopoly

of English in all areas of public activity remains unchallenged. Less prestigious language and local cultures must suffer in consequence.

5.6.2 Language and education

5.6.2.1 The right to basic education

The South African Constitution guarantees basic education, though not the free, compulsory education that has been prioritized in international law. (Universal Declaration of Human Rights, Article 26. 1. (Ozmanczyk 2003: 958)) This is something that should also take precedence over the provision of multilingual public services. It is a children's right of the utmost importance and should perhaps receive even greater priority than hitherto accorded it. The Government seems, however, conscious of the fact that many families either cannot afford or experience great hardship in paying fees and other expenses associated with schooling. In her address before the opening of the parliamentary debate on the education budget, the Minister of Education expressed her concern over the question of school fees and her commitment to ensuring that provincial departments guarantee schools the necessary funds to enable them to implement the exemption system satisfactorily (Pandor 2004). Any infringement of access to basic education is intolerable. Oosthuizen and Rossouw emphasize that this is “'n sterk positiewe reg”, and, (according to Judge Chaskalson), “'n reg wat afgedwing kan word ten spyte van die staat se ander finansiële verpligtinge”. (Oosthuizen and Rossouw 2001: 660). Their article effectively highlights the importance of education for the exercise of civil and political rights (Oosthuizen and Rossouw 2001: 662), the attainment of dignity and self-respect (2001: 656-57) and the ability to make a meaningful contribution to society (2001: 661). They quote the judge in *San Antonio School district v Rodrigues* concerning the deprivation of this vital human right: “The stigma of illiteracy will mark them for the rest of their lives” (2001: 661).

5.6.2.2 Language in education rights

Oosthuizen and Rossouw furthermore emphasise that basic education must be of a certain standard to properly equip the child (2001: 661-62), which brings us back to the language issue. The right to receive education in a language of choice is not an unqualified right, but it is a positive right which is included in the Bill of Rights. The fact that, as a right, it can be exercised only in respect of the official languages does not, of course, prevent the Government from providing mother tongue instruction at some stage in the future in other languages where circumstances warrant it, but it precludes this being required directly as a right. However, the scope of the right is further specifically demarcated by the requirement of reasonable practicability. This implies not only that circumstances must warrant it, but that resources and administrative capacity must be available. De Waal, Currie and Erasmus are of the opinion that “[t]he standard of reasonableness means that where mother tongue education is not provided there must be an objective justification for the denial of the right. International practice suggests that denial of the right can be justified by reference to a sliding scale” (De Waal, Currie and Erasmus 2001: 484). This formula dictates that the larger the number of speakers of a language in a particular locale the greater the obligation of Government to provide mother tongue education, and the higher the level of education the less pressing the obligation becomes. At primary school level, with children who do not have an adequate command of any other language, it would appear to be inescapable.

Oosthuizen and Rossouw do not regard Section 29. 2 (a), (b) and (c) merely as factors the Government must take into account when considering “all reasonable educational alternatives” but as a “specifieke internsbeperkings” (Oosthuizen and Rossouw 2001: 668). They would certainly constitute limiting factors were one dealing with (historically) privileged groups of students, but most of the children without access to mother tongue education are speakers of African languages from underprivileged or historically disadvantaged communities. The equity and redress requirements are therefore on their side. These are not predominantly children whose families can afford to set up expensive private institutions to provide for

their language needs (or for a congenial culturally familiar educational environment, either, for that matter).

The fact that choice of language medium is a qualified right does not prevent it from being eminently justiciable. Any applicant would need to ensure that in his/her particular circumstances all qualifying conditions were fully met. The 'reasonable practicability' condition is, however, a demarcation of the right rather than a special limitation, since it circumscribes or places conditions on the use of the right (De Waal 2001: 164), and the onus is therefore on the applicant to prove that an infringement of the right has occurred (2001: 165). However, there are many areas in South Africa where this is clearly the case, since there are high concentrations of African language speaking pupils of primary school age directly in need of mother tongue education in provinces which are underspending their allocation for education or allocating large amounts to causes not based on high priority or fundamental human rights. The implication of the founding values of the Constitution (*Juta's Statutes* 2003: Vol 5 1-145) expounded in the Preamble and in Section 7 and the fact that these are also children's rights may also be relied on, as I indicated earlier, in establishing the grave nature of the infringement. The Government's own policy statements, referred to previously, may also be employed by the applicant to prove that the Government itself has acknowledged the need for and desirability of mother tongue education in many contexts. Finally, the matter would certainly be ripe for adjudication, provided all avenues, such as those prescribed in the Norms and Standards for Language Policy in Public Schools V.E. of 14 July 1997 (Norms and Standards 1997: V. E. 1-3), had been explored to secure government consent and co-operation, since Government is certainly not engaged in legislating or even in instituting measures to encourage mother tongue education beyond Grade 3.

The main difficulty for any applicant other than a parent would be in obtaining enough support for such action. Though Section 29 (2) gives the learner the prerogative of choice, with very young children, where the right is strongest, so too would be the claim of parents to decide for their children. In fact, V. B. 1. of the

Norms and Standards, in contradiction to the modern tendency in international law, attempts to bypass the attitudes and opinions of children by decreeing that “[t]he parent exercises the minor learner’s language rights on behalf of the minor learner” (Norms and Standards 1997: V. B. 1.). A judge might well consider the choices of older children material, but surely few children would not hesitate to defy their parents on such an issue. Though it is theoretically within the powers of South African courts to rule against the wishes of parents, unless the applicant had the consent of concerned parents it is probable that most judges would hesitate to do so. For an educator to take up cudgels on behalf of students would, therefore, involve not only braving the displeasure of the authorities, but enlightening and obtaining the support of the parents. Without the wholehearted support of a substantial body of parents neither judicial nor any other significant action to implement mother tongue instruction is likely to succeed.

Under the South African Schools Act (*Juta’s Statutes* 2003: Vol 3 1-226), Section 23 (9) parents must constitute a majority on the School Governing Body [SGB], and it is the prerogative of the SGB under Section 6 (2) to determine the school’s language policy. Theoretically, the SGB could decide upon and implement mother tongue instruction beyond the first three years. In fact, the research done by Margie Probyn et al, is illuminating on some of the reasons this does not happen. Their study in the Eastern Cape found that very few schools had thus far developed language policies in line with the Language in Education Policy [LIEP] (Probyn et al 2002: 30) and that “a number of schools expressed the need for more support and information in order to understand and implement the policy” (2002: 32). They express serious concern about the capacity of the SGBs to develop school language policy (2002: 45). Very often the literacy levels of parents are not high and there is sometimes friction between the SGB and teachers and very little motivation to address the issue of language policy, let alone increase the use of the mother tongue in the classroom. Feelings were mixed among teachers, but in general parents were keen to have their children acquire English through maximum exposure to the language: “as long as parents and teachers equate English acquisition with time or task and therefore English LoLT [language of learning and teaching] , they are

unlikely to make decisions about school language policy that include a stronger vote for home language for LoLT, as suggested in the literature and the LiEP” (2002: 45).

Plüddemann, too, indicates that “[t]eachers experience enormous pressure from parents to use English” (Plüddemann 2002: 51). Vivian de Klerk says that teachers confirmed that “parents desperately wanted their children to become ‘multis’” (de Klerk 2002 (b): 22) and send them to English schools for maximum exposure to English. There has been a massive influx into all English schools in the past ten years, but heads report that language related problems have been worse than expected (2002 (b): 18). Where parents prefer English schools it is, of course, often because the standard of education in these schools is so much higher, but also because they are unaware that the conversational skills their children pick up are no indication that they have acquired cognitive academic language proficiency. No one has seen fit to tell them of the findings of research projects over the past twenty odd years or explain the frequent detrimental effects of developing literacy in a second language.

Heugh, on the other hand, disputes the fact that the overwhelming majority of black parents would go for English only or English mainly if given a choice. She says that such impressions (and Government would certainly wish to encourage these) “overlook the surprisingly high number of parents [in other recent surveys] who favoured gradual transfer to English” and “in actual fact want improved and greater access to English alongside the home language for their children”. (Heugh in de Klerk (b) 2002: 12). It seems that she in turn is overlooking the fact that these are parents to whom the possibility of an option had been put. Most are probably oblivious to the fact that they can have both.

But even if a very capable, enlightened SGB did manage to win the support of the parent body and decide to opt for extended mother tongue education on the late gradual transition or multilingual model they would not be in a position to do so. The initiative must come from Government and would, as Heugh points out, require careful planning and implementation programs as well as the provision of the

necessary finances (2002 (1): 191). African teachers have not been trained to teach in their mother tongue, for example; neither are the textbooks and materials readily available. The enterprise is not practical at a local level in individual schools. In fact the strategy of leaving the matter in the hands of SGB's has most effectively maintained the status quo while apparently shifting all responsibility from the shoulders of officialdom. Consequently, the rights of young children continue to be infringed and their welfare ignored.

5.6.3 Children's rights

Section 28 (2) of the Constitution (Juta's Statutes 2003: Vol 5 1-145) states that: "A child's best interests are of paramount importance in every matter concerning the child". This echoes international sentiments on the subject and, because of the unity and supremacy of the Constitution (Du Plessis and Pretorius 1995: 524) which dictates that it should be read holistically, each provision in the light of other provisions and of its founding values, this subsection is material to a reading of any matters concerning children addressed by the Constitution. Rights automatically carry more weight if they are children's rights and the rights of adults must usually give way to the best interests of children.

Parental authority as such is not protected by the Constitution (De Waal, Curry and Erasmus 2001: 457). De Waal, Curry and Erasmus consider that children have a right to some degree of choice, personal authority and personal self-fulfilment under the Constitution and that the "limitation of these rights becomes more difficult to justify as the child grows older" (2001: 457). Moreover, "[p]arents' 'power' over their children is derived from and is dependent on their responsibilities towards their children and it therefore diminishes as the child gets older" (2001: 457). The State will not usually interfere with the reasonable decisions of parents with regard to their children, but only "where it is necessary to protect the child and, in exceptional circumstances, to secure more autonomy for the child" (2001: 457). Consequently children, especially older children, should certainly be consulted as to their feelings on serious issues that closely concern them and, more importantly, the State has an

obligation to intervene in the interests of the child where parental choices are definitely and materially in his/her disinterest.

Visser mentions too the fact that the State is liable for damage caused as a result of any educational activity for which the public school (or a juristic person) would normally be liable (Visser 1997: 630). It may seem somewhat unreasonable to stretch this principle to cover the detrimental effects of language in education practices, but it does apply and the harm caused by these may be serious and far-reaching. Morally, the State cannot be absolved of responsibility for any deleterious effects of any policy (official or unofficial) or any activity over which it has control in the sphere of education, even if these have the support of parents. Culpability would be increased if any failure to inform or deliberate deception were employed in order to obtain that support.

It is important to take note of Julia Sloth-Nielsen's 1996 perspective on children's rights (Sloth-Nielsen 1996). Even before the adoption of the present Constitution children's rights had been firmly incorporated into the Interim Constitution and by the time of writing much had already been accomplished. Initially, children's rights were a "'vote-winning' and 'non vote-alienating' cause to espouse" (1996: 12), but she maintains that real political will lay behind telling improvements in, for example, healthcare for children, where "measurable transformation was initiated by Government in the face of scarce resources, bureaucratic inertia and competing political demands for attention" (1996: 13). This political will was derived, she considers, from "the de facto moral legitimacy of the cause for children" (1996: 13), but also from unanimous governmental and presidential support (1996: 23). She detects some diminishing of enthusiasm and speculates on how real or substantial future commitments to the cause will prove.

5.6.3.1 The Children's Bill

There is again considerable public interest in children's rights (particularly children's socio-economic rights) in the wake of the new Children's Bill. The result

of six years of consultation and research, the South African Law Commission's Working Draft of this bill was handed to the Department of Social Development in December 2002. The consensus seems to have been that the new Bill would provide the wherewithal to increase pressure on the Government to prioritize improvements in the conditions in which the youngest, most vulnerable and deprived children live. Poverty alleviation can only impact positively on ability to access and benefit from education and is therefore a positive development.

On a purely educational front, however, even this initial draft of the Bill seemed to be less adequate. Veriava criticized it in that it fell short of international standards in a number of important respects, including failure to ensure economic access or detail the extent of state obligations to properly provision schools (Veriava 2003: 10). Possibly there had been less pressure on government to produce on the educational front. Most notably, Veriava does not mention the language issue, so it is fair to conclude that its importance escapes even some more knowledgeable proponents of education rights. By and large, little is commonly found on the subject in more widely accessible media. Apart from important specific omissions, Veriava found the Bill disappointing in that it did not elaborate on and give content to the unqualified right to basic education. It did nothing to detail precisely what 'entitlements' the right guarantees (2003: 10).

The current "watered down" (Bower 2004: 1) version of the Bill, published in the *Government Gazette* of 13 August 2003, "has a number of critical excisions, including the removal of the National Policy Framework" (Bower 2004: 1) which Sloth-Nielsen regarded as crucial for the setting of objectives and practical delivery of socio-economic rights (Sloth-Nielsen 2003: 1-2). It has also suffered the removal of the entire education clause. The submission of the Education Law Project to the Portfolio Committee hearings on the Bill expresses the concern that the removal of this clause "will undermine the potential of the state to provide access to a basic education of an adequate standard to all children living in South Africa" and "undermine the potential for especially poor children to realize their full potential" (Education Law Project Submission 2004: A.). This document claims that 'the

removal of “key rights clauses” “undermines the original intent, purpose and effect” of Chapter 3 of the Draft Bill. It does nothing to address the inadequacy of the exemption policy regarding school fees or the inequities, inefficiencies and low standards of education that prevail in many areas. It calls emphatically for a reinstatement of the relevant provisions and a re-evaluation of the “existing regulatory framework”, in accordance with the entitlements defined in the education clause of the Bill of Rights (2004: C.).

The new Bill does retain some useful provisions, such as its support for the ‘best interests’ principle (Section 9), its stipulation that the child be consulted and its requirement that he/she be protected against unfair discrimination (Section 5 (2) (d)) or against “harmful social and cultural practices that affect [his/her] well-being, health or dignity” (Section 12 (1)). These are, however only indirectly applicable in the sphere of education, and do not compensate for the omission of directives that require, for example, that the education of the child must be directed towards “the development of the child’s personality, talents and intellectual and physical abilities to their fullest potential” (Section 21 (2) and (2) (a)). Most importantly, there is no guarantee of the right to “receive education and information through a medium which makes such education and information accessible to the child, having regard to the child’s personal circumstances...” (Section 21 (1) (d)). This is the first time the medium of instruction has been acknowledged as a vital element in the child’s ability to access basic education. Arguably, the chances of reinstatement of this particular provision are vanishingly small.

5.6.4 Fundamental rights and values

I have emphasized from the outset the interrelationship between various rights, and the way in which the fundamental democratic rights and values of human dignity, equality and freedom may depend on the full and effective enjoyment of lesser rights. The latter are to some extent derivative rights and their relative prioritization must depend on the coincidence of and extent to which fundamental rights, are involved. Dignity, freedom and equality are likewise interdependent.

5.6.4.1 Dignity

Dignity is one of the core constitutional rights. Dignity depends on freedom and the opportunity for the full, unhampered development of the individual's personality and potential. The notion that people are inherently equal in dignity in turn provides the basis for the right to equality and the prohibition of unfair discrimination. This was explicitly recognized by the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) (De Waal, Currie and Erasmus 2001: 231). It is also "a value that informs the interpretation of possibly all other fundamental rights and it is further of central significance ... when balancing rights under the limitations clause" (2001: 232). All three values have been used by the Court repeatedly in weighing claims and interpreting constitutional provisions.

5.6.4.2 Freedom

The connection between freedom and education, however, requires a little elaboration. The right to freedom has many facets and it is not always immediately apparent how these are enhanced by access to education of a high standard. Freedom is a right guaranteed by the Section 12 of the Constitution:

Section 12 (1) Everyone has the right to freedom and security of the person, which includes the right-

- a) not to be deprived of freedom arbitrarily or without just cause;
- b) not to be detained without trial;
- c) to be free from all forms of violence from either public or private sources;
- d) not to be tortured in any way; and
- e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity...

In *Ferreira v Levin NO*, Judge Ackerman considered that the wording of Section 12 (1) (or 11 (1) of the Interim Constitution) constituted two separate rights and that the former, the 'right to freedom', should be read broadly and negatively as the right of

individuals not to have “obstacles to possible choices and activities” placed in their way. (2001: 247). However, if the state education system itself places such obstacles in the individual’s way it cannot be read entirely negatively. Government would be obliged to take whatever positive measures, even fairly costly ones, to remove all obstacles and provide the learner with an education that will maximize the range of opportunities and choices available to him/her. The right to equality is also here engaged: this range of opportunities and choices must be no less than those available to any other citizen with the same innate talents and abilities who is prepared to put in the same amount of effort. Education trains the mind — this not only improves one’s employment opportunities but increases one’s ability to make balanced, far-sighted, objective decisions and to choose wisely the direction one’s life should take. It increases one’s capacity to think independently and logically about all aspects of one’s life and one’s ability to express those thoughts. This aspect of freedom is highly valued by liberal Western philosophers. Crucially, De Waal, Currie and Erasmus conclude, moreover, that “On the basis of the majority’s interpretation of Section 11 (1) IC in Ferreira, it can be added that the section may have a residual role in protecting fundamental freedoms that are not adequately protected by other sections of the Bill of Rights” (2001: 248).

The right not to be tortured or subjected to “cruel, inhuman or degrading” punishment is also to be construed as extending beyond the mere physical to unmerited mental suffering or extreme psychological stress and discomfort. Section 12 (2) also protects ‘psychological integrity’. This is extremely difficult to define. The new Collins Concise Dictionary includes in its definition of integrity the notions of “unity”, “wholeness”, “soundness” and “the quality of being unimpaired” (Collins 1984: 585). Any process which impairs one’s ability to function conceptually at an age-appropriate level or one’s capacity for critical judgement might well be considered to impair one psychologically. Any system which undermines one’s confidence, denigrates one’s culture, marginalizes one’s language or subjects one to a frequent sense of failure and confusion would also certainly interfere with one’s psychological integrity.

5.6.4.3 Equality

Section 9 of our Constitution provides that:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).

De Waal, Currie and Erasmus provides a comprehensive understanding of the right to equality as provided for in Section 9, the first section in the Bill of Rights (2001: 197 – 229). This section prohibits the State and private persons (it has horizontal application) from discriminating, directly or indirectly, against anyone on one or more of a series of ‘listed grounds’. The discrimination does not have to be intentional (2001: 220): it is unfair if it has an unfair impact on its victims (2001: 213). The State is committed to ensuring that the law will protect and benefit people equally, i.e. to substantive equality, an equality of outcome. This means that no law, policy, application of policy or administrative action may have the effect of unfairly discriminating against any citizen. Discrimination is presumed to be unfair if, in effect, it occurs on one or more of the listed grounds, including race, ethnic or social origin, colour, culture or language. It is also unfair if it can be shown to be based on ‘analogous grounds’, that is “on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them seriously in a comparable way” (2001: 210).

Differentiation or discrimination are not, in themselves, unfair; in fact, the requirements for achieving substantive equality may often necessitate very different treatment of people in different circumstances. This is particularly important in improving the circumstances of especially vulnerable or previously disadvantaged groups and provides the justification for the Government's policy of affirmative action. In education it justifies the allocation of substantial funds and the undertaking of extensive measures to improve educational outcomes through increased access to and improved quality of education. "A person who is illiterate, uneducated or undereducated is not in the same position to enjoy the right of freedom of expression or political right as a person who is educated" (2001: 223). Every aspect of the education system, including language practices, must contribute to the equalization process. It is not enough that policies or practices be designed to achieve certain goals, e.g. the improvement of English proficiency or academic success; they must be shown to effectively do so. There must be a "causal connection" and rational relationship between means and ends (2001: 224) and any (unofficial) policies which can be shown to hamper the achievement of substantive equality may be found to violate the constitutional right to equality.

It is interesting to compare the impact of affirmative action in the sphere of employment with the probable benefits to be derived from effective reform of the educational system. Affirmative measures of any kind are essentially based on group rights, with the purpose of uplifting disadvantaged groups, and their implementation must, on occasion, impact unfairly on individuals. It is difficult to see how the upliftment of large sections of the population, previously discriminated against on racial grounds, could be achieved without countenancing some recognition of group rights and some degree of affirmative action. Affirmative action, however, as presently implemented, not only impacts very unjustly against individuals in many situations, but has a strong detrimental effect on economic growth. Though many of the Government's macroeconomic policies have had a positive impact, at a microeconomic level the focus on the redistribution rather than the creation of income and wealth has resulted in the alienation of white human and

financial capital, low levels of foreign investment and the channelling of black human and financial capital “towards the capture of the fruits of redistribution rather than the generation of new enterprises” (Hosking 2003 (a): 8). Race preferring policies have created distortions in the reward structures in South Africa (Hosking 2003 (a): 8), as well as in labour and capital markets (Hosking 2003 (a): 6). They also tend to increase the costs and reduce the competitiveness of both local and international companies. Real growth in total fixed capital between 1995 and 2000 was only 2,3%, while, in the same period, real private sector investment increased by just 2,7%, instead of the Growth, Employment and Redistribution [GEAR] target of 11,7% (Hosking 2003 (a): 7). Hosking says that the average annual growth in real GDP of 2,8% for the eight years after the ANC took over government is almost 4% lower than that of similarly situated globalising countries (Hosking 2003 (a): 4), and less than half the 6% the ANC themselves realistically predicted at the outset (Hosking 2003 (b)).

If Hosking is right, South Africa’s failure to perform as expected in these areas is largely due to the fact that we have not structured an economically efficient level with regard to affirmative action and black economic empowerment (BEE) (Hosking 2003 (a)). The impact of this on poorer, most disadvantaged sections of the population, those in most desperate need, can, of course, only be negative in terms of living conditions, creation of opportunities and, ultimately their right to equality. Effective affirmative measures within education, on the other hand, might be expected to have a positive effect on the economy.

To return to our subject: most children obliged to receive education through a medium other than their mother tongue are black and a large proportion come from very impoverished communities. It has been shown above that non-mother tongue education further disadvantages them substantially. It therefore constitutes unfair discrimination on the prohibited grounds of race, ethnic or social origin and language. An indirect racial impact is not acceptable (De Waal, Currie and Erasmus 2001: 121). Once it has been established that unfair discrimination has occurred on a prohibited ground, the onus is on the respondent, in this case the Government, to

prove that the limitation can be justified under the limitation clause (Section 36 of the Constitution). The right to equality is not limited by any other provisions of the Constitution; neither does it have any internal limitations. The provision in Section 9 (2) which allows for affirmative measures does not constitute a limitation or qualification; it is seen as a means to the end of a more equal society” (2001: 223) and therefore part of the right to equality.

Rights are not absolute, but the reasons for limiting a right need to be exceptionally strong. Any limitation must meet certain criteria:

- a) Rights may only be limited under a law of general application. Administrative action that does not take the form of legislation does not qualify (2001: 153). The law must not be arbitrary or arbitrarily applied and must provide for parity of treatment. It is thus unacceptable that some groups in society are provided with mother tongue education while other previously disadvantaged groups are not, unless the differential treatment can be shown to be to the latter's advantage,
- b) Rights may only be limited in a way that is reasonable and justifiable in an open and democratic society. Any limitation, must, under this criterion, meet the requirements of proportionality.

This involves a weighing up of competing values. The nature and importance of the right must be weighed against the validity and weight of the reasons for limiting it. The limitation of the right to life (contemplated in *S v Makwanyane* (2001: 156)) or to equality require reasons of exceptional weight. Under Section 36 (1) these may be evaluated according to:

- a) The importance of the purpose of the limitation
- b) The nature and extent of the limitation
- c) The relationship between the limitation and its purpose
- d) Whether less restrictive means are available to achieve the purpose (2001: 145).

The State might limit a right to an extent justifiable to ‘the reasonable man’ in a just and democratic society in order to achieve a worthwhile societal goal. In the case of the right to equality this would need to be a goal of exceeding importance, probably involving the protection of other fundamental rights such as the right to life, freedom or dignity. Furthermore, the State would be under an obligation to prove that there was a direct causal connection between the limitation and the achievement of this purpose and that the purpose was not achievable by less restrictive means (2001: 162). In this instance it would have to prove, not only that the acquisition of English skills was of vital importance to African language speaking children in advancing their interests, important enough to justify the proven detrimental effects of non-mother tongue education in third world contexts on conceptual development and academic performance, but that English medium education resulted in superior English language skills and that there was no other less restrictive means of acquiring the same levels of proficiency. It would clearly be unable to prove any of these things. Therefore, on the grounds of unfair discrimination alone, the Government would have to rethink its stance on medium of instruction in black schools and institute far-reaching reforms.

5.6.4.4 The Gauteng School Education Bill case (In re: The School Education Bill (Gauteng) 1996 (4) BCLR 537 (CC))

We have noted that the provisions of Section 29, like other socio-economic rights, are justiciable. Judge Kriegler, in a concurring judgement in the above case, gave it his opinion, for example, that the standard of reasonable practicability is “objectively justiciable” (2001: 484, note 54). Superficially, the Gauteng School Education Bill appears to quash any hopes of obtaining a decision obliging the State to implement and fund mother tongue education. Closer inspection will, however, show that this case was largely decided on precisely those principles which would act in favour of any applicant seeking the implementation of mother tongue education for previously disadvantaged African language speaking students in a very different context.

The above case was not essentially about the right to mother tongue education, and certainly not about the right to basic education. It was about the right of a historically privileged and powerful language minority to maintain separate institutions based on a special culture, language and religion (provided they did not overtly discriminate on the grounds of race) and whether they could do so at the State's expense. In a separate judgement, Judge Kriegler stated that the dispute "really revolved around money" and "the question of whether the richly endowed Model C schools could retain their exclusive identity" (In re: 1996: 546). It was also about whether such institutions might institute language competence testing (which would inevitably be employed in many instances to exclude on racial grounds) or mandate attendance at religious education classes and religious practices.

The right to establish separate cultural, language and religious educational institutions is, of course, protected under Section 32 (c) of the Interim Constitution and Section 29 (3) of the present Constitution, but nothing, as Judge Sachs points out, in international law or in the Constitution obliges the State to finance such institutions. While expressing considerable sympathy with the aim of preserving cultural diversity and with Afrikaners, who had fears about forced assimilation and the survival of their language, Judge Sachs focuses on the six principles which made an adverse decision mandatory:

- 1) The right to existence.

Judge Sachs clearly did not appear to consider the Afrikaans language or culture to be in immediate jeopardy. In fact, this might be said of any of the official languages. In the long run, however, Afrikaans is probably in a better position vis-à-vis the encroachment of English and the threat of marginalization than most. It has strong, determined and vocal educated core supporters and forms an important part of the Afrikaans identity. In contrast, De Waal, Currie and Erasmus consider it likely that the State might have positive obligations to support vulnerable or disadvantaged cultural, religious or linguistic communities that do not have the resources for such initiatives (De Waal, Currie and Erasmus 2001: 477).

2) Non-discrimination.

Protection of minorities in international law was based on the principle of preventing discrimination against disadvantaged or marginalized groups and guaranteeing them full and factual equality. The State did not have a duty to “support discrimination” or “subsidize privileges” (In re: 1996: 541), but rather to equalize access (1996: 540).

3) Equal rights.

The dominant theme of the constitution was equality.

4) The right to develop autonomously within civil society.

That of Afrikaners was not under any appreciable threat. (It is doubtful whether the same applies to disadvantaged individuals deprived of good quality basic education)

5) Affirmative action.

6) Positive support from the state.

One more rather significant remark appears in his judgement. He said that “the Constitution required that the Court take into consideration not only the interests of the parents, which may be unduly rooted in the past, but give paramount place to the interests of children, which may require looking more to the future” (1996: 540). This is valid in more educational contexts than this.

Neither international nor South African law supports then an unqualified right to mother tongue education. They may certainly do so, however, in certain situations: where numbers warrant perhaps, where other rights are at issue or where underprivileged minorities’ interests are at stake. The context is all-important. The Minority Schools in Albania case 1935 PCIJ found that cultural minorities were entitled to their own schools and other educational establishments for the preservation of their heritage and ways (De Waal, Currie and Erasmus 2001: 485). A similar decision on behalf of some ethnic or cultural groups in South Africa would be meaningless unless accompanied by financial support. In the Belgian Linguistics Case the European Court for Human Rights interpreted the European Charter not to guarantee a child the right to obtain instruction in a language of his or her choice. (2001: 484, note 52). It stated, though, that “the right to education would be

meaningless if it did not imply in favour of its beneficiaries the right to be educated in the national language or in one of the national languages, as the case may be” (Coomans 2003: 174). The denial of mother tongue education may not in any event be arbitrary, but must have an objective and reasonable justification. Much closer to our context is the American case of *Lau versus Nichols*, which shows conclusively that where the right to effective access to education is concerned any litigant would have a very good case. This verdict of the Supreme Court in 1974 outlawed English submersion programs for language minority children on the principle that “[t]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education” (Baker 2001: 182).

6. ECONOMIC GROWTH AND THE ALLOCATION OF SCARCE RESOURCES

The point was made initially that the South African economy has not performed according to potential over the past ten years and that one of the reasons for this was the largely unskilled, under-educated and under-productive workforce. Improving academic achievement levels through improved access to better quality education would obviously improve both productivity and skills levels and should have a considerable effect in lowering unemployment levels. It is very doubtful if very much improvement is possible without far-reaching changes in media of instruction and these would undoubtedly cost an appreciable amount. Whether Heugh's assumption is right and this amount would be comparatively modest, or whether it is correct to assume that countrywide reform would require extensive planning and reorganization (never cheap), hands-on assistance, guidance and monitoring throughout on the lines of that provided at Plüddemann's schools, as well considerable additional resource allocation, it is not something that can be neglected. It is not a question of putting money into a language-related issue or into quality of education: language is part of the solution to the quality problem. It is also vital to the stimulation of economic growth in the medium and long term. There is no conflict between fulfilling language rights in the educational arena and the most efficient allocation of scarce resources. Here, at any rate, the means to efficiency and justice are one and the same. The fairest educational dispensation will simultaneously increase aggregate welfare and improve the lot of the poorest sections of the community.

As an added benefit at no extra cost, increasing the use and status of languages in schools can do much to prevent their decline and loss of prestige in other domains. Increasing aggregate welfare does not only mean maximizing the production of material or easily quantifiable goods and ensuring their efficient distribution. It can encompass maximizing the happiness and well-being of citizens by increasing the availability of non-material goods, such as environmental, cultural or linguistic diversity or multilingual skills. Many see language-related benefits as a luxury that

we cannot in our present circumstances afford. However, the marketing of languages need not be extortionately expensive. A change in the attitudes and practices of political leadership is in itself a promotional measure and a necessary condition for the successful implementation of other measures, such as the increased use of minority languages in regional business circles, in the workplace, in advertising, and so on. Increasingly, languages are being regarded as a resource and can actually be used to economic advantage (Grin 1999: 17). Grin also points out that “policies in favour of minority languages stand to gain credibility if, without neglecting the equity issues involved, they are also shown to promote overall allocative efficiency”. (Grin and Vaillancourt 2000: 110). This requires a sound cost benefit analysis utilizing the methodology of economics. Apparently, investigations on these lines frequently show a positive balance when benefits are weighed against costs. The difficulty lies in computing the benefits. Vaillancourt’s assessment of the economic impact of Quebec’s Charter of the French Language, for example, shows that the annual cost of these promotional policies is modest and, he submits, outweighed by benefits such as (in this case) the strengthening of ties with the world community and in particular the United States (Grin 1996: 27). There is also “increasing interest in the possibly stimulating effects that minority languages can have on the local economy in peripheral regions of Europe” (1996: 24), but economic development has never been studied in less developed contexts. South Africa is a developing country with some first world characteristics and many which bring us far closer to less developed third world contexts, so there can be no certainty how our economy would react to concerted efforts to promote African languages. The many benefits derived from English as a lingua franca are manifest, but it is fairly possible, too, that indigenous languages may, in turn, be found to present not a costly problem but distinct assets.

Their promotion as media of instruction, if carried out efficiently and effectively, can only have a positive impact on educational standards and on the economy. A serious study of projected long and medium term benefits should have a considerable influence on Government’s attitude on the subject. On the one hand, in the words of the Committee on Economic, Social and Cultural Rights, “increasingly,

education is recognized as one of the best financial investments states can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence” (General Comment 13 (1)) (ESCR). On the other hand, according to Heugh, “to go the English mainly or only route because it is cheaper” is “an argument which can only spring from an intention to preserve the current inequities in the society. It is also a sheer waste of money.” (Heugh 2002 (1): 192)

7. FUTURE DEVELOPMENTS

7.1 Possible legal action

As we have seen, the matter is amenable to successful litigation. Of course, no matter how good one's case, there is always an element of uncertainty regarding the outcome of judicial proceedings. As Siegel points out, "states tend to be more successful than most private actors in gaining judicial consent for discrimination on at least some bases" (Siegel 2003: 221). Nevertheless, there would be a reasonable chance of success should any institutional body or private individual choose to take the matter to court. It is important to consider what actors might in the future wish to institute proceedings in order to ascertain whether they would be in a position to do so. Would they have sufficient standing to bring a constitutional matter before the courts?

SGBs have thus far shown little inclination and/or capacity to alter existing arrangements regarding media of instruction (Probyn et al 2002: 45). They are made up of a majority of parents and parents are, of course, the obvious persons to act on behalf of their children. But, in the absence of any concerted attempt by academics, researchers or government officials to disseminate the facts regarding the close connection between medium of instruction and unacceptable educational outcomes, they remain by and large unaware precisely why their offspring are underachieving. Academics and researchers, writing on language and education, tend to seek publication in accredited journals and professional media, rather than in popular journals, widely read journals and freely accessible internet websites. The reaction in the media by such as Van Louw and Carstens (2004), Van Rensburg (2004) and Brand (2004) to the pronouncement of the new Minister of Education that the aim was to ensure that children were able to cope with English as medium of instruction after the first three years (Pandor 2004) was somewhat exceptional. As an information librarian, I searched Google extensively, but unsuccessfully, for readily available information on the subject. There is much criticism of the educational system in general, e.g. the press release of the South African Democratic Teachers

Union [SADTU]: *Matriculation Results 2003 – Beyond Matric...*, and a lot of concern about dropout rates and poor educational outcomes; there is also a good deal on children's socio-economic rights by activists such as Sloth-Nielsen of the Children's Rights Project of the Community Law Centre (2003), Liebenberg (2001 and 2004), Veriava (2002), Diokno (1999) and Cassiem and Streak of IDASA's Children's Budget Unit (2001). Nowhere, even in Veriava or Cassiem and Streak, who address educational issues in detail, were the facts about language barriers in education laid out for public inspection. Articles advocating the feasibility and desirability of using the mother tongue as medium of instruction and emphasizing that this would not hinder and might even facilitate the acquisition of superior English language skills can be located via the SA Citations databases on Sabinet and other subscription databases, but not easily by means of Google or Alltheweb. Consequently, parents are likely to remain unaware that they can have both mother tongue education and, with good quality English language instruction, high levels of English proficiency (Heugh 2002(a): 193). It is possible therefore that none may be inspired to take action, legal or otherwise, in this regard.

Bloch regards it as "the responsibility of those with the expertise to share the necessary information so that parents can make informed choices" (Bloch 2000:195). Such experts would include many in government circles, including the Minister of Education. In fact, a good case may be made that government obligations include a 'duty to inform'. Under the Promotion of Access to Information Act 42 of 2001 (*Juta's Statutes 2003*) any member of the public has a right to any information he/she may require for the protection of his/her rights. This right is, however, dependent on the citizen requesting the information, which in turn requires that he/she be aware of the existence of such information. Section 59 (1) of the South African Schools Act (*Juta's Statutes 2003*), however, says that "A school must make information available for inspection by any person in so far as such information is required for the exercise and protection of such person's rights." No request is necessary, but Section 59 (1) does not specify how and where the information is to be made available. Moreover, it is probable that many heads are

unaware of the latest research on the advantages of mother tongue education. Direction would probably be necessary from the highest administrative levels.

Government's obligation under regional and international human rights law extends much further than this, however. Article 9 (1) of the African Charter (African Charter) states simply that "[e]very individual has the right to receive information". The Limburg Principles (Article 38) (Limburg Principles 1987) interpret the ICESCR (Ozmanczyk 2003: 952) as requiring the elimination of "[d]e facto discrimination as a result of the unequal enjoyment of economic, social and cultural rights", while the Maastricht Guidelines (Maastricht Guidelines 1998) condemn violation of state obligations through Acts of Omission as well as Acts of Commission (Maastricht II, 14 and 15). Read together, these documents would require the Government to take positive action to provide its citizens with any information they would require to appreciate or ameliorate their position in any discriminatory situation in which they might find themselves. In more general terms, the incontrovertible obligation of Government to protect the child and promote his/her 'best interests' would require that it make available to parents any information necessary for them to make the best possible choices on behalf of their children.

Should Government at any time in the future decide to act in accordance with these obligations the likelihood that parents may wish to take action, even legal action, to obtain guidance and resources from Government to support substantial changes in school language practices becomes significantly greater. Alternatively, in the absence of such action, it is possible that an educator might wish to institute legal proceedings on behalf of his/her charges. It is less immediately clear whether an educator would have sufficient legal standing to do so.

Standing concerns the question of who is an appropriate person to bring a matter to court for adjudication. Under common law South African courts have traditionally taken a restrictive approach to standing (De Waal, Currie and Erasmus 2001: 81), developed in the context of private litigation, which prevents people who are not

personally affected by the issue in question from meddling in the affairs of others (2001: 81-82). On constitutional issues the courts take a much broader, indeed a generous view of standing (2001: 83) and, where it has been alleged that a right in the Bill of Rights has been infringed, under Section 38 of the Constitution (*Juta's Statutes* 2003) anyone may approach the court who is

- a) acting in their own interest
- b) acting on behalf of another person who cannot act in their own name
- c) acting as a member of, or in the interest of, a group or class of persons
- d) acting in the public interest; and
- e) an association acting in the interests of its members (2001: 81).

Parents may clearly act on behalf of their children (2001: 83) but in the absence of their preparedness to do so a teacher or head should have sufficient standing. Theoretically, even in the face of opposition by parents courts have the power to overrule their wishes in the best interests of children. An educator, being in a position of trust vis-à-vis the children, would be the next appropriate person to bring an action, especially if he/she had the support of slightly older children. Though the situation was not analogous, a relationship of trust was considered adequate to create sufficient interest in *Jacobs v Waks* 1992 (1) SA 521 (A) (2001: 83). In *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the RSA* 1996 (3) SA 1095 (TkS) 1232-3, the Wildlife Society was similarly considered an appropriate body to bring actions on environmental issues (2001: 83); an educator must surely be an appropriate person to bring an action in the sphere of education and it is very much in the public interest that the South African education system function effectively. She might even be deemed to have an interest in her own right since the medium of instruction materially influences her ability to do her job properly.

7.2 Implementation of mother tongue education

If, by whatever means, a serious attempt is ever made to implement mother tongue education, thorough and detailed planning will be indispensable. Which model is

chosen, whether the gradual late transition or the fully bilingual (concurrent use of more than one language), depends partly on the availability of suitable personnel. Plüddemann suggests the establishment of a language committee (Plüddemann 2002: 53), which would map out the details of the projected model, ensure that all participants clearly understood the methods and objectives and deal with any problems or necessary changes as they arose. The committee would need to avail itself, at this stage and on an ongoing basis, of the experience and linguistic and educational expertise of members of a support team. Guidance and practical assistance at classroom level will also be essential for some time. Plüddemann found that the literacy practices and traditional teaching methodology common in most South African classrooms are only altered with considerable expenditure of time and effort. Both the philosophical principles underlying the changes and the practical implications of these need to be appreciated and the implementation of the new methodology closely monitored.

A part-time support team of this kind might be adequate in the case of a single school, while a full-time team might service a number of schools within an area.

Before any plan can be implemented it must be verified that all necessary resources will be available as and when required. These include both human and material resources, both of which may require development. It will be the responsibility of Government to undertake any necessary language and materials development and teacher training, but the responsibility of the committee and interested researchers or pressure groups to ensure that they honour their obligations.

7.2.1 Materials

These include a variety of teaching aids, textbooks and reading materials. The development of literacy and the creation of independent readers require that interesting, culturally appropriate story books in the earlier standards and, later, a variety of reading materials be freely available.

7.2.2 Teachers

Fairly balanced bilingual teachers are invaluable, especially during stages of transition from one medium of instruction to another and in the early stages of second language instruction. Moyo says that only 20% of English language teachers are first language speakers of the language (Moyo 2001: 106) — language teachers must either have very high levels of proficiency in the target language or themselves be native speakers of the language. Considerable upgrading of teachers' language skills and teaching methodology is necessary for effective English language instruction alongside mother tongue instruction or in preparation for the transition to English as medium of instruction. Content teachers using a second language as medium of instruction should ideally also speak the first language fluently and must have special training in bilingual teaching methodologies as well as competence in participative learner-centered modern teaching methods. Content teachers must also to some extent become language teachers. They need to provide scaffolding or support in the language learning process as well as in subject areas. In Vygotsky's terminology the teacher plays a mediational role on a cultural, conceptual and language level. (Vygotsky 1934). Children will be working through two levels of symbolism, learning to solve problems, categorize, generalize, synthesize and function logically through an imperfectly known second language. This makes interaction with and positive support from the teacher doubly necessary. Teachers must be trained in the necessary principles and techniques.

Teachers are particularly important too in dealing with underprepared or disadvantaged learners, who may have been culturally deprived because of a dearth of adult mediation and be quite unfamiliar with the raw materials of literacy and academic development. Enriched language programs and the use of elements of Feuerstein's Instrumental Enrichment Program (Feuerstein 1980) may be vital in ensuring that such children make up the backlog and cope with a cognitively demanding language regime at the same time. Care must be taken to recruit and

train competent, well-qualified teachers, so that initial experiments in any type of bilingual education succeed and provide an example to stimulate further demand for change.

8. CONCLUSION

With the right planning, staff, training, materials and expert assistance, such an attempt might be a resounding success. Even if initial costs prove moderately high, recurrent costs after the early years will be much the same as for traditional programs (Plüddemann 2002: 62). It is, in any event, an investment we cannot afford to neglect to make. A cost benefit analysis will show that the continued huge costs of academic failure and high repetition and dropout rates far outweigh those of implementing extended mother tongue education. Legally and morally this is the only defensible course to follow: mother tongue education is now a human rights issue. But from an economic point of view it is also the only sensible alternative. As Kotzé says: “[t]he cost of disregarding centuries of failed experiments with imperfect media of communication has never been calculated, neither for education nor for the realization of democracy....”

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APPENDIX 1

The United Nations Convention on the Rights of the Child

Article 2. 1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Article 3. 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4. State parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources...

Article 5. State parties shall respect the responsibilities, rights and duties of parents...

Article 12. 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Article 13. 1. The child shall have the right to freedom of expression; the right shall include freedom to send, receive and impart information and ideas...

Article 17. State parties ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well being and physical and mental health...

Article 18. 1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

Article 19. 1. State parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation...

Article 27. 1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

Article 28. 1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- a) Make primary education compulsory and free to all;
- b) Encourage the development of different forms of secondary education... make them available and accessible to every child...
- c) Make higher education accessible to all on the basis of capacity by every appropriate means;

e) Take measures to encourage regular attendance at schools and the reduction of dropout rates.

Article 29. 1. States Parties agree that the education of the child shall be directed to:

a) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

d) The preparation of the child for responsible life in a free society.

Article 30. In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 31. 2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 37. State Parties shall ensure that:

a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

APPENDIX 2

The African Charter on the Rights and Welfare of the Child

Article 4: Best interest of the Child

1. In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.
2. In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

Article 11: Education.

1. Every child shall have the right to an education.
2. The education of the child shall be directed to:
 - a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - c) the preservation and strengthening of positive African morals, traditional values and cultures;
 - d) the preparation of the child for responsible life in a free society...

Article 20: Parental Responsibilities

1. Parents or other persons responsible for the child shall have the primary responsibility of the upbringing of the child and shall have the duty:
 - a) To ensure that the best interests of the child are their basic concern at all times-