



**TRUST^{VIR}
AFRIKAANSE
ONDERWYS**

LEGAL OPINION

**A CONSTITUTIONAL PERSPECTIVE ON THE
CONTINUED USE OF AFRIKAANS IN HIGHER
EDUCATION IN SOUTH AFRICA**

**Compiled by a panel of senior legal practitioners
for the Trust vir Afrikaanse Onderwys (TAO)**

August 2017

PRE-AMBLE BY THE TRUST VIR AFRIKAANSE ONDERWYS (TAO)

It is clear that Afrikaans as a higher education language is under severe pressure. The TAO is committed to multi-lingualism and specifically Afrikaans as an education language. It therefore commissioned this legal opinion to give a constitutional perspective on the continued use of Afrikaans as a higher education language in public universities in South Africa. The debate (and often decision-making) about language is often done against the background of emotions, political correctness and a warped sense of (racial) transformation.

This legal opinion, written in accessible language, is meant to provide a firm constitutional foundation for the debate about higher education language, transformation and diversity. It is intended to be used by members of university councils, university senior management, academics, student leadership and concerned stakeholders. Although we do not (for professional reasons) provide the names of the legal practitioners who wrote this opinion, some of them count among the most respected senior counsellors in South Africa.

It is our hope that this opinion would not only be found useful by associates of the two universities whose councils decided to stop the use of Afrikaans as language of tuition (with a few exceptions), namely the University of Pretoria (UP) and the University of the Free State (UFS), but also by those associated with the last two remaining universities where Afrikaans is – under specific circumstances – still used, University of Stellenbosch (US) and North West University (NWU – at its Potchefstroom Campus).

This opinion is specifically written and offered in English, so that it could also be accessed and utilised by non-Afrikaans speaking stakeholders.

1. INTRODUCTION

- 1.1. The *Trust vir Afrikaanse Onderwys* (TAO)¹ requested a number of legal practitioners to provide a document that would give a constitutional education.
- 1.2. For this purpose, they analysed section 29(2) of the Constitution² and endeavoured to provide a constitutional perspective on the rights of students who choose to study in Afrikaans at university level.
- 1.3. The TAO is a proponent of mult-lingualism in South African education and is of the belief that recognising the imperatives of mother – tongue education is not only achievable in a practical sense but an absolute necessity to promote access and quality education for all the youth of South Africa.

2. BACKGROUND

- 2.1. The development of Afrikaans during the 20th century³ to a scientific and academically esteemed language has been placed under strain in the past twelve months as a result of changes in language policies adopted by universities such as Stellenbosch (US), Pretoria (UP), UNISA, and Free State (UFS). Prior to this the University of Johannesburg has changed from a single medium Afrikaans university to a single medium English university a few years ago.
- 2.2. Historically single medium Afrikaans universities have since the new democracy adopted a parallel medium language policy with the intent to redress the results of past discriminatory laws and practices and to

¹ TAO has been registered as an ownership Trust by the well-known Dagbreek Trust as founder. The main objective of the TAO is for Afrikaans to be sustainable as an academic and business language.

² Constitution of the Republic of South Africa, 1996

³ Since the late 1920's and at a stage that when English dominated the South African landscape and Afrikaner children lacked proper education, mother tongue education in single- medium schools were demanded. See: Woolman & Bishop – **Constitutional Law of South Africa, Second Edition**, Volume 4, at p 57-43.

avoid a situation whereby Afrikaans as a single - medium of instruction would exclude access to those who choose English as a medium of instruction.⁴

2.3. However prominent universities⁵ have recently opted to discontinue Afrikaans and changed their language policies to English single – medium as language of learning and tuition (LOLT) albeit with tutorial support to students whose mother tongue is not English. These changes occurred despite the fact that a substantial number of students⁶ still choose Afrikaans and despite it being practicable and affordable to continue with the Afrikaans – offering at those institutions at least in certain faculties or academic departments.

2.4. According to statistics of enrolments by race in 2014 at public Higher Education Institutions⁷ from a total enrolment number of 968 890⁸ students the demographic composition was as follows:

African – 688 427 = 71%

Coloured – 60 685 = 6,2 %

Indian – 53 609 = 5,5 %

White – 166 169 = 17%.

2.5. The aforesaid figures illustrate to what extent the redress has taken place over the past years.

2.6. If one assumes that only 50 %⁹ of all Afrikaans mother tongue students choose to study in Afrikaans¹⁰ and apply this to the figures of the

⁴ See para 11.1.1 of the Language Policy for Higher Education 2002 ["LPHE"]

⁵ UNISA, UP, UFS.

⁶ Although a minority compared to the total student population.

⁷ <https://chet.org.za/data/sahe-open-data#> South African Higher Education Open Data – Centre for Higher Education Trust. This data also provide figures of the racial composition of each university in South Africa.

⁸ This includes UNISA which represents a number of 328 491. The total enrolment number has increased with approx. 360 000 since the 2000 figures published in the LPHE.

⁹ Derived from a published study performed at UNISA by Professors Bornman and Potgieter titled: LANGUAGE CHOICES AND INDENTITY IN HIGHER EDUCATION: AFRIKAANS SPEAKING STUDENTS AT UNISA – Studies in Higher Education – 2015 <http://dx.doi.org/10.1080/03075079.2015.1104660>.

¹⁰ The other half opting to study in English.

coloured and white enrolments from which ranks the majority of Afrikaans students emanate, and assuming that 50% of the white enrolment figures¹¹ and 50 % of the coloured enrolment figures are Afrikaans then the ultimate figures of students choosing Afrikaans are illustrated as follows:

Coloured: $50\% \times 60\,685 = 30\,342 \times 50\% = 15\,171,25$

White: $50\% \times 166\,169 = 83\,084,5 \times 50\% = 41\,542,25$

Total: 56 713,50¹²

- 2.7. A parallel–medium policy, accommodating Afrikaans and English as languages of instruction, coupled with the intention to uplift other official languages to the level of acceptable educational standards, have been the aim of many higher education institutions language policies since the advent of the new democracy.
- 2.8. As laudable as this approach may be, in the recent past, an about turn has been made with regards to Afrikaans and which has left Afrikaans, as the only fully pedagogical language besides English, in legal uncertainty. We have now seen that certain public universities have moved from initially single - medium Afrikaans to parallel-medium and now to single–medium English. This despite the overall language demographics in South Africa.¹³

¹¹ Which is likely to be more.

¹² This figure doubles the total student population of US (28 869) and equals the total student population of UP (56 376) of 2014. One can argue that the number justifies two single – medium Afrikaans universities.

¹³ *"Today, Afrikaans is the mother tongue of almost 6 million residents of the Republic of South Africa. This group includes coloured South Africans, white Afrikaners and a relatively small black population (under 100 000). (As these statistics indicate, such terms as "the Afrikaner language" or "Afrikaner literature" are misleading, for Afrikaners are not the only people to claim Afrikaans as their first language.) By contrast, English is the first language of just 3.4 million South Africans. When we compare the use of English and Afrikaans as a (second or third) foreign language, the disparity is levelled: 13 million white, coloured and black citizens of South Africa use Afrikaans and 13 million use English."* - Jerzy Koch - **"A History of South African Literature"**

- 2.9. The issue today is no longer one of retention of dominance or privilege of Afrikaans but rather a quest for the prevention of further erosion and disadvantage.
- 2.10. Although there are pending court challenges against the language policies of certain universities¹⁴ which adopted changes resulting in the erosion of Afrikaans tuition, the fact of the matter is that prior to the recent changes in language policy there were 19 universities in SA with only 5 offering Afrikaans¹⁵ as part of a language policy.¹⁶ After the recent changes by some to single-medium English¹⁷ there remain only two¹⁸ universities that offer Afrikaans-medium tuition: NWU (Potchefstroom) and US (the latter in a qualified way). Afrikaans as a higher education language is ostensibly on a slippery slope.¹⁹
- 2.11. In recent court cases against various universities, judgments have been delivered in UFS²⁰ and UP²¹. We refer to these judgments later. At the time of the drafting of this opinion an application for leave to appeal to the Constitutional Court in UFS was pending.
- 2.12. In the light of the prevailing uncertainty, it is thus the aim of this opinion to provide a constitutional perspective, albeit in an abbreviated format, on how section 29(2) is to be understood and to be applied in the current context in higher education.
- 2.13. In the evaluation of the legal position of Afrikaans in higher education institutions, emphasis shall be placed on the following themes:
- 2.13.1. An exposition of section 29(2) and the “reasonably practicable” standard in the interpretation of section 29(2).

¹⁴ UNISA, US, UFS.

¹⁵ UNISA, UP, UFS, US and NWU

¹⁶ Most of them as part of a parallel medium policy.

¹⁷ UNISA, UP, UFS

¹⁸ US and NWU – which begs the question whether this result was intended by the Language Policy in Higher Education.

¹⁹ Although US in general has a Afrikaans and English parallel medium policy internally the Afrikaans offering is in certain respects qualified and subject to reasonable practicability e.g. clauses 7.1.3, 7.1.5.2 and 7.1.7.2

²⁰ In the High Court and SCA . Application for leave to appeal to the Constitutional Court pending.

²¹ High Court, Gauteng.

- 2.13.2. Leading jurisprudence on Afrikaans instruction in cases where section 29 (2) of the Constitution has been invoked.
- 2.13.3. The Higher Education Act²² and Language Policy for Higher for Higher Education (“LPHE”).
- 2.13.4. Commentary by certain learned authors.

3. THE CONTENT OF SECTION 29(2) OF THE CONSTITUTION.

3.1 Section 29(2) of the Constitution provides:

“Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account—

(a) equity;

(b) practicability; and

(c) the need to redress the results of past racially discriminatory laws and practices.”

3.2 The test for continued Afrikaans-offering in higher education ultimately rests on the Constitution as starting point. Any policy adopted by a university who ignores the provision or commits an error of law in the interpretation and application of section 29(2) is susceptible to being set aside.

²² No 101 of 1997.

3.3 In *Ermelo*²³ the Constitutional Court said about section 29(2):

“The provision is made up of two distinct but mutually reinforcing parts. The first part places an obvious premium on receiving education in a public school in a language of choice. That right, however, is internally modified because the choice is available only when it is “reasonably practicable”. When it is reasonably practicable to receive tuition in a language of one’s choice will depend on all the relevant circumstances of each particular case. They would include the availability of and accessibility to public schools, their enrolment levels, the medium of instruction of the school its governing body has adopted, the language choices learners and their parents make and the curriculum options offered. In short, the reasonableness standard built into section 29(2)(a) imposes a context-sensitive understanding of each claim for education in a language of choice. An important consideration will always be whether the state has taken reasonable and positive measures to make the right to basic education increasingly available and accessible to everyone in a language of choice. It must follow that when a learner already enjoys the benefit of being taught in an official language of choice the state bears the negative duty not to take away or diminish the right without appropriate justification.” (emphasis inserted).

3.4 The Court also said:

“The second part of section 29(2) of the Constitution points to the manner in which the state must ensure effective access to and implementation of the right to be taught in the language of one’s choice. It is an injunction on the state to consider all reasonable educational alternatives which are not limited to, but include, single medium institutions. In resorting to an option, such as a single or parallel or dual medium of instruction, the state must take into account what is fair, feasible and satisfies the need to remedy the results of past racially discriminatory laws and practices.”

²³ **HOD, Mpumalanga Department of Education v Hoërskool Ermelo** 2010 (2) SA 415 (CC) at para [52].

- 3.5 It is to be borne in mind that *Ermelo* was concerned with the right to basic education in schools and in the context of a school that was single-medium Afrikaans and not filled to capacity with learners coupled with the need to address historical disparities in basic education and schools. The basic educational resources in Ermelo were considerably scarce with neighbouring schools filled to capacity, to such an extent that should the affected learners not be admitted to Hoërskool Ermelo, they would not receive basic education at all. That was the context and circumstances of Ermelo as a school viewed against the backdrop of its community.
- 3.6 However, what the Court said concerning the interpretation of section 29(2) remains a valuable starting point in order to apply it in the higher education context.
- 3.7 Where the court stated that section 29(2) consists of two distinct but mutually reinforcing parts it did not intend to say that the two parts are interwoven to the extent that the distinction between them are blurred. The section contains a two tiered approach. The first tier is in the first sentence and the second tier in what follows thereafter.
- 3.8 The first part gives expression to the right to receive education in the language of choice of persons. Being a fundamental right although internally qualified by “reasonably practicable”, the right binds in terms of section 8(1) of the Constitution the state and all organs of state. Public universities are organs of state. The first part contains the core of the right.²⁴
- 3.9 This turns to the meaning of the words “reasonably practicable”. The word “reasonably” is an adverb and derivative of “reasonable” which

²⁴ See also section 32(b) of the Interim Constitution of 1993.

means “fair and sensible”. An adverb is word or phrase that modifies the meaning of an adjective, verb or other adverb or of a sentence²⁵. “Practicable” is an adjective being a word naming an attribute of a noun. Therefore “reasonably practicable” is one concept where “reasonably” is linked to “practicable” and describes or modifies it.

- 3.10 “Practicable” means able to do or put into practice, useful²⁶. That which is ‘*practicable*’ is something that is capable of being put into practice, or of being done or accomplished, or that is ‘*feasible*’.²⁷
- 3.11 “Reasonable” or “reasonableness”²⁸ cannot be read into the section as if it is a stand-alone and a separate requirement from “practicable”.
- 3.12 The first part is in our opinion the overriding provision, and that the choice to receive education in a language of choice is primarily subject to the practicability test and not the factors mentioned in the second part of section 29(2).
- 3.13 The second part relates to the determination of the best suitable manner to ensure that the right in the first part is actualised, where it follows that the second part may not be used as a justification to deny the right contained in the first part.
- 3.14 Section 29(2) imposes a constitutional obligation not only on the State but organs of state, which include higher education institutions.
- 3.15 The Constitutional Court has interpreted section 32 (b) of the Interim Constitution as the forerunner to section 29(2) in *Ex parte Gauteng*

²⁵ Oxford South African Concise Dictionary, Second Edition.

²⁶ Ibid

²⁷ <http://www.merriam-webster.com/dictionary/practicable>.

²⁸ Adjective or noun.

Provincial Legislature ²⁹(“the Gauteng Education Bill case”). The second part of section 29(2) was added in the final text.

3.16 The *Gauteng Education Bill* case considered linguistic rights, cultural and minority rights and diversity. Sachs J said *inter alia* the following:

“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.”

3.17 Mahomed DCJ said the following with reference to section 32(a) of the Interim Constitution:

“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.” (emphasis inserted).

3.18 Sachs J also referred the fear of the destruction of Afrikaans as follows:

“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.”

²⁹ 1996 (3) SA 165 (CC)

3.19 That being said in 1996 must be compared with the position in 2017. Today the fear is no longer subjective. It is real and legitimate. This was echoed in the following portion in the judgment of the Supreme Court of Appeal in the UFS case:³⁰

“However, I accept their legitimate concern that the new language policy, which prefers English over Afrikaans at UFS, and the adoption of similar policies at other universities, will erode the position of Afrikaans as a language of instruction and its constitutionally protected status as an official language. Their disquiet should be shared by all South Africans who value our diverse cultural and language heritage. Because Afrikaans is, as Sachs J colourfully observed in the Gauteng School Education Bill case: ‘one of the cultural treasures of South African national life, widely spoken and deeply implanted, the vehicle of outstanding literature, the bearer of rich scientific and legal vocabulary and possibly the most creole or “rainbow” of all South African tongues’.”

3.20 Unfortunately in our view the Court erred in its interpretation of the words *“reasonably practicable”* which in turn became one of the vital reasons why the appeal of UFS succeeded notwithstanding the expression of the aforesaid sentiment. We motivate this view further herein. The Constitutional Court will ultimately have a final say on this important issue. In the meantime we express an opinion without intending to venture into what the final outcome might be.

3.21 The key question is how must transformation be balanced today in the interests of justice and equity so as avoid the ultimate destruction of Afrikaans at tertiary level? We submit that the one should not be pinned against the other. In other words the retention of Afrikaans is not a constitutional obstacle for transformation. And transformation is

³⁰ **University of the Free State v Afriforum & another** [2017] ZASCA 32 (28 March 2017) at para [2].

not meant to cause and should not cause the further erosion and ultimate destruction of Afrikaans. This applies also to the advancement of other indigenous languages at tertiary level.

3.22 Justice Kriegler said the following with reference to right to education in the language of choice in term of the Interim Constitution: ³¹

“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 gelê 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”.

3.23 Kriegler J underscored the constitutional obligation of the state to provide for instruction in a language of choice, subject to reasonable practicability. Recognising the elasticity of the term ‘*reasonably practicable*’, he nonetheless considered that it was objectively justifiable, with the effect that ‘*meaningful numbers of language-speakers have an enforceable right against the government to instruction in the language of their community as long as it is reasonably practicable*’.

3.24 What a meaningful number is must, of course, be determined by reference to contextualized facts in each instance.

³¹ Para [41] of the judgment in the Gauteng Education Bill case.

3.25 Justice Sachs J said further the following³²:

“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. 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”.

3.26 *“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. 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”.* (emphasis inserted).

3.27 However and unfortunately so, the exercising of the choice in terms of

³² Para [49].

section 29(2) has now in two university council³³ decisions been given an unjust and inequitable racial connotation which in our view is unconstitutional.

3.28 In the recent judgment of the *University of Pretoria* case³⁴ the High Court referring to the meaning of “practicable” said that it relates purely to the functional task namely whether the available resources enable the task to be undertaken. But the court also held that the matter does not end at the functional level because of the importation of the *standard of reasonableness* and that the lawmaker contemplated more than a functional ability to provide education in the language of choice and therefore does not justify the exclusion of the factors in the second part of section. It held that *reasonableness* includes considerations of race and equity. It therefore conflated the second part of section 29(2) with the first part.

3.29 From this premise of interpretation the High Court in *University of Pretoria* found merit in the reasoning of the Senate and Council of the university that a parallel medium policy with Afrikaans and English as medium of tuition would perpetuate racial segregation.³⁵

3.30 In the recent judgment of the Supreme Court of Appeal in *University of the Free State* (“UFS”) it overturned a judgment of the full court³⁶ of the Free State High Court³⁷. Although it is not the primary focus of this opinion to do a critical analysis of the judgment in UFS by the Supreme Court of Appeal the subject matter of this opinion inevitably

³³ UFS and UP by holding that it leads to racial segregation.

³⁴ **Afriforum and another v Chairperson of the Council of the University of Pretoria and Others** [2017] 1 All SA 832 (GP) at paras [31] - [33].

³⁵ *Supra* at paras [35] – [36].

³⁶ Three judges.

³⁷ **Afriforum and Another v Chairman of the Council of the University of the Free State and Others** (A70/2016) [2016] ZAFSHC 130 (21 July 2016)

causes a consideration of the judgment.

3.31 The UFS–SCA judgment dealt with the following key issues:

- 3.31.1 whether the adoption of the new policy amounted to administrative action³⁸ or whether it was merely an executive decision³⁹;
- 3.31.2 the interpretation of section 29(2) of the Constitution;
- 3.31.3 section 27(2) of the Higher Education Act and the meaning of “subject to” in relation to the question whether the language policy of a university is subject to the Language Policy for Higher Education made by the minister.

3.32 With regards to the issue in 3.31.1 above, the Court held that the adoption of the new policy was an executive decision⁴⁰ and not administrative action. The question is whether this is correct. The answer is not a simple one.

3.33 In *Permanent Secretary, Education & Welfare, EC v ED – U- College (PE)*⁴¹ the Constitutional Court (per O’Regan J) said that the question is whether the policy is formulated outside of the legislative framework involving a political decision or whether the formulation of policy is in a narrower sense under implementation of legislation.⁴²

3.34 A university is a public higher education institution under the Higher Education Act⁴³. It is a statutory body and an organ of state. Its governing body is its council. Its functions and powers are subject to

³⁸ And subject to review under the Promotion of Administrative Justice Act (“PAJA”)

³⁹ Not subject to review under PAJA but only reviewable on limited grounds if the decision infringed the legality principle.

⁴⁰ Because as the court reasoned in policy – making in general lies in the realm of executive authority and the implementation of policy lies within the administrative domain. [para 17 of the judgment].

⁴¹ 2001(2) SA 1 (CC)

⁴² At pp 13 – 14D.

⁴³ Act No 101 of 1997.

the Act⁴⁴ and the institutional statute. The institutional statute is subject to approval by the Minister.⁴⁵

3.35 Section 27(2) of the Act provides as follows:

“Subject to the policy determined by the Minister, the council, with the concurrence of the senate, must determine the language policy of a public higher education institution and must publish and make it available on request.” (emphasis inserted).

3.36 It therefore appears that language policy making is singled out specifically under a statutory obligation and its determination made subject to the policy determined by the Minister. Therefore it is not part of general policy making powers under the general governance functions of a council on which a council has a free reign but one specifically singled out in the statute.⁴⁶ It rather appears to be implementation of legislation which then is a policy in the narrower sense and administrative action. It is also a power which inevitably will give effect to or affect the right of choice in section 29(2) and has an external legal effect at a university.⁴⁷

3.37 With reference to the issue in 3.31.2 above and as in the *University of Pretoria* case, the Supreme Court of appeal in UFS upheld the submission of UFS namely that the right to receive an education in a language of choice is not only a matter of practicality, but also of reasonableness and that on this interpretation, the criteria mentioned in the second part (equity, practicability and redress), which are

⁴⁴ Section 27(1).

⁴⁵ Section 33.

⁴⁶ Which in turn raises the question as to the purpose of the Act here and why it was singled out and why being made subject to the policy determined by the Minister.

⁴⁷ A further indication of the implementation of the Act and National Policy is seen from section 31 which provides : **Institutional forum.**—(1) The institutional forum of a public higher education institution must—
(a) advise the council on issues affecting the institution, including—
(i) the implementation of this Act and the national policy on higher education;

relevant when considering effective access to, and implementation of the right, also enter into the assessment.

3.38 The Court then said the following:

“The legal standard is reasonableness, which of necessity involves a consideration of constitutional norms, including equity, redress, desegregation and non-racialism. The factual criterion is practicability, which is concerned with resource constraints and the feasibility of adopting a particular language policy.

It follows, in my view, that even if a language policy is practical because there are no resource constraints to its implementation, it may not be reasonable to implement because it offends constitutional norms.”

3.39 Having adopted this interpretation of section 29(2) the Court, although it acknowledged that *“once the standard is met and the right to a language of choice exists, the State bears a negative duty not to take it away or diminish the right without justification”*, found that there were changed circumstances justifying a change in policy. This change is then described as follows:

“UFS’s research has shown conclusively that as the demographic and language profile of its student population has changed with ever-increasing numbers of black students opting for English-medium language instruction, and correspondingly fewer numbers of white Afrikaans students seeking Afrikaans- medium instruction, racial segregation is becoming an increasing problem.⁴⁸ The ratio of Afrikaans speaking students per lecturer and per classroom is significantly lower than is the case with non-Afrikaans-speaking students, who choose the English stream. This in turn leads to a perception that Afrikaans-speaking students are receiving closer supervision than students who choose to study through the English medium of instruction.”

⁴⁸ Underlining inserted.

- 3.40 This was the rationale of the change in policy and endorsed by the Court on appeal because the Court found that because of the consideration of reasonableness and that it included the criteria in the second part of section 29(2), the racial segregation caused by increased black students and decrease in white Afrikaans students and lesser ratio per lecturer per classroom was not acceptable even if was still practical or practicable to retain Afrikaans in the sense that there were no resource constraints.
- 3.41 We are of the opinion that this interpretation is erroneous and amount to a misdirection in the interpretation of section 29(2) of the Constitution for several reasons to which we refer to below.
- 3.42 As stated above reasonableness is not a self-standing requirement in the first part. It is practicability and “reasonably” being an adverb which describes practicability. The second part of section 29(2) then places the obligation on the state to implement and give effect to the right *to ensure effective access to, and implementation of this right*. The state must then consider all the reasonable (“fair”) alternatives which include single–medium institutions taking into account (when giving consideration to the alternatives and the implementation of the right) equity, practicability and redress. The state does this through the public universities and which makes the national language policy an important consideration.
- 3.43 In our view the Court erroneously conflated the second part of section 29(2) with the first part. If the Constitution intended to include the criteria such as equity and redress in the first part it could have easily said so and would have said so.

3.44 In *Certification of the Constitution of the Republic of South Africa*,⁴⁹ the Constitutional Court said the following in comparing the text of the new Constitution with the Interim Constitution:

“In any event, the various factors set out in NT 29(2)(a) to (c) are the basis on which the state is directed to take positive action to implement the right to receive education in the official language or languages of choice; they impose a positive duty on the state which does not exist under the IC.”

3.45 Section 29(2) intended to mean that if it is “*reasonably practicable*” in the sense that there are no resource constraints and it being feasible for the right of choice of Afrikaans to be exercised and accommodated at a university and bearing in mind that there is a negative duty not to take the right away without proper justification⁵⁰ then the question is simply what is the best manner to give effect to the right? If equity, practicability and redress is better fulfilled in a parallel-medium setting than in single-medium then it follows that that is the manner how it is to be given effect to. The right is not given effect to by changing a parallel-medium policy to English single-medium.

3.46 In the well –known work, *Constitutional Law of South Africa (Second Edition)* by Woolman & Bishop and in Volume 4, Chapter 57 which chapter was written by the said authors, the following is said⁵¹ :

“Though FC s 29(2)’s second sentence may provide a rather weak test for justification⁵², it does not turn the choice of medium of instruction into a matter of mere policy preference. Moreover, FC s 29(2) does not as Advocate Chaskalson suggested of IC 32, possess the structure of an

⁴⁹1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC)

⁵⁰ As stated in the *Ermelo* case.

⁵¹ At p. 57-57.

⁵² i.e for single medium Afrikaans schools.

affirmative action provision. FC s 9(2)⁵³ provides the perfect example of a constitutional norm whose aim is restitutionary justice. Whereas FC s 9(2) differentiates between groups that have been historically disadvantaged and those that have not, FC s 29(2) does not do so. Single medium public schools could be approved for any preferred language of instruction so long as instruction in a preferred language is reasonably practicable and the single medium public school, as the best means of accommodating such instruction, satisfies the three criteria of equity, practicability and redress. As we have been at pains to point out, the Final Constitution, as a liberal political document, does not view all social, legal and economic arrangements through the prism of equality and reparations.”

3.47 If then significant progress has been made to redress the results of past discriminatory practices as the demographic data referred to above shows resulting also in an increase in the entire student population at universities, it will automatically follow that because of the language choices, the vast majority of students who will choose English comes from mainly black students, English speaking white students and mainly Indian students. The result is that Afrikaans speaking students will automatically be a minority at universities and accordingly parallel-medium lecture rooms will reflect that. The fulfilment of constitutionally ordained redress and the increase in black students brings about this result.

3.48 Is it then tenable and rational to contend that because of this redress and from the exercising of the language choice in section 29(2) that there is now impermissible racial segregation? We submit not, especially where the rest of the university is integrated in all spheres of its life and activities and in the residences (which we believe is indeed the case with UFS and UP and elsewhere after 21 years into

⁵³ The clause in the Bill of Rights from which affirmative action measures is derived in order to promote the achievement of equality.

the democracy) and there is social cohesion on these campuses. The differentiation is then only a as a result of giving effect to section 29(2) and the promotion of multilingualism and diversity which is part of the Constitutional vision.

3.49 It was known when the final Constitution was designed that the choice of Afrikaans at university will mostly lie with Afrikaans speaking white students although many coloured students has Afrikaans as mother tongue. What about also the Black students who grew up with Afrikaans as second language and who would choose Afrikaans as their second language in education despite being a minority? Was the Constitution designed in section 29(2) that because of the foreseeable increase in numbers of English speaking students of which the majority are Black that the right of choice for Afrikaans speaking will eventually become academic and for practical purposes erode further and then eventually terminate? Is such a result equitable? It cannot be.

3.50 The aforesaid danger was precisely what the Gerwel Committee foreshadowed in 2002 in its report to the Minister prior to adoption of the national language policy. The report also predicted that there will be pressure on Afrikaans students to change to English medium classes. But the report went further and predicted continued pressure on Afrikaans as an academic language. The Gerwel Committee then made the following important point:

“... the argument of this Committee has been that the process of nation building is not intent upon the obliteration of any of its constituent elements but that on the contrary, it has the obligation to avoid erosion through benign neglect and laisses-faire.”

For *inter alia* this reason the Gerwel Committee proposed the following:

“The University of Stellenbosch and Potchefstroom University are the two that the Committee would recommend for being tasked with having as one of their main responsibilities attending to the sustained development of Afrikaans as academic and scientific medium.

The distinction is that while the previously mentioned three universities⁵⁴ should retain the freedom to offer in Afrikaans next to their offerings in English, the latter two will have a primary obligation to nurture, develop and promote the knowledge production functions of Afrikaans.”

3.51 When the national language policy was then drafted and in response to the Gerwel Report’s recommendation referred to above it said the following:

“15.4.1 The Ministry does not believe, however, that the sustainability of Afrikaans in higher education necessarily requires the designation of the University of Stellenbosch and the Potchefstroom University for Christian Higher Education as ‘custodians’ of the academic use of the Afrikaans language, as proposed by the Gerwel Committee.

15.4.2 In this regard, the Ministry agrees with the Rectors of the Historically Afrikaans Universities that the sustained development of Afrikaans should not be the responsibility of only some of the universities (Views on Afrikaans, by the rectors of the HAUs, 23 September 2002). The concern is that the designation of one or more institutions in this manner could have the unintended consequence of concentrating Afrikaans speaking students in some institutions and in so doing setting back the transformation agendas of institutions that have embraced parallel or dual medium approaches as a means of promoting diversity. Furthermore, some of those making the call for Afrikaans as the anchor language of one or more institutions are of the view that access for non-Afrikaans speakers could be accommodated provided that they acquire proficiency in the Afrikaans language for academic purposes.....

⁵⁴ Referring to UP, UFS and the former RAU.

15.4.4 The Ministry is of the view that the sustainability of Afrikaans as a medium of academic expression and communication could be ensured through a range of strategies, including the adoption of parallel and dual language medium options, which would on the one hand cater for the needs of Afrikaans language speakers and, on the other, ensure that language of instruction is not a barrier to access and success. In this regard, the Ministry will, in consultation with the historically Afrikaans medium institutions, examine the feasibility of different strategies, including the use of Afrikaans as a primary but not a sole medium of instruction.” (emphasis inserted).

3.52 The National Language Policy not only provides the voice and views of the state on the manner of implementation of right in section 29(2) but also manner in which Afrikaans as an academic language can be retained and strengthened.⁵⁵ This was part and parcel of the context sensitive understanding ⁵⁶ in which the historic Afrikaans universities had to fashion their language policies. After all it is primarily at tertiary level and at universities where Afrikaans is dependent on retaining its status as academic language and language of science.

3.53 As we have seen from the statistics mentioned above, the numbers of Afrikaans speaking students probably still choosing Afrikaans amount to approximately 56 000. If each university then discontinues tuition in Afrikaans, must the state then take steps to establish new universities to give effect to the right by way of single–medium tuition? The obvious answer to this proposition will be that it will not foster a multilingual environment envisaged by the national policy and will create new patterns of segregation. It is therefore not a solution.

3.54 Furthermore in the UFS and UP cases the racial segregation argument was limited to classrooms because of the language choice.

⁵⁵ Which is stated in so many words in the Summary in paragraph 21 of the LPHE

⁵⁶ To use the words of the Constitutional Court in *Ermelo*. In other words there is our view a broader context which universities are obliged to consider as opposed to schools.

There was no suggestion or finding that there was no integration and social cohesion on the campuses and in residences as a result.

3.55 It can be concluded that both the structure and content of section 29(2) leads to an interpretation that educational institutions are constitutionally required to continue with the Afrikaans—offering, where reasonably practicable and where there are still meaningful numbers as we see from the existing data.

4. THE HIGHER EDUCATION ACT AND LANGUAGE POLICY ON HIGHER EDUCATION.

4.1 That brings us to the interpretation of the word “*subject to*” in section 27(2) of the Higher Education Act referred to above in paragraph 3.29.3. In this regard the Supreme Court of Appeal held that the words “subject to” in section 27(2) do not impose a legal obligation on any university to adopt the LPHE and that the LPHE goes no further than to provide a policy guideline for the universities which they are free to depart and the only obligation on universities that choose this course is to justify their departure.⁵⁷ The Court also found that the LPHE is noticeable for its absence of any prescriptive language.

4.2 Although it is correct that one cannot elevate the LPHE to law which makes it binding on all universities, one needs to consider what the intention was of the legislature with regards to language policy in higher education in particular (as opposed to other policies) by using the words “subject to”.

4.3 In *Sentra–Oes Koöperatief Bpk v Commissioner for Inland Revenue*⁵⁸ Nicholas AJA said the following:

⁵⁷ Para [39] of the judgment in UFS.

⁵⁸ 1995 (3) SA 197 (AD) at 207 C – F.

“In the majority judgment in S v Marwane 1982(3) SA 717(A) at 747H-748B, Miller JA explained that the purpose of the phrase "subject to" when used in a legislative provision, is –

‘.. to establish what is dominant and what subordinate or subservient; that to which a provision is 'subject', is dominant - in case of conflict it prevails over that which is subject to it. Certainly, in the field of legislation, the phrase has this clear and accepted connotation. When the legislator wishes to convey that that which is now being enacted is not to prevail in circumstances where it conflicts, or is inconsistent or incompatible, with a specified other enactment, it very frequently, if not almost invariably, qualifies such enactment by the method of declaring it to be 'subject to' the other specified one. As MEGARRY J observed in C and J Clark v Inland Revenue Commissioners (1973) 2 All ER 513 at 520:

'In my judgment, the phrase 'subject to' is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. When there is no clash, the phrase does nothing: if there is collision, the phrase shows what is to prevail.’⁵⁹

4.4 One therefore has to conclude that where the legislature in section 27(2) of the Higher Education Act ordained that the language policy to be determined by a council of a university *is subject to* the policy of the Minister it means that where the policy adopted by a council is in conflict with the LPHE, the latter must prevail. The language policy of a university must therefore be compatible with the key features of the framework and its parameters.

4.5 The LPHE in paragraph 7 thereof stated the following:

⁵⁹ This dicta was also referred to with approval by Justice Corbett in **Rennie NO v Gordon and Another NNO** 1988(1) SA 1 (AD) at 21 D- G

“The requirement of the Act takes into account the authority of institutions to determine language policy provided that such determination is within the context of public accountability and the Ministry’s responsibility to establish the policy parameters.”

4.6 It also has to be acknowledged that the LPHE carefully considered from a constitutional perspective how language rights in higher education are to be given effect to. It gave also specific attention to Afrikaans and the means to retain it and ensure its further development. It provides a framework of important parameters and principles. In our view policies adopted whereby existing rights are adversely affected and eroding Afrikaans where the offering is still reasonably practicable is in conflict with the LPHE and cannot be regarded as proper justification.

4.7 In paragraph 15.4 of the LPHE, it was also stated that:

“Ministry acknowledges that Afrikaans as a language of science and scholarship is a national resource. It, therefore, fully supports the retention of Afrikaans as a medium of academic expression and communication in higher education and is committed to ensuring that the capacity of Afrikaans to function as such a medium is not eroded.”

4.8 As organs of state, universities are also bound by the principle of cooperative governance required by the Constitution. Therefore councils of universities are duty bound not to adopt language policies that would make the Ministerial endeavour as set out in the LPHE merely lip service but in practice meaningless.

4.9 In its concluding summary, the LPHE foresees the development of more South African languages of instruction ‘*alongside English and Afrikaans*’ and the ‘*retention and strengthening of Afrikaans as a language of scholarship and science*’ thereby unreservedly re-

affirming the intention to provide for the continued existence of tuition in both English and Afrikaans. On several occasions the LPHE emphasises the promotion of multilingualism and not English hegemony.

4.10 A council should therefore afford serious regard to the interest of the community seeking Afrikaans tuition, to consider the extent of the demand (and anticipated demand) and must remain responsive to that demand, given considerations of reasonable practicability. This interest may never be left out of account, given the constitutional recognition of linguistic diversity and the constitutional guarantee to receive education in the language of one's choice, where reasonably practicable.

4.11 Councils of higher education should therefore heed to the serious implications of decisions that involve matters of constitutional importance. The choice which is to be exercised under section 29(2) can impossibly be viewed as of no consequence. To the contrary, on a plain reading of section 29(2) the choice is one which involves constitutional rights and as such persons are exercising a constitutional choice.

5 CIRCUMSTANCES UNDER WHICH AN INFRINGEMENT UNDER SECTION 29(2) MAY BE INVOKED

5.1 At the onset, it can be stated that in circumstances where the constitutional standard of *reasonably practicable* according to the meaning that is in our opinion the correct one, is met at any particular educational institution⁶⁰, an infringement will occur once a person is deprived of exercising a choice in terms of section 29(2).

⁶⁰ Which includes primary and secondary education.

- 5.2 Drawing from *Ermelo* and the *Gauteng Educational Bill* case, section 29(2) entails the *positive obligation* on universities as organs of state to not only acknowledge the vested right of exercising a choice to receive education in one's language of choice, but to have it continuously actualised in practice⁶¹.
- 5.3 Concomitantly, the *negative obligation* is not to minimise or dilute vested rights without appropriate justification, as provided for in the text of section 29(2). This principle was reiterated in *Ermelo*, where Moseneke DCJ held that, where a student *already enjoys the benefit of being taught in an official language of choice the State bears the negative duty not to take away or diminish the right without appropriate justification*'.⁶²
- 5.4 The deprivation of rights, theoretically, may manifest in different forms. Evidently, the preferred route of higher education institutions is by way of a council decision to lessen or obliterate the Afrikaans – offering in its entirety. This entails a revised language policy or the adoption of an entire new language policy.

6 CONCLUDING OBSERVATIONS

- 6.1 What has transpired over the relative recent past is a fundamental shift in approach to language in education by certain universities - from a committed stance to promote multi-lingualism to a model of mono-lingualism.
- 6.2 The call for mono-lingualism is a departure from constitutional jurisprudence on how section 29(2) is to be understood and applied in a milieu of linguistic and cultural diversity.
- 6.3 This view is consistent with the one expressed in the *Belgian Linguistics case*⁶³ that there ought to be an objective justification for

⁶¹ Subject of course to it being **reasonably practicable**.

⁶² See para 52 at 2010 (2) SA 415 (CC) p 433G.

⁶³ 1 EHRR 252 (1965) at 284 – 285.

the denial of the right to receive mother-tongue education. In our view the denial in two cases rested on a wrong interpretation of section 29(2).

- 6.4 What also has to be borne in mind by universities and other higher education institutions is the wording in the second part of section 29(2) namely to “*consider all reasonable educational alternatives*”. This allows for flexibility namely that a policy need not be either single-medium or parallel-medium. There could be combinations of the two. Certainly the demand for Afrikaans could differ from course to course or from module to module at a particular university. Therefore a policy could be a combination whereby parallel-medium is retained as general policy in the case of UFS and UP but subject to demand and practicability for Afrikaans offering being assessed per faculty or department from year to year.
- 6.5 Furthermore considering that universities are organs of state, what prevent them from cooperating with one another and sharing their public resources to facilitate practicability of the language offering?
- 6.6 For example and assuming that 13 million South Africans speaks and understands Afrikaans (and the same number English⁶⁴) to whom graduates in formal professions such as medicine have to give a service in either Afrikaans or English (they the only languages of science), should universities with health sciences faculties not keep this into account? With the University of Pretoria and University of the Free State having adopted English as single medium there remains now only one⁶⁵ out of five universities with faculties of medicine. If each had a limited number of Afrikaans students in medicine the arrangement could have been made to continue the Afrikaans offering at least at two of them and allocate the Afrikaans candidates

⁶⁴ See footnote 13 above.

⁶⁵ Stellenbosch

accordingly.

- 6.7 It has been expressed at the start that the purpose of this opinion is to provide an analysis of section 29(2) of the Constitution.
- 6.8 Given our mandate to do so as briefly as possible a comprehensive and all – inclusive analysis is not possible. However, it is our view that the core and essential elements have been captured herein.