

Basic Education in the Language of Choice: a Contextual Interpretation

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ABSTRACT

This thesis explores the constitutional right to receive basic education in the language of choice. This fundamental human right imposes a duty on the state to provide children with education in the language of their choice whenever reasonably practicable. It is not a matter of whether the state has to fulfil section 29(2) of the Constitution, but rather how to give effect to this provision.

The right to receive basic education in the language of your choice is however, qualified by the specific internal limitation that provides that the right is subject to the condition that provision of education in the preferred language has to be reasonably practicable. Section 36, the limitation clause, is also a measure that can be used to limit this right.

The aim of this paper is to contextually interpret the fundamental right to receive education in the language of one's choice and to weigh up the intent of the provision to the provision's actual result. All relevant factors will be taken into consideration to examine the possibility of limiting the right to receive instruction in the language of choice to comply with the purpose of education and the best interests of the child.

Basic Education Rights Best Interest Child Children's Act Limitation

OPSOMMING

Hierdie proefskrif ondersoek die grondwetlike reg om basiese onderrig te ontvang in die taal van jou keuse. Hierdie fundamentele reg lê 'n plig op die staat om basiese onderrig te verskaf in die taal van jou keuse wanneer dit redelik uitvoerbaar is. Dit is nie 'n kwessie van of die staat artikel 29 (2) van die Grondwet moet nakom nie, maar eerder hoe om uiting te gee aan hierdie bepaling.

Die reg om basiese onderwys in die taal van jou keuse te ontvang is egter gekwalifiseer deur die spesifieke interne beperking wat bepaal dat die reg onderworpe is aan die voorwaarde dat voorsiening van onderwys in die taal van voorkeur redelik uitvoerbaar moet wees. Artikel 36, die beperkingsklousule, is ook 'n maatreël wat gebruik kan word om hierdie grondwetlike reg te beperk.

Die doel van hierdie skripsie is om die fundamentele reg om onderrig te ontvang in die taal van jou keuse op te weeg met die bedoeling van die bepaling en die bepaling se werklike resultaat vas te stel. Alle relevante faktore sal in ag geneem word naamlik die moontlikheid om die reg om onderrig te ontvang in die taal van jou keuse te beperk, om te voldoen aan die doel van onderwys asook om die beste belang van die kind te ondersoek.

Basiese Onderwys, Regte, Beste Belang, Kind, Kinderwet, Beperking

LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
CRC	United Nations Convention on the Rights of the Child
DOE	Department of Education
EHRR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
JCRDL	Journal of Contemporary Roman-Dutch Law
MPEPIL	Max Plank Encyclopedia of Public International Law
PAJA	Promotion of Administrative Justice Act

1 Introduction

Section 29(2) of the *Constitution of the Republic of South Africa*, 1996 (hereafter *Constitution*) recognises the necessity of multilingual education.¹ It explicitly states that

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.²

This right thus imposes a duty on the state to provide children with education in the language of their choice whenever reasonably practicable.³ Furthermore, this right is not restricted to basic education but applies to all levels of education.⁴ It should however be stressed that section 29(1) differentiates between basic and further education by subjecting the realisation of the latter to reasonable measures and progressive availability and accessibility.⁵ This is in accordance with Liebenberg and Brand's classification of basic and qualified rights.⁶ They distinguish between three categories of socio-economic rights, namely socio-economic rights that are qualified by an internal limitation, socio-economic rights that place a prohibition on state and private action and unqualified basic socio-economic rights.⁷ The right to education is both a socio-economic and a civil and political right. As a civil and political right, section 29(2) provides the freedom to choose the language of preference. The fact that the right to receive education in

1 *Constitution of the Republic of South Africa*, 1996.

2 *Constitution of the Republic of South Africa*, 1996.

3 Woolman *et al Constitutional Law of South Africa* 1.

4 Woolman *et al Constitutional Law of South Africa* 1.

5 Brand and Heyns *Socio-economic Rights* 3.

6 Brand and Heyns *Socio-economic Rights* 3.

7 Brand and Heyns *Socio-economic Rights* 3.

the language of your choice imposes budgetary implications upon the state gives this right its socio-economic nature.⁸

Adherence has therefore to be given to the interpretation of the Constitutional Court (hereafter the Court) in the *Grootboom* case with regards to rights in the Bill of Rights.⁹

The Constitutional Court's method of interpreting fundamental human rights consists of two stages.¹⁰ The Court not only considers the textual context of the right, but also the social and historical context.¹¹ The right to basic education as a fundamental human right must thus not only be interpreted within its textual context but also within its social and historical context.¹² Furthermore, section 39(1)(b) of the *Constitution* obliges the courts of South Africa to adhere to International law when interpreting the Bill of Rights.¹³ International law must therefore also be taken into consideration with regards to the right to be educated in the language of choice.¹⁴

The Court is of the opinion that socio-economic rights are not meant to be powerless provisions on paper.¹⁵ It has made it clear that the South African courts are constitutionally obliged to protect and enforce these rights.¹⁶ It is

8 Brand and Heyns *Socio-economic Rights* 4.

9 Brand and Heyns *Socio-economic Rights* 3.

10 *Government of the Republic of South Africa and others v Grootboom and others* 2001 1 SA 46 (CC) para 25.

11 *Government of the Republic of South Africa and others v Grootboom and others* 2001 1 SA 46 (CC) para 25.

12 *Government of the Republic of South Africa and others v Grootboom and others* 2001 1 SA 46 (CC) para 25.

13 *Constitution of the Republic of South Africa*, 1996.

14 *Constitution of the Republic of South Africa*, 1996.

15 *Government of the Republic of South Africa and others v Grootboom and others* 2001 1 SA 46 (CC) para 20.

16 *Government of the Republic of South Africa and others v Grootboom and others* 2001 1 SA 46 (CC) para 20.

therefore not a matter of whether the state has to fulfil section 29(2) of the Constitution, but rather how to give effect to this provision.¹⁷

All the rights in the *Bill of Rights* are interrelated and mutually supporting.¹⁸ A child, or any other person for that matter, who is being denied the right to education, is automatically being denied the foundational values of our society namely human dignity, freedom and equality.¹⁹ The Court held that if these fundamental rights are implemented and given effect to, as supposed to be, it will advance race and gender equality as well as the evolution of a society within which everyone will be equally able to achieve their full potential.²⁰

Section 29(2) only refers to South Africa's official languages and not all languages used in South Africa.²¹ Therefore it has to be stated that section 29(2) does not make provision for the right to be educated in a mother tongue.²² The right to education in the language of preference, and the manner in which the right is structured, create various difficulties with regard to the realisation of the right.²³ These difficulties more often than not, lead to the neglecting of its constitutional duties by the South African government.²⁴

It is the duty of the courts and the legislator to clarify the difficulties resulting from the provision contained in section 29(2) of the *Constitution*.²⁵ There are indeed various cases in which the South African courts have dealt with the issue of language as medium of instruction. The question remains whether the application

17 *Government of the Republic of South Africa and others v Grootboom and others* 2001 1 SA 46 (CC) para 20.

18 *Government of the Republic of South Africa and others v Grootboom and others* 2001 1 SA 46 (CC) para 23.

19 *Government of the Republic of South Africa and others v Grootboom and others* 2001 1 SA 46 (CC) para 23.

20 *Government of the Republic of South Africa and others v Grootboom and others* 2001 1 SA 46 (CC) para 23.

21 Boezaart *Child Law* 411.

22 Boezaart *Child Law* 411.

23 Boezaart *Child Law* 412.

24 Boezaart *Child Law* 412.

25 Brand and Heyns *Socio-economic Rights* 17.

and enforcement of the right, as provided for in the *Constitution*, is done in an effective and appropriate manner.

Section 29(2) is qualified by the specific internal limitation that provides that the right is subject to the condition that provision of education in the preferred language has to be reasonably practicable.²⁶ The implication of this limitation is that, unless it is reasonably practicable to provide education in the preferred language, the state is not obliged to comply with this obligation.²⁷ This is, however, not the only measure that may possibly limit this right.²⁸ Section 36, the limitation clause, is also a measure that can be used to limit this right.²⁹

Relevant factors that may assist in determining whether, in a particular case, it is reasonably practicable to provide such education are *inter alia* learner numbers, costs, availability of facilities and educators, and the distance to the nearest similar institution that is able to provide education in the chosen language.³⁰ Other considerations such as language planning and the best interest of the child principle are also very important when the right to education in the language of choice is considered.³¹ The best interests of the child cannot be left out of account when interpreting section 29(2). According to section 28(2) of the *Constitution*, article 3(1) of the *United Nations Convention of the Rights of the Child (CRC)* and article 4(1) of the *African Charter on the Rights and Welfare of the Child, (ACRWC)* the best interest of a child is a paramount consideration in every matter concerning the child.³²

The aim of this paper is to contextually interpret the fundamental right to receive education in the language of one's choice and to weigh up the intent of the

26 Boezaart *Child Law* 411.

27 Boezaart *Child Law* 411.

28 Boezaart *Child Law* 411.

29 Boezaart *Child Law* 411.

30 *Seodin Primary School and Others v MEC of Education Northern Cape and Others* 2006 4 para 5.

31 Halliday *Language and Education* 219.

32 Section 28(3) of the *Constitution* defines a child as a person under the age of 18 years.

provision to the provision's actual result. All relevant factors will be taken into consideration to examine the possibility of limiting the right to receive instruction in the language of choice to comply with the purpose of education and the best interests of the child.

This paper is restricted to basic education. According to the South African Education Department basic education can be defined as appropriately designed education programs to the level of the achievement of a General Education Certificate.³³ This certificate is obtained after the compulsory schooling phase.³⁴ Case law establishes that the compulsory schooling phase in South Africa is up to the age of 15 years or when a person reaches Grade 9.³⁵ Prior to this nine year period, a reception year must also be completed.³⁶

2 Interpreting fundamental human rights

2.1 Textual context

The Constitutional Court in the *Grootboom* case held that socio-economic rights are justifiable regardless of the fact that these rights will give rise to budgetary implications.³⁷ The Court stated that at the very minimum socio-economic rights should be at least negatively protected against improper invasion.³⁸ Section 7(2) of the *Constitution* puts an obligation upon the state to respect, protect, promote and fulfil the rights in the *Bill of Rights*.³⁹

33 Arendse *The school funding system in post apartheid South Africa* 17.

34 Arendse *The school funding system in post apartheid South Africa* 17.

35 Arendse *The school funding system in post apartheid South Africa* 17.

36 Arendse *The school funding system in post apartheid South Africa* 17.

37 *Government of the Republic of South Africa and others v Grootboom and others* 2001 1 SA 46 (CC) para 20.

38 *Government of the Republic of South Africa and others v Grootboom and others* 2001 1 SA 46 (CC) para 20.

39 *Government of the Republic of South Africa and others v Grootboom and others* 2001 1 SA 46 (CC) para 20.

It is very important to keep in mind that the provisions of section 29 of the *Constitution* have to be interpreted and applied on a case by case basis and the facts of every case must be taken into consideration.⁴⁰ The text has to be interpreted and applied to the facts and circumstances of each case.⁴¹ Section 29(2) can be divided into three subsections.⁴² The first subsection confers a general right to receive basic education in an official language or language of one's choice.⁴³ Secondly, the implementation and execution of this right must however be reasonably practicable.⁴⁴ This implies that it has to be reasonable to expect of the state to provide such education.⁴⁵ Thirdly, this section establishes and delimits the scope of the positive obligation imposed upon the state to ensure the realisation of the right provided for in section 29(2) of the *Constitution* by forcing the state to consider all reasonable educational alternatives, taking into account equity, practicability and the need to redress the result of racial discriminatory laws and practices of the past.⁴⁶

The choice of the medium of education is of fundamental importance because it is directly connected to the standard of living of South Africans, their access to basic human rights, the unequal access to scarce resources, poverty and the battle against prejudice, discrimination and exploitation.⁴⁷ The principle of interrelatedness of human rights consequently implies that, if a child is being denied the right to receive education in the language of choice, there is also a violation of that child's right not to be unfairly discriminated against on the basis

40 *Government of the Republic of South Africa and others v Grootboom and others* 2001 1 SA 46 (CC) para 21.

41 *Government of the Republic of South Africa and others v Grootboom and others* 2001 1 SA 46 (CC) para 21.

42 *Constitution of the Republic of South Africa*, 1996.

43 *Constitution of the Republic of South Africa*, 1996.

44 *Constitution of the Republic of South Africa*, 1996.

45 Boezaart *Child Law* 410.

46 *Government of the Republic of South Africa and others v Grootboom and others* 2001 1 SA 46 (CC) para 21.

47 Webb 2006 *Tydskrif vir Geesteswetenskappe* 37.

of language, and therefore also of the right to dignity.⁴⁸ One of the main objectives of education is to create and develop a child's sense of dignity.⁴⁹ The best interests of the child are therefore also implicated when a violation of section 29(2) occurs. The right contained in section 29(2) of the *Constitution* can therefore not be seen in isolation.⁵⁰

Article 5 of the *Convention against Discrimination in Education* (1960) is an example of treaty protection for the educational rights of minorities and indigenous children.⁵¹ The aim of this treaty is to eliminate all forms of discrimination in education which also includes discrimination on the basis of language.⁵² Article 5(c)-(2) of this treaty provides that:⁵³

(c) It is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language, provided however:

(i) That this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty;

(ii) That the standard of education is not lower than the general standard laid down or approved by the competent authorities; and

(iii) That attendance at such schools is optional.

48 *Government of the Republic of South Africa and others v Grootboom and others* 2001 1 SA 46 (CC) para 21; s 9(3) and s 10 of the *Constitution of the Republic of South Africa*, 1996.

49 *International Covenant on Economic, Social and Cultural Rights* (1966).

50 *Government of the Republic of South Africa and others v Grootboom and others* 2001 1 SA 46 (CC) para 21.

51 Van Bueren *International Law on the Rights of the Child* 247.

52 The *Convention against Discrimination in Education* (1960) defines discrimination in article one as:

“any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:

(a) Of depriving any person or group of persons of access to education of any type or at any level;

(b) Of limiting any person or group of persons to education of an inferior standard;

(c) Subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or

(d) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.”

53 *Convention against Discrimination in Education* (1960).

2. The States Parties to this Convention undertake to take all necessary measures to ensure the application of the principles enunciated in paragraph 1 of this article.

This provision indicates clearly that it is important for states to recognise the right of all citizens to carry out their own educational activities.⁵⁴ Article 30 of the *CRC* expands article 5 of the *Convention against Discrimination in Education* and ensures that children of any group shall not be denied the right to use their own language and to be educated in the language of their choice.⁵⁵

Article 27 of the *International Covenant on Civil and Political Rights (ICCPR)* protects the right of a child to use his own language in almost the exact words as in article 30 of the *CRC*.⁵⁶ Article 29(c) of the *CRC* provides that the education of a child shall be directed *inter alia* to the development of respect for the child's language and values.⁵⁷ The objectives of education are directed at the full development of human personality and human dignity.⁵⁸

The European Court of Human Rights, in the *Belgian Linguistic Cases*, held that the right to education would be meaningless if this right did not imply that education must be instructed in one of the national languages.⁵⁹ The court however also stated that article 14 of the *European Convention on Human Rights*, together with article 2 of Protocol No. 1 to the *European Convention of Human Rights*, do not explicitly guarantee everyone the right to receive education in the language of his or her choice.⁶⁰

Even though the right to education in the language of one's choice is not explicitly stated in international instruments, there are various instruments which imply this right by means of the right to education on the basis of equal

54 Van Bueren *International Law on the Rights of the Child* 247.

55 Van Bueren *International Law on the Rights of the Child* 247.

56 *International Covenant on Civil and Political Rights* (1966).

57 *United Nations Convention on the Right of the Child* (1989).

58 Art 13(1) of the *International Covenant on Economic, Social and Cultural Rights* (1966).

59 Van Bueren *International Law on the Rights of the Child* 248.

60 Van Bueren *International Law on the Rights of the Child* 248.

opportunity and non-discrimination.⁶¹ There are certain groups of children who are more likely to be victims of educational discrimination which include indigenous and minority children and children living in rural communities.⁶² According to international instruments such as the *Convention against Discrimination in Education*, the *ACRWC*, the *CRC*, the *ICESCR* and the *ICCPR*, educational discrimination includes any distinction, exclusion, limitation or preference based on *inter alia* language.⁶³

Article 5(1)(c)(ii) of the *Convention against Discrimination in Education* provides that the standard of education may not be lower, where this instruction is given in the language of choice, than the general standard laid down by the Department of Education.⁶⁴ There are three factors that can possibly affect the standard of basic education when it is conveyed in the mother tongue.⁶⁵ Firstly, in courses such as maths and science, there are instances where there is no translation for some of the terms used.⁶⁶ Secondly, not every single English textbook has a translated equivalent.⁶⁷ And finally there are not enough trained professionals to educate children in their mother tongue.⁶⁸ According to article 1(b) of the *Convention against Discrimination in Education* it is discriminatory to limit a child to a standard of inferior education.⁶⁹ Article 4(b) of the Convention provides that States Parties to the Convention shall ensure that the standards as well as the conditions relating to the quality of education are equivalent.⁷⁰

In addition, article 29(1)(a) of the *CRC* requires States Parties to achieve, through education, the development of a child's talents, involving mental and

61 Van Bueren *International Law on the Rights of the Child* 246.
62 Van Bueren *International Law on the Rights of the Child* 246.
63 Van Bueren *International Law on the Rights of the Child* 246.
64 *Convention against Discrimination in Education* (1960).
65 Webb 2006 *Tydskrif vir Geesteswetenskappe* 38.
66 Webb 2006 *Tydskrif vir Geesteswetenskappe* 38.
67 Webb 2006 *Tydskrif vir Geesteswetenskappe* 38.
68 Webb 2006 *Tydskrif vir Geesteswetenskappe* 38.
69 *Convention against Discrimination in Education* (1960).
70 *Convention against Discrimination in Education* (1960).

physical abilities, to their fullest potential.⁷¹ The latter could not possibly be achieved if education in the language of one's choice should result in a lower standard of education.⁷² Hence, one can argue that if the objective of education is not met, in this case to provide education in the language of one's choice on the necessary standard, education is consequently denied to these children.⁷³

Section 39(1)(b) of the *Constitution* obliges South African courts to consider International law.⁷⁴ International treaties therefore play a fundamental role in the South African legal structure.⁷⁵ South Africa has ratified the *Convention against Discrimination in Education*, the *ICCPR* as well as the *CRC* and must therefore give adherence to the provisions of these treaties.⁷⁶

2.2 Social and historical context

Consideration should not only be given to the textual setting of the right, but also to its social and historical context.⁷⁷ This context was described as follows in the case of *Soobramoney*

The reality is that there is a high level of unemployment, inadequate social security, and millions of people do not have access to clean water or to adequate health services. The underlying principle of our new constitutional order is to address these conditions, which is the result of our past and apartheid, and to ensure that our society becomes one in which there will be human dignity, freedom and equality. These values will not realise for as long as the people of South Africa continue to live in the horrible conditions that was caused by our past.⁷⁸

71 *United Nations Convention on the Rights of the Child* (1989).

72 *United Nations Convention on the Rights of the Child* (1989).

73 Van Bueren *International Law on the Rights of the Child* 248.

74 *Constitution of the Republic of South Africa*, 1996.

75 *Constitution of the Republic of South Africa*, 1996.

76 *Convention against Discrimination in Education* (1960), *International Covenant on Civil and Political Rights* (1966), *United Nations Convention on the Rights of the Child* (1989).

77 *Government of the Republic of South Africa and others v Grootboom and others* 2001 1 SA 46 (CC) para 22.

78 As quoted in *Government of the Republic of South Africa and others v Grootboom and others* 2001 1 SA 46 (CC) para 25.

Section 29(2) of the *Constitution* created a lot of difficulties during the negotiation stages of South Africa's first democratic constitution in the nineties.⁷⁹ The suspicion regarding hidden agendas made it difficult to compromise with regard to section 29(2).⁸⁰ It was in the best interests of some parties to maintain the existing separate schools for different language groups by making single medium schools a constitutional right.⁸¹ It was believed that these parties were inspired by racism to prevent children from other language groups to enter the existing white schools.⁸² This concept was in contradiction with the ANC's ideal of equal, non-racial education that would exterminate the disparities and injustices of the past.⁸³

It is thus significant that the need for multilingual education was accepted and that section 29(2) therefore provides everyone the right to education in the official language or languages of one's choice in public schools where it is reasonably practicable.⁸⁴

3 Current situation in South Africa

Section 29(2) is referred to as an empowerment clause.⁸⁵ The reason is that its actual intention is to ensure education to as many South Africans as possible.⁸⁶ The right to education in the language of one's choice is applicable to all levels of education and not restricted to only basic education.⁸⁷ Universities for example are therefore also subject to section 29(2) of the *Constitution* to provide instruction in the languages that the students prefer.⁸⁸ The right to receive education in the language of choice is guaranteed in section 29(2) of the

79 Boezaart *Child Law* 410.
 80 Boezaart *Child Law* 410.
 81 Boezaart *Child Law* 410.
 82 Boezaart *Child Law* 410.
 83 Boezaart *Child Law* 410.
 84 Boezaart *Child Law* 410.
 85 Boezaart *Child Law* 410.
 86 Boezaart *Child Law* 410.
 87 Boezaart *Child Law* 411.
 88 Boezaart *Child Law* 411.

Constitution and it puts an obligation on the state to provide such education where reasonably practicable.⁸⁹

It is essential to emphasise the fact that section 29(2) of the *Constitution* does not refer to all languages spoken in South Africa but only to the 11 official languages of the country.⁹⁰ Section 29(2) strictly does not provide for the right to be educated in one's mother tongue. A French speaking child, for instance, cannot demand to receive education in French when this specific child is attending a public school in South Africa.⁹¹

South Africa's language policy for instruction is governed by legislation in the form of the *South African Schools Act* 84 of 1996 and the *National Education Policy Act* 27 of 1996.⁹² The aim of the policy is amongst others to contribute to the building of a non-racial South African nation and for citizens to have respect for languages other than their own.⁹³ The policy also attempts to encourage learners to learn more than one language.⁹⁴ According to article 3(4)(m) of the *National Education Policy Act* a learner has to learn one language in grade 1 and 2, and from grade 3 onwards the learner is obliged to learn a second language.⁹⁵ All languages are supposed to receive equal time and resource allocation.⁹⁶ Learners only have to pass one language subject in grades five to ten.⁹⁷ From grade ten to twelve learners have to pass both languages of which one of the languages has to be an official language.⁹⁸ In terms of section 6(1) of the *South African Schools Act* the provincial education department is obliged to make provision for a learner's request to receive education in his/her preferred language, even in the case where no school in a school district offers the desired

89 Davel *Introduction to Child Law* 279.

90 Boezaart *Child Law* 411.

91 Boezaart *Child Law* 411.

92 The *South African Schools Act* 84 of 1996; *National Education Policy Act* 27 of 1996.

93 Department of Education 1997 <http://www.education.gov.za>.

94 Department of Education 1997 <http://www.education.gov.za>.

95 Department of Education 1997 <http://www.education.gov.za>.

96 Department of Education 1997 <http://www.education.gov.za>.

97 Department of Education 1997 <http://www.education.gov.za>.

98 Department of Education 1997 <http://www.education.gov.za>.

language of instruction as an instruction medium. According to the *South African Schools Act* it is the duty of the governing body to determine the language policy of a specific school. The governing body is however obliged to promote multilingualism by means of its language policy.⁹⁹

It is essential to understand the complexity of the fundamental right to receive education in the language of your choice. The right to education consists of various integrated factors such as teacher training, curriculum and syllabus construction, the roles and functions of the language of presentation, the study material, the value that is attached to the language and the socio-cultural aspects of language teaching.¹⁰⁰

Section 29(2) provides that the state has to ensure effective access to and implementation of the right to receive education in one's chosen language.¹⁰¹ This means that the state is obliged to take the right seriously and has to demonstrate that it acts reasonably in providing this right effectively.¹⁰² In reality this is not the current situation, which implies that the state is in violation of its constitutional duty.¹⁰³ The inconsistency of the state with regard to realising the constitutional right entrenched in section 29(2) is evident in several cases that have already appeared before the courts of South Africa.¹⁰⁴ Enforcing English, the indiscriminate targeting of Afrikaans medium institutions to transform to dual or parallel medium schools, neglecting indigenous languages in education, denying the multilingual reality of South Africa, and violating the language rights guaranteed by the *Constitution*, are some of the examples that prove the state's inconsistency with regard to giving effect to the provisions of section 29(2).¹⁰⁵

99 Department of Education 1997 <http://www.education.gov.za>.

100 Halliday *Language and Education* 239.

101 Boezaart *Child Law* 412.

102 Boezaart *Child Law* 412.

103 Boezaart *Child Law* 412.

104 Boezaart *Child Law* 412.

105 Boezaart *Child Law* 412.

The reason could be that the concept of mother tongue education is stigmatised, specifically by black leaders, because of mother tongue education's association with the Afrikaner, Christian education, ethnicity, apartheid, one sided decision making, human marginalisation and human disregard.¹⁰⁶ In addition, education by means of ethnic black languages has been stigmatised as education of poor quality.¹⁰⁷ The existence or non-existence of a single or parallel medium school is in reality not supposed to influence the right to education in the language of one's choice.¹⁰⁸

The way in which section 29(2) is structured creates confusion when it has to be interpreted.¹⁰⁹ The way in which the internal limitations are structured has the effect that section 29(2) is as a whole being misinterpreted.¹¹⁰ A problem arises when the limitations are not applied in the correct sequence.¹¹¹ The primary limitation on the right to education in the language of one's choice is the practicability test that occurs in the first part of section 29(2).¹¹² The second part of section 29(2) only provides factors that have to be given effect to in a case where a situation calls for the best alternative to provide the right effectively.¹¹³ The right itself cannot be limited by the last mentioned factors namely equity, practicability and redress.¹¹⁴ To ensure that the implementation of the right to receive instruction in the language of choice is practicable, the state has to consider equity, practicability and redress.¹¹⁵

One of the factors mentioned as an alternative in the second part of section 29(2) is single medium institutions.¹¹⁶ Once again confusion might be created when

106 Webb 2006 *Tydskrif vir Geesteswetenskappe* 37.

107 Webb 2006 *Tydskrif vir Geesteswetenskappe* 37.

108 Webb 2006 *Tydskrif vir Geesteswetenskappe* 38.

109 Boezaart *Child Law* 412.

110 Boezaart *Child Law* 412.

111 Boezaart *Child Law* 412.

112 Boezaart *Child Law* 412.

113 Boezaart *Child Law* 412.

114 Boezaart *Child Law* 412.

115 Boezaart *Child Law* 412.

116 Boezaart *Child Law* 412.

section 29(2) is interpreted and applied.¹¹⁷ The fact that single medium schools are explicitly mentioned in this section consequently implies that in such a given matter the state is obliged to make use of a single medium school without even considering the possibilities of dual and parallel medium instruction.¹¹⁸ Should the state not make use of single medium instruction in such a case, the state will be obliged to provide an explanation, in terms of section 33 of the *Constitution* as well as *PAJA*,¹¹⁹ as to why it did not comply with the provisions of the *Constitution*.¹²⁰

Section 29(2) has, as a result, created more tension between specifically Afrikaans medium schools and other language instruction institutions.¹²¹ It is often said that Afrikaans medium schools are denying access to education to learners of other language groups.¹²² This is almost impossible to prove, simply because there are too few Afrikaans medium schools left to be able to have this effect.¹²³ It would in any case be inconsistent with the equality principle in terms of section 9 of the *Constitution*, if single medium instruction should be used to deny access to education to others.¹²⁴

4 Case law

A single medium school can only be forced to change its status and accommodate children of another language in cases where other schools in the vicinity which are instructing in the latter language are utilised to capacity.¹²⁵ This was held in *Laerskool Middelburg v Departementshoof, Mpumalanga*

117 Boezaart *Child Law* 412.

118 Boezaart *Child Law* 412.

119 *Promotion of Administrative Justice Act* 3 of 2000.

120 Boezaart *Child Law* 412.

121 Boezaart *Child Law* 413.

122 Boezaart *Child Law* 413.

123 Boezaart *Child Law* 413.

124 Boezaart *Child Law* 413.

125 *Laerskool Middelburg en 'n ander v Departementshoof, Mpumalanga Departement van Onderwys en andere* 2003 4 SA 160 (T).

Departement van Onderwys.¹²⁶ In this case Laerskool Middelburg was forced by the Department of Education to register 20 English speaking children in an Afrikaans medium school and to instruct those children in English.¹²⁷ The court held that the Department of Education did not act according to the above mentioned regulation and ruled against the Department of Education.¹²⁸ However, the children have already been settled in the school after having attended this school for nine months. The court held that it was in the best interests of the children to remain in the Afrikaans medium school.¹²⁹

More or less the same incident occurred in the *Mikro Primary School* case where the Department of Education took control of the registration functions of the school and registered children attending the Afrikaans medium school to be educated in English.¹³⁰ The court ordered that the Department of Education should register those children in another school which would be able to instruct the children in their chosen language.¹³¹ The High Court as well as the Supreme Court of Appeal made it clear that the Department of Education acted *ultra virus* and that it is not the duty of the Department of Education but rather the duty of the governing body of the school to determine the school's language policy.¹³²

The Supreme Court of Appeal further held that children do not automatically qualify for the right contained in section 29(2) of the *Constitution*.¹³³ In other words, a child cannot just claim to receive education in the language of his or her

126 *Laerskool Middelburg en 'n ander v Departementshoof, Mpumalanga Departement van Onderwys en andere* 2003 4 SA 160 (T).

127 *Laerskool Middelburg en 'n ander v Departementshoof, Mpumalanga Departement van Onderwys en andere* 2003 4 SA 160 (T).

128 *Laerskool Middelburg en 'n ander v Departementshoof, Mpumalanga Departement van Onderwys en andere* 2003 4 SA 160 (T).

129 *Laerskool Middelburg en 'n ander v Departementshoof, Mpumalanga Departement van Onderwys en andere* 2003 4 SA 160 (T).

130 *Western Cape Minister of Education v Governing Body of Mikro Primary School* 140/2005 (SCA) para 1.

131 *Western Cape Minister of Education v Governing Body of Mikro Primary School* 140/2005 (SCA) para 43.

132 *Western Cape Minister of Education v Governing Body of Mikro Primary School* 140/2005 (SCA) para 43.

133 *Western Cape Minister of Education v Governing Body of Mikro Primary School* 140/2005 (SCA) para 31.

choice at each and every public educational institution where it is reasonably practicable.¹³⁴ This could result in a situation where a child would be able to demand education in English at an Afrikaans medium school, even if the two schools are neighbouring institutions.¹³⁵

Contrary to the two abovementioned cases, the court in *Seodin Primary School v MEC of Education, Northern Cape* ordered all the Afrikaans medium schools in the Kuruman region to convert to dual medium instruction to enable registered learners to be educated in English.¹³⁶ The court held that the MEC did not act unlawfully by enforcing the decision.¹³⁷ The reason for the court's decision was that the MEC did not act *mala fide* and the court could therefore not interfere with the MEC's decision.¹³⁸ The MEC followed all the necessary steps as prescribed by the law and therefore did not act *ultra virus*.¹³⁹

The Supreme Court of Appeal in *Hoërskool Ermelo v Head of Department of Education Mpumalanga* also held that the duty to formulate the language policy of a school is that of the governing body and not of the Department of Education.¹⁴⁰ In this case the Department of Education withdrew the governing body's policy making competency and changed the single medium school to a dual medium school.¹⁴¹ The Head of the Department then enrolled 20 English

134 *Western Cape Minister of Education v Governing Body of Mikro Primary School* 140/2005 (SCA) para 30.

135 *Western Cape Minister of Education v Governing Body of Mikro Primary School* 140/2005 (SCA) para 30.

136 *Seodin Primary School and others v MEC of Education Northern Cape and others* 2006 4 BCLR 542 (NC) para 62.

137 *Seodin Primary School and others v MEC of Education Northern Cape and others* 2006 4 BCLR 542 (NC) para 20.

138 *Seodin Primary School and others v MEC of Education Northern Cape and others* 2006 4 BCLR 542 (NC) para 20.

139 *Seodin Primary School and others v MEC of Education Northern Cape and others* 2006 4 BCLR 542 (NC) para 8.

140 *Hoërskool Ermelo and another v Head of Department of Education, Mpumalanga and others* 2009 3 SA 422 (SCA) 2.

141 *Hoërskool Ermelo and another v Head of Department of Education, Mpumalanga and others* 2009 3 SA 422 (SCA) 2.

speaking children after having changed the language policy.¹⁴² The Constitutional Court in the latter case held that the Department of Education would have acted *intra vires* in the case where the school's governing body failed to act.¹⁴³ It was clear, however, that the real issue was not whether the school's governing body ceased or failed to act, and that the interim committee as well as the new language policy they have incorporated, were therefore invalid.¹⁴⁴ The Court however kept the bigger picture in mind and ordered the school's governing body to take the larger interests of the community, in which the school was situated, into consideration, as well as the needs of other learners.¹⁴⁵ The school was ordered to review its language policy according to the last mentioned factors and to report back to the Court within one month.¹⁴⁶ The Court further ordered the Department of Education to report on the steps they have taken to satisfy the demand for an English or parallel medium high school in the Ermelo district as well as on the situation in other high schools in that area.¹⁴⁷

The fact of the matter is that the right to be educated in the language of one's choice is guaranteed in the South African Bill of Rights.¹⁴⁸ It remains the state's duty to effectively provide education in learners' preferred language even in the instances where it have been proven that a single medium institution would not be the best alternative.¹⁴⁹ The greatest concern with regard to the realisation of this fundamental right is that the state is actually advancing policies that undermine this right instead of fulfilling the right.¹⁵⁰

142 *Hoërskool Ermelo and another v Head of Department of Education, Mpumalanga and others* 2009 3 SA 422 (SCA) 3.

143 *Head of Department: Mpumalanga Department of Education and another v Hoërskool Ermelo and another* 2010 2 SA 415 (CC) para 68.

144 *Head of Department: Mpumalanga Department of Education and another v Hoërskool Ermelo and another* 2010 2 SA 415 (CC) para 68.

145 *Head of Department: Mpumalanga Department of Education and another v Hoërskool Ermelo and another* 2010 2 SA 415 (CC) para 80.

146 *Head of Department: Mpumalanga Department of Education and another v Hoërskool Ermelo and another* 2010 2 SA 415 (CC) para 106.

147 *Head of Department: Mpumalanga Department of Education and another v Hoërskool Ermelo and another* 2010 2 SA 415 (CC) para 106.

148 Boezaart *Child Law* 415.

149 Boezaart *Child Law* 415.

150 Boezaart *Child Law* 415.

All the case law discussed above involve the dispute between Afrikaans as medium of instruction and English as medium of instruction, as well as the different roles and functions of the respective parties involved in the education sphere. At no stage did the parties fight for education in another mother tongue such as Tswana or Zulu. It is submitted that the government and the respective education officials are pursuing a political agenda instead of taking the actual interests of children into account. Children are being used as pawns to achieve the wanted result. I believe that the enforcement of English, as the sole instruction medium in public schools, will bring an end to this type of litigation.

5 Argument for and against education in the language of choice

The right to receive education in the language of your choice is not absolute and can be limited in a number of ways.¹⁵¹ Article 29(2) contains a specific limitation provision providing that one can only demand the right on the condition that education in the preferred language is reasonably practicable.¹⁵² Factors to be taken into consideration to determine whether, in a particular case, it is reasonably practicable to realise the fundamental right, are learner numbers, costs, availability of facilities and educators, and the distance to the nearest similar institution that is able to provide education in the chosen language.¹⁵³

Section 29(2) also provides that all reasonable alternatives have to be taken into consideration by the state in order to ensure effective access to and implementation of this right.¹⁵⁴ These reasonable alternatives would include single medium institutions, taking into account equity, practicability and the need to redress the results of past discrimination.¹⁵⁵ In other words the state has to choose the appropriate institutions in which they want to enforce this right very

151 Boezaart *Child Law* 411.

152 Boezaart *Child Law* 411.

153 Boezaart *Child Law* 411.

154 *Constitution of the Republic of South Africa*, 1996.

155 Boezaart *Child Law* 411.

carefully and consider all the last mentioned factors.¹⁵⁶ The state cannot simply declare any institution multilingual without following the necessary administrative process.¹⁵⁷ The factors listed in section 29(2) have no specific order of importance and carries equal weight.¹⁵⁸ These factors have to be balanced.¹⁵⁹ What might be equitable to some might not necessarily be practicable or educationally appropriate to others.¹⁶⁰ However, what might be practicable to some might not serve the purpose to remedy the country's historical inequalities.¹⁶¹ All education departments and school governing bodies have thus to give effect to section 29(2) of the *Constitution* when they make decisions regarding a school's instruction medium.¹⁶²

Over and above the internal limitations contained in section 29(2) of the *Constitution*, the right to receive education in the language of one's choice can also be limited by means of the limitation clause, section 36 of the *Constitution*.¹⁶³ Section 36 provides that:¹⁶⁴

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

156 Boezaart *Child Law* 412.

157 Boezaart *Child Law* 412.

158 Boezaart *Child Law* 412.

159 Boezaart *Child Law* 412.

160 Boezaart *Child Law* 412.

161 Boezaart *Child Law* 412.

162 Boezaart *Child Law* 412.

163 Nieuwenhuis *Growing Human Rights* 100.

164 *Constitution of the Republic of South Africa*, 1996.

The question to be addressed is whether the decision to limit section 29(2) of the *Constitution*, will be reasonable and justifiable in an open and democratic society that is based on human dignity, equality and freedom.¹⁶⁵ It is submitted that limiting the right to be educated in the language of one's choice would actually contribute to the development of human dignity, equality and freedom, as the author will indicate below by examining each factor listed in section 36.

The nature of the right to be taught in the language of choice is unquestionably of great importance. The limitation of this right would mean that instruction would only be provided in English.¹⁶⁶ It is often argued that the main reason for poor performance at school and early dropout rates, are because children are being forced to receive instruction in English.¹⁶⁷ It is argued that one must receive education in one's mother tongue.¹⁶⁸ Mother tongue education is however not the only determining factor when it comes to children's academic performances.¹⁶⁹ Some of the factors which play a huge role in poor academic performances are the literary culture at home, incompetent teachers, poor or no facilities and inefficient or no textbooks.¹⁷⁰ Existing research points out the contrary to the fact that children perform poor at school because of instruction in a secondary language.¹⁷¹ Although this limitation will have a temporary negative effect on the child's right, the decision to limit the right will still in the long term be in the child's best interests and the limitation can therefore still be considered.¹⁷²

The purpose of the limitation of the right to be educated in the language of one's choice, is very important because it aims to promote *inter alia* equality in various spheres, for example the quality of education, access to education and the advantages in the labour sector.¹⁷³ In various sections of the labour sector in

165 Nieuwenhuis *Growing Human Rights* 101.

166 Nieuwenhuis *Growing Human Rights* 101.

167 Webb 2006 *Tydskrif vir Geesteswetenskappe* 38.

168 Webb 2006 *Tydskrif vir Geesteswetenskappe* 38.

169 Webb 2006 *Tydskrif vir Geesteswetenskappe* 38.

170 Webb 2006 *Tydskrif vir Geesteswetenskappe* 38.

171 Webb 2006 *Tydskrif vir Geesteswetenskappe* 38.

172 Nieuwenhuis *Growing Human Rights* 101.

173 Nieuwenhuis *Growing Human Rights* 101.

South Africa a general concept exists that South Africans' knowledge, proficiency, values and attitudes are not developed to meet the needs of the modern labour market.¹⁷⁴ The latter resulted in ineffective management, poor service delivery, especially in the state departments, and unacceptable productivity rates.¹⁷⁵ One of the main causes of those shortcomings is the fact that English as second or third language is the medium of formal training and education in the labour environment.¹⁷⁶ This is the result of a situation where a child has received education in languages beside English for twelve years and when he/she enters the labour sector after schooling, all his/her formal training is conducted in English.¹⁷⁷ Basic education in the language of choice can thus surely not be in the long term best interests of a child.¹⁷⁸ The limitation of section 29(2) of the *Constitution* can also contribute to the promotion of inclusive education.¹⁷⁹ The limiting of section 29(2) of the *Constitution* can therefore be justifiable.¹⁸⁰

The nature and the extent of the limitation are in keeping with the purpose of the limitation.¹⁸¹ It is in every child's best interests to limit this right for various reasons, for example to be able to receive education on the highest possible standard and to be on parallel footing with his/her opponents when he/she enters the labour sector. Statistics gathered in 2001 provide a practical example in favour of instruction in English where the children's mother tongue in actual fact is Afrikaans.¹⁸² The statistics showed that 80 000 Afrikaans speaking Coloured students preferred to receive instruction in English.¹⁸³ Further statistics show the percentage of English being spoken by those children on a social basis with their parents (8,15%), with their extended family (15,5%), with their brothers and

174 Webb 2006 *Tydskrif vir Geesteswetenskappe* 37.
 175 Webb 2006 *Tydskrif vir Geesteswetenskappe* 37.
 176 Webb 2006 *Tydskrif vir Geesteswetenskappe* 37.
 177 Webb 2006 *Tydskrif vir Geesteswetenskappe* 37.
 178 Webb 2006 *Tydskrif vir Geesteswetenskappe* 37.
 179 Nieuwenhuis *Growing Human Rights* 147.
 180 Nieuwenhuis *Growing Human Rights* 101.
 181 Nieuwenhuis *Growing Human Rights* 101.
 182 Webb 2006 *Tydskrif vir Geesteswetenskappe* 42.
 183 Webb 2006 *Tydskrif vir Geesteswetenskappe* 42.

sisters (19,1%), and with their friends (36,6%).¹⁸⁴ The statistics hence indicate that children who have the option to use their mother tongue on a social basis, still choose to rather speak English.

The argument also exists that English is a neutral language and will contribute to the building of the nation as well as regional and global co-operation, and therefore it has to be the language of instruction in public institutions.¹⁸⁵ In addition to the latter, the following arguments are also in favour of English as the medium for instruction in public schools:¹⁸⁶ South Africa is a multilingual nation and therefore requires a language of instruction that is *lingua franca*. English is the gateway to the future with regard to all rights and privileges, international communication, participation in modern technology and access to the globalised word. Furthermore, the labour sector functions in English and instruction in English therefore makes good sense.¹⁸⁷ The only effective way to master English as a language is to receive basic education in that language, and instruction in English guarantees the highest standard of education.¹⁸⁸

The limitation will achieve its purpose to protect the best interests of the child.¹⁸⁹ There is also not a less restrictive measure available, and therefore the fundamental right to receive instruction in the language of one's choice can lawfully be limited, in terms of section 36 of the Constitution, to act in the best interests of children.¹⁹⁰

Limiting the right to receive education in the language of one's choice should not be seen in a negative way. The essence of the problem should not be an issue of which language is preferred, but rather, which roles or functions are to be

184 Webb 2006 *Tydskrif vir Geesteswetenskappe* 42.

185 Webb 2006 *Tydskrif vir Geesteswetenskappe* 42.

186 Webb 2006 *Tydskrif vir Geesteswetenskappe* 42.

187 Webb 2006 *Tydskrif vir Geesteswetenskappe* 42.

188 Webb 2006 *Tydskrif vir Geesteswetenskappe* 43.

189 Nieuwenhuis *Growing Human Rights* 101.

190 Nieuwenhuis *Growing Human Rights* 101.

considered for the specific language policy.¹⁹¹ Economical, political and social factors, to name a few, make it inevitable within the complex multilingual societies of Africa, to give priority to the development of only one language.¹⁹² Of the 4000 languages that exist in the world, 2000 of those languages are spoken within the African Union.¹⁹³ The process of limiting should not be seen as a troublesome complication having to be tolerated, but as a positive and significant feature in the existence of a nation.

Section 28(2) of the *Constitution* provides that a child's best interests are of paramount importance in every matter concerning the child.¹⁹⁴ This principle is also provided for in Article 4 of the *ACRWC*, as well as in Article 3 of the *CRC*.¹⁹⁵ Section 7 of the *Children's Act* 38 of 2005 explicitly provides for the "best interests of a child" principle and can therefore not be neglected.¹⁹⁶ The objective of the principle is to promote the best interests of children.¹⁹⁷ To achieve this objective, the principle acts as directive for the manner in which children's rights should be interpreted and weighed up against other rights.¹⁹⁸ The "best interests of a child" principle plays a significant role in the interpretation, limitation and application of children's rights.¹⁹⁹ In this specific matter the principle may be applied in the process of general official decision-making in education and may be applied to a specific child or to children collectively.²⁰⁰ In *Grootboom v Oostenberg Municipality*, the court made it clear that the principle has to be used in the review of all proceedings in which decisions regarding children are taken.²⁰¹

191 Halliday *Language and Education* 217.

192 Halliday *Language and Education* 235.

193 Halliday *Language and Education* 235.

194 *Constitution of the Republic of South Africa*, 1996.

195 *African Charter on the Rights and Welfare of the Child* (1999); *United Nations Convention on the Right of the Child* (1989).

196 *Children's Act* 38 of 2005.

197 Visser 2007 *JCRDL* 459.

198 Visser 2007 *JCRDL* 459.

199 Visser 2007 *JCRDL* 459.

200 Visser 2007 *JCRDL* 460.

201 *Grootboom v Oostenburg Municipality and others* 2000 3 BCLR (C) para 288.

Similar to the way in which the best interests principle can limit the decision-making capacity and interests of parents, the principle can also limit the decision-making capacity of public education officials when decisions are taken with regard to children's education.²⁰² Education in general is meant to serve the best interests of children, evidently all educational decisions taken by parents or education officials with regard to children should thus be measured in terms of section 28(2) of the *Constitution*.²⁰³ Judge Bertelsmann declared in the *Laerskool Middelburg* case that it is evident that section 28(2) of the Constitution is directly applicable to decisions regarding children's education.²⁰⁴

Language is a pawn that is used by political leaders to receive and maintain power.²⁰⁵ It is a fact that white Afrikaans speaking South Africans do not trust the government's motives, specifically with regard to language issues.²⁰⁶ The government also does not trust the Afrikaans speaking citizens' motives.²⁰⁷ This problem can be solved by introducing English as the only medium of instruction in public schools.²⁰⁸

The reason why English has to be chosen as the official language for instruction is because English is not only a language that can be understood throughout the country and the continent, but it is also globally recognised.²⁰⁹ English fulfils a dual role namely to serve as an international language and as the only global language.²¹⁰ The standard of education in English are higher than in any other language, one of the many reasons being that more journals and research papers are devoted to English and English teaching than to any other

202 Visser 2007 *JCRDL* 463.

203 Visser 2007 *JCRDL* 463.

204 *Laerskool Middelburg en 'n ander v Departementshoof, Mpumalanga Departement van Onderwys en andere* 2003 4 SA 160 (T).

205 Webb 2006 *Tydskrif vir Geesteswetenskappe* 46.

206 Webb 2006 *Tydskrif vir Geesteswetenskappe* 46.

207 Webb 2006 *Tydskrif vir Geesteswetenskappe* 46.

208 Webb 2006 *Tydskrif vir Geesteswetenskappe* 46.

209 Halliday *Language and Education* 7.

210 Halliday *Language and Education* 7.

language.²¹¹ The budgetary implications, in the author's opinion, would therefore also be kept to a minimum because it would not be necessary to translate study material to all the other official languages of South Africa.

From a philosophical point of view the author tends to agree with writer Nieuwenhuis who is of the opinion that we are our brothers' and sisters' keepers.²¹² We are under a moral obligation, by a higher duty we owe to ourselves, to not only have our own best interests at heart but to act in the best interest of others.²¹³ According to the author's view, we are not only obliged by law to act in the best interests of our children by enforcing English as the medium of instruction, but there is a moral duty upon us to ensure sustainable development. Morally the author knows that it will be in his child's and his fellow beings' children's best interests to receive instruction in English; not only because it will be the best for the children in the long run when they will have to enter the labour sector, but also because of the fact that education in English would eliminate all other disruptive issues such as litigation, discrimination, racism and differentiation. The concept of caring for each other is after all what human rights are all about, namely social justice.²¹⁴

According to the author's opinion, the best interests of the child with regard to education in the language of choice cannot be determined by law or those who practice law, but it is a problem to be solved by experts in this division such as psychologists and language experts.

211 Halliday *Language and Education* 7.

212 Nieuwenhuis *Growing Human Rights* 23.

213 Nieuwenhuis *Growing Human Rights* 23.

214 Nieuwenhuis *Growing Human Rights* 23.

6 Conclusion

Section 29(2) of the *Constitution* makes provision for every child's fundamental right to receive basic instruction in the language of choice on a national level.²¹⁵ The text has to however be interpreted and applied on a case by case basis, bearing in mind the very important internal limitations contained in section 29(2).²¹⁶ This fundamental right can only be called upon if it is reasonably practicable to enforce it and if there is no other reasonable educational alternative.²¹⁷ The right to education in the language of one's choice is also secured on a regional as well as a global level in *inter alia* the *Convention against Discrimination in Education*, the *International Covenant on Civil and Political Rights* and the *United Nations Convention on the Rights of the Child*.²¹⁸ These instruments however explicitly state that the quality of the education provided in the language of choice may not be of a lower standard of education than the standard set out by the Department of Education.²¹⁹

The application of the right provided for in section 29(2) of the *Constitution* has to be realised in a manner which will improve South Africa's social and historical circumstances.²²⁰ If the application of the right actually advances disparities, deplorable living conditions, poverty, unemployment and inadequate social security, it would be in contrast with the constitutional values of human dignity, freedom and equality.²²¹ Education on a lower standard and poor education, will result in *inter alia* poverty, crime, and a high unemployment figure.²²²

215 *Constitution of the Republic of South Africa*, 1996.

216 Boezaart *Child Law* 411.

217 Boezaart *Child Law* 411.

218 See article 5 of the *Convention against Discrimination in Education* (1960), article 27 of the *International Covenant on Civil and Political Rights* (1966) and article 30 of the *United Nations Convention on the Rights of the Child* (1989).

219 Article 4(b) of the *Convention against Discrimination in Education* (1960) and article 29(2) of the *United Nations Convention on the Rights of the Child* (1989).

220 Webb 2006 *Tydskrif vir Geesteswetenskappe* 37.

221 Webb 2006 *Tydskrif vir Geesteswetenskappe* 37.

222 Webb 2006 *Tydskrif vir Geesteswetenskappe* 37.

When the right to education in one's preferred language is considered it has to be interpreted against the background of the right to the fullest development of a child's talents and his/her mental and physical abilities.²²³ The latter enables the child to free and equal access to work opportunities and results in labour flexibility.²²⁴ This provides access to free and fully economic participation.²²⁵ In terms of the bigger picture the right to education in one's preferred language has to be in line with the vision of the development and broadening of South African nationals' educational, economical, political, social and cultural options.²²⁶

The aim of section 29(2) of the *Constitution* is to provide education to as many people as possible.²²⁷ The result of this fundamental right is not as trouble free as it intends to be.²²⁸ The complexity of the enforcement of section 29(2) is often overseen.²²⁹ The fulfilment of the right includes, among other things, the provision of teachers' training, curriculum and syllabus construction, study material and facilities.²³⁰ The matter of the fact is that the state does not have the resources and manpower to give adherence to all the abovementioned requirements needed to effectively realise section 29(2).²³¹ There are also various political reasons and differences that prevent the state to submit to its constitutional duty.²³²

The South African courts and in particular the Constitutional Court have been reluctant to address and clarify the meaning of the right to receive education in the language of one's choice. All the court cases to date involve parties differing about the language policies of single medium schools. The arguments concern school governing bodies of Afrikaans medium schools which refuse to register

223 Webb 2006 *Tydskrif vir Geesteswetenskappe* 37.
 224 Webb 2006 *Tydskrif vir Geesteswetenskappe* 37.
 225 Webb 2006 *Tydskrif vir Geesteswetenskappe* 37.
 226 Webb 2006 *Tydskrif vir Geesteswetenskappe* 37.
 227 Boezaart *Child Law* 410.
 228 Boezaart *Child Law* 410.
 229 Boezaart *Child Law* 410.
 230 Boezaart *Child Law* 410.
 231 Boezaart *Child Law* 410.
 232 Boezaart *Child Law* 410.

English speaking learners. The issues raised in the current case law are mostly about schools' language policies and governing bodies' policy making competency. Unto date, no case has addressed a situation where a person's right to be educated in the language of choice had been violated. Since the current struggle anyway concerns English and Afrikaans medium schools, it would be in the majority's interest to provide education in English as the sole medium of instruction. The last mentioned solution would also bring an end to political and other difficulties involved. The author tends to agree with what Nieuwenhuis regards as essential educational values, namely choice, quality, efficiency and equity.²³³ Those values will be advanced if English is made the only medium of instruction in public schools.²³⁴

Even though the right to education in the language of one's choice is secured in the South African Constitution as well as in some regional and global instruments, it has to be taken into consideration that the right is not absolute and that the limitation thereof is possible.²³⁵ Apart from the internal limitation contained within section 29(2) the right can also be limited by means of section 36 of the *Constitution*.²³⁶ As it is explained in the discussion above, the right to receive basic instruction in the language of one's choice can lawfully be limited and would be in the child's best interests if limited.²³⁷ The fact that it would be in the best interests of the child not to receive instruction in the language of choice would become clear after proper investigation and language planning have been conducted.²³⁸ In terms of section 28(2) of the Constitution it would be unconstitutional not to limit the right, for the reason that it is not in line with the best interests principle.²³⁹ This process should not be seen as troublesome and complicated but as a positive feature in the development of a nation.²⁴⁰

233 Nieuwenhuis *Growing Human Rights* 23.

234 Nieuwenhuis *Growing Human Rights* 23.

235 *Constitution of the Republic of South Africa*, 1996.

236 *Constitution of the Republic of South Africa*, 1996.

237 Halliday *Language and Education* 219.

238 Halliday *Language and Education* 219.

239 *Constitution of the Republic of South Africa*, 1996.

240 Halliday *Language and Education* 219.

The best interests of the child standard is not applied sufficiently in policy making decisions with regard to the language of instruction and section 29(2) of the *Constitution*.²⁴¹ More objective research has to be done to establish a language policy which would have as its primary objective the best interests of children and not the ideology of government, education officials and policy makers.²⁴²

241 Halliday *Language and Education* 219.

242 Halliday *Language and Education* 219.

Bibliography

Literature

A

Arendse *The school funding system in post apartheid South Africa*
Arendse L E *The school funding system in post apartheid South Africa: Is the right to basic education accessible to the rich only?* (LLM dissertation University of the Western Cape 2009)

B

Boezaart *Child Law in South Africa*
Boezaart T *Child Law in South Africa* (Juta Claremont 2009)

Brand and Heyns *Socio-economic rights in South Africa*
Brand D and Heyns C *Socio-economic rights in South Africa* (ABC Press Cape Town 2005)

D

Davel *Introduction to Child Law in South Africa*
Davel CJ *Introduction to Child Law in South Africa* (Juta Lansdowne 2000)

H

Halliday *Language and Education*
Halliday MAK *Language and Education* (MPG Books London 2007)

Hodgson 2006 *Max Plank Encyclopedia of Public International Law*
Hodgson D "Education, Right to, International Protection" 2006 *Max Plank Encyclopedia of Public International Law* 1-21

N

Nieuwenhuis *Growing Human Rights and Values in Education*
Nieuwenhuis J *Growing Human Rights and Values in Education* (Van Schaik Publishers Pretoria 2007)

V

Van Bueren *The International Law on the Rights of the Child*
Van Bueren G *The International Law on the Rights of the Child* (Martinus Nijhoff The Hague 1995)

Visser 2007 *Journal of Contemporary Roman-Dutch Law*

Visser PJ "Some Ideas on the 'Best Interest of a Child Principle' in the Context of Public Schooling" 2007 *Journal of Contemporary Roman-Dutch Law* 459-469

W

Webb 2006 *Tydskrif vir Geesteswetenskappe*

Webb V "Perspektiewe op Moedertaalonderrig" 2006 *Tydskrif vir Geesteswetenskappe* 37-50

Woolman *et al Constitutional Law of South Africa*

Woolman S *et al Constitutional Law of South Africa* 2nd ed (Juta Pretoria 2002)

Legislation

Constitution of the Republic of South Africa, 1996

Children's Act 38 of 2005

National Education Policy Act 27 of 1996

Promotion of Administrative Justice Act 3 of 2000

South African Schools Act 84 of 1996

Law Reports

G

Grootboom v Oostenberg Municipality and others 2000 3 BCLR 277 (C)

Government of the Republic of South Africa and others v Grootboom and others 2001 1 SA 46 (CC)

H

Head of Department: Mpumalanga Department of Education and another v Hoërskool Ermelo and another 2010 2 SA 415 (CC)

Hoërskool Ermelo and another v Head of Department of Education, Mpumalanga and others 2009 3 SA 422 (SCA)

L

Laerskool Middelburg en 'n ander v Departementshoof, Mpumalanga Departement van Onderwys en andere 2003 4 SA 160 (T)

S

Seodin Primary School and others v MEC of Education Northern Cape and others 2006 4 BCLR 542 (NC)

W

Western Cape Minister of Education v Governing Body of Mikro Primary School 140/2005 (SCA)

International instruments

African Charter on the Rights and Welfare of the Child (1999)

Convention against Discrimination in Education (1960)

International Covenant on Civil and Political Rights (1966)

International Covenant on Economic, Social and Cultural Rights (1966)

United Nations Convention on the Rights of the Child (1989)

Vienna Declaration and Program of Action (1993)

Internet sources

Department of Education 1997 <http://www.education.gov.za>.

Department of Education 1997 Language Education Policy
<http://www.education.gov.za> [date of use 4 October 2010]