In re Gauteng School Education Bill of 1995 (CCT39/95) [1996] ZACC 4; 1996 (4) BCLR 537; 1996 (3) SA 165 (4 April 1996)

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO CCT 39/95

In the matter of:

THE GAUTENG PROVINCIAL LEGISLATURE

In re: DISPUTE CONCERNING THE CONSTITUTIONALITY OF CERTAIN PROVISIONS OF THE SCHOOL EDUCATION BILL OF 1995

Heard on: 29 February 1996

Delivered on: 4 April 1996

JUDGMENT

[1] **MAHOMED DP**: Various members of the Gauteng provincial legislature, constituting at least one third of the total membership of that body, acting pursuant to the provisions of section 98(9) of the Constitution of the Republic of South Africa Act, 200 of 1993 ("the Constitution"), petitioned the Speaker, requiring him to request this Court to exercise its jurisdiction in terms of section 98(2)(d) of the Constitution to resolve a dispute which had arisen in respect of the constitutionality of certain provisions of the School Education Bill ("the bill") of the Gauteng Province. That request was duly communicated by the Speaker of the Gauteng provincial legislature to this Court.

[2] Subsequently the bill was passed and duly enacted as the School Education Act of 1995 but the disputed sections were not put into operation. It was not contended by any of the parties appearing before us that the jurisdiction conferred upon us by section 98(2)(d) of the Constitution was in any way ousted because the bill which was previously before the provincial legislature had since ceased to be a bill and had been enacted as a statute. For the purposes of this judgment I shall continue to refer to the School Education Act as "the bill".

[3] The objects and content of the bill
The long title of the bill describes its objects. It is "[t]o provide for the provision and control of education in schools, and matters connected therewith". Chapter 3 of the bill deals with "schooling". Section 11(2) provides that admission requirements for public schools "shall not unfairly discriminate on grounds of race, ethnic or social origin, colour, gender, sex, disability, sexual orientation, religion, conscience, belief, culture or language". ("Model C schools" are included within the definition of public schools in section 1.) Section 19 provides as follows:
"Language and discrimination

19. (1) Language competence testing shall not be used as an admission requirement to a public school.

(2) Learners at public schools shall be encouraged to make use of the range of official languages.

(3) No learner at a public school or a private school which receives a subsidy in terms of section 69 shall be punished for expressing himself or herself in a language which is not a language of learning of the school concerned."

The constitutionality of section 19(1) is disputed by the petitioners and the South African Foundation for Education and Training ("the Foundation") which was admitted as an *amicus curiae* in these proceedings. The executive director of the Foundation states that-
"The mission of the Foundation is to support a Christian value system and prescribe to the principle of mother tongue education. The Foundation also aspires to promote education in the South African community as a whole with special reference to the Afrikaans medium education."
[4] Section 21 and section 22 of the bill read as follows:
"Religious policy of public schools

21. (1) The religious policy of a public school shall be made by the governing body of the school concerned after consultation with the department, and subject to the approval of the Member of the Executive Council.

(2) The religious policy of a public school shall be developed within the framework of the following principles:

(a) The education process should aim at the development of a national, democratic culture of respect for our country's diverse cultural and religious traditions.

(b) Freedom of conscience and of religion shall be respected at all public schools.

(3) If, at any time, the Member of the Executive Council has reason to believe that the religious policy of a public school does not comply with the principles set out in subsection (2) or the requirements of the Constitution, the Member of the Executive Council may, after consultation with the governing body of the school concerned, direct that the religious policy of the school shall be reformulated in accordance with subsections (1) and (2).

(4) The provisions of section 18(4) to (8) shall apply *mutatis mutandis* to a directive issued by the Member of the Executive Council under subsection (3) and in such application any reference to language policy shall be construed as a reference to religious policy.

Freedom of conscience

22. (1) No person employed at any public school shall attempt to indoctrinate learners into any particular belief or religion.

(2) No person employed at any public school or private school shall in the course of his or her employment denigrate any religion.

(3) (a) (i) Every learner at a public school, or at a private school which receives a subsidy in terms of section 69, shall have the right not to attend religious education classes and religious practices at that school.

(ii) In this regard the department shall respect the rights and duties of parents to provide direction to their children in the exercise of their rights as learners, in a manner consistent with the evolving capacity of the children concerned.

(b) The right conferred by paragraph (a) on a learner at a private school which receives a subsidy in terms of section 69, may be limited where such limitation is necessary to preserve the religious character of the private school concerned.

(c) Except as is provided for in paragraph (b) no person employed at a public school, or at a private school which receives a subsidy in terms of section 69, shall in any way discourage a learner from choosing not to attend religious education classes or religious practices at that school.

(4) No person employed at a public school shall be obliged or in any way unduly influenced to participate in any of the religious education classes or religious practices at that school."

The constitutionality of section 21(2), section 21(3) and section 22(3) is also impugned.
[5] The complaint made against the impugned sections of the bill is that their effect is to invade the right of persons to attend schools where language competence testing is permitted as an admission requirement or where the religious policy of the school is developed within a framework which does not fall within the principles set out in section 21(2) of the bill or where the school is not subject to the directions contemplated in section 21(3) or where the attendance of scholars at religious education classes is compulsory. The answer proffered on behalf of the provincial government is that the bill makes no invasion on any of these rights at all. Section 19(1) which prohibits language competence testing as an admission requirement to a public school, section 21(2) which provides for the religious policy to be developed in a school and section 21(3) which provides for directions in this regard in certain circumstances do not have any application at all at private schools and section 22(3) which creates a right not to attend religious education classes is confined to public schools and only such private schools which

receive a subsidy in terms of section 69 of the bill. All the rights which the petitioners and the Foundation seek to assert can therefore be freely exercised at other schools. Both the Foundation and the petitioners seek to counter that answer by the submission that section 32(c) of the Constitution creates a positive obligation on the state to accord to every person the right to require the state to establish, where practicable, educational institutions based on a common culture, language or religion as long as there is no discrimination on the grounds of race. It is contended that on this interpretation of section 32(c), the government is not entitled to prohibit language competence testing as an admission requirement or direct what religious policy should be developed or who should or should not attend religious classes at schools so established. Counsel for the petitioners and the Foundation were correct in conceding that this submission on the proper interpretation of section 32(c) was "central" to the attack made on the impugned sections. It substantially dominated counsel's argument. It therefore becomes crucial to determine whether section 32(c) of the Constitution indeed creates a positive obligation on the state to accord to every person the right to have established, where practicable, schools based on a common culture, language or religion subject only to the qualification that it is practicable and that there is no discrimination on the grounds of race.

[6] Section 32(c) of the Constitution

Section 32 reads as follows:

"Education

32. Every person shall have the right-

(a) to basic education and to equal access to educational institutions;

(b) to instruction in the language of his or her choice where this is reasonably practicable; and

(c) to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race."

[7] The submission that every person can demand from the state the right to have established schools based on a common culture, language or religion is not supported by the language of section 32(c). The section does not say that every person has the right to have established by the state educational institutions based on such a common culture, language or religion. What it provides is that every person shall have the right to establish such educational institutions. Linguistically and grammatically it provides a defensive right to a person who seeks to establish such educational institutions and it protects that right from invasion by the state, without conferring on the state an obligation to establish such educational institutions.

[8] Considered in context, there is no logical force in the construction favoured by the petitioners. If a person has the right to basic education at public expense in terms of sub-paragraph (a) and if he or she has the right is to be instructed in the language of his or her choice in terms of sub-paragraph (b), why would there be any need to repeat in sub-paragraph (c) the right to education at public expense through a common language? The object of sub-section (c) is to make clear that while every person has a right to basic education through instruction in the language of his or her choice, those persons who want more than that and wish to have educational institutions based on a special culture, language or religion which is common, have the freedom to set up such institutions based on that commonality, unless it is not practicable. Thus interpreted, section 32(c) is neither superfluous nor tautologous. It preserves an important

freedom. The constitutional entrenchment of that freedom is particularly important because of our special history initiated during the fifties, in terms of the system of Bantu education. From that period the state actively discouraged and effectively prohibited private educational institutions from establishing or continuing private schools and insisted that such schools had to be established and administered subject to the control of the state.[1] The execution of those policies constituted an invasion on the right of individuals in association with one another to establish and continue, at their own expense, their own educational institutions based on their own values. Such invasions would now be constitutionally impermissible in terms of section 32(c).

[9] The interpretation of section 32(c) as a defensive right, based on its grammatical and linguistic structure, seems to me also to be supported by its context within section 32 itself. Section 32(a) creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education. Section 32(b), recognising the diversity of languages in our country, again creates a positive right for every person to instruction in the language of his or her choice, where this is reasonably practicable, not merely a negative right to prevent any obstruction if such person seeks instruction in the language of his or her choice. Section 32(c), by contrast, guarantees a freedom - a freedom to establish educational institutions based on a common culture, language or religion. It is that freedom which is protected by section 32(c). A person can invoke the protection of the court where that freedom is threatened, but the language of section 32(c) does not support a claim that such educational institutions, based on a commonality of culture, language or religion, must be established by the state, or a claim that any person is entitled to demand such establishment, notwithstanding the fact that his or her right to basic education and to instruction in the language of his or her choice is, where practicable, otherwise being satisfied by the state.

[10] Mr NGD Maritz SC, who appeared on behalf of the petitioners, and Mr Raath, who appeared on behalf of the Foundation, both contended that if section 32(c) was only intended to protect the right of persons to establish their own educational institutions, it would not be necessary to qualify such a right by making it subject to the requirement that it should be practicable. It was suggested that that qualification was more consistent with a positive obligation on the part of the state to establish educational institutions based on a commonality of language, culture or religion and that the requirement of practicability was inserted so as to relieve the state from the obligation to establish such educational institutions in circumstances where this was not practicable because of the smallness of the numbers of persons wishing to attend such institutions or some similar practical or logistical difficulties.

[11] I am unable to agree with that submission. It is certainly true that if every person had the right to require the state to establish educational institutions based on a common culture, language or religion, it would be sensible to provide that that duty need only be discharged by the state where it was practicable. But, it is equally true that if the right protected by section 32(c) is the right of private persons to establish such institutions, such a right should only be asserted if it were indeed practicable. Were it otherwise, the state might, pursuant to its duty to ensure basic education for every person, be obliged to monitor and supervise such institutions and to ensure some element of quality control, even in circumstances where this was not reasonably practicable. The state has a positive interest in ensuring that the right is being asserted in circumstances where it is practicable. Otherwise this might engage the resources of the state quite unjustifiably in dealing with hopelessly impractical ventures eventually aborted or

abandoned. Prospective students invited to such institutions might in those circumstances also be prejudiced. The state has a positive interest in ensuring that the execution of the right which is being asserted is practicable in the circumstances. The right of private persons to establish educational institutions, protected by section 32(c), should therefore be subject to the qualification that it is practicable. If it is not, the persons exercising such a right cannot assert the protection of the Constitution against the state. The requirement of practicability is therefore sensible on both interpretations of section 32(c). It is of neutral value in the proper interpretation of the sub-section. It does not support the interpretation contended for by Mr Maritz and Mr Raath any more than it supports the interpretation contended for by Mr Trengove, on behalf of the Gauteng government.

[12] It was also contended that section 32(c) could not have been intended to protect merely the freedom of every person to establish educational institutions based on a common culture, language or religion because the right of every person to use the language and to participate in the cultural life of his or her choice was in any event protected by section 31 of the Constitution and similarly the right to freedom of religion was guaranteed by section 14. I am not persuaded, however, that a positive obligation on the state to establish educational institutions based on a common culture, language or religion can necessarily be inferred from the fact that the right of every person to use the language and to participate in the cultural life of his or her choice is expressly protected in section 31 or from the fact that freedom of religion is protected by section 14. Sections 14 and 31 are general sections which do not specifically deal with education. Section 32 is a specific section setting out specifically what rights a person has to education, what right he or she has to education in the language of his or her choice and what right there exists for every person to establish educational institutions based on a common culture, language or religion. None of these rights are expressly dealt with in sections 14 and 31. It is perfectly understandable that the lawmaker would wish to articulate such educational rights in the section dealing specifically with education.

[13] In the written argument which was lodged on behalf of the petitioners, some reliance was placed on Canadian authority.[2] We were reminded of section 35(1) of the Constitution which provides that in the interpretation of Chapter 3 of the Constitution, a court of law may, *inter alia*, have regard to comparable foreign case law and we were referred to various *dicta* in a number of Canadian cases to the effect that the Canadian Charter of Rights and Freedoms imposed obligations on the Government to provide specific opportunities for the use of English and French in schools.[3]

[14] The relevant provision of the Canadian Charter is section 23 which provides that:

"23. (1) Citizens of Canada

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

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

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.
(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

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

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

"The special provisions of section 23 of the Charter makes it a unique set of constitutional provisions quite peculiar to Canada."[4]
[15] The language and structure of section 23 of the Canadian Charter are wholly distinguishable from section 32(c) of our Constitution. Section 23 of the Canadian Charter is clearly concerned with the obligation of the Government to provide education in the official languages of Canada to linguistic majorities and minorities. It is analogous to section 32(b) of our Constitution, but very different from section 32(c). The interpretation accorded to it by the Canadian courts can therefore be of scant assistance in the proper interpretation of section 32(c) of our Constitution.
[16] After oral argument had been concluded and judgment had been reserved in this matter, a written application was made on behalf of the Foundation to advance three further contentions. The first contention was that the bill "offered no language protection for minorities" and that all that was being offered was some kind of protection by way of executive policy and discretion in terms of section 18(2)(c) of the bill which provides that-
"[s]chool language policy should be designed to facilitate the maximum participation of learners in the learning process."
Counsel for the Foundation appears to have misunderstood the argument advanced on behalf of the Gauteng government. It was never contended that learners wishing to be instructed in the language of their choice at public schools funded by the state should have to depend on some kind of executive policy or discretion for the protection of that right. It is a clear constitutional right of every person to be instructed in the language of his or her choice in terms of section 32(b). This is guaranteed by the clear language of section 32(b). The only qualification is that it must be "reasonably practicable." If it is, it can be demanded from the state. The parents of the children who demand it do not have to rely on any executive policy or discretion. They are entitled to rely on the plain and imperative terms of the Constitution itself.
[17] The second complaint contained in the additional submission on behalf of the Foundation was that the bill does not provide for any "possible transformation from a model C school to a private school". Assuming that this is correct, I am unable to appreciate how this could impact upon the constitutionality of any of the impugned provisions of the bill at all. Those who controlled model C schools would continue to enjoy the right for every person to be instructed in such schools in the language of their choice. If they did not wish their children to attend model C schools but to attend private schools, they would again constitutionally be entitled to establish such private schools and even to negotiate with the province in acquiring any of the facilities or

assets of any model C school which they wished to leave. But whether they did or did not do so, what is left quite intact are two clear constitutional rights: the right to instruction at a public school in the language of their choice and the right to establish schools of their own based on a common culture, language or religion. The only qualifications are that the exercise of such rights must be practicable in each case and that the right to establish educational institutions based on a common culture, language or religion cannot be exercised in a manner that discriminates against pupils on the grounds of race.

[18] The third and final argument advanced in the new submissions on behalf of the Foundation was that the impugned provisions constitute "a negation of the protected minority rights themselves" in terms of section 33 of the Constitution. I do not appreciate this argument. Section 33 simply deals with the circumstances under which rights protected by chapter 3 of the Constitution may be limited by laws of general application. If, however, the impugned sections of the bill do not invade or limit any of the relevant sections of chapter 3, the question as to whether there would have been any justification in terms of section 33 would not arise at all.

[19] What remains therefore the real case for the petitioners and the Foundation is their interpretation of section 32(c). Having regard to the language of section 32(c), its objects and its context, both in relation to section 32 itself and to the Constitution generally as well as its specific historical context, I am satisfied that section 32(c) is not reasonably capable of bearing the interpretation sought to be placed on it by Mr Maritz and by Mr Raath. Section 32(c) does, of course, protect a very important freedom. The state is constitutionally obliged to respect that freedom, but is not so obliged to establish educational institutions based on a commonality of culture, language or religion. This conclusion effectively disposes of the main thrust of the attacks made on the impugned provisions of the bill.

[20] Mr Maritz contended, however, that there was a "peripheral" ground for attacking section 22(3)(b) of the bill which was not dependant on his interpretation of section 32(c). The complaint was that section 22(3)(b) conferred a right on a private school to insist that a learner at that school attends religious classes and religious practice at that school. It was argued that this was also a right which should accrue at a public school. Even if this argument is a good argument, it cannot assist the case sought to be made on behalf of the petitioners and the Foundation. The case sought to be made on their behalf was that this right should also be available at public schools to avoid discrimination. No constitutional ground was suggested which could entitle us to extend to public schools the right accorded by section 22(3)(b) to private schools. The alternative would be to invalidate section 22(3)(b) because it does not extend to public schools. This is, however, not what Mr Raath or Mr Maritz urged us to do because that would not in any way provide a right for a public school to insist that a learner attends religious classes and religious practices at the school. In any event, the submission that public schools must be allowed to insist that a learner be compelled to attend religious classes and religious practices at the school might also conflict with section 14(2) of the Constitution, which expressly provides that such attendance must be free and voluntary. Faced with all these difficulties, Mr Maritz did not press the objection to section 22(3)(b) and correctly contended that the heart of his case rested on his interpretation of section 32(c).

[21] Although the certificate from the Speaker, lodged in terms of rule 13(3) of the Rules of Court, did not rely on section 247 of the Constitution as a ground of attack on the impugned sections, considerable reliance on that section was placed by Mr Raath, on behalf of the Foundation. Section 247 reads as follows:

"247. Special provisions regarding existing educational institutions

(1) The national government and the provincial governments as provided for in this Constitution shall not alter the rights, powers and functions of the governing bodies, management councils or similar authorites of departmental, community-managed or state-aided primary or secondary schools under laws existing immediately before the commencement of this Constitution unless an agreement resulting from *bona fide* negotiation has been reached with such bodies and reasonable notice of any proposed alteration has been given.
(2) The national government shall not alter the rights, powers and functions of the controlling bodies of universties and technikons under laws existing immediately before the commencement of this Constitution, unless agreement resulting from *bona fide* negotiation has been reached with such bodies, and reasonable notice of any proposed alteration has been given.
(3) Should agreement not be reached in terms of subsection (1) or (2), the national government and the provincial governments shall, subject to the other provisions of this Constituton, not be precluded from altering the rights, powers and functions of the governing bodies, management councils or similar authorities of departmental, community-managed or state-aided primary or secondary schools, as well as the controlling bodies of universities and technikons, provided that interested persons and bodies shall be entitled to challenge the validity of any such alteration in terms of this Constitution.
(4) In order to ensure an acceptable quality of education, the responsible government shall provide funds to departmental, community-managed or state-aided primary or secondary schools on an equitable basis."

[22] It was contended by Mr Raath that section 19(1) of the bill was unconstitutional because it had the effect of altering the rights, powers and functions of the governing bodies of certain schools which had existed before the commencement of the Constitution and there had been no agreement resulting from any *bona fide* negotiations conducted with any such bodies pursuant to the requirements of section 247(1). It was contended, in particular, that before the commencement of the Constitution, the governing bodies of model C schools had the power to determine that there was to be language competence testing as an admission requirement to a public school and that section 19(1) had the effect of altering that right.
[23] My first difficulty with this argument is that it is not supported by the relevant legislation which preceded the Constitution. The Education Affairs Act of the House of Assembly No 70 of 1988 ("the principal Act"), which was the relevant law existing immediately before the commencement of the Constitution, provided, in section 49, that the admission of persons to public schools and state-aided schools should be subject to prescribed conditions. Section 50 dealt with age requirements; section 52 dealt with the power of school boards in relation to the admission of children; section 53 determined compulsory school attendance; section 54 determined exemption from such compulsory school attendance; and section 55 determined how the mother-tongue of a child admitted to school should be determined. Section 57 provided that the mother-tongue of the child would be its medium of instruction up to certain levels. All the basic criteria for admission pertaining to age, readiness for school, language, medium of instruction and geographical feeder areas were all matters regulated by the state in terms of the statute. The input of parent bodies on this issue was largely peripheral. Language proficiency testing, as an admission requirement, was certainly competent, but was clearly in the hands of the state in terms of this statute. This was not a function of any parent body or of any governing

body in which parents were represented. It was the principal who determined the mother-tongue of the child admitted to school for the first time in terms of section 55(1). If the principal could not, it was the person designated by the Head of Education who caused such a determination to be made in terms of section 55(4) and an appeal against any such determination was to the Head of Education and the Minister, in terms of section 56. Such determination fixed the child's medium of instruction up to the ninth level in terms of section 57(1)(b). Section 58 empowered the Minister to designate the medium of instruction at public schools. Parents on "governing" bodies had no powers or functions in this regard and none were provided in the regulations which were published in 1990 in Government Notice R703 of 30 March 1990. Admission policy in regard to public schools remained, clearly, a governmental function.

[24] The principal Act was amended on numerous occasions thereafter. The first amendment was effected by Act 88 of 1991, which made provision for "state-aided schools", (which are also known as model C schools). Governing bodies for such schools were created and their powers, functions and duties were defined in certain regulations published under the principal Act in Government Notice R2932 of 6 December 1991. Nothing in these regulations empowered the governing bodies concerned either to determine or alter any criteria for the admission of pupils to their schools, in terms of the principal Act.

[25] Prior to the commencement of the Constitution the principal Act was again amended by Act 39 of 1992, Act 36 of 1993, Act 139 of 1993 and Act 162 of 1993. The amendments that are relevant to the present discussion provided for the conversion of existing public schools into model C schools by ministerial edict, gave to model C schools a juristic persona in terms of section 30(1), empowered such schools to acquire the ownership of school assets in terms of section 31(A) and put these schools generally under the "management, control and executive power" of their governing bodies in terms of section 31(1). In terms of section 31(2) (read with section 19(1)) the Minister could make regulations with respect to "the constitution, powers, duties and functions" of such bodies. Neither the principal Act nor any of the amendments conferred any power on the Minister to make any such regulations in conflict with the principal Act. More pertinently, none of the amendments effected any change to the regime described in paragraph 23 above.

[26] The last of the legislative steps to be considered is the promulgation on 14 February 1992 of the "Amendment of Regulations Relating to Governing Bodies of State-aided Schools..." in terms of Government Notice R441. This instrument amended regulation 6 of the previous regulations pertaining to state-aided schools, published under Government Notice R2932 of 6 December 1991, by inserting, after the existing regulation 6(4), new regulations 6(5) and 6(6), which read as follows:

"(5) A governing body may, after consultation with the parent community and subject to the provisions of the Regulations Relating to the Conditions of Admission of Pupils to Public Schools (Excluding Industrial and Reform Schools) and State-aided Schools, promulgated by Government Notice No. R703 of 30 March 1990, determine criteria for the admission of pupils to a state-aided school.

(6) A governing body may levy school fees and enforce payment thereof."

[27] Read in isolation, this regulation may very well have created the impression that what was being conferred on governing bodies was some "autonomous" right to determine criteria for the admission of pupils to model C schools and this impression may well have informed the

submission by Mr Raath that this autonomous authority was being altered in terms of the impugned provisions of the bill without the *bona fide* negotiations contemplated by section 247(1) of the Constitution. That impression is, however, quite incorrect because the regulations made by the Minister could not, and did not purport to, change sections 49 to 58 of the principal Act in terms of which the basic criteria for a child's admission to a particular school and various other related matters pertaining to policy were predetermined and fell outside the jurisdiction of any parent organisation or governing body. Such bodies simply had no power to fix a lower age for the admission of pupils to schools than the age already fixed by section 50(c) of the principal Act, they had no power to admit to a school a learner older than the limit which was set out in section 50(e) and with respect to feeder areas, they could not be given any authority which vested with school boards under section 52. More crucially, the Minister was not entitled to vest a governing body of a school with any authority to determine the medium of instruction of a learner or prospective learner of a school, because that power had, in terms of sections 55 to 58 of the principal Act, been vested in others and at all times remained so vested.
[28] During some stage in his argument Mr Raath also contended that because a principal of a model C school was an *ex officio* member of the governing body, the governing body could, in effect, have exercised the autonomy now said to be invaded by section 19(1) of the bill. I have difficulty with that submission. The principal is not the governing body and even if the two were to be equated, the governing body cannot exercise any powers in conflict with the principal Act.
[29] In the result, I am not persuaded that the governing body of a model C school had in fact any relevant right, power or function which section 19(1) of the bill could be said to be altering and the attack on section 19(1) on this ground must therefore fail.
[30] In any event, I have another difficulty with Mr Raath's argument based on section 247(1) of the Constitution. It is necessary to have regard to sections 97(3) and (5) of the bill which read as follows:

"97. (3) Notwithstanding any other provision of this Act, but subject to subsection (4) and (5), a body referred to in subsection (1) or a governing body which succeeds it in terms of subsection (2) shall continue to exercise whatever rights, powers and functions the body referred to in subsection (1) exercised on 27 April 1994.

(4) ...

(5) The rights, powers and functions contemplated in subsection (3) may be altered by law after negotiations contemplated in section 102 over such alterations have taken place."

The effect of sections 97(3) and (5) is therefore to entitle the governing body of a school to continue to exercise whatever rights, powers and functions it exercised on 27 April 1994. These powers could only be altered after negotiations contemplated in section 102 over such alterations had taken place. Section 102(1) of the bill provides that:

"102. (1) For the purposes of facilitating negotiations between the department and governing bodies as contemplated in section 247(1) of the Constitution, the Member of the Executive Council may by notice in the *Provincial Gazette* establish a centralised negotiating forum at

which negotiations over the alteration of the rights, powers and functions of such bodies shall take place."

What section 247 protects is the right of governing bodies of schools and other similar bodies to continue to exercise the rights, powers and functions which they had before the commencement of the Constitution. Such rights cannot be altered unless an agreement has been reached resulting from *bona fide* negotiations. Sections 97(3) and (5) of the bill continue that protection. Section 102 merely creates the opportunities and the infrastructure for the conduct of the *bona fide* negotiations which must precede any such alteration in the rights, powers and functions exercised before the commencement of the Constitution. The bill is therefore not inconsistent with any right protected by section 247 of the Constitution.

[31] Confronted with this difficulty, Mr Raath contended that the provincial government had effectively precluded any *bona fide* negotiations by deciding in advance to enact the impugned provisions of the bill into an Act, although these provisions have not yet been put into operation by the Premier.

[32] There can, in my view, be no doubt that the *bona fide* negotiations which are contemplated by section 247, are negotiations which must be conducted with the object of reaching an agreement and if the provincial government in fact has no such intention and is determined to put the impugned provisions of the Act into operation regardless of the quality and nature of the negotiations and the outcome thereof, it is vulnerable to the attack that it has no intention whatever of conducting *bona fide* negotiations for the purposes of reaching such an agreement.[5]

[33] My difficulty is to infer from the existing evidence before us any justifiable conclusion that the provincial government has indeed precluded the possibility of *bona fide* negotiations with the relevant bodies with the object of reaching an agreement such as that contemplated in section 247(1). It is perfectly true that the impugned sections have been enacted, but they have deliberately not been put into operation and may, in fact, never become operative. It might be true to say that the provincial government favours the policies upon which the disputed provisions are premised, but I am unable, on the evidence before us, to conclude that such policies are inflexible and will be implemented at every model C school, regardless of the circumstances and regardless of what emerges during the course of any negotiations in the centralized negotiating forum, now contemplated in terms of section 102(1) of the bill. There is nothing which obliges the provincial government from favouring a general policy as long as it is not so inflexible as to preclude a departure from that policy, if this is justified by the circumstances.[6]

[34] It therefore follows that the evidence does not support the objection to the bill based on the requirements of section 247(1) of the Constitution.

[35] These conclusions make it unnecessary to consider whether or not Mr Trengove is correct in his submission that section 247(1) only operates as a restriction on the power of the executive and the consequential submission that because the impugned provisions of the bill are acts of the legislature and not that of the executive, section 247(1) cannot be invoked to assist the case sought to be made by Mr Raath. Even assuming the incorrectness of that submission, the attack on the impugned sections must fail for the reasons which I have analysed.

[36] Costs

It was submitted by Mr Trengove that the costs of the proceedings before us should be paid by the petitioners if they are unsuccessful in their attack on the impugned provisions. We were referred, in this regard, to the well-known rule in the Supreme Court that ordinarily, and subject

to the discretion of the Supreme Court, costs should follow the result and the losing party should be directed to pay the costs of the successful party.[7] There are obviously attractive grounds of policy which support such an approach in ordinary litigation between litigants in the Supreme Court and in the Magistrates' Courts. It does not follow, however, that it should also be the general rule in the Constitutional Court and more particularly the rule in cases brought to the Constitutional Court in terms of section 98(9) of the Constitution at the request of the Speaker. A litigant seeking to test the constitutionality of a statute usually seeks to ventilate an important issue of constitutional principle. Such persons should not be discouraged from doing so by the risk of having to pay the costs of their adversaries, if the Court takes a view which is different from the view taken by the petitioner. This, of course, does not mean that such litigants can be completely protected from that risk. The Court, in its discretion, might direct that they pay the costs of their adversaries if, for example, the grounds of attack on the impugned statute are frivolous or vexatious or they have acted from improper motives or there are other circumstances which make it in the interest of justice to direct that such costs should be paid by the losing party. I am satisfied that no such factors exist in the present case. In the result I would, in the circumstances of the present case, make no order of costs notwithstanding the fact that the record was unjustifiably burdened by a large number of unnecessary documents lodged on behalf of the petitioners.

[37] Order

It is declared that sections 19(1), 21(2), 21(3)and 22(3) of the School Education Bill of 1995 are not inconsistent with the Constitution on any of the grounds advanced on behalf of the petitioners and the South African Foundation for Education and Training.

I MAHOMED
DEPUTY PRESIDENT

Chaskalson P, Ackermann J, Didcott J, Kentridge J, Langa J, Madala J, Mokgoro J and O'Regan J concur in the judgment of Mahomed DP.

[38] **KRIEGLER R**: Ek is dit volmondig eens met Mahomed AP se kliniese ontleding, en gevolglike verwerping, van die betoN namens die petisionarisse en die *amicus curiae* onderskeidelik. In die breN beaam ek ook die meer histories-volkeregtelike gedagtetrant en slotsom van Sachs R. Elkeen van die gemelde uitsprake is op sy eie 'n volslae loNnstraffing van die aanvalle op die gewraakte wetsbepalings. Gesamentlik is hul verdoemend.

[39] Nietemin is daar enkele aspekte wat ek spesifiek wil toelig. Taal - en by name die behoud van Afrikaans - ontlok diepgewortelde emosie. Daarom is dit lewensnoodsaaklik dat daar nugter en oorwoN gelet word op die implikasies van hierdie saak. Subartikel 32(c) van die Grondwet dra weliswaar nie die breN betekenis wat die petisionarisse en die *amicus* daaraan wou heg nie. Dit is en bly egter 'n skans teen verswelging van enige minderheid se gemeenskaplike kultuur, taal of godsdiens. Solank 'n minderheid daadwerklik wagstaan oor sy gemeenskaplike erfgoed, solank is dit sy onvervreembare reg om eie onderwysinstellings ter behoud van kultuur, taal of godsdiens tot stand te bring.

[40] Daar is egter twee belangrike voorbehoude. Ten eerste is die slotwoorde van die betrokke subartikel ondubbelsinnig; daar mag geen diskriminasie op grond van ras wees nie. Die Grondwet bied dus geen beskerming vir rassevooroordeel op die onderwysterrein nie. ‘n Gemeenskaplike kultuur, taal of godsdiens met rassisme as ‘n wesenselement het geen konstitusionele aanspraak op die vestiging van afsonderlike onderwysinstellings nie. Die Grondwet beskerm verskeidenheid nie rassediskriminasie nie.
[41] Ten tweede moet daar duidelik ingesien word waaroor die debat in hierdie saak werklik gaan. Subartikels (a) en (b) van artikel 32 van die Grondwet boekstaaf en bevestig die reg van iedereen op basiese onderwys, gelyke toegang tot onderwysinstellings en, waar redelikerwys uitvoerbaar, onderrig in die taal van die leerling se keuse. Daartoe is die owerheid grondwetlik verplig. Die maatstaf van redelike uitvoerbaarheid is wel rekbaar - soos dit noodwendig moet wees om ruimte te laat vir ‘n groot verskeidenheid omstandighede. Dit is egter objektief beoordeelbaar, wat beteken dat owerheids-willekeur deur die howe aan bande gelΛ kan word. Betekenisvolle getalle taalsprekers het gevolglik ‘n afdwingbare reg teenoor die owerheid op onderrig in hul gemeenskaplike taal solank dit maar redelikerwys uitvoerbaar is.
[42] Daarop brei subartikel 32(c) dan uit. Soos my kollega Mohomed AP aandui - en ek wil onderstreep - hou die Grondwet daarmee die deur oop vir diegene vir wie die staat se onderwysinstellings ontoereikend geag word wat betref gemeenskaplike kultuur, taal of godsdiens. Dit staan hul vry om eendragtig die erwe van hul vaders vir hul kinders te behou. Daar is egter ‘n prys, naamlik dat so ‘n bevolkingsgroep daarvoor die hand in eie sak moet steek. In ‘n sin gaan die huidige geskil dus nie om volksgoed nie maar om geld.
[43] Die betoog rondom artikel 247(1) van die Grondwet is dan ook nie daarvan los te maak nie. Ontdoen van al die voorhangsels, gaan dit grondliggend om die vraag of ryklik bedeelde Model C-skole hul eksklusiewe identiteit sal kan behou. Die regsantwoord daarop het Mahomed AP ondubbelsinnig verstrek. Die beheerliggame van Model C-skole het voor die inwerkingtrede van die Grondwet geen wetlike bevoegdheid gehad om voorgenome skooltoetreders deur middel van ‘n taaltoets te sif nie. Bygevolg doen artikel 19(1) van die wetsontwerp niks af aan enige grondwetlik beskermde bevoegdheid nie. Dit beteken egter geensins dat onderhandelings oor toelatingskriteria vir Model C-skole regtens verbied word nie. Of samesprekings in wedersyds goeie trou aangewese is, is ‘n maatskaplik-politieke beleidsvraag waaroor ek my nie uitlaat nie. Wat die reg betref, is daar geen onduidelikheid nie. Daarom stem ek saam met die uitspraak en bevel soos deur Mahomed AP verwoord.

JC KRIEGLER

[44] **SACHS J**: A straightforward reading of the text of section 32 of the Constitution runs directly counter to the arguments advanced by counsel for the Petitioners and the amicus curiae. We were urged, however, to approach the section in a broad and generous manner[8] which took account both of cultural realities in this country and of internationally recognised principles relating to the protection of minorities.[9] In view of the importance of the broader questions argued by the Petitioners in relation to minority rights, I propose to follow their argument through to see if applying internationally accepted principles of minority rights protection, would indeed suggest a different result, even if straining against the text. Preliminary though my explorations have to be,[10] I am left in no doubt as to the answer to the above question. Thus, my answer, and the reasons therefor, follow.

I. THE BROAD SOUTH AFRICAN CONTEXT OF THE ENQUIRY

[45] Before touching on the evolution of international law principles in relation to minority rights, I feel it would be appropriate to locate the problem before us in a broad South African historical/constitutional context. For the purpose of this analysis I will begin by making four assumptions in favour of the Petitioners.

[46] The first assumption is that the "never again" principle, which I feel should be one of our guides to interpretation, applies not only to bitter experiences of former state enforced segregation, but also to those of past compulsory assimilation. This was a major theme at the National Convention held to draft the document which became the Constitution of the Union of South Africa in 1910.[11]

[47] The second assumption is that the Afrikaans language, like all languages, is not simply a means of communication and instruction, but a central element of community cohesion and identification for a distinct community in South Africa.[12] We are accordingly dealing not merely with practical issues of pedagogy, but with intangible factors, that as was said in *Brown v Board of Education of Topeka*[13], form an important part of the educational endeavour. In addition, what goes on in schools can have direct implications for the cultural personality and development of groups spreading far beyond the boundary fences of the schools themselves.[14]

[48] The third assumption is that there exists amongst a considerable number of people in this country a genuinely-held, subjective fear that democratic transformation will lead to the down-grading, suppression and ultimate destruction of the Afrikaans language and the marginalisation and ultimate disintegration of the Afrikaans-speaking community as a vital group in South African society.

[49] The fourth assumption is that the Afrikaans language is one of the cultural treasures of South African national life, widely spoken and deeply implanted, the vehicle of outstanding literature, the bearer of a rich scientific and legal vocabulary and possibly the most creole or "rainbow" of all South African tongues. Its protection and development is therefore the concern not only of its speakers but of the whole South African nation.[15] In approaching the question of the future of the Afrikaans language, then, the issue should not be regarded as simply one of satisfying the self-centred wishes, legitimate or otherwise, of a particular group, but as a question of promoting the rich development of an integral part of the variegated South African national character contemplated by the Constitution. Stripped of its association with race and political dominance, cultural diversity becomes an enriching force which merits constitutional protection, thereby enabling the specific contribution of each to become part of the patrimony of the whole.[16]

[50] At the same time, these assumptions have to be located in the context of three important considerations highlighted by the Constitution.

[51] In the first place, similar claims for constitutional regard can be made by ten or more other language communities,[17] claims which could be weaker in some detailed respects than those made on behalf of Afrikaans, and very much stronger in others. It was evident from the intensity with which the matter was presented by some of the Petitioners that it represents an issue of deep meaning to them. One may accept that even abstract questions of law have to be considered in the concrete context of history, and we can not ignore the fact, urged upon us by counsel, that, although the words of the Constitutional text are generalised, they are also suffused with specific and (frequently contradictory) life experiences. Yet, even if the poignancy of history flows

through the veins of the Constitution, we must always be guided by the words and spirit of the constitutional text itself, supporting, not this group or that, but the values articulated by the Constitution. In interpreting clause 19 of the Gauteng Education Bill in the light of section 32 of the Constitution, the rights of certain members of the Afrikaans-speaking community, therefore, cannot be considered in isolation from equally valid claims of members of other language groups. The very concept of multi-culturalism has to be looked at in a multi-cultural way.[18]
[52] The second consideration is that immense inequality continues to exist in relation to access to education in our country. At present, the imperatives of equalising access to education are strong, and even although these should not go to the extent of overriding constitutionally protected rights in relation to language and culture, they do represent an important element in the equation. The theme of reducing the discrepancies in the life chances of all South Africans runs right through the Constitution, from the forceful opening words of the preamble to the reminder of the past contained in the powerful postscript. The very first fundamental right to be specified, preceding even the rights to life and dignity, is the right to equality.[19] We are further enjoined to interpret the whole of Chapter 3, including section 32, in a way which promotes the values of an open and democratic society based on freedom and equality.[20] The theme of diversity has markedly less constitutional pungency. There are express language rights[21], a general right to use the language or participate in the cultural life of a person's choice,[22] the provision on educational rights under discussion and, looking to the future, Principle XI, which declares that the diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged. Thus, the dominant theme of the Constitution is the achievement of equality, while considerable importance is also given to cultural diversity and language rights, so that the basic problem is to secure equality in a balanced way which shows maximum regard for diversity.[23] In my view, the Constitution should be seen as providing a bridge to accomplish in a principled yet emphatic manner, the difficult passage from State protection of minority privileges, to State acknowledgement and support of minority rights. The objective should not be to set the principle of equality against that of cultural diversity, but rather to harmonise the two in the interests of both. Democracy in a pluralist society should accordingly not mean the end of cultural diversity, but rather its guarantee, accomplished on the secure bases of justice and equity.
[53] The third important contextual consideration is that the Constitution requires us ever to be vigilant in protecting the rights of the child. Section 30(3) of the Constitution states:

30. Children

...

(3) For the purpose of this section a child shall mean a person under the age of 18 years and in all matters concerning such child his or her best interest shall be paramount.

The Constitution therefore requires us to take into consideration not only the interests of the parents, which may be unduly rooted in the past, but to give paramount place to the interests of the child, which may require looking more to the future. Each child is unique, and each child is entitled to a good education, independently of what might in any particular case be the motives or passions of his or her parents or of the parents of other children.[24] Article 26(2) of the Universal Declaration of Human Rights of 1948 lists four objectives for education:

(1) the full development of the human personality;
(2) strengthening of respect for human rights and fundamental freedoms;
(3) the promotion of understanding, tolerance and friendship among all nations, racial or religious groups;
(4) the furtherance of the activities of the UN for the maintenance of peace.
To these, Article 13(1) of the International Covenant on Civil and Political Rights (ICCPR) of 1966 adds three more:
(5) the development of the sense of human dignity;
(6) enabling all persons to participate effectively in a free society;
(7) the promotion of understanding, tolerance and friendship among ethnic groups.
[54] It is against this background that I propose to look at universally accepted principles of international law to see what bearing, if any, they could have on the interpretation of section 32, more particularly of section 32(c).

II. THE INTERNATIONAL LAW CONTEXT

[55] A review of literature by leading authors in the field suggests that over the years there has been a firm movement from the concept of tolerance of religious and other minorities, to that of protection of national groups, to that of guaranteeing rights of individuals. The question that remains is whether there is a current trend towards supplementing individual rights, expressed mainly by the principles of non-discrimination and equality, with additional group rights claimable against the State in the form of obligatory State support for fostering cultural, linguistic and religious diversity.

League of Nations

[56] The development under the League of Nations after World War I of a system of treaties in Eastern Europe, enforced by the Permanent Court of International Justice, is often regarded as the effective beginning of the international protection of human rights.[25] Through the treaty system a breach was made into rigid state sovereignty, in terms of which international law had been concerned strictly with relations between states, and not with relations between states and entities or individuals within their borders.[26] The emphasis at that stage was on protecting the group rights of minorities, rather than on guaranteeing the rights of individuals as such. In general, the treaties and minority provisions in peace treaties were intended to achieve two aims: (a) to grant legal equality to individuals belonging to minorities, on a par with other nationals of the State; and (b) to make possible the preservation of the group's characteristics, traditions and modalities.
[57] This double purpose was clearly stated by the Permanent Court of International Justice in its Advisory Opinion on the subject of (Greek) Minority Schools in Albania, handed down on 6 April 1935. The issue was a decision of the Albanian Government to close all private schools. The Court declared that the Government's decision would affect the material equality of the minorities. It said:

The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peacefully alongside that population and co-operating amicably with it,

while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.

In order to attain this object, two things were regarded as particularly necessary, and have formed the subject of provisions in these treaties.

The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State.

The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.

These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being a minority.[27]

[58] The intractability of the subject and the inevitable overlap of law and politics led one author to observe that as far as redress of grievances was concerned, the League was quite effective on the small issues and everyday frictions, but failed to solve the wider problems of peaceful living and amicable co-operation - ultimately, what could not be achieved by persuasion and mediation could not be achieved at all.[28] A harsher cautionary observation by someone who lived through the period was that the problem of minorities in Europe was solved not by the protection of the League, but largely by spontaneous or enforced repatriation, by mass expulsions, and by mass murder.[29]

United Nations

[59] The main trend after World War II was to eliminate the concept of minorities rather than to protect them. The United Nations Charter and the Universal Declaration of Human Rights both focused on human rights for individuals and not on group protections for minorities.[30] The new approach was that, whenever someone's rights were violated or restricted because of a group characteristic - race, religion, ethnic or national origin, or culture - the matter could be taken care of by protecting the right of the individual, on a purely individual basis, mainly by the principle of non-discrimination.[31]

[60] Twenty years were to pass before clear acknowledgement of minority rights was to re-emerge in the form of Article 27 of the ICCPR. This Article, which was heavily relied upon by the Petitioners in this case as supporting the generous interpretation which they sought for section 32(c), reads as follows:

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

It should be noted that the rights are timidly expressed in two respects: firstly, they are recognised in relation to individual "persons belonging to minorities",[32] and not to minorities as such, and, secondly, they are expressed in negative terms, that is that the rights "shall not be denied".[33] Nevertheless, despite its "nervousness in handling minorities' issues", historically Article 27 represented the first international norm dealing specifically with rights for ethnic, religious and linguistic groups that were capable of, and intended for, universal application.

[61] With a view to furthering the principles contained in Article 27, Dr. Francesco Capotorti was appointed Special Rapporteur of the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities. The definition given by Dr. Capotorti on what constitutes a minority is still the most widely quoted one today.[34] In the context of the application of Article 27 he gave the following formulation:

(a) group which is numerically inferior to the rest of the population of a State and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language.[35]

[62] It is clear from the debates that the text of Article 27 was not intended to imply that members of minorities had the right to demand that the state should adopt positive measures.[36] Thus, Article 27 does not contain any explicit reference to positive measures to which the minority might be entitled. Proposals for including in Article 27 a list of concrete rights such as state supported schools for minorities or language rights, in fact failed.[37] Supporters of minority rights, such as Capotorti, Thornberry and Lerner, contend, however, that in spite of its wording, a certain 'programmatic' element involving duties on the State must necessarily be read into the Article.

[63] Capotorti, although acknowledging that Article 27 accorded rights only to individuals, urges the adoption of a liberal interpretation of the Article in general. He contends that it would be superfluous if it only granted liberties that could be adduced from other provisions in the Covenants. In his view, mere tolerance on the part of the State, without special rights, would not be sufficient to secure real equality.[38] Thornberry suggests that although Article 27 is contained in the ICCPR, which generally is cast in such a way as to prohibit the State from acting in a certain manner against individuals, it is in reality similar to the typical rights set out in the Covenant on Cultural, Economic and Social Rights. Rights of this kind, he argues, ring hollow without active and sustained state intervention directed towards their achievement. Thus, as in the case of rights to education and health, the special rights of members of minority communities would be deprived of substantive content without a level of active support equivalent to that provided to the majority of the population. He suggests that Article 27 contains a programmatic element particularly important in relation to enabling marginalised and disadvantaged groups to achieve real or substantive equality. Depending on the particular circumstances, needs and desires of minorities, such a programme could include intervention to support schools, libraries and museums, the means by which the culture of one generation is transmitted to another. Thornberry suggests that Article 27 should be seen as constituting at most a framework provision that needed to be supplemented by a clearer statement of the rights and duties of minorities.[39]

[64] The initiative spearheaded by Capotorti, and supported by the other writers quoted, was aimed at reasserting the importance of group rights. It emerged, however, that the great majority of states were far more interested in assimilating their minorities than in protecting them.[40] Humphrey points out that most government appointees on the Sub-Commission were opposed to the protection of minorities and that even in the working group there was objection to any mention of the promotion of the ethnic, cultural, linguistic and religious identity of minorities.[41]

Current trends

[65] The authors cited are all supporters of recognition of minority rights, eager to interpret Article 27 in as affirmative a manner as possible. Even at its strongest, however, they see it as a framework measure which has implicit in it an incipient or embryonic obligation on the State to pay regard to the needs of cultural, linguistic and religious minorities. Thus, even on their most

benevolent interpretation, it falls far short of imposing a firm duty on the state to promote the separate development of minorities (as opposed to the duty of preventing discrimination against them, where there is a high level of responsibility). It comes nowhere near supporting a State duty to establish separate schools, as argued for by the Petitioners in this case. On the contrary, legislative history at the United Nations suggests that such an obligation was expressly considered and expressly rejected.

[66] There appears to have relatively little momentum at the United Nations in the years following Capotorti's report to revive the initiative that he embarked upon. Nevertheless, there has in recent years been some discernible movement for recognition of the rights not just of individuals but of distinct groups in society, such as migrant workers and indigenous peoples.[42] The impulse for this trend appears to have been recognition of the plight of discrete disadvantaged communities, rather than a generalised support for State-backed cultural diversity as such. At the same time, there has been increasing recognition of the general importance of pluralism and diversity, and acknowledgement of what has been called "the right to be different",[43] which by its very nature is a right claimed by those who do not wish to be assimilated into the dominant culture or forced to live their lives according to the dominant norms.

[67] As part of this revival, the United Nations Human Rights Committee recently issued a General Comment on Article 27.[44] According to the Committee, the article is intended to ensure the survival and continued development of the cultural, religious and social identity of minorities. Therefore the right granted by the article must be distinguished from other personal rights conferred on one and all under the Covenant. The Committee has emphasized that the right is a right of individuals (held by persons "belonging to such minorities"), and should not be confused with the collective right of peoples to self-determination. But, although an individual right, its exercise depends on the collective ability of the minority group to maintain its culture, language or religion. The right of a member is not exercised alone. Rather, the enjoyment of culture, practice of religion, and use of language presupposes a community of individuals with similar rights. Accordingly, the Committee argues, the article may require positive measures by states to protect the identity of a minority and the rights of its members to enjoy and develop their culture in a community with other members of their group. Provided that these measures are aimed at correcting conditions that prevent or impair the enjoyment of the rights of members of minorities, they will constitute a legitimate ground for differentiation and will comply with the non-discrimination requirements of the Covenant.[45]

[68] The situations are varied, but the common theme that runs through most of the international documents on the subject is the duty of the State to take remedial action in relation to groups that have been subjected to different forms of disadvantage. Thus, Capotorti's definition refers to groups which are not only quantitavely in the minority, but also in a non-dominant position. There are indications in his report that he was specifically concerned not to accord any legitimation to the minorities which at that time were in power in Southern Africa.[46] To cater for the situation where a majority group was in one way or another underprivileged and in a non-dominant position, the terms "sociological minority" and "functional minority" were accordingly coined. Following on from the state duty to overcome the effects of past disadvantage, came recognition of the fact that affirmative action in favour of disadvantaged groups would not be regarded as unlawful discrimination, and, on the contrary, could actually be required.

III. BASIC PRINCIPLES OF MINORITY PROTECTION LAW

[69] A rough survey of the current situation in international law suggests that six interrelated principles enter the picture, with varying degrees of relevance and intensity, when the broad concept of protection of minorities comes into play. They are i) the right to existence, ii) non-discrimination, iii) equal rights, iv) the right to develop autonomously within civil society, v) affirmative action, and vi) positive support from the state. The significance of each and the way they are dealt with in our Constitution, with special reference to language rights, will be treated below.

[70] i) The right to existence. The United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 1948 clearly acknowledges the right of all national groups to physical existence. It is not so clear, however, whether a right to independent cultural existence is also recognised, that is, whether or not there is a prohibition on what has been called cultural genocide.[47] There is nothing in the present case, however, to suggest that the challenged statutory provisions form part of a programme calculated to physically eliminate members of the Afrikaans speaking community or to wipe out their culture. In South African conditions today, the group that would appear to have the greatest claim to invoke any such right would be the San/Khoisan population, whose habitats have been taken away from them or else so ecologically despoiled that their survival as a distinct cultural group can be said to be in peril.[48] It would, however, be unwise to express any opinion on the subject, save to say that the present case stems from the situation of a community defending relative affluence and privilege, rather than one combatting marginalisation and the imminence of group annihilation.

[71] ii) Non-discrimination. This is the most enduring and powerful principle to have emerged in relation to protection of minorities. Sieghart[49] refers to it as perhaps the strongest principle of all to be found in international human rights law. It is central to the Universal Declaration of Human Rights,[50] the ICCPR,[51] the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950,[52] and many other conventions. It precludes the State from discriminating on grounds regarded as unfair or unjustifiable, and race, language, religion and culture are invariably contained in definitions of outlawed discrimination. It is to be noted that various international conventions not only oblige states not to discriminate, but impose obligations on them to take steps to end discrimination.[53] In the case of South Africa, section 8(2) of the Constitution expressly itemises language, culture and religion as constituting *prima facie* examples of unjustifiable grounds of unfair discrimination. Thus, if persons were denied access to school because they spoke Afrikaans, or belonged to a cultural group which identified itself as Afrikaner, they could claim a violation of their constitutional rights. Similarly, any person who was denied access to State facilities because they did not speak Afrikaans or did not belong to the self-constituted Afrikaner community, could allege that their fundamental rights were being infringed.

[72] iii) Equal rights. This is the other side of the non-discrimination coin. It could have more affirmative connotations than non-discrimination, however, in that it could deal not merely with protection against exclusion, but with entitlement to equal benefits and equal regard. This becomes particularly important if the objective is to achieve real rather than formal equality. Thus, it is the equality principle rather than the non-discrimination one which becomes the foundation for special legal and other measures to assist groups suffering from *de facto* rather than *de jure* disadvantage. In principle there is, of course, no fundamental distinction between

the concept of non-discrimination and that of equal rights, and both are embodied in section 8 of our Constitution. As far as members of the Afrikaans-speaking community are concerned, they could complain if the State treated them less advantageously than other groups; their claim to retain a privileged situation, however, would not have the same, or any, force.
[73] It is important to note that the principle of language equality is strongly underlined in our Constitution. Section 3(1) expressly identifies Afrikaans as one of eleven languages entitled to enjoy equal status. Section 3(9) goes on to state the following:
(9) Legislation, as well as official policy and practice, in relation to the use of languages at any level of government shall be subject to and based on the provisions of this section and the following principles:

(a) The creation of conditions for the development and for the promotion of the equal use and enjoyment of all official South African languages;

(b) the extension of those rights relating to language and the status of languages which at the commencement of this Constitution are restricted to certain regions;

(c) the prevention of the use of any language for the purposes of exploitation, domination or division;

(d) the promotion of multilingualism and the provision of translation facilities;

(e) the fostering of respect for languages spoken in the republic other than the official languages, and the encouragement of their use in appropriate circumstances; and

(f) the non-diminution of rights relating to language and the status of languages existing at the commencement of this Constitution.

Section 32 carries the matter a step further in relation to education by providing that:
32. Every person shall have the right -

....

(b) to instruction in the language of his or her choice where this is reasonably practicable; ... .

Section 32(b) articulates an affirmative right that can be exercised against the State, which, subject to the criterion of reasonable practicability, would be under a duty to make appropriate resources available for instruction in the chosen language. It would seem that failure to provide such facilities would not necessarily amount to unfair discrimination in terms of section 8(2), but would involve a violation of section 32(b). It is not necessary to decide that matter, and I leave it open in this judgment.
[74] The implications of the above clauses for members of the Afrikaans language community are significant. As far as section 3(9) is concerned, legislation and official policy and practice at any level of government require, *inter alia*, the promotion of the equal use and enjoyment of Afrikaans, the prevention of the use of, say, English for the purposes of domination, and the non-diminution of rights relating to Afrikaans and its status. Whether or not these principles apply

directly only to intra-governmental behaviour, or whether they govern all externally directed government policy and practice, need not be decided in the present case. On any reading, however, they provide a valuable general guide to the objectives in relation to the language question which were regarded as constitutionally significant by the framers of the Constitution. In whatever way these principles are applied, it is clear that they need to be balanced against each other. Thus, the non-diminution principle is an important one, but so are creating the conditions for the development of all official languages, the extension of rights in relation to languages previously restricted, the prevention of the use of any language for the purposes of division, and the promotion of multi-lingualism. Reading these principles together with section 32(b) in the manner most favourable to the Petitioners, would mean that the practicability of language instruction in existing Afrikaans medium schools could, applying the non-diminution principle, be assumed to exist. At the same time, there is nothing in these principles to guarantee the exclusivity of Afrikaans in any school. On the contrary, the promotion of multi-lingualism, even leaving out the factor of equal access to schools, would encourage the establishment of dual- or multiple-medium schools. Whether or not the Afrikaans language would survive better in isolation rather than, as it were, rubbing shoulders with other languages, would not be a matter of constitutionality but one of policy, on which this Court would not wish to pronounce. Similarly, it would not be for us to say whether denying Afrikaans-speaking children the right to study and play with children of other backgrounds would or would not be to their mutual educational and social detriment or advantage.

[75] iv) The right to autonomous development in civil society. The Constitution acknowledges considerable space in civil society in which people may freely advance their interests as members of linguistic, cultural and religious communities. Section 17 provides that every person shall have the right to freedom of association. Read with freedom of speech, expression and artistic creativity protected by section 15(1) of the Constitution, this guarantees the development of language free from interference by the State. Section 31 goes on to state expressly that "every person shall have the right to use the language and participate in the cultural life of his or her choice". Section 32(c) is even more specific in relation to education. It declares that:

Every person shall have the right:

...

c) to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.

The judgment of Mahomed DP deals extensively with this clause in terms of its obvious meaning, and its place in the logic of section 32 as a whole. I agree fully with his analysis, which in my view is consistent both with the language used and the overall spirit of the Constitution. I would merely add one further reason, influenced by my explorations of international human rights law, but derived directly from the text of the Constitution, as to why I consider that it makes best sense to regard this paragraph as concretising rights to a certain measure of cultural/linguistic autonomy in the private sphere, rather than as imposing an express duty on the State to establish single-medium community based schools. This additional argument flows from the connection between section 32(c) and section 8(2).

[76] Section 8(2) provides that no person may be discriminated against on grounds, *inter alia*, of religion, culture or language. The provision in section 8 (4) to the effect that *prima facie* proof of discrimination on the grounds specified in section 8(2) shall be presumed to be sufficient proof of unfair discrimination until the contrary is proved, would make all schools based upon a common culture, language or religion liable to attack on the grounds of practising unfair

discrimination, particularly if they closed their doors to persons who did not share that common culture, language or religion. Legislation could then be passed prohibiting such discrimination, and such schools would then have no constitutional umbrella to protect them at all. Section 32(c) appears, therefore, to be an explicit, if limited, acknowledgement of the need in certain circumstances to allow for a departure from the general principles of section 8(2) read with section 8(4). The anti-discrimination principle is so powerful, both in international law and in the warp and woof of our Constitution, that any intention to deviate from it would have to be articulated in the clearest possible language.

[77] What appears to be provided for in section 32(c) is not a duty on the state to support discrimination, but a right of people, acting apart from, but in practicable association with the State, to further their own distinctive interests. If the intention were not only to **permit** discrimination on the grounds of culture, language or religion in state schools, in such cases where it was justified, but to **require** it in all cases on demand, then one would have expected that such an exemption from the general non-discrimination principle would have been expressed in the clearest possible language. Furthermore, should such a radical departure from the provisions of the equality clause have been contemplated, then it would have been far more logical to have expressed it as a qualification of section 8, than to have left it to be read in as an implied incident of section 32(c).

[78] My view is strengthened by the fact that section 32(c), construed in the manner proposed by Mahomed DP, corresponds precisely to concepts accepted in many international instruments (although by no means universally). It acknowledges that constitutionally guaranteed space should be made available for private individuals to set up and maintain [establish] their own schools if they feel that their special cultural, language or religious needs are not being sufficiently catered for in the state system. Two cases heard under the European Convention which concern parental rights in relation to education, suggest a disinclination on the part of the court to compel states to establish or maintain schools based on a particular language or religion, though they did emphasize the importance of pluralism of education and parental choice. The first protocol to the European Convention provides in part: "No person shall be denied the right to education". In the *Belgian Linguistic case*[54] the Court said that the Convention does not guarantee children the right to be educated in the language of their parents by the public authorities or with their aid. "The negative formulation indicates... that the Contracting Parties do not recognize such a right to education as would require them to establish at their own expense, or to subsidise, education of any particular type or at any particular level." Similarly, in a case involving Danish parents who objected to compulsory sex-education in the public schools, it was held that the State met its obligation to "respect the right of parents to ensure... education in conformity with their own religious and philosophical convictions" because the parents were free to send their children to a private school.[55]

[79] The deviation from the normal non-discrimination principles is therefore a highly qualified one. Firstly, it is limited to the spheres of culture, language or religion; secondly, the running of the school must be practicable insofar as it implicates the State in guaranteeing education of appropriate standard; thirdly, there shall be no discrimination on the grounds of race, and fourthly, the community concerned must itself be responsible for the setting-up and running of such a school. All these qualifications conform to criteria widely accepted in international instruments. This is not to say that the State is forbidden by our Constitution from setting up or maintaining communally- or religiously-based schools. There is a great difference, however, between what the State is permitted to do and what it is required to do. In my view, there is

nothing in section 32 which obliges it to set up such schools. Indeed, any departure from the general principles of non-discrimination by the State itself in relation to State schools, would have to be justified by the State as being fair.[56] There might, for example, be good educational or administrative reasons for having a girls-only school in a certain area, or for having a unilingual school in another. These would be questions of state policy and practice, subject to judicial review in the ordinary courts undertaken with due regard to fundamental rights guaranteed in the Constitution. They would not be matters of constitutional rights inhering in and enforceable by cultural, language or religious communities.[57] In such circumstances, it would be the existence of exclusivity that would have to be justified, not, as the Petitioners claim in this case, the exclusion of exclusivity.

[80] I would add two more and to my mind, equally compelling reasons, both of which international law principles have alerted me to, for preferring not to adopt the "generously amplified" interpretation of section 32(c) urged upon us by the petitioners. The first is the historical background of enforced school segregation, which was always justified on grounds of cultural incompatibility, and the spirit of which runs directly counter to the explicit values of our constitution.[58]

[81] The second point is that from a cultural or language point of view, there is no clear majority population in South Africa[59] against which minorities need to be protected. Linguistically and culturally speaking, there are only minorities in our country. The problem is to balance out their various interests, rather than to protect any one group against another. From a purely practical point of view, the financial and administrative implications of granting to each language or cultural group a claim, as of right, on the State to establish schools, exclusive to themselves, not to speak of the extreme educational fragmentation involved, seem to be insuperable. Eleven languages are officially recognised. In addition about a dozen further languages are specified in section 3(10)(c) as being languages whose development must be promoted by the Pan South African Language Board (and this is not presented as an exhaustive list).[60] Added to this, it is a matter of public record that our country is blessed with a multiplicity of religious communities, with independent churches alone probably running into the hundreds if not thousands. Could it possibly be that the framers of the Constitution intended that each language group and each religious community in every one of their multiple spatial conglomerations, should have a claim on the State in terms of section 32(c) to establish on their behalf exclusive schools? Writing before the Constitution was adopted, Professor Van der Westhuizen makes the following pertinent remark:

"Public schools exclusively or specifically for cultural, religious, or linguistic groups would not seem to be acceptable either. Not only would such a state of affairs serve to perpetuate apartheid in disguise with state funding and official blessing, but as a practical matter, it would be extremely difficult to allocate funds and other supporting facilities on an equal basis."[61]

[82] v) Affirmative action. Article 1(4) of the Convention on the Elimination of all Forms of Racial Discrimination of 1965 declares that:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure to such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.[62]

Article 2, dealing with obligations of States, reads:
States parties shall, when the circumstances so warrant, take in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them for the purposes of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.
[83] Although the Convention is aimed at the elimination of the effects of racial discrimination, the principles contained in these two paragraphs could be applied to any minorities trying to overcome the effects of past and continuing discrimination.[63] Applied to members of the Afrikaans language community, these principles would favour those groups seeking admission to Afrikaans medium schools, rather than the present incumbents in their defensive postures.[64] Any claim of Afrikaans community groups to have the State subsidize what, objectively speaking, are privileges in terms of exclusive access to affluent schools, would therefore be weak. Their argument that the State should anticipate and obviate possible future disadvantage may well be somewhat stronger, but I do not see how the threat of loss of dominance could legally *per se* be regarded as threatened disadvantage.
vi) Positive support from the State. The sixth, and most controversial possible legal consequence of identifying and distinguishing a cultural, linguistic or religious minority group, could be that such a minority might be able to make a claim for special resources from the State for the purposes of maintaining its identity. There can be no doubt that the recognition of diversity and pluralism, and the weakening of state hegemony, has come in recent years to receive growing support from legal scholars, non-governmental organisations and a number of political philosophers.[65] The literature to which I have referred, however, suggests that there is little hard international human rights law to back a generalised claim on State resources for the promotion of cultural, linguistic and religious diversity, and none at all to support a legal entitlement to separate state-funded schools. As has been pointed out above, when the question of legal protections for cultural, language and religious minorities was debated at the United Nations, the majority of countries argued for a state duty to facilitate assimilation by means of outlawing discrimination, rather than for a state responsibility to encourage diversity. Even those countries which have given greater acknowledgement to minority rights, have tended to leave the creation of communally or religiously based schools to the private sphere, particularly if such schools are exclusive in character.
[84] Thus, Sieghart[66] points out that a person cannot draw from Protocol 1(2) of the European Convention on Human Rights, the right to obtain from the public authorities the creation of a particular kind of educational establishment. As far as the International Convention on Civil and Political Rights is concerned, Lerner[67] laments the fact that Article 27 does not contain any explicit reference to positive measures to which the minority might be entitled, and goes on to say that proposals for including in Article 27 "(a) list of concrete rights, such as state supported schools of the minority or language rights" failed. Professor Charles Dlamini[68] in our country, comments that it is generally accepted that Article 27 of the Covenant requires only that the State parties to the Convention should allow minorities to set up private schools at their own expense and to provide for instruction in their own language. He regards it as unfortunate that in terms of Article 27, the State is not obliged to assist minorities, either financially or materially, to establish minority public schools. The UNESCO Convention against Discrimination in

Education of 1960[69] similarly does not impose any obligation on the State to establish separate minority schools. On the contrary, it outlaws discrimination based, *inter alia* on language, religion and national origin, and singles out as discriminatory acts, the establishing or maintaining of separate education systems or institutions for persons or groups of persons. It then goes on, however, to qualify this prohibition in two important respects. Article 2, in addition to allowing single-sex educational institutions, states that the following do not constitute discrimination:
(a) the establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, on an optional basis and if the education provided conforms to certain standards;
(b) the establishment or maintenance of private educational institutions, if their object is not to exclude any group but to provide educational facilities *in addition* to those provided by the public authorities, under certain conditions.

The clauses identify permissible departures from the normal rule, not positive obligations on the State.
[85] Article 5 goes on to balance out the need for education to promote understanding, tolerance and friendship among all nations, racial or religious groups, with the guaranteed respect for the liberty of parents:
(a) Firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities, and
(b) secondly, to ensure the religious and moral education of the children in conformity with their own convictions, while no person or group of persons should be compelled to receive religious instruction inconsistent with his or her own convictions"
Article 5 expressly recognises the right of members of national minorities to carry on their own educational activities provided 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.
[86] It is quite clear that the manner in which these provisions have been applied varies considerably from country to country, depending on local conditions and preoccupation. In Canada, for example, section 23 of the Canadian Charter of Rights and Freedoms establishes an express right to minority language education out of public funds, providing Francophone and Anglophone minorities with special treatment as compared to other cultural and linguistic minorities.[70] In Belgium and Switzerland, on the other hand, the concept of "areas of linguistic security" applies in terms of which each collectivity can protect its "linguistic homogeneity" from "linguistic competition" from other groups within a defined territory.[71] India provides yet another variant. There, Article 30 of the Constitution guarantees religious and linguistic minorities the right to establish and administer educational institutions of their own choice. The State is precluded, in granting aid to educational institutions, from discriminating against any educational institution on the ground that it is under the management of a minority.[72] These are three countries that have made special provision for minority schools. If Capotorti's Report is any guide, they certainly cannot be regarded as establishing a universal practice. It would seem

that each country has the right, in terms of international law, to develop its own rules in this respect, based on its own history and needs.
[87] It should be added that the central theme that runs through the development of international human rights law in relation to protection of minorities, is that of preventing discrimination against disadvantaged and marginalised groups, guaranteeing them full and factual equality and providing for remedial action to deal with past discrimination. Capotorti devotes several paragraphs in his report to this theme. The weight of international law, in his view, should be in favour of the dominated and not the dominating minorities. There is nothing to indicate in the present case that the Petition based itself on arguments that the clause in dispute imposed discrimination, denied equality, or repudiated remedial action for a marginalised or deprived language minority. On the contrary, the contention was that existing rights to language exclusivity in relatively affluent schools should be maintained. It was common cause that these schools were well endowed because of past State support, while the majority of schoolchildren in the province were, as result of past State discrimination, forced to attend schools that were grossly deprived in comparison. Thus the thrust of international human rights law principles would be far more in favour of supporting the so-called "sociological" or "functional" minority, than of upholding the claims of what might be termed the "sociological" or "functional" majority.[73] In other words, the values underlying international law concerned with protection of minorities, would tend to favour the contentions of the Provincial Government rather than those of the Petitioners.
[88] The latest international instrument on the subject available to me supports the view that there has been some revival of the importance attached to the protection of national minorities as a general group, that goes beyond simply guaranteeing individual members of such minorities protection against discrimination. It is the framework Convention for the Protection of National Minorities adopted towards the end of 1994 by the Committee of Ministers of the Council of Europe.[74]A booklet produced by the Council of Europe Press reports that the framework Convention was the first ever legally binding multilateral instrument devoted to the protection of national minorities in general. The main operative part of the framework Convention contains provisions laying down principles covering a wide range of areas, and I reproduce the booklet's summary in full, inasmuch as it appears to represent the latest, and, I would say, most advanced, international law thinking on the matter:

- non-discrimination;

- promotion of effective equality;

- promotion of the conditions regarding the preservation and development of the culture and reservation of religion, language and traditions;

- freedom of assembly, association, expression, thought, conscience and religion;

- access to and use of media;

- linguistic freedom;

X use of the minority language in private and in public as well as its use before administrative authorities;
X use of one's own name;
X display of information of a private nature;
X topographical names in the minority language;

- education:

X **learning of and instruction in the minority language;**
X **freedom to set up educational institutions;** [my emphasis]

- transfrontier contacts;

- international and transfrontier cooperation;

- participation in economic, cultural and social life;

- participation in public life;

- prohibition of forced assimilation.[75]

[89] The Council of Europe document indicates that special emphasis was put on provisions of a programme-type, defining certain objectives which the States undertake to pursue through legislation and appropriate governmental policies at a national level. It will be noted that this framework Convention, sensitive as it is to the rights of minorities, does not impose positive obligations on states to establish or maintain minority schools. Instead, it confirms the right to learn and be instructed in a minority language, and the freedom to set up educational institutions. These principles are remarkably close to the provisions of sections 32(b) and (c) of our Constitution, adopted a year earlier. It suggests that the interpretation given to the Constitution by Mahomed DP conforms to the principles contained in the most recent and developed international instrument dealing with minority protection.

CONCLUSION

[90] In summary: a reading of our Constitution would be entirely consistent with the principles of international human rights law if it:
- prevented the State from embarking on programmes intended or calculated to destroy the physical existence or to eliminate the cultural existence, of particular groups;
- required the State to uphold the principles of non-discrimination and equal rights in respect of members of minority groups;
- permitted and possibly required the State to take special remedial or preferential action to assist disadvantaged groups to achieve real equality;
- permitted but did not require the State to establish communal schools, or to support such schools already established;
- permitted members of minority groups to establish their own schools.

[91] None of these principles carry the Petitioners' case any further. The papers before us show a need to transform education in South Africa in the light of constitutional precepts which pay due regard to international law. Exactly how the correct balance should be struck between the importance of overcoming systemic inequality inherited from the past, on the one hand, and preventing legally enforced or *de facto* assimilation of groups wishing to preserve and develop a distinctive identity, on the other, would, in my view, be primarily a matter for democratic resolution in the legislatures of our country, and not in the first instance be one of adjudication by the courts. Provided that such deliberations result in legislation not transgressing the Constitution, this Court should decline to interpose its own opinion in relation to exactly how best this balance should be achieved.
[92] In the present case, I would accordingly say that section 32(c) of the Constitution should be interpreted in the way that Mahomed DP has done, and that International law on the subject reinforces the conclusions to which he comes. I also agree that section 247 of the Constitution does not avail the petitioners, and accordingly concur in the order he proposes.

A L SACHS

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[1] See section 9 of the Bantu Education Act No. 47 of 1953.

[2]Reaume and Greene, *Education and Linguistic Security* (1989) 34 McGill Law Journal 777 at 779-81; *Reference Re Education Act Ontario and Minority Language Rights* [1984] 10 DLR (4th) 491 (Ont. C.A.) at 529; *Mahe et al. v The Queen in Right of Alberta et al.* [1990] 68 DLR (4th) 69 (S.C.C); *Attorney-General of Quebec v La Chaussure Brown=s Inc. et al.* [1989] 54 DLR (4th) 577 (S.C.C.) at 606-7; Bastarache, *Education Rights of Provincial Official Language Minorities* in Canadian Charter of Rights and Freedoms (2nd ed, edited by Beaudoin & Ratushny) at 687-705.

[3]*Mahe=s* case, *supra* n.2, at 82-83 and *La Chaussure Brown=s Inc=s* case, *supra* n.2, at 604.

[4]*Attorney-General of Quebec v Quebec Association of Protestant School Boards et al.* [1984] 10 DLR 321 (S.C.C.) at 331.

[5]*East Rand Gold & Uranium Co Ltd v National Union of Mineworkers* (1989) 10 ILJ 683 (LAC) (T); *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd* 1992 (1) SA 700 (A); *National Union of Mineworkers v Gold Fields of SA Ltd & Others* (1989) 10 ILJ 86 (IC); *Food & Allied Workers Union & Others v Kellogg SA (Pty) Ltd* (1993) 14 ILJ 406 (IC); *Food & Allied Workers Union v Spekenham Supreme* (2) (1988) 9 ILJ 628 (IC); *SA Electrical Workers Association v Goedehoop Colliery (Amcoal)* (1991) 12 ILJ 856 (IC). Although these are labour law cases in the context of what is an unfair labour law practice, the reasoning is not inapplicable to the specific wording of section 247 which also contemplates an agreement following on *bona fide* negotiations.

[6]*Britten & Others v Pope* 1916 AD 150; *Richardson and Others v Administrator, Transvaal* 1957 (1) SA 521 (T) at 530 A-C.

[7]*Fripp v Gibbon & Company* 1913 AD 354 at 357-8; *Merber v Merber* 1948 (1) SA 446 (A) at 452.

[8]One should bear in mind, of course, that a liberal interpretation when one is dealing with the rights of the individual as against the state is one thing - a generous interpretation when the issue

requires the state to mediate between multiple groups, each asserting legitimate claims, is another.

[9]Prof. John Dugard suggests that section 35(1) of the Constitution requires us, when interpreting the Bill of Rights, to have regard, not only to treaties ratified by South Africa, and to customary rules that have been accepted by South African courts, but also to Ainternational law contained in general treaties, custom, general principles of law, the writings of jurists, and the decisions of international and municipal courts.≅ He cites section 116(2), which requires the Human Rights Commission to take account of Aother relevant norms of international law≅ as supporting his contention. *Public International Law* in Chaskalson *et al* (ed) *Constitutional law of South Africa* (1996), 13-11. I would add that promoting the values of an open and democratic society based on freedom and equality (section 35(2)) would also require us to pay special attention to the sources he mentions, not excluding his own distinguished work in the area.

[10] Without hearing further argument on the subject, and without doing more profound research, I would be reluctant to offer definitive opinions on the interpretation of what is an elusive, complex and constantly mutating subject.

[11]De Kiewiet CW *A History of South Africa. Social and Economic*,Clarendon Press, Oxford, (1941) 147 summarizes the Boer experience after defeat of the Boer Republics as follows: AMilner=s schools and English teachers were countered in the ex-Republics by some 200 independent schools, under local committees of parents. Against the superior teachers, the better equipment, and the financial strength of the government schools, the Dutch >Christian National Education= schools could not prevail. Their importance was nevertheless great. They served notice that the Boers would not abandon any of their attachment to their language and tradition.≅ Wilson and Thompson (ed) *The Oxford History of South Africa II 1870-1966*, Clarendon Press, Oxford, (1971) 361-2 states: AJ.B.M. Hertzog feared that the Afrikaner people would indeed be denationalized, as Milner had intended ... Hertzog=s diagnosis of the intentions of the English-speaking delegates was correct. Men like Jameson and Fitzpatrick associated Dutch - and especially Afrikaans - with cultural backwardness, and hoped and assumed that in the course of time English would oust it from South Africa ... the question came up for discussion during the first week of the Convention. Hertzog and Steyn made impassioned and moving speeches for the fullest recognition of Dutch. To their surprise, the English-speaking delegates responded in a conciliatory manner, and after informal discussions Hertzog=s resolution was unanimously adopted in an abbreviated form, but still containing the key phrase that besides being declared official languages, >English and Dutch ... shall be treated on a footing of equality, and possess and enjoy freedom, rights and privileges=... .≅

[12]There are, of course, many different communities for which Afrikaans is the mother tongue, and many different perspectives within each of these. My judgement focuses on the particular perspective argued before us.

[13]347 US 483 (1954).

[14] See Woehrling J *Minority and Equality Rights* 1985 McGill Law Journal 51 at 58. See also *Minority Schools in Albania Case* 1935 PCIJ (ser A/B) No 64 at 20.

[15]On the subject of the intrinsic value of diversity, Otto Klineburg was quoted in the UN *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* UN Doc. E/CN.4/Sub.2/384/Rev.1 (1979) reprinted as UN Pub.E.78.XIV.1 (1979) (hereinafter referred to as the Capotorti Report) as saying: AAn undertaking to abolish discrimination against an individual if he becomes similar to the majority is obviously unsatisfactory in the case of those who do not seek to become completely like the majority ...One of the motives operating here is the growing belief in the value of diversity, the enrichment of community life through the maintenance of cultural variations, the fruitfulness of continuing contrast between different ways of life.≅, para 318, 55.

[16] Van der Westhuizen J *A Post-Apartheid Educational System: Constitutional provisions* 1985 Columbia Human Rights Law Review 111 at 64.

[17]Section 3(1) of Act 200 of 1993 (Athe constitution≅) provides: AAfrikaans, English, isiNdebele, Sesotho sa Leboa, Sesotho, siSwati, Xitsonga, Setswana, Tshivenda, isiXhosa and isiZulu shall be the official South African languages at national level, and conditions shall be created for their development and for the promotion of their equal use and enjoyment.≅

[18] Prof. Carel Boshoff and Carel Boshoff IV bring this necessary perspective out well when they say that we must not close our eyes to: A[T]he existential reality, intensity and meaning of this intercultural encounter, to the confrontation with those other worlds outside one=s own, worlds in which human lives exist with no less legitimacy and no less right to be. We should not be looking for some technical restructuring of society, for some mechanical repair of its working parts. We should rather try to find ways in which this encounter could proceed to an active communication, mutually recognising the others= autonomy and dignity; entering into communion, aiming at a reciprocal revelation and understanding of each other.≅ in *The sociopolitical conditions for democratic nation-building: an Afrikaner point of view* Rhoodie and Liebenberg (ed) *Democratic Nation-building in South* Africa, HSRC Publishers, Pretoria, (1994) 164. Cf Prof. Johann Degenaar, in the same volume at 25 and 29 who proposes that the myth of building a nation be replaced by the idea of creating a democratic culture which enables South Africans to live creatively with the inevitable tensions of diversity.

[19]Section 8. Yash Ghai refers to the dilemma of post-colonial societies in Africa as follows: ASome groups must be stripped of privileges they have enjoyed hitherto; often these groups are >minority= groups, and so the process of producing a just society can all too easily be seen as a case of racial or tribal persecution. On the other hand, not to pursue this process can build up bitterness and frustrations, which pose a grave threat to racial harmony.≅ Quoted in the Capotorti Report *supra* note 15 para 311 at 54. He stresses the importance of creating a just society as the foundation for solving ethnic and racial questions.

[20]Section 35(1).

[21]Section 3.

[22]Section 31.

[23]See Dhlamini C *Culture, Education, and Religion* in *Rights and Constitutionalism. The New South African Legal Order* Van Wyk *et al* (ed) Juta (1994), 589-590 for a historical overview of the educational inequalities that existed prior to the Constitution. He makes the following remark at 589: AA balance must be struck between the statutory requirement of compulsory schooling and the liberty of the individual parent to educate his or her children as he or she sees fit. Balancing this issue involves balancing fairness and efficiency which should be done with a certain amount of pragmatism.≅

[24]Section 30(3) read with section 32(a).

[25]According to Lerner N *From Protection of Minorities to Group Rights* (1988) Israel Yearbook on Human Rights 111 at 106, international human rights law actually began, rather timidly, as an attempt to protect discriminated groups, particularly religious communities, through initial emphasis on tolerance rather than rights. He refers to the writings of early Spanish international lawyers in favour of the American indigenous populations and the measures taken in Europe to protect minority religions during the European wars of religion.

[26]Id. at 108.

[27]Id. at 110.

[28]Thornberry P *Is there a Phoenix in the Ashes? - International Law and Minority Rights* (1980) Texas International Law Journal 421 at 425.

[29]Robinson J *International Protection of Minorities, A Global View* 1 Israel Yearbook on Human Rights (1971) 61 at 80.

[30]The only protection for minorities was through the non-discrimination principle. See Capotorti *supra* note 15.

[31]*Supra* note 25 at 112.

[32]The South African Law Commission, after an intensive investigation, rejected the notion of Agroup rights≅ and came to the conclusion that A(T)he needs of individuals who are members of different linguistic, cultural and religious groups would be adequately protected by individual rights in a bill of rights.≅ *Interim Report on Group and Human Rights* (1991) 679-80. See also Currie I *Minority Rights: Language, Education and Culture* in Chaskalson et al *supra* note 9 at 35-2 to 35-3.

[33]See Thornberry P *supra* note 28 at 433 and 447.

[34]It has been praised for neatly combining the objective criterion (possession of distinct characteristics) with the subjective criterion (the wish to preserve these characteristics) that constitute a minority in fact. *Supra* note 28 at 423.

[35]This is the text of Capotorti=s definition in *Minorities* in 8 *Encyclopaedia of Public International Law* 385 R. Bernardt ed. (1985). In his UN Report his definition stated that members of the minority should be nationals of the State concerned. See also the advisory opinion of the PCIJ on the Greco-Bulgarian Convention on Emigration, where it refers to minorities, or Acommunities≅ as Aa group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity with a view to preserving their traditions, maintaining their form of worship, insuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other≅. PCIJ, Ser. B, No 17, at 19. Quoted and discussed by Lerner N in *Group Rights and Discrimination in International Law* Martinus Nijhoff, Dordrecht, (1991) 9. He argues for replacing the phrase Aminority protection≅ with the phrase Agroup rights≅.

[36]*Supra* note 28 at 449.

[37]Lerner *supra* note 35 at 16.

[38] Capotorti Report *supra* note 15.

[39]*Supra* note 28 at 449-450.

[40]See Humphrey J *No distant millennium The International Law of Human Rights* UNESCO Paris (1989) 56 and Capotorti Report *supra* note 15 para 311 at 53.
[41] S*upra* note 29 at 91 Robinson says: AThis brings us to the future of international protection of minorities. In the present circumstances, with the Communist world disinterested, the Latin American continent openly hostile to the very idea, Black Africa immunized [because of fear of fragmentation within colonially imposed boundaries], and Europe, as represented by its Council, going its own way, the problem has shrunk to a not very significant one for the international community.≅

[42]For example the ILO Convention No 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers of 1975 and the ILO Convention concerning Indigenous and Tribal Populations or Peoples of 1957 as revised in 1989.

[43] Thornberry suggests that this trend is associated with the decline of USA hegemony in the UN system. *Supra* note 28 at 455. It also corresponds to the increasing acknowledgement of >hyphenated persons= in the USA itself - African-Americans, Spanish-Americans, Chinese-Americans.

[44]General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the ICCPR, No 23(50) (art 27) UN Doc CCPR/C/21/Rev 1/add 5 (26 April 1994).

[45]The summary above is taken from Currie I in *Minority Rights supra* note32 at 35-7.

[46]Referring to what he termed hateful regimes of oppression and racial discrimination in disregard of the elementary principles of respect for the dignity of human beings, as in Southern Africa at the time, Capotorti *supra* note 15 writes that Ait is obvious that the dominant minority groups do not need protective measures, while the oppressed majorities have rights which far exceed the very limited content of Article 27 of the Covenant≅. See para 55 at 12.

[47] *Supra* note 25 at 141-146.

[48]Currie I suggests in Minority Rights *supra* note32 at 35-8 that A...if as a result of state action or inaction, that community loses its identity, if it is absorbed without trace into the majority population, the individual right of participation in a cultural or linguistic community will be harmed. The right therefore may require positive measures by the state to preserve the separate identity of distinct cultural and linguistic communities.≅

[49] Sieghart P *The International Law of Human Rights,* Clarendon Press, Oxford (1983). He observes the following at 17: A[T]he concept of >non-discrimination= is so central to international human rights law that all but one of the major instruments prescribe it in an Article of general application...≅.

[50]Article 7 provides: AAll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.≅ See also Article 2 in this regard.

[51] Articles 2 (1), 3 and 26 respectively. The latter states: AAll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.≅ In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[52] Articles 14 and 16.

[53]For example the International Convention on the Elimination of all forms of Racial Discrimination of 1950 and the Convention on the Elimination of Discrimination Against Women of 1953.

[54] 1 European Human Rights Reporter 253.
[55]*Kjeldsen, Busk Madsen and Pedersen v Denmark,* Series A, No.23, 7 December 1976. See also Sohn LB *The Rights of Minorities* in *The International Bill of Rights* Henkin (ed) Colorado UP 1981, 271.

[56]See section 8(2) and (4).

[57]For the purposes of discussion, I accept that although language and religious rights are expressed purely as individual rights, they can only meaningfully be enjoyed in community with others.

[58]Furthermore, if the framers were mindful of international law, they would have borne in mind the existence of the Convention on the Suppression and Punishment of the Crime of Apartheid of 1973, which took a drastic stand against the policies which led to the untold suffering and strife referred to in the Postscript to the Constitution.

[59] It might be, that in language terms, there is a massive push by parents of many different cultural backgrounds to have their children educated in English and, from this point of view, English could be considered a majority language. This, however, would be a question of language choice as guaranteed by section 32(b). Communities have a right to assimilate if they so wish, to the extent that they desire. What is objected to is enforced assimilation. For a discussion on Swiss practice see Robinson J *supra* note 29.

[60]Section 3(9) of the Constitution lists the principles upon which official policy and practice in relation to the use of languages shall be based and which include in section 3(9)(e) A...the fostering of respect for languages spoken in the Republic other than the official languages, and encouragement of their use in appropriate circumstances.≅

[61] *Supra* note 16 at 130.

[62] For a summary of the text of the Convention see Lerner *supra* note 25 at 165. See also preferential treatment for indigenous peoples called for in the ILO Convention Concerning Indigenous and Tribal Peoples of 1989, which calls for special measures implying preferential treatment provided they are not contrary to the freely expressed wishes of the groups concerned and do not prejudice the enjoyment of equal rights in any way.

[63]They could also obviously be pertinent to easing the way for women, who are not a minority, but are disadvantaged, to overcome the obstacles placed in their way by patriarchal and sexist laws and practices.

[64]For the right to remedial equality see *supra* note 14 at 65.

[65]Prof Degenaar *supra* note 18 whose reflections on the subject have been influential, refers approvingly to what he calls post-modern rethinking of the nature of the nation-state.

[66]S*upra* note 49 at 77, commenting on the Belgian Linguistic case . The First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome in 1950 states in Article 2 : ANo person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.≅

[67] *Supra* note 25 at 16.

[68]*Supra* note 23 at 105.

[69]Article 1.1(c).

[70]See discussion by Woehrling *supra* note 14 at 70-74.

[71]Id. at 66.

[72] Seervai HM *Constitutional Law of India* Tripathi (1983) chap XIII and *The Ahmedabad St. Xaviers College Society v State of Gujarat* S.C.R. [1975] 173.

[73]See Capotorti=s strong remarks on the situation in Southern Africa of the Capotorti Report *supra* note 15 at 12.

[74] As at 1 March 1995 twenty-two States had signed. For entry into force it required ratification by twelve member States.

[75]*Human Rights. A continuing challenge for the Council of Europe* 1995 Council of Europe Press 47.