The Problem of the 'Other' Language

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> There is increasing ignorance of the second language; ignorance brings a feeling of inferiority, and that in turn brings aggressive assertion that it is a good thing to be unilingual and that strength lies in isolationism. Let us save our children from isolationism. The adult, with all the worries of a busy life and the handicap of an unfavourable environment, finds it difficult to acquire a new language and to break down group barriers; to a child it is 'child's play'. The world is moving away from the isolationist principle… . Fullness of life, educationally or spiritually, is not comparable with the barbed-wire fences of racial politics. With the sun of a new world rising over the grandeur of our limitless veld, the darkness of estranging barriers will yield; it will yield before the creative inspiration of giving ourselves to South Africa – ourselves undivided to her undivided.
>
> T J Haarhoff[1]

I Introduction: Inside and Out

The above words, written at a very different time, in a vastly different context, contain a contemporary resonance. Haarhoff and Malherbe can be read as maintaining that genuine reconciliation, dignity and equal citizenship can only be achieved in multilingual, radically heterogeneous societies when members of any given group learn the language(s) of the other groups with whom they share political sovereignty. That Haarhoff and Malherbe understood reconciliation, race and the 'other' solely in terms of English and Afrikaans give their words a bitterly ironic bite.

That bitter ironic bite has not been lost on present day commentators and members of our highest courts. In *Head of Department, Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another,*[2] Deputy Chief Justice Moseneke offers a set of reflections substantially more germane for our time:

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[1] 'Foreword' in EG Malherbe *The Bilingual School* (1941).

[2] *Head of Department, Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another* [2009] ZACC 32, 2010 (2) SA 415 (CC), 2010 (3) BCLR 177 (CC)('*Ermelo*'). The High Court had heard the matter twice. *Hoërskool Ermelo & Others v Departementshoof van die Mpumalanga Departement van Onderwys en Ander* [2007] ZAGPHC 4 (2 February 2007)('*Hoërskool Ermelo I*'); *Hoërskool Ermelo & Others v Departementshoof van die Mpumalanga Departement van Onderwys en Ander* [2007] ZAGPHC 232 (12 October 2007)('*Hoërskool Ermelo II*'). In *Hoërskool Ermelo I*, Judge Prinsloo, of the Pretoria High Court, suspended a decision of the Mpumalanga Education Department to dissolve the school's governing body and to replace it with a departmentally appointed committee. The dissolution would have enabled the Mpumalanga Education Department to alter the school's language policy

> The case arises in the context of continuing deep inequality in our educational system, a painful legacy of our apartheid history. The school system in Ermelo illustrates the disparities sharply. The learners-per-class ratios in Ermelo reveal startling disparities which point to a vast difference in resources and of the quality of education… . And therefore, an unequal access to education entrenches historical inequity since it perpetuates socio-economic disadvantage… . [W]hite public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government… . On the other hand, formerly black public schools have been, and by and largely remain, scantily resourced… That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education… . Of course, vital parts of the 'patrimony of the whole' are indigenous languages which, but for the provisions of s 6 of the Constitution, languished in obscurity and underdevelopment with the result that, at high-school level, none of these languages have acquired their legitimate roles as effective media of instruction and vehicles for expressing cultural identity… . And that perhaps is the collateral irony of this case. Learners whose mother tongue is not English, but rather one of our indigenous languages, together with their parents, have made a choice to be taught in a language other than their mother tongue. This occurs even though it is now well settled that, especially in the early years of formal teaching, mother-tongue instruction is the foremost and the most effective medium of imparting education… . *However, I need say no more about this irony because the matter does not arise for adjudication.*[3]

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and allowed English-speaking pupils to receive instruction in English. On appeal, Transvaal Judge President Ngoepe, along with Judges Seriti and Ranchod, set aside the High Court ruling in *Hoërskool Ermelo I*. The *Hoërskool Ermelo II* Court found that the Afrikaans-medium public school must admit English-speaking pupils. Of particular moment for the *Hoërskool Ermelo II* Court was the undersubscription of Hoërskool Ermelo. Given that Hoërskool Ermelo was operating at only half-capacity, the Full Bench found that it was 'reasonably practicable' – as contemplated by Final Constitution ('FC') s 29(2) – for the high school to accommodate the 113 Grade 8 learners. The mere fact that all the classrooms were being employed and that the existing curriculum turned on the current availability of classrooms did not constitute sufficient grounds for excluding English learners and maintaining Hoërskool Ermelo as a single-medium Afrikaans-speaking public school. Equity, practicability and historical redress – the three express grounds for assessment of existing language policy in terms of FC s 29(2) – justified the transformation of Hoërskool Ermelo from a single-medium public school into a parallel-medium public school. The Supreme Court of Appeal reversed the judgment of the High Court in *Hoërskool Ermelo III. Hoërskool Ermelo & Another v Head, Department of Education, Mpumalanga, & Others* [2009] ZASCA 22, 2009 (3) SA 422 (SCA)('*Hoërskool Ermelo III*'). The Supreme Court of Appeal found that the provincial Head of Department ('HoD') lacked the requisite statutory authority to alter the SGB's language policy. It did not contemplate the constitutional implications of the matter. The Constitutional Court upheld some aspects of the SCA's judgment – namely the rebuke of the HoD with regard to a brace of procedural irregularities that undermined the Department's attempt to alter Hoërskool Ermelo's language policies. At the same time, the Constitutional Court indicated that it wanted to hear – after appropriate consideration – how the HoD planned to engage the issue of a parallel instruction school or an English only instruction school in the Ermelo circuit. It also made clear that Hoërskool Ermelo must revisit its language policies in light of the Constitutional Court's finding that the SGB did not possess the unmitigated authority to determine the school's language policy and that it was obliged, in terms of FC s 29(2), to take the needs of *all* learners and the broader society into account when it determined the language of instruction.

[3] *Ermelo* (note 2 above) at paras 46–49. Deputy Chief Justice Moseneke's use of the term 'indigenous languages' places in him in hotly contested waters. That would still be true if he had chosen the term 'African languages'. The Afrikaans language lobbies have convincingly pressed the claim that

Seventy years later, race, language and understanding the 'other' retain their force with respect to the promise of genuinely equal citizenship. Only the players and the petitioners have changed. Most black South Africans have done their share of heavy lifting when it comes to overcoming problems associated with race, language and understanding the 'other'. The same cannot be said for most white South Africans.

This article takes the *Ermelo* Court's concerns seriously. It refracts the issues the judgment raises from the issue they raise through recent policy initiatives designed to influence how we, as School Governing Bodies (SGBs), provincial Heads of Department (HoDs), the Department of Basic Education (DBE), interested academics, lawyers, teachers, parents and learners should decide which official languages should be taught at any given public school.

The new Curriculum and Assessment Policy Statement [CAPS] (First Additional Language Policy) and the draft Incremental Implementation of African Language (IIAL Policy or Second Additional Language Policy (SAP)) have led to a number of disputes over the languages taught in our public schools.[4] The new policies broach at least two new education law questions. First, do parents *alone* have a right to choose the First Additional Language their children will learn?[5] Or does the state, with its responsibilities to the commonweal as a whole, and not just the interests of insular minorities, have an obligation to turn inward-looking communities outward and prepare all learners for engagement with other members of our radically heterogeneous society. Second, assuming that provincial education departments have some say over language policy, what does the Constitution, the South African Schools Act (SASA) and extant case

Afrikaans is both an African language *and* an indigenous language. If one wished to avoid an outcome in which Afrikaans is understood to be both an African language *and* an indigenous language – for the purposes of an argument that distinguishes between Afrikaans and other African languages *and/or* indigenous languages – one could adopt the locution found in s 6 of the Constitution, 'historically diminished indigenous language', or the equally inelegant 'African languages other than Afrikaans'. For the sake of form, and *not* substance, this article often deploys the term 'African languages' in a manner that assumes the same denotation of the phrase 'African languages other than Afrikaans'.

[4] Department of Basic Education (2012) *National Curriculum Statement: Curriculum and Assessment Policy Statement Foundation Phase R-3, English Home Language*, available at www.education.gov.za/LinkClick.aspx?fileticket=qARJRpYgmRI%3d&tabid=671&mid=1213.

[5] South African language law and policy contain quite a number of technical terms that may not be familiar to scholars from other disciplines. For example, the term Language of Learning and Teaching (LOLT) refers to the language medium in which learning and teaching, including assessment, takes place. Home Language (HL) denotes the language that is spoken most frequently in the home by a learner and her or his family. First Additional Language (FAL) indicates a (second) compulsory language subject which learners must study. Dual medium of instruction signifies the use of two mediums (languages) of instruction by a learner in a lesson and the ability of both the teacher and the learner to switch from one medium to the other medium during the same lesson. Parallel-medium instruction, on the other hand, means that tuition takes place in two or more languages of instruction in separate classes at the same grade level within the same school. See Department of Basic Education (2011) *The Status of Language of Learning and Teaching (LOLT) in South African Public Schools: A Quantitative Overview* 3.

law tell us about the strictures placed upon SGB decisions with regard to First Additional Language policies and Incremental Implementation of Additional Language policies in our schools?

These questions are not merely of consequence for those elite public schools which have generally chosen English and Afrikaans as primary mediums of instruction (Home Language and First Additional Language), and a third African language as something akin to an extra-curricular activity. Prior to the introduction of CAPS, most South African schools tended to teach in their learners' home language: that is, in one or two of the nine African languages.[6] A small percentage of disadvantaged schools shifted to English as the 'default' home language and medium of instruction. In the past, most quintile 1–3 schools introduced English towards the end of the Foundation Phase.[7] However, many learners in these schools did not acquire sufficient vocabulary and reading and writing proficiency to cope with the language demands of English-medium teaching in Grade 4.

Aware of this deficit, the Department of Basic Education has shifted the introduction of the first additional language to the first year of schooling. The department reasoned as follows:

> Children come to school knowing their home language. They can speak it fluently, and already know several thousand words. Learning to read and write in Grade 1 builds on this foundation of oral language. Therefore, it is easier to learn to read and write in your home language. When children start to learn an additional language in Grade 1, they need to build a strong oral foundation. They need to hear lots of simple, spoken English which they can understand from the context. Listening to the teacher read stories from large illustrated books (Big Books) is a good way of doing this as it also supports children's emergent literacy development. As children's understanding grows, they need plenty of opportunities to speak the language in simple ways. This provides the foundation for learning to read and write in Grades 2 and 3. In South Africa, many children start using their additional language, English, as the Language of Learning and Teaching (LoLT) in Grade 4. This means that they must reach a high level of competence in English by the end

[6] A growing body of evidence supports the proposition that a significant percentage of learners who begin their school careers learning in one of the nine non-Afrikaans African languages, are in fact not learning in their 'mother tongue'. Extant research reveals two permutations of this phenomenon. First, a significant portion of African language learners are taught an African language that is not spoken at home. Second, even where learners are, broadly speaking, taught in their home language, the African language of instruction often takes the form of a dialect with which they are not entirely familiar. For example, many learners speak isiMpondo rather than isiXhosa, or Sesotho-se-Pretoria rather than Sesotho-se-Lebowa. See National Education Evaluation and Development Unit (2013) *National Report 2012*.

[7] In terms of the s 35 of the South African Schools Act, the Minister must develop a national quintile system, based on objective financial criteria, in which all public schools are assigned to one of five quintiles. Funding for non-personnel expenditure is then allocated to schools in terms of a formula that allows for historical redress. In terms of the quintile system, the poorest schools are in quintile 1, the richest in quintile 5. The current quintile school profile maps closely onto the 'racially' distinct departments of the apartheid era. Not surprisingly, most former white schools – while now racially and ethnically mixed – remain quintile 5 schools. In these schools, the home language of the learners is primarily, though not exclusively, English or Afrikaans.

> of Grade 3, and they need to be able to read and write well in English. For these reasons, their progress in literacy must be accelerated in Grades 2 and 3.[8]

So far so good. It would appear an eminently reasonable manner in which to retool the early school environment of most South African learners. To address the specific challenge of ensuring that African language speakers become sufficiently proficient in English, CAPS made a First Additional Language (FAL) mandatory at *all* public schools. In most instances schools would choose English. They would expressly require instruction in English reading, writing and oral skills from Grade 1.

While CAPS may have been an appropriate curriculum policy decision for most quintile 1–3 schools, it has had unanticipated consequences for a growing number of quintile 5 English home language schools. Over the past 15 years, privileged public schools such as Parkview Junior Primary in Johannesburg and Grove Primary School in Cape Town began teaching two additional languages in the Foundation Phase. In Johannesburg, the two additional languages tended to be Afrikaans and isiZulu. Western Cape schools have been inclined to teach Afrikaans and isiXhosa. Tutelage in these additional languages was initially limited to oral instruction. By Grade 3, schools introduced a limited degree of reading and writing tuition.

A new irony arose. As a result of the new FAL requirement, a sizeable number of English home language schools (a) correctly assumed that they were obliged to make a choice as to which two languages required the 'Full Monty' in the Foundation Phase and (b) opted to drop non-Afrikaans African languages and select Afrikaans as the First Additional Language. The choice of Afrikaans as the FAL was, generally, based on a range of practical considerations. First, these schools had Foundation Phase teachers that have been trained to teach Afrikaans as a second language. The African language was often taught by a specialist SGB paid teacher. Second, the adoption of an African language as an FAL – with its additional two to three hours of weekly instruction – would have staffing consequences and increase overall school expenditures. As matters stood, these quintile 5 schools already possessed the existing resources – books and teachers – to provide instruction in Afrikaans as a second language. Few schools enjoyed comparable resources for African language instruction. Most publishers had never produced systematic materials in African languages for the youngest cohort of second language speakers.[9] Third, many parents expressed anxiety regarding the extremely high demands, and disadvantage, which isiZulu and other African language matriculation examinations would place upon their children. Even exceptional African language students often performed poorly. Afrikaans, by contrast, was widely viewed as an 'easy' language that offered the opportunity for excellent matric results. For learners in elite public schools competing for a limited number of places in first rate university programmes, a mediocre FAL mark could

[8] Ibid.

[9] See H Koornhof *From Conception to Consumption: An Examination of the Intellectual Process of Producing Textbooks for Foundation Phase Education in South Africa.* (Dissertation, University of the Witwatersrand, 2012).

well prejudice their chances. Given the 'locked-in' systemic advantages of tuition in English and Afrikaans, the SGBs of many top quintile schools have chosen Afrikaans as the FAL and dropped African language instruction. The irony of which Deputy Chief Justice spoke is no longer collateral.[10] Diminished African language instruction, in a growing cohort of schools, is a direct function of the absence of adequate teaching materials, qualified teachers, additional expenses, ostensibly difficult matric exams and the lock-in of English and Afrikaans.[11]

These disheartening consequences raise a number of thorny legal questions. We know that s 6(1) of SASA grants an SGB the power to determine the language policy of the school subject 'to the Constitution, this Act [SASA] and any applicable provincial law.' For some SGBs, this grant of power answers any questions that one might have about an FAL. The learning of *Ermelo* suggests that the answer is not so straightforward. Although the most immediate answers to the statutory and constitutional questions raised in *Ermelo* engaged SGB admissions policies (and their exclusionary consequences), the broader concerns in the matter turned on who (which entity) possessed the ultimate authority to assess the 'reasonableness' of these policies. *Ermelo* found that the final say vested with the provincial HoD once it had undertaken appropriate review of (a) the SGB's decision-making process and (b) the Final Constitution ('FC') s 29(2) rights of the learners in question.[12] At the same time, the *Ermelo* Court held that

[10] See MH Smit 'Collateral Irony' and 'Insular Construction': Justifying Single-Medium Schools, Equal Access and Quality Education' (2011) 27 *South African Journal on Human Rights* 398. While Professor Smit is correct in noting that single-medium Afrikaans-speaking schools are entitled to contest the 'reasonableness' of state action which might require a single-medium school to become a parallel-medium school, his rather blinkered reading of *Ermelo* causes him to miss Deputy Chief Justice Moseneke's two primary points: (1) that such single-medium schools have benefitted from and continue to benefit from radical differences in political and economic power exercised by teachers, parents, learners and the communities in which those schools are situated; and (2) that *all* state institutions have an obligation to *all* learners to ensure that their basic education enables them to engage on a relatively equal and respectful footing with other learners – who eventually become adult citizens – in other communities in South Africa. Neither we, nor DJC Moseneke, are alone in believing such ends to be within the accepted ambit of public school education. See J Jansen *Knowledge in the Blood*: *Confronting Race and the Apartheid Past* (2009). As we have argued elsewhere, following Justice Kriegler, individuals and groups who wish to opt out can do so on their own dime and their own time. See S Woolman & B Fleisch (2009) *The Constitution in the Classroom: Law and Education in South Africa, 1994 – 2008*; S Woolman 'Defending Discrimination: On the Constitutionality of Independent Schools that Promote a Particular, If Not Comprehensive, Vision of the Good' (2007) 18 *Stellenbosch Law Review* 31; *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* [1996] ZACC 4, 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 CC) (Kriegler J) at paras 39–42.

[11] Indeed, it is accurate to say that (a) almost all former Model C schools in Gauteng (including schools with a majority of black learners), and (b) virtually all schools in Gauteng with English, Afrikaner, Indian and Coloured learner majorities have opted for English and Afrikaans language instruction. The LOLT survey is but one public source of this data.

[12] As this article went to press, the Constitutional Court held that the same set of propositions hold true for 'right to a basic education' analysis in terms of FC s 29(1). See *Member of the Executive Council for Education in Gauteng Province & Others v Governing Body of the Rivonia Primary School & Others (Equal Education, Centre For Child Law, Suid-Afrikaanse Onderwysersunie, Amici)* [2013] ZACC 34, 2013 (6) SA 582 (CC) at paras 36, 39, 44, 48, 49 ('*Rivonia*')('The Schools Act envisages that public schools are run by a three-tier partnership consisting of: (i) national government; (ii) provincial government; and (iii) the parents of the learners and the members of the community in which the school is located… . At a provincial level, section 3(3) of the Schools Act places an obligation on the relevant provincial MEC

good reasons *had to exist* in order for the provincial HoD to disturb the SGBs' original decisions. We will suggest that a similar, but by no means identical, set of issues are raised by FAL decisions taken by SGBs.

Unfortunately, the thorny legal and empirical questions thrown up by FAL do not end there. In the face of the need to develop non-Afrikaans African languages and to promote the tuition of these languages by English and Afrikaans first language speakers, the Department of Basic Education has recently initiated a new language pilot programme: the Incremental Implementation of African Languages (IIAL) Policy. Having reached the conclusion that many, if not *all,* quintile 5 schools will use the CAPS (FAL) policy to justify opting out of the teaching of African languages, the DBE had planned to remedy the neglect of indigenous languages but requiring *all* schools to add a third language to primary school curricula in 2014. (In the IIAL policy document, this third language is referred to as the Second Additional Language (SAL).) Given the tight time

to ensure that "there are enough school places so that every child who lives in his or her province can attend school". If the MEC cannot comply with this obligation because of a lack of capacity existing at the commencement of the Schools Act, then, in terms of section 3(4), "he or she must take steps to remedy such lack of capacity as soon as possible and must make an annual report to the Minister on the progress achieved in doing so." Further, section 58C of the Schools Act contemplates that the MEC and the head of department will play a role in ensuring that the admission policy determined by the school governing body complies with the national norms and standards, where prescribed … while the school governing body determines admission policy, individual decisions on admission are taken only provisionally at school level, by the principal acting under the authority of the head of department. Where the need arises, section 5(9) provides a safety valve, which allows the MEC to consider admission refusals and overturn an admission decision taken at school level… . This matter is the latest instalment in a trilogy of school-related cases in this Court which, at their heart, concern the powers of a provincial department in relation to policies adopted by school governing bodies. The question that keeps coming back to this Court is whether a head of department is entitled to override or depart from a policy adopted by a school governing body. Distilling the core of these judgments, the principles that have emerged from the case law can be set out as follows: (a) Where the Schools Act empowers a governing body to determine policy in relation to a particular aspect of school functioning, a head of department or other government functionary cannot simply override the policy adopted or act contrary to it. This is so even where the functionary is of the view that the policies offend the Schools Act or the Constitution. But this does not mean that the school governing body's powers are unfettered, that the relevant policy is immune to intervention, or that the policy inflexibly binds other decision-makers in all circumstances. (b) Rather, a functionary may intervene in a school governing body's policy-making role or depart from a school governing body's policy, but only where that functionary is entitled to do so in terms of powers afforded to it by the Schools Act or other relevant legislation. This is an essential element of the rule of law. (c) Where it is necessary for a properly empowered functionary to intervene in a policy-making function of the governing body (or to depart from a school governing body's policy), then the functionary must act reasonably and procedurally fairly. (d) Further, given the partnership model envisaged by the Schools Act, as well as the co-operative governance scheme set out in the Constitution, the relevant functionary and the school governing body are under a duty to engage with each other in good faith on any disputes, including disputes over policies adopted by the governing body. The engagement must be directed towards furthering the interests of learners.')(Footnotes omitted.) See also *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* [2013] ZACC 25, 2014 (2) SA 228 (CC); *Head of Department, Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another* [2009] ZACC 32, 2010 (2) SA 415 (CC), 2010 (3) BCLR 177 (CC). This line of cases, along with *Juma Musjid*, is consistent with a commitment to shared constitutional interpretation and episodic political participation by citizens articulated in S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013).

constraints, and the possible blowback from teachers, principals, schools, SGBs, learners, parents and provincial DoEs (faced with yet another unfunded mandate), the DBE wisely decided to roll out the IIAL in a select number of schools.

Both the *Ermelo* Court and the national government have made it clear that the nine official non-Afrikaans African languages ought to be treated with same degree of respect accorded English and Afrikaans in our public schools. Fair enough. It's taken long enough. For sound pedagogical reasons, they want to ensure that home language instruction and second language tuition is offered from initial entrance into our primary schools. Moreover, both the *Ermelo* Court and the national government have recognised that schools have more than just an obligation to provide what learners believe to be appropriate and desired instruction in the languages of their choice. Schools also have an obligation to enable learners, through language instruction, to engage members of the South African polity *who do not share their home language* in a respectful and dignified fashion. However, as the state and everyone else is well aware, the national purse, the resources of individual schools, the availability of appropriately trained teachers and the adequacy of existing textbooks across all 11 official languages place cognisable, constitutionally-recognised limits on our capacity to deliver immediately upon this laudable goal.

Thorny questions of capacity do not preclude 'ball-park' responses to some of the more obvious legal questions. When asked where SASA places ultimate authority for FAL and IIAL decisions, *Ermelo* and *Juma Musjid*[13] strongly support the dual proposition that while initial responsibility to determine the appropriate languages of instruction falls within the remit of SGBs and various private parties, that responsibility is shared with the provincial HoD (and even the national DBE.) That shared competence has its limits. Should the provincial HOD believe that a school has not applied its mind to both the internal and external demands for appropriate language instruction, it may, after appropriate consultation and adequate review of a school's language policy, reverse the FAL and IIAL (SAL) decisions of an SGB and intimately related private parties. Some might question this extension of the line of reasoning in *Ermelo* and *Juma Musjid*.[14] However, a clear prima facie case can be made that the FAL and IIAL (SAL) policies serve the rights to education, equality, dignity, equal citizenship and the commitment to the development of all 11 official languages. The aim of both policies is to create conditions in which we are truly capable of speaking to one another, as Malcolm X said, 'right down to earth in a language all of us can easily understand'.

But the purpose of such tuition is not the mere creation of a new nation. (Nation-building, and the 'we' so often invoked in its service, is a fraught endeavour in as fragmented, highly stratified and radically heterogeneous, a society as South Africa. Frankly, nation-building exercises in an age of disintegration and disorder ought to be viewed with some suspicion.) The *true aim* of these rather modest policies is the creation of greater trust through enhanced understanding of 'the

[13] *Governing Body of the Juma Musjid Primary School & Others v Ahmed Asruff Essay N.O. & Others* [2011] ZACC 13, 2011 (8) BCLR 761 (CC).

[14] The recent decision in *Rivonia* would appear to bear out our understanding. See *Rivonia* (note 12 above) at paras 48–49.

other'. Apartheid was – and remains – enormously successful on its own terms. It drove racial, ethnic, cultural and linguistic communities apart. To overcome the depredations of apartheid, and rampant mistrust it sewed between communities, we need to identify means of according one another the dignity and the equal citizenship to which the Constitution tells us we are all entitled.

Underwritten by the language of FC s 7(1) and FC s 7(2),[15] and the gloss placed on these provisions by the Court in *Glenister*, the bottom line is that if all citizens are to enjoy the full benefits afforded us by our Constitution, then we need to secure an education for all learners that provides for a form of multilingualism that extends significantly beyond that to which we are already committed. By limiting instruction to English and Afrikaans, many learners are denied these basic entitlements. Second class linguistic skills invariably re-entrench second class status. The new policies allow us to look *inward* and protect our particular community's linguistic heritage. At the same time it demands that we also look *outward* toward the broader South African landscape so as to appreciate that learning another language, however difficult and uncomfortable, is essential if we are ever to truly understand and respect one another. While such understanding may appear thin to some, it must be, much like our rule of law doctrine, one of our first staging posts in a post-apartheid dispensation[16] possessed of the vibrant civil society to which we collectively aspire. Giant rainbows cannot just be willed into existence.[17]

In Part 2 of this article, we adumbrate the background for the implementation of the First Additional Language [FAL] policy and the Second Additional Language [IIAL] policy and assess the problems that the two policies have thrown up. In Part 3, we assess the two policies in terms of the existing case law – and, in particular, the jurisprudence of FC s 29(1) and FC s 29(2) recently developed in *Ermelo* and *Juma Musjid*. In Part 4, we look at *prima facie* justifications for FAL and IIAL. Both policies enjoy clear support in our basic law: from rights to equality (s 9), dignity (s 10), and linguistic community life (ss 30 and 31) to express principles or commitments to 11 official languages and equal citizenship. In Part 5, we press the claim that South Africa's democratic project is less likely to flourish until we all make some de minimus effort to understand one another as best as we possibly can, in languages we all ought to

[15] FC s 7(1): 'This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. The state must respect, protect, promote and fulfil the rights in the Bill of Rights. The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'

[16] See S Woolman 'Humility, Michelman's Method and the Constitutional Court: Rereading *the First Certification Judgment* and Reaffirming a Distinction between Law and Politics' (2013) 25 *Stellenbosch Law Review* 281.

[17] See M Ignatieff 'The New World Disorder' *The New York Review of Books* (September 2014); H Kissinger *World Order* (2014); F Fukuyama *Political Order and Political Decay* (2014).

make some effort to master.[18] We also believe that the Constitution *qua* social

[18] However, we do not follow Martin Chanock's implicit claim that constitutionalism in South Africa will fail to take root until the Constitution itself and the language of all laws are expressly embedded in all 11 officials languages – and the language of everyday life for the majority of South Africans. We do agree with him in so far as he contends that 'only a … small proportion of the people speak or are literate in the language of constitutions, bill of rights and constitutional discourse.' M Chanock 'Constitutionalism, Democracy and Africa: Constitutionalism Upside Down' 28 *Law in Context* 126, 137 (see also P Andrews, S Ellmann & H Klug (eds) *For Martin Chanock: Essays on Law and Society*). Chanock is correct to assert, in echoing Locke and Huntington, that we would do well to remember that the first step in in any constitutional order is to create effective authority: 'The primary problem is not liberty, but the creation of a legitimate public order.' Ibid citing SP Huntington 'Will More Countries Become Democratic?' (1984) 99 *Political Science Quarterly* 193 – 218. Tony Judt, the late social democratic historian makes this point even more powerfully in a recent survey of our global political landscape. See T Judt 'On Intellectuals and Democracy' (March 22, 2012) 59 *The New York Review of Books* 7 ('If you look at the history of nations that maximized the virtues that we associate with democracy, you notice that what came first was constitutionality, rule of law, and the separation of powers. Democracy almost always came last. If by democracy we mean the right of all adults to take part in the choice of government that's going to rule over them, that came very late – in my lifetime – in some countries that we now think of as great democracies… . Democracy bears the same relationship to a well-ordered liberal society as an excessively free market does to a successful, well regulated capitalism. Mass democracy in an age of mass media means that on the one hand, you can reveal very quickly that Bush stole the 2000 election, but on the other hand, much of the population doesn't care. … So we pay a price for the massification of our liberalism, and we should understand that. That's not an argument for going back to restricted suffrage. … But it is an argument for understanding that democracy is not the *only* solution to the problem of unfree societies. … Democracy has been the best short-term defense against undemocratic alternatives, but it is not a defense against its own genetic shortcomings. The Greeks knew that democracy is *not* likely to fall to the charms of totalitarianism, authoritarianism, or oligarchy; it's much more likely to fall to a corrupted version of itself. Democracies corrode quite fast; they corrode linguistically, or rhetorically, if you like – that's the Orwellian point about language. They corrode because most people don't care very much about them… . The difficulty of sustaining voluntary interest in the business of choosing the people who will rule over you is well attested. And the reason why we need intellectuals … is to fill the space that grows between the two parts of democracy: the governed and the governors.') Locke succinctly summarised the need for a social contract between relative equals if a legal order is to have any legitimacy at all: 'So that, however it may be mistaken, the end of law is not to abolish or restrain, but to preserve and enlarge freedom: for in all the states of created beings capable of laws, where there is no law, there is no freedom: for liberty is, to be free from restraint and violence from others; which cannot be, where there is no law: but freedom is not, as we are told, a liberty for every man to do what he lists: (for who could be free, when every other man's humour might domineer over him?) but a liberty to dispose, and order as he lists, his person, actions, possessions, and his whole property, within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own.' J Locke *Second Treatise on Government*: *An Essay Concerning the True Original Extent and End of Civil Government* (1690) Chapter 6, Section 57. However, Chanock overeggs the pudding when, retracing Englund's analysis of the history of Malawi's Bill of Rights, he claims that because '[I]n new democracies *translation* of the foreign language concepts of human rights (and of statutory law generally) is often highly problematic …[because] democratic and human rights discourses, have 'arrived through official languages inherited from colonial rulers … [and] control of, and choices made in, translation, flow downward from the powerful, not upward through soundings of popular meanings and is informed by the translator's interests.' M Chanock 'Constitutionalism and "the Customary"' (Conference Paper, Early Draft Version at http://web.up.ac.za/sitefiles/file/47/15338/Constitutionalism%20and%20the%20%E2%80%98Customary%E2%80%99%20Chanock.pdf). Chanock, following and quoting Mazrui, concludes that 'the continued reliance on imperial languages may itself have become the primary cause of in the failure of democracy and human rights culture to take root in the continent.' M Chanock 'Constitutionalism, Democracy and Africa: Constitutionalism Upside Down' (above) at 137 quoting A Mazrui 'Globalization and Some Linguistic Dimensions in Africa' in P Zeleza and P McConnaughay (eds) *Human Rights, the Rule of Law and Development in Africa* (2004) 61. We would be inclined to dismiss

contract requires relationships between relative equals for our new legal order to possess legitimacy, and that some degree of aptitude by all South Africans in languages other than English and Afrikaans is a necessary condition for the equal citizenship that forms the basis for such legitimacy. To that end, we contend that a panoply of rights and other constitutional provisions provide more than *prima facie* support for FAL and IIAL. Whilst others might argue that, as currently conceived, the combination of FAL and IIAL will fail to meet the requirements of reasonableness and practicability found within the right to education itself, FC s 29(2), and the limitations clause, FC s 36, we show that the vast majority of South African public schools have the capacity to meet the challenges of the new policy regime and in many instances are already doing so.

II The Policy Background of FAL and IIAL and Their Problems

In order to understand the current 'languages of instruction' policy challenges, one must first appreciate the initial formulations of language policy in the post-apartheid era.[19] The Language in Education Policy (LiEP) – issued in terms of

Chanock's analysis entirely if he did not offer the following clawback near the end of his analysis: 'This [problem of authority and legitimacy] is not a deficit in African understandings of the public realm that somehow needs to be closed, but it is a deficit in the modes of legal governance.' Chanock 'Constitutionalism and "the Customary"' (above). Even so, Chanock's views – in so far as they purport to describe those views held by the majority of South Africans – possess a patronising cast (even if unintended). Sociologists of law who likewise traffic in such views, ought to take cognisance of Steven Robbins' account of how 'rights discourse' – the ostensible playthings of the elite – have been used in post-apartheid South Africa: by NGOs in land struggles in Namaqualand, by the Khoi-San in creating a new social movement, by AIDs activists (of all colours) in pressing the government to respond to our AIDs pandemic, and by post-AIDS activists in using what they have learned (a) to press for recognition of non-traditional (but ever present) understandings of sexual identity, and (b) more recently, to demand, in concert with various local communities, that all children in this country receive the basic education to which FC s 29(1) entitles them. S Robbins *From Revolution to Rights in South Africa: Social Movements, NGOs and Popular Politics after Apartheid* (2009). Rights discourse and constitutional challenges, as tools employed by various social movements, can have significant disentrenching effects with respect to the current holders of both public power and private power. For a similar, but no less radical, point of view that allows law its proper place without diminishing the capacity of the colonised and the historically disadvantaged to use the law to press for more egalitarian political and economic structures, see, eg, RM Unger *Politics: A Work in Constructive Social Theory* (1987): *Social Theory: Its Situation and Its Task (Volume I)*(1987); *False Necessity: Anti-Necessitarian Social Theory in the Service of Social Democracy (Volume II)*(1987); and *Plasticity into Power: Comparative Historical Studies on the Institutional Conditions of Economic and Military Societies (Volume III)*(1987). Language, as Robbins makes clear, is not the primary barrier to the success of historically disadvantaged groups and communities. They understand the Final Constitution well enough. The primary problem with rights challenges is their inherent limitations: the remedies offered by courts only take us so far. See S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013) 215–221.

[19] FC s 29(2) frames all debates about language in the classroom and vouchsafes a right to tuition in the language of a learner's choice (subject to such modifiers as practicability, equity and historical redress.) SASA s 6 grants school governing bodies real but limited scope to develop language policy. The Language in Education Policy (LiEP) – promulgated in terms of the National Education Policy Act (1996) – provides guidelines regarding (a) the relationship between language policies and grade levels and (b) the determination as to whether extant circumstances make the provision of a new language practicable. For the purposes of this article, it is important to note that LiEP expressly recognises that the use of a home language in the classroom enables learners to grasp basic concepts more quickly and to adapt more readily to changes in a school's overall environment.

the National Education Policy Act (NEPA) and the South African Schools Act (SASA) – contain a number of critical provisions.[20] First, section 6 required all learners to learn one of the official languages in Grade 1 and 2, and only requires them to learn a second language from Grade 3 onwards. In terms of section 5 of the Norms and Standards Regarding Language Policy – published in terms of s 6(1) of SASA – school governing bodies (SGBs) must promote multilingualism through the use of one or more languages of instruction, and, where possible, by offering additional languages as fully fledged subjects. Section 6(2) signals that these language norms were subject to the 40/35 rule. The 40/35 rule holds that where fewer than 40 requests for instruction in a language in Grades 1 to 6 exist, and fewer than 35 requests occur in Grades 7 to 12 for such instruction, the onus to provide instruction shifts to the provincial department of education to address these language choice entreaties.[21]

A significant indicator of a shift in the language policy debate occurred in 2011. The Department of Basic Education published a report on the status of language of learning and teaching in South African public schools.[22] Based on annual school survey data from 1998 to 2007, the study tracks changes in learners' home language, their language of learning and teaching, their study of additional languages and the number of single medium and parallel medium schools. The survey revealed significant statistical patterns of disjunction between languages spoken most frequently at home and languages most often used in the classroom. At the same time, it reflected significant shifts toward the use of non-Afrikaans African languages in the classroom. At home, the majority of learners used isiZulu (25%), followed by isiXhosa (20%), Afrikaans (10%) and English (9%). Of greater interest, however, is that during the period covered by the study, the percentage of learners receiving primary Foundation Phase instruction in English declined from 31.7% in 1998 to 21.8% in 2007. At the same time, the percentage of learners receiving primary Foundation Phase instruction in isiZulu increased from 17% to 23.4%. The shift away from English as the initial LOLT to African languages other than Afrikaans has been attributed to the success of the LiEP and the National Curriculum Statement policies of the past decade.

That shift has had *extremely* limited long-term effects.

While a growing percentage of home language African language speakers shifted towards learning in their home language or another African language in the Foundation Phase, almost all of these learners shifted to English as the LOLT in Grade 4. In hard numbers, whereas 80% of learners were receiving instruction in their home language during the Foundation Phase in 2007, only 27% of learners were receiving instruction in their home language by Grade 4. More significantly, the report found that almost *no* learners who had received Foundation Phase instruction in an African language had received instruction

[20] Department of Education (1997) *Language in Education Policy,* at www.education.gov.za/LinkClick.aspx?fileticket=XpJ7gz4rPT0%3d&tabid=390&mid=1125.

[21] Department of Education (1997) *Norms and Standards Regarding Language Policy* at http://www.education.gov.za/LinkClick.aspx?fileticket=XpJ7gz4rPT0%3d&tabid=390&mid=1125.

[22] Department of Basic Education (2011) *The Status of the Language of Learning and Teaching (LOLT) in South African Public Schools.*

in English or Afrikaans as First Additional Languages during their Foundation Phase (less than 5%). In other words, over 75% of learners had received no instruction in the two languages that would become the LOLTs in Grade 4.[23]

In 2012, the Curriculum and Assessment Policy Statement (CAPS) formalised the DBE's novel First Additional Language requirements for tuition in our public schools' Foundation Phase. As we noted above, prior to the introduction of CAPS, schools tended to teach Foundation Phase learners in their home languages. Although most quintile 1–3 schools introduced some English tutelage towards the end of the Foundation Phase, most children in South African schools did not receive sufficient training to meet the reading and writing demands of English-medium teaching initiated in Grade 4.[24] This problem, not surprisingly, has a long legacy. Researchers, such as Carol McDonald, have identified this on-going hindrance to reading and writing proficiency for more than a score years.[25]

Rather than introducing the First Additional Language at the end of the Foundation Phase, the Department of Basic Education decided to shift FAL to the first year of schooling. To ensure that all non-Afrikaans African language speakers become sufficiently proficient in English, CAPS has required that all schools identify a First Additional Language. In most instances, our public schools will choose English. They now teach English in oral and written form from Grade 1. The new curriculum policy explicitly demands that every school offers

[23] The LOLT report also contains a detailed analysis of languages of instruction across all South African public schools from the period 1998 to 2007. It showed substantial growth in English single-medium institutions and parallel-medium English and Afrikaans schools, and small, but significant, decrease in Afrikaans single-medium public schools. *More disturbingly for our purposes*, the data in the LOLTS report reflected no schools operating as parallel-medium institutions with both (1) LOLT in English or Afrikaans and (2) LOTL in an African language.

[24] See S Howie & T Plomp 'System-level Evaluation: Language and Other Background Factors Affecting Mathematics Achievement' (2005) XXXV *Prospects* 179. See also S Howie 'Contextual Factors in the School and Classroom Level Related to Pupils' Performance in Mathematics in South Africa' (2005) 11 *Educational Research and Development* 123; Y Broom 'Reading English in Multilingual South African Primary Schools' (2005) 7 *Bilingual Education and Bilingualism* 506; Z Desai 'Multilingualism in South Africa with Particular Reference to the Role of African Languages in Education' 47 (2001) *International Review of Education* 332; N Taylor & P Vinjevold *Getting Learning Right: Report of the President's Education Initiative Research Project* (1999); F Banda 'The Dilemma of the Mother Tongue: Prospects for Bilingual Education in South Africa' (2000) 13 *Language, Culture and Curriculum* 51; B Brock-Unte & H Holmarscottir 'Language Policies and Practices in Tanzania and South Africa: Problems and Challenges' (2004) 24 *International Journal of Educational Development* 67; K Setati & J Adler 'Between Language and Discourses: Language Practices in Primary Multilingual Mathematics Classrooms in South Africa' (2000) 43 *Education Studies in Mathematics* 243; M Setati, J Adler, Y Reed & S Bapoo 'Incomplete Journeys: Codeswitching and Other Language Practice in Mathematics, Science and English Language Classrooms in South Africa' (2002) 16 *Language and Education* 128; N Alexander & M Cherry 'The Centrality of the Language Question in Post-Apartheid South Africa: Revisiting a Perennial Issue' (2012) 9/10 *South African Journal of Science* 108; N Alexander 'The Impact of the Hegemony of English on Access to and Quality of Education with Special Reference to South Africa' (2009) 141 *Language and Poverty* 53; R Sookrajh & J Joshua 'Language Matters in Rural Schools in South Africa: Are Educators Making the Implementation of the Language in Education Policy Work?' (2009) 37 *Language Learning Journal* 323; JW Tollefson and ABM Tsui (eds) *Medium of Instruction Policies: Which Agenda? Whose Agenda?* (2004); R Wildsmith 'The African Languages in South African Education, 2009–2011' (2013) 46 *Language Teaching* 120.

[25] CA Macdonald '*Crossing the Threshold into Standard Three in Black Education: The Consolidated Main Report of the Threshold Project* (1990).

between two and three hours per week of instruction for the First Additional Language in Grades 1 and 2, and between three and four hours per week for the First Additional Language in Grade 3. The primary purpose of this additional FAL instruction is to develop 'listening and speaking, thinking and reasoning and language structure and use, which are integrated into all 4 languages skills (listening, speaking, reading and writing), reading and phonics, writing and handwriting.' The CAPS Foundation Phase policy specifies that Grade 1 teachers should impart listening and speaking skills for one and a half hours a week, and spend an additional half an hour on reading and phonics for the First Additional Language. By Grade 3, the policy requires that teachers spend one hour on listening and speaking ability, one hour on reading and phonics proficiency, and half an hour respectively on writing and language use.

However, as several recent court cases and a significant number of unreported SGB disputes have demonstrated, the implementation of FAL has not been as straightforward as expected. The linguistic, racial and class heterogeneity and overall stratification of our society has led to a number of unanticipated conflicts between SGBs, parents, learners and provincial HoDs over early stage multilingual tuition.

In October 2012, a conflict erupted over the language policy at the Hillary Primary School outside Durban. English remains the first language of choice. The demographics of the school speak volumes as to the source of recent clashes over the FAL. Of the school's 800 learners, 65 per cent are of Indian decent and 25 per cent are isiZulu first language speakers.

Somewhat surprisingly, most parents favoured Afrikaans as the FAL. What irked a sizeable percentage of parents has been the School Governing Body's decision to discontinue the teaching of isiZulu in Grades 4 to 7.

The SGB chairperson, Mr Alex Ndlovu, acknowledged that the school had failed to invite its learners' parents to a meeting to discuss and to resolve the matter. Instead, the SGB employed a 'survey' to guide the SGB's decision. The survey might have sufficed had it not included the following sentence: 'In the event of your child leaving KwaZulu-Natal, Zulu may not be offered in other provinces'. The survey thus contained a heuristic that invariably nudged parents toward Afrikaans and away from isiZulu. Here, for the first time, we begin to see why, despite the FAL's goals to promote reading and writing in all 11 official languages, the default position remains LOLT instruction in English and Afrikaans.

The debate over FAL at Hillary Primary led to a somewhat unusual polarisation of powerful interest groups. The South African Democratic Teacher Union (SADTU) currently supports those parents who favour instruction in Afrikaans. The Pan South African Language Board, on the other hand, has weighed in on the side of those parents who support instruction in isiZulu. The conflict and the interim results are hardly surprising. Afrikaans remains – for historical and pecuniary reasons – an easier language to offer. The required materials and teachers for Afrikaans instruction already exist. The provision of materials and qualified teachers for adequate instruction in isiZulu remains a more complicated affair. On the other side of the ledger are those learners, parents, government

institutions and experts (such as Jonathan Jansen) who compellingly contend that we, as a nation, will not come to understand 'the other' and genuinely afford 'the other' mutual respect until we, collectively and individually, undertake the undeniably laborious task of learning to speak the language of 'the other'.[26] And let there be no doubt as to the meaning of 'the other'. No fancy continental footwork is necessary to work out that 'the other' means black folk.

Other parties have also waded into these choppy waters. The national deputy chief executive of the Federation of Governing Bodies of SA Schools suggested that the FAL choice has had less to do with the hegemony of English and Afrikaans and more to do with the limited number of teachers available to teach isiZulu as an additional language.[27] Of course, the adoption of such a position, and the re-inscription of English and Afrikaans as the two dominant means of discourse, creates an invidious cycle in which African languages fail to get a foot in the door. The only potentially meaningful response left is for the state to train a sufficiently large number of teachers to provide adequate instruction in African languages and spend the resources necessary to create comparable teaching materials.

A less compelling argument for the ascension of Afrikaans over isiZulu is on offer from Tim Gordon, the national chief executive of the Governing Body Foundation:

> Afrikaans is a much easier language to master. There are no clicks, the vocabulary and the structures are part of the same family of languages as English and therefore easier to pick up… [It] has none of the archaic, historical structures of older languages like English, German, Latin [and] Zulu.[28]

This justification doesn't pass the laugh test.

For decades, Latin was taught in former model C schools and private institutions – just as Roman Law lasted in South African law school curricula well into the mid-1990s – simply because it was deemed to be 'necessary' for a classical education. It offered neither intrinsic nor extrinsic benefits. Nor was it used as a means of regular communication amongst any South African linguistic group.

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[26] See, eg, J Jansen *Knowledge in the Blood*: *Confronting Race and the Apartheid Past* (2009).

[27] N Mtshali 'Language and the Two Schools of Thought' *Independent on Line* (21 May 2013) http://www.iol.co.za/news/south-africa/gauteng/language-and-the-two-schools-of-thought-1.1519470#.Ul1-iaEaJEY ('Federation of Governing Bodies of South African Schools chief executive Paul Colditz said that in principle, the federation supported the idea of multilingualism as it improved pupils' abilities to communicate effectively. Implementing the policy, though, does not seem feasible, he said. Colditz said the Curriculum and Assessment Policy Statement … spells out how the curriculum should be delivered [and] does not make provision for an additional language. "If you introduce a third language, there won't be space for it in the curriculum. There won't be enough teaching time – you'd have to expand the school day or drop one of the existing languages," he said. "The second issue is the availability of teachers. We have almost 25 000 schools in the country with an average of 500 pupils each. For a new subject to be introduced, each school would need at least two new teachers to teach it. That's plus/minus 50 000 new teachers. Where are we going to get them?" Colditz said that in addition to hiring more teachers, the proposed policy has huge cost implications in terms of teacher training, additional school facilities, and teaching and learning materials.')

[28] W Jasson da Costa & L Jansen 'Afrikaans vs Zulu Row Brewing at Schools' *Independent on Line* (12 October 2013) available at http://www.iol.co.za/news/south-africa/kwazulu-natal/afrikaans-vs-zulu-row-brewing-at-schools-1.1407943#.Ul2BbaEaJEY.

What language does the Governing Body Foundation believe will address issues of historical redress, equity, mutual respect, self-actualisation and equal citizenship? It's certainly not some new form of Esperanto. Perhaps the Governing Body Foundation would like to 'borrow us' an explanation?[29]

It may well be that Afrikaans is easier to pick up than isiZulu. But that alone hardly qualifies as a justification for teaching Afrikaans over any indigenous, officially recognized African language. The entire point of the FAL policy is to place African languages on a more equal footing with their European counterparts and to enable mother-tongue African language speakers to make the transition into English tuition far more comfortable.

Another set of justifications lurk in the background. Afrikaans is a preferred medium of instruction if the learner's goals turn on the number of distinctions secured during matric exams. As we noted above, a far higher percentage of exam takers secure distinctions in Afrikaans than in any of the other African languages. Afrikaans also remains the second most dominant language in which commerce is conducted. Again, neither of these justifications engages the primary driver of the FAL policy: Equal citizenship and equal respect require equal abilities to communicate effectively across a range of South Africa's official languages.

Another fascinating FAL dispute has recently taken place at the Gonubie Primary School in East London.[30] Parents of this middle class former Model C school were informed of the FAL policy in a meeting on the new curriculum that took place on the 30 January 2012. The School Governing Body decided that Afrikaans would be the school's First Additional Language for the Foundation Phase in 2012 and for the Intermediate Phase in 2013. Upon discovering that there had been no consultation process with the parents or the learners regarding the FAL, a cohort of concerned parents raised the matter (in writing and by telephone) with the school. The SGB undertook to vet the matter at its next meeting (6 February 2012). At the SGB meeting, the principal indicated that the parent's written FAL concern would be reviewed and that the parents would receive a justification for the decision from the SGB's Chairperson. When the SGB failed to respond with alacrity, the parents attempted to persuade the Parent Teachers Association to intervene on their behalf. That effort also proved unsuccessful. On the 27 February 2012, the concerned parents submitted a further letter to the SGB. The SGB refused to meet the concerned parents, but undertook to look into the matter and consider the curriculum implications for 2013. Dissatisfied with these apparently deliberate delays, the concerned parents turned to the Eastern Cape Department of Education. The intervention by the Department failed to

[29] Actually, one of the best arguments for learning English, prior to the pressure that electronic communication has placed on verbal reading and written skills, was the complexity and richness of the language. The last printed Oxford English Dictionary (OED, 1989) contained well over three million words, and a dizzying array of denotations and connotations for many of its entries. Recent studies, however, have found that average daily word usage by English speakers has shrunk from 2800 words to roughly 800 words. Even the OED has acknowledged 'Thx' – sms shorthand – as a legitimate manner of saying 'thank you'. C'est dommage. Where is the French Academy when you need it?

[30] 'Parents in Race Row over isiXhosa' *City Press* (28 April 2012) at http://www.citypress.co.za/news/parents-in-race-row-over-isixhosa-20120428. We are grateful to the Legal Resources Centre for sharing with us documents related to the subsequent litigation.

advance matters. The relationships between parents, learners, the school and the SGB became increasingly polarised around language and race. In August 2012, the concerned parents lodged a complaint with the Equality Court.[31]

Comparable cases have been heard and adjudicated by Equality Courts. Take *Nkosi v Vermark & Durban High School Governing Body*.[32] The matter in *Nkosi* arose when the CEO of PANSALB sought admission for her son to one of Durban's finer public schools and insisted that her high school age son be given high level instruction in isiZulu as well as English. At the time, English was the primary language of instruction. Afrikaans maintained its status as a secondary language of tuition. IsiZulu pulled up the rear. In a fairly nuanced finding of fact and law – consistent with what we know today – Magistrate JV Sanders held that a single student was not entitled to mother-tongue instruction as matter of right, especially where numerous schools teaching primarily in isiZulu existed in the immediate environs. He concluded, however, that the question truly germane to the dispute revolved around the 'additional language'. So while Magistrate Sanders found that primary instruction in English constituted *fair* discrimination, the distinction made between, and the attention paid, respectively, to Afrikaans and to isiZulu constituted *unfair* discrimination on the basis of language. As first additional languages, they both had to be accorded equal respect and resources – rough parity of treatment would meet the learners' constitutional and statutory entitlements.

In response to the dual challenge of inadequate teaching of non-Afrikaans African languages and the well-nigh total neglect of indigenous languages in quintile 5 schools, the Department of Basic Education (DBE) initiated a process designed to rectify these gaps. Only weeks after the University of KwaZulu-Natal announcement that they intended to make isiZulu compulsory for all first-year students,[33] the Department presented its new draft policy to the National Assembly's Education Portfolio Committee.[34] The DBE argues that the new Incremental Implementation of African Languages (IIAL) policy addresses

[31] Equality Court *Inequality at Gonubie Primary School* (Eastern Cape, 8 August 2012)(Record on file with authors and the Legal Resources Centre.) The LRC's record reveals apparent racist behaviour on the part of the extant SGB and mobilisation by white parents to exclude black parents from becoming members of the SGB in forthcoming elections.) The Equality Court determined that the school would offer tuition in both Afrikaans and isiXhosa and would operate as a parallel-medium school. What's more intriguing than the outcome is that the parties to the litigation appear satisfied that, having been heard, the language issue has been settled and the school can carry on with its normal business. This outcome – greater normative legitimacy and the overcoming of informational deficits – lends credence to the view that meaningful engagement and experimental constitutional structures such as participatory bubbles can overcome zero-sum outcomes associated with binary litigation. See S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (note 18 above) at 208–222. The outcome also seems consistent with the Constitutional Court's instructions in *Ermelo*, *Juma Musjid* and *Rivonia* that all parties to litigation over FC s 29 issues must attempt to work out a solution that serves every leaner's right to a basic education.

[32] *Nkosi v Vermaak NO & Another* (77/2007) [2008] ZAKZHC 83 (Equality Court, Durban, 30 September 2008).

[33] *Daily News* (17 May 2013).

[34] See Portfolio Committee Presentation and Debate Summary (June 2013) available at http://www.pmg.org.za/report/20130610-teacher-development-introduction-african-languages-in-schools-departmental-briefings.

manifold language problems in our public schools – but none more profound than the absence of tuition in home languages and the inability to become proficient readers, writers or interlocutors in either English or their home language. The DBE further contends that should African languages continue to go untaught, a real danger exists that these languages could be further marginalised, and that the culture and heritage associated with these languages would be lost. The IIAL imagines the incremental increase of African languages from the reception year (Grade R) all the way up to Grade 12. The IIAL would, if adopted as national policy, strengthen African language instruction through the provision of workbooks and an advocacy campaign. The more controversial aspect of the proposed policy turns on the requirement that all schools would be compelled to offer a second First Additional Language (SFAL) or more simply, a Second Additional Language. That language would, in all likelihood, have to be one of the nine quintessentially African languages or Afrikaans.

Initially, the inauguration of the IIAL policy was to occur at the onset of the 2014 school year. While the Basic Education Portfolio Committee was generally supportive of the policy, it articulated strongly worded concerns about the very tight time frames required by the DBE for implementation, the inevitable budgetary constraints and the adequacy of current resources in South Africa's teaching and learning environment.[35] In response to the Committee's concerns, and to make this new initiative more palatable to various constituencies, the DBE proposed that the IIAL begin as a pilot programme in 2014. Its efficacy in a representative cohort of schools would help the DBE and Parliament determine whether a full roll-out should occur at a later date.

III Existing Statutory and Constitutional Framework for First Additional Languages

What, if any, statutory and constitutional issues arise from these disputes over FAL policies? In terms of s 6(1) of SASA, the governing body of a public school may determine the language policy of the school 'subject to the Constitution, this Act and any applicable provincial law'. The ostensible starting point of our analysis – confirmed by the Constitutional Court in *Ermelo* – is that the determination of school language policy first falls to the SGB.

But as a long, and now fairly settled, line of cases makes clear, the starting point is not our terminal point. The body of case law built up over the past 17 years evinces the present government's desire to advance transformation efforts more quickly and to control the exercise of private power in public spaces. At the same time, the decisions acknowledge that certain kinds of associational interests merit continued solicitude even in the face of the state's pursuit of more egalitarian educational arrangements. The cases discussed below engage the state's and

[35] See Portfolio Committee Discussion of IIAL (June 2013) available at http://www.pmg.org.za/print/report/20130610-teacher-development-introduction-african-languages-in-schools-departmental-briefings and http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=37285&tid=110067.

parent and learner groups' attempts to experiment with public school admissions requirements facially designed to protect linguistic rights.

Stated at a relatively high level of generality, the government has stepped into the breach created by those who assert a constitutional entitlement to single-medium public schools and those who assert the constitutional right to be educated in the official language of one's choice. Not surprisingly, the state has weighed in on the side of black students who wish to receive instruction in English, but who have found themselves excluded from predominantly Afrikaans-speaking public schools. (That English has not suffered the same setbacks (as yet) can be attributed to such contingent facts as: (a) the acknowledged hegemony of English as the language of business (and thus success) and (b) the identification of Afrikaans with the imposition of that language as a medium of instruction in the 1970s, the Soweto school uprisings of 1976, and the consequent use of schools as sites of struggle against the apartheid state.)

Matukane & Others v Laerskool Potgietersrus addressed the attempt by the parent of three learners, Mr Matukane, to enroll his three children (13, 13 and 8) at the Laerskool Potgietersrus.[36] Laerskool Potgietersrus was then, and remains still, a state-aided dual-medium primary school. In the High Court, Laerskool Potgietersrus argued that it was unable to accommodate more children and that it had not rejected the children on racial grounds. At the time of the hearing, Laerskool Potgietersrus had 580 Afrikaans students and 89 English students. (The applicants were black.) The Laerskool Potgietersrus expressed concern that if it admitted these children, it would be swamped by English-speaking children who would destroy the Afrikaans ethos of the school.

Our law uniformly prohibits discrimination on grounds of race. Despite the school's assertion that the refusals were based on overcrowding, not race, the facts clearly painted a different picture. No black children had been admitted to the school. There were no black children on the waiting list. Room existed to accommodate more English-speaking children. Little danger existed of the school's Afrikaans culture and ethos being destroyed even if every black applicant were to be accepted. The ratio of Afrikaans-speaking students to English-speaking students would remain 5:1. The *Matukane* court held that it could draw no other inference as to the actual intent of the school's admissions policy other than that it discriminated directly on the basis of race, ethnicity, social origin, culture and language. The *Matukane* court was driven by the facts to conclude that the ostensible promotion of language and culture were operating as surrogates for racial discrimination and that the respondent had failed to discharge its burden of proving the fairness of its admissions policies.

Laerskool Middelburg en 'n ander v Departementshoof, Mpumalanga Departement van Onderwys, en andere extended the holding in *Matukane* from parallel-medium schools to single-medium schools.[37] However, in *Laerskool Middelburg*, the High Court was clearly more troubled by the conflict between the ostensible right to

[36] *Matukane and Others v Laerskool Potgietersrus* 1996 (3) SA 223 (T).
[37] 2003 (4) SA 160 (T).

a single-medium school and the right to be educated in the official language of one's choice.

After chiding the state for failing to take cognisance of FC s 29's commitment to linguistic and cultural diversity, the *Laerskool Middelburg* court conceded that the ostensible right to a single-medium public educational institution was subordinate to the indisputable right of every South African to a basic education and the need for linguistic and cultural communities to share education facilities with one another. The *Laerskool Middelburg* court was unwilling to allow the needs of 40 English-speaking – and largely black – learners to be prejudiced by the state's failure to play by the rules and the school's intransigence on the issue of dual-medium education. So while the state's actions had, in fact, been *mala fide*, it was still able to secure a victory for educational equity by getting the proper parties – namely the children – before the court.[38]

At issue in *The Western Cape Minister of Education & Others v The Governing Body of Mikro Primary School* was the refusal of an Afrikaans-medium public school to accede to a request by the Western Cape Education Department ('WCED') to change the language policy of the school so as to convert it into a parallel-medium school.[39] Acting on behalf of 21 learners, the WCED had directed the primary school to offer instruction in their preferred medium: English. The WCED had interpreted the Norms and Standards issued by the National Department of Education under SASA as requiring all primary schools with 40 learners who preferred a particular language of learning to offer instruction in that language. The Supreme Court of Appeal summarily rejected both the WCED's reading of

[38] FC s 28(2)'s guarantee that the best interests of the child are always of paramount importance was held by the *Laerskool Middelburg* Court to trump the linguistic and cultural rights of the school's Afrikaans-speaking learners. In deciding that the 'minority' students must be accommodated, the *Laerskool Middelburg* court correctly concludes that the right to a single-medium public educational institution is clearly subordinate to the right to a basic education in a similar institution as well as a demonstrable need to share education facilities with other linguistic cultural communities. The *Laerskool Middelburg* court seems to be on far shakier grounds when it suggests that a claim to a single-medium institution is probably best defined as a claim to emotional and social-psychological security. This proposition trivialises the desire to maintain basic, constitutive attachments. The desire to sustain a given culture as it stands – read contemporary Afrikaner culture – *is* best served by single-medium institutions that reinforce implicitly and expressly the importance of sustaining the integrity of that community. As a result, the *Laerskool Middelburg* Court must be wrong when it claims that the conversion of a single-medium public institution to a parallel-medium school cannot *per se* diminish the force of each ethnic, cultural and linguistic community's claim to a school organised around its language and culture. Ibid at 173. That is exactly what the conversion does. Whether such insularity is good for learners in a multicultural society is another matter. We, like Professor Jansen and others, tend to think that it leaves such learners ill prepared to engage the radically heterogeneous world that they will enter upon graduation. See J Jansen *Knowledge in the Blood: Confronting Race and the Apartheid Past* (2009).

[39] *Minister of Education Western Cape & Others v Governing Body, of Mikro Primary School & Another* [2005] ZASCA 66, 2006 (1) SA 1 (SCA)('*Mikro*'). See also *Governing Body, Mikro Primary School, & Another v Minister of Education, Western Cape & Others* 2005 (3) SA 504 (C), [2005] 2 All SA 37 (C), 2005 (10) BCLR 973 (C).

the Norms and Standards and the WCED's gloss on FC s 29(2).[40] The decision is notable in two important respects. First, it diminished the ability of the state to determine admissions policy with regard to language. Such power continued to vest in the SGB. Second, while affirming the rights of learners to instruction in a preferred language, it simultaneously confirmed that individual schools retain the privilege of offering instruction in a single medium.

Mikro brought temporary relief to SGBs of single-medium Afrikaans-speaking schools.

In *Seodin Primary School v MEC Education, Northern Cape*, the High Court held that the three SGBs of three primarily Afrikaans-speaking public schools could not use language preference to exclude black, primarily English-speaking learners from admittance.[41] Moreover, public pronouncements by the MEC for Education on the need for greater integration in the public schools system could not be interpreted as an *ultra vires* act aimed at the elimination of single-medium (ie, Afrikaans) public schools. *Seodin*'s reading of the Final Constitution makes it clear that considerations of equality and transformation would, more often than not, trump considerations of associational freedom within public institutions. Put slightly differently, while the language of the Final Constitution appears to reflect a compromise between the two parties, FC s 29(2) clearly: (1) eliminates any 'right' to single-medium public schools, (2) grants the state ultimate authority over language policy and (3) makes any demand for single-medium schools subject to threshold tests for equity, practicability and historical redress.

The Constitutional Court's decision in *Head of Department, Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another* puts that last set of propositions beyond dispute. Although *Ermelo* addresses a mixed bag of legal irregularities, opaque statutory provisions and complex constitutional issues, Deputy Chief Justice Moseneke's opinion makes transparent the basis for the Court's lack of patience with Hoërskool Ermelo's intransigence with respect to language policy and to the admission of black students who wish to be taught in English:

> [F]ormerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education … [FC s 29(2)] is made up of

[40] The SCA did so on three primary grounds. First, the Supreme Court of Appeal overturned Bertelsmann J's finding in *Laerskool Middelburg* that the Norms and Standards provided a mechanism for the alteration of the language policy of a public school. At best, the Supreme Court of Appeal said, the Norms and Standards constituted a guideline for members of the department and those parties responsible for the governance of public schools. Second, the Supreme Court of Appeal held that SASA s 6(1) granted neither the national Minister of Education nor the provincial MEC or HoD the authority to determine the 'language policy of a particular school, nor does it authorize him or her to authorize any other person or body to do so'. The power to determine language policy vests solely with the SGB of a given public school and is subject only to the Final Constitution, SASA and any applicable provincial law. Third, the Supreme Court of Appeal rejected the applicant's contention that FC s 29(2) could be 'interpreted to mean that everyone had the right to receive education in the official language of his or her choice at each and every public educational institution where this was reasonably practicable'. *Mikro* (note 39 above) at para 30.

[41] *Seodin Primary School v MEC Education, Northern Cape* 2006 (1) All SA 154 (NC).

> 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 [but] … is available only when it is 'reasonably practicable' … . The second part of s 29(2) of the Constitution protects 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.[42]

Thus does the Deputy Chief Justice shut the window of *unencumbered* autonomy granted SGBs with respect to the determination of language policy (and the discharge of any other function). While the Head of Department of the Mpumalanga Department of Education may not have followed the correct statutory procedures, and had his decision reversed accordingly, a provincial HoD clearly possesses the power to withdraw, for good reason, a function currently discharged by an SGB. In this matter, the Constitutional Court found that the necessary grounds existed for the withdrawal of the SGB's restrictive language policies. It required that the HoD and the SGB revisit the existing language policy of Hoërskool Ermelo in light of the needs of learners in the Ermelo circuit and then report back to the Constitutional Court with regard to their findings.[43]

But what does this new legal regime mean for First Additional Language policies? The Deputy Chief sends an additional message when he writes:

> [A]n unequal access to education entrenches historical inequity since it perpetuates socio-economic disadvantage… . [W]hite public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government… . On the other hand, formerly black public schools have been, and by and largely remain, scantily resourced… . That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education… . Learners whose mother tongue is not English, but rather one of our indigenous languages, together with their parents, have made a choice to be taught in a language other than their mother tongue. This occurs even though it is now well settled that, especially in the early years of formal teaching, mother-tongue instruction is the foremost and the most effective medium of imparting education.[44]

The Deputy Chief Justice does not pin the possibility of learners flourishing solely upon their ability to secure instruction in English. In this remarkable

[42] *Ermelo* (note 2 above) at paras 46, 49–53.

[43] It did not follow, however, that the withdrawal of an SGB function for good reason permitted the HoD to take over, effectively, the *Hoërskool Ermelo* SGB through the appointment of new personnel in terms of s 25(1) of SASA. As a consequence, the HoD's power to alter the language policy of *Hoërskool Ermelo* – while substantively sound as a matter of law (as interpreted by the Constitutional Court) – was reversed because of procedural irregularities. The *Hoërskool Ermelo* Court did, however, invite the HoD to report back to the Court on the language needs of learners in the Ermelo school district before the 2010 school year. The invitation – found in the Court's remedy – indicated the Court's interest in ensuring that all learners received instruction in their language of choice where it was both reasonably practical to do so and met other critical desiderata of fairness and historical redress. The Hoërskool Ermelo SGB was likewise invited to offer a new IIAL-like gloss on its language policy in light of the Court's factual finding that the current language policy of the undersubscribed single-medium Afrikaans school was manifestly unconstitutional.

[44] Ibid at paras 46–48.

aside, the Deputy Chief Justice questions whether the majority of South African learners are well-served by choosing English as their sole or primary language of instruction. He contends, instead, that they would be better served by pursuing dual-medium instruction that embraces their home language.[45]

In *Ermelo*, the Deputy Chief Justice raises the real possibility that South Africa will experience a second lost generation of learners. This second generation would be lost *not* through the imposition of a language of instruction, but through an understandable misapprehension amongst parents about the language instruction that will serve their children best. In reading 'the market', parents of learners have concluded that the flourishing of their child hinges on a mastery of English. The Deputy Chief Justice calls that reading into question. As we previously noted, in policy circles a consensus is building around the conclusion that the *de facto* default position of English as the primary language of instruction from primary school onwards has not served South African learners well. Educationalists, as well as the Deputy Chief Justice, are rightly alarmed by illiteracy and innumeracy rates for primary school learners that place South Africa 45th out of 46 developing countries.[46]

A third, largely unstated, ground for Moseneke DCJ's remarks exists. He takes subtle aim at first language English speakers. Just as Jonathan Jansen has rightly rounded on first language Afrikaans-speaking communities for leaving their children ill-equipped to live in a multilingual society, so too might the Deputy Chief Justice remarks be read as a critique of white English-speakers' lassitude. Both Jansen and Moseneke call the cossetted privilege of each group into question.

So again: What does all this learning and pointed asides mean for FAL and IIAL policies?

FC s 29(1) (the right to an 'adequate' basic education) and FC s 29(2) (the right to instruction in the languages (plural) of one's choice) – when *read with* rights to dignity (FC s 10 and its commitment to equal worth, equal respect and self-actualisation), to equality (FC s 9 and its express presumption that no person will be unfairly discriminated on the grounds of language or race), to sustain existing linguistic and cultural practices (FC ss 30 and 31), and to recognise, concretely, all 11 official languages (FC s 6) – evince a Constitution that contemplates a nation in which a learner's choice of preferred language or *languages* of teaching and instruction ought not to be too strictly circumscribed by any given SGB's views regarding LOLTs. The right to learn in a First Additional Language is a qualified right in terms of FC s 29(2). FC s 29(2) contains the internal limitation of 'reasonably practicable' and the internal modifiers of 'historical redress' and 'equity'. In other words, as long as one can demonstrate that the provision of an FAL is reasonably practicable and meets the further threshold criteria of historical redress and equity, then a sufficiently large cohort of learners (35/40) ought to be guaranteed an FAL that suits them best.

[45] Although the Deputy Chief Justice uses the term 'mother tongue', the preferred new nomenclature is 'home language'.

[46] B Fleisch *Primary Education in Crisis* (2010).

We can secure somewhat greater traction as to what would constitute a constitutionally-compliant FAL, if we return to the Language in Education Policy of 1997. This document reflects a first stab at a First Additional Language policy. Despite the provision of only gradual introduction of an FAL in the Foundation Phase, Section 6(2) of the Language in Education Policy reads as follows:

> Where there are less than 40 requests [for tuition in a specific language] for Grade 1 to 6, or less than 35 requests in Grade 7 to 12 for instruction in a language in a given grade not already offered by a school in a particular school district, the head of the provincial department will determine how the needs of those learners will be met taking into account: the duty of the state and the right of the learners in terms of the Constitution, including: (a) the need to achieve equity; (b) the need to redress the results of past racially discriminatory laws and practices and (c) practicability and the advice of the governing bodies and principals of the public school concerned.[47]

One may be forgiven for hearing the *Ermelo* Court's reading of FC s 29(2) in this very early iteration of a multilingual national education policy. But does it really have anything particular to say about the rights of parents and learners with regard to FALs or IIALs of choice, in particular, and the limits that might be imposed upon SGBs to determine a school's FAL and IIAL policies?

By inference we can assume that where a primary school has more than 40 requests by learners for instruction in a given language, the school would be obliged to make the necessary arrangements to offer that language. When the number of requests from learners falls below 40, the responsibility shifts to the head of the provincial education department to made provision for instruction in the preferred language of choice for these learners. When the administrative head of the provincial education department must address such a request, he or she would need to consider the need to achieve equity, secure historical redress, and take into account the practicability of offering the desired tuition. While we presume that this rule was designed for the Language of Learning and Teaching (LOLT) policy, it's fair to assume that it would equally apply to FAL and IIAL policy. Thus, when a school receives 40 or more requests to tuition in a given language, its SGB would have to take these requests into consideration – within the well-articulated policy, statutory and constitutional law standards – in determining the school's language policy. If fewer than 40 students request FAL and IIAL instruction, then the Language in Education Policy of 1997 – read in light of *Ermelo* circa 2010 – implies that the responsibility falls upon the provincial department.

But let's tease out the consequences of *Ermelo* (as well as the more recent decisions of *Juma Musjid*, *Welkom* and *Rivonia*) for the FAL and IIAL policies a bit further.

First, the *Ermelo* Court interpreted s 22(1) of the South African Schools Act in a manner that permits an HoD to withdraw any function of an SGB, if s/he has good reason to believe that such powers were not reasonably exercised by the

[47] Department of Education (1997) *Language in Education Policy*, available at www.education.gov.za/LinkClick.aspx?fileticket=XpJ7gz4rPT0%3d&tabid=390&mid=1125; Department of Education (1997) *Norms and Standards Regarding Language Policy*, available at http://www.education.gov.za/LinkClick.aspx?fileticket=XpJ7gz4rPT0%3d&tabid=390&mid=1125.

SGB. So while an SGB may have the initial obligation and authority to determine a school's language policy, including the FAL (and the IIAL) policy, it must do so in a reasonable manner. The tripartite test established in *Ermelo* suggests that the Court will impose some fairly exacting dictates on SGB language policy (as well as providing guidelines as to how language instruction issues ought to be engaged by parents, learners, an SGB and a provincial HoD.).

Second, while *Ermelo* confirms that SASA s 6(2) grants SGBs first call in determining school language policy, the Court observes that '[t]his grant of authority is subject to 'the Constitution, this Act and any applicable provincial law.' SASA s 6(1), which allows the Minister to issue 'norms and standards regarding for language policy in public schools' increases the polycentricity of decisions by making national and provincial government important players at the table of any discussions regarding any given school's language choice. More recently, the Constitutional Court in *Juma Musjid* recognises that state actors, private actors, parent, learners, SGBs and provincial SGBs all have a role to play in ensuring that learners receive an adequate basic education in terms of FC s 29(1).

Third, SASA 6 is not at all unusual with respect to polycentric decision-making. SASA ss 20 and 21 grant SGBs a broad array of powers that are subject to SASA, and thus by extension to the Constitution. These powers cover such privileges as adopting constitutions, mission statements and codes of conduct, to more mundane responsibilities as improving school grounds, purchasing text books and determining extra-mural activities.

Fourth, the *Ermelo* Court provides SGBs with some guidance as to how they should think about core decisions like language policy. According to the *Ermelo* Court, s 22(2) contains a substantive component. Policy in this domain must not just be rational. It must be reasonable.[48] The *Ermelo* Court's reasonableness criteria offer a principled rubric within which parents, learners, SGBs, HoDs, the national government and court might meaningfully engage language policies. The players must consider:

(1) the nature of the function;
(2) the purpose for which the function may be revoked in light of the best interest of the actual and potential learners,
(3) the views of the school governing body;
(4) the nature of the power sought to be withdrawn;
(5) the likely impact of the withdrawal on the well-being of the school, its learners, parents and educators; and
(6) the objective, normative value system made manifest in the Constitution.[49]

[48] See M Bishop 'Rationality is Dead! Long Live Rationality! Saving Rational Basis Review' in S Woolman & D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench & the Academy* (2012) 1; A Price 'The Content and Justification of Rationality Review' in S Woolman & D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench & the Academy* (2012) 38. See also F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa,* 2nd Edition (2006) Chapter 11.

[49] *Ermelo* (note 2 above) at para 74.

Finally, after a decade of litigation around single-medium public schooling,[50] we now possess, post-*Ermelo*, greater clarity around four unassailable propositions regarding language choice, admissions criteria and other SGB functions: (1) the Constitution clearly bars the refusal of admission on the basis of race; (2) linguistic and associational interests may occasionally trump equity concerns where there is *no* sign of overt discrimination and where learners who wish to receive instruction in another language, say English, isiZulu or Sepedi, have meaningful access to schools that provide an equal and an adequate education to the schools from which the students have been turned away; (3) learners have *no* constitutional right to single-medium public schools under s 29(2) of the Constitution; and (4) SGB responsibilities extend beyond narrow fiduciary duties to the learners in a particular school and embrace the broader needs of a South African society that each and every school ultimately serves.

IV How Rights to Equal Citizenship, Equality, Dignity, Linguistic Community, and the Use of Official Languages Shape Our Understanding of the First Additional Language Policy and the Incremental Implementation of African Language Policy

Even with all the direction that education policy documents and the Constitutional Court in *Ermelo*, *Juma Musjid*, *Welkom* and *Rivonia* have given us with respect to how FAL and IIAL decisions ought to be taken by SGBs, parents, learners and HoDs, no easy algorithm can be contrived for determining the language options that ought to be made available at any given school. We live in a radically heterogeneous society still riven by mistrust based on race, culture, religion, creed, gender, language and class. Having said that, the basic law and the jurisprudence of our highest court suggests how decisions regarding First Additional Languages and the Incremental Implementation of African Languages might best be pursued (by all parties concerned).

Section 3 of the Constitution – Citizenship – tells us that all citizens are 'equally entitled to the rights, privileges and benefits of citizenship.' Given the long history of colonialism, racism and second class membership – forget citizenship – experienced the majority of South Africans, it comes as little surprise that 'equal citizenship' possesses such prominence of place in our Constitution. In terms of any discussion of FAL and IIAL policies, FC s 3 reminds us that the majority of South Africa's citizens will not receive equal benefits from their citizenship unless they possess an

[50] Of course, the outcome in *Ermelo* doesn't forestall future litigation over the same set of issues. See S Tshwete *Hundreds to Descend on Fochville Schools – Gauteng Legislature Media Statement* (17 January 2012), available at www.politicsweb.co.za/politicsweb/view/politicsweb/en/page72308?oid=275526&sn=Marketingweb+detail&pid=90389 ('Gauteng Legislature's Committee on Petitions will be visiting Fochville Hoërskool and Fochville Losberg Primary School who have in the past turned away Black students from their premises because the medium of instruction at the schools is Afrikaans. Last year, the Gauteng Legislature and Gauteng Department of Education intervened and instructed the schools to open its doors to Black learners and stop denying them their right to be instructed in English. The Fochville Hoërskool took an issue with this [order] and tried to fight this instruction by going to court in December [2011]. The case was dismissed in January.')

equal voice in the decision-making processes that determine the contours of our democracy. We are not, it should be clear, arguing that being heard and understood in one's home language is a prerequisite for meaningfully equal citizenship (and that any conduct, policy or law that falls short of such an aim is constitutionally infirm.) That's too strong a claim: at least with respect to the intentions behind the FAL and IIAL policies. However, it seems reasonably plausible to argue that FC s 3 buttresses the claim the state ought to promote the use of African/indigenous languages by both home language speakers and non-home language speakers.

It is no surprise that s 6 of the Constitution – Official Languages – comes hot on the heels of FC s 3. It places 11 of the most prominent languages written and spoken in South Africa on (relatively) equal footing. It reverses the century long hegemony of English and Afrikaans – at least in the abstract – and expressly tells us that we must recognise

> … the historically diminished use and status of the indigenous languages of our people, [and that] the state must take practical and positive measures to elevate the status and advance the use of these languages.

Both the FAL policy and the IIAL policy contain 'practical and positive measures to elevate the status and advance the use of these [historically diminished, indigenous] languages.' Given the passage of 17 years since the *Language in Education Policy* and the *Norms and Standards Regarding Language Policy* were promulgated, one might argue that both the FAL and IIAL policies are long overdue and that FC s 6 places a thumb on the scale of any debate about which languages ought to be treated as first additional languages.

Section 9 of the Constitution – Equality – tells us that we may not discriminate on the basis of language, in the public realm or the private domain. To the extent that learners do not receive an adequate basic education because their mother tongue is neither English nor Afrikaans, a *prima facie* case might, under the right circumstances, be made out that they have been subject to unfair discrimination in terms of FC s 9(3) and s 9(5).[51] FAL and IIAL asks us to take seriously the burden that second language English or Afrikaans speakers carry, and places schools on notice that they may have to rebut the presumption – in terms of FC s 9(5) – that unfair discrimination has taken place if an African language is not chosen as a first additional language.

[51] FC s 9. Equality (1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Section 10 of the Constitution – Dignity – tells us that we must, at a minimum, treat every individual as an end in herself, and never solely as a means.[52] However, if our linguistic exchanges invariably place English and Afrikaans speakers in a dominant position, and language becomes a mere tool for ordering people to undertake one task or another, then a speaker of an indigenous language will struggle for recognition as an end in herself. Dignity, moreover, demands equal concern and respect, and the capacity for both self-governance and self-actualisation. Once again, unless an individual possesses the capacity to make herself fully understood, she will likely find mutual respect,[53] self-governance[54] and self-actualisation[55] beyond her reach.[56] Human beings are creatures 'bathed in words'. Or, put somewhat differently, we can never be fully human without the capacity for, and capabilities associated with, sophisticated use of language

[52] Justice Ackermann, the Court's original exponent of dignity, grounds the first definition of dignity in two sources: the history of apartheid and the work of Immanuel Kant: '[I]t is permissible and indeed necessary to look at the ills of the past which [the Constitution] seeks to rectify and in this way try to establish what equality and dignity mean … What lay at the heart of the apartheid pathology was the extensive and sustained attempt to deny to the majority of the South African population the right of self-identification and self-determination … Who you were, where you could live, what schools and universities you could attend, what you could do and aspire to, and with whom you could form intimate personal relationship was determined for you by the state … That state did its best to deny to blacks that which is definitional to being human, namely the ability to understand or at least define oneself through one's own powers and to act freely as a moral agent pursuant to such understanding of self-definition. Blacks were treated as means to an end and hardly ever as an end in themselves; an almost complete reversal of the Kantian imperative and concept of priceless inner worth and dignity.' LWH Ackermann 'Equality under the 1996 South African Constitution' in R Wolfrem (ed) *Gleichheit und Nichtdiskriminierung im Nationalen und Internationalen Menschenrechtsschutz* (2003) 547. See also *Dawood & Another v Minister of Home Affairs & Others* [2000] ZACC 8, 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at para 35 (O'Regan J writes: 'The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings.')

[53] *President of the Republic of South Africa v Hugo* [1997] ZACC 4, 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC)('*Hugo*') at para 41 ('[T]he purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded *equal respect* regardless of their membership in particular groups.')

[54] See *August v Electoral Commission* [1999] ZACC 3, 1999 (3) SA 1 (CC), 1999 (4) BCLR 363 (CC) at para 17 ('The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of *dignity* and of personhood. Quite literally, it says that everybody counts.')

[55] The majority in *Ferreira v Levin* rejected Justice Ackermann's view that IC s 11(1) and FC s 12(1) contain a robust, self-standing freedom right. *Ferreira v Levin* [1995] ZACC 13, 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at paras 170–185. The Constitutional Court accepted, subsequently, Justice Ackermann's thesis that dignity is meant to secure the space for self-actualisation (autonomy). See, eg, *Hugo* (note 53 above) at para 41 ('[D]ignity is at the heart of individual rights in a free and democratic society.') See also N Haysom 'Dignity' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 131–132.

[56] See S Woolman 'The Architecture of Dignity' in D Cornell, S Woolman, M Bishop, J Brickhill, S Fuller & D Dunbar (eds) *The Dignity Jurisprudence of the Constitutional Court of South Africa* (2013); S Woolman 'Dignity' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 36.

and symbolic systems.[57] If we withhold this capability from a majority of our fellow South Africans, then the likelihood is that we will turn them into means, not ends, and significantly diminish their capacity for self-actualisation.[58] The argument from 'Dignity' may have greater force in terms of the requirement that we accord others mutual respect when we undertake the effort to speak the home languages of others. This argument buttresses the rather limited aims of the FAL policy and the IIAL policy.

FC ss 30 and 31 – 'Language and Culture' and 'Cultural, Religious and Linguistic Communities' – expressly protect the institutions that sustain our many languages.[59] Moreover, both sections recognise that we draw a significant degree of meaning in our lives from the ability to connect with speakers of our home language (and the rich culture often affiliated with that language).[60] If we

[57] Matthew Elton, in tying our ability to flourish to these specific capabilities, contends: 'Could it be through language, the constant trading of ideas, that we come to be creatures that see the commitment to the existence of genuine responsibility, of genuine praise and blame, genuine right and wrong, as a condition without which we would not be fully human.' M Elton *Daniel Dennett: Reconciling Science and Our Self-Conception* (2003) 265.

[58] See A Maslow 'A Theory of Human Motivation' (1943) 50 (4) *Psychological Review* 370. Nussbaum's core of capabilities, like Maslow's hierarchy of needs, looks very much like a ladder that climbs toward greater self-actualisation, even as it emphasises the importance of Gilligan-like relationships necessary for flourishing. M Nussbaum *Women and Human Development: The Capabilities Approach* (2000) 78–80; M Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (2006) 76–78; M Nussbaum 'Constitutions and Capabilities: "Perception" against Lofty Formalism' (2007) 121 *Harvard Law Review* 4. See also C Gilligan *In a Different Voice: Psychological Theory and Women's Development* (1982).

[59] See S Woolman 'Community Rights: Religion, Language and Culture' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2007) Chapter 58.

[60] The Constitutional Court in *Fourie* offers us useful guidance as to how the state ought to engage the religious, cultural and linguistic communities that make up the state and how those communities ought to engage one another. *Minister of Home Affairs v Fourie (Doctors For Life International & Others, Amici Curiae); Lesbian & Gay Equality Project & Others v Minister of Home Affairs* [2005] ZACC 20, 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC). In *Fourie*, the Constitutional Court found that while the state could not continue to enforce common-law rules and statutory provisions that prevented same-sex life partners from entering civilly-sanctioned marriages, the Final Constitution had nothing immediate to say about religious prohibitions on gay and lesbian marriage and could not be read to require religious officials to consecrate a marriage between members of a same-sex life partnership. The *Fourie* Court wrote:

> [The amici's] arguments … underline the fact that in the open and democratic society contemplated by the Constitution … the religious beliefs held by the great majority of South Africans must be taken seriously. For many believers, their relationship with God or creation is central to all their activities. … It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. … For believers, then, what is at stake is not merely a question of convenience or comfort, but an intensely held sense about what constitutes the good and proper life and their place in creation… . Religious bodies play a large and important part in public life, through schools, hospitals and poverty relief programmes… In the open and democratic society contemplated by the Constitution there must be mutually respectful coexistence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group, the law will legitimately acknowledge a diversity of strongly-held opinions on matters of great public controversy. I stress the qualification that there must be no prejudice to basic rights. Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom … . The

diminish the ability of our fellow citizens to speak in their home language, then we deny them the ability to connect with others and to fully flourish as human beings.

These aforementioned rights – read together with rights to freedom of expression[61] and freedom of association[62] and the right to learn in a language of one's choice[63] – provide a powerful foundation for FAL and IIAL policies designed to bolster the use of indigenous African languages in South African schools, in particular, and in South African society, in general. But despite their legal and rhetorical force, the rights do not answer two extremely important questions. Can they be used to compel state and private actors to make good on the promise of FAL and IIAL policies? If so, how?

objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all. *Fourie* (above) at paras 90–98. The *Fourie* Court commits itself to five propositions that are fundamental for flourishing, generally, and for religious, cultural and linguistic community rights, in particular. First, religious, cultural and linguistic communities are a critical source of meaning for the majority of South Africans. Second, religious, cultural and linguistic communities create institutions that support the material, intellectual, ethical and spiritual well-being of many South Africans. Third, religious, cultural and linguistic associations, as part of civil society, play an essential role in mediating the relationship between the state and its citizens. Fourth, while religious, cultural and linguistic associations are entitled to articulate – and make manifest through action – their 'intensely held world views', they may not do so in a manner that unfairly discriminates against other members of South African society. Fifth, although the 'intensely held world views' and practices of various religious, cultural and linguistic associations must, by necessity, exclude other members of South African society from various kinds of membership and of participation, such exclusion may not necessarily constitute unfair discrimination. The critical question – as the *Fourie* Court notes – is whether such discrimination rises to the level of an unjustifiable impairment of the dignity of some of our fellow South Africans. Again: *this enquiry turns on access to the kinds of goods that enable us to lead lives that allow us to flourish.* It would be foolish to dismantle every institution solely on the grounds that either some form of exclusion takes place or that some reinscription of privilege occurs. Almost all meaningful human labour occurs within the context of self-perpetuating social networks of various kinds. We must be alive, as Nancy Rosenblum contends, to the problem of moral and cognitive 'spillover': not all associations possess the same virtues and vices, and to assume that they do leaves us open to charges of transmission belt sociology (ie, if it's bad there, it must be bad everywhere). N Rosenblum *Membership and Morals: The Personal Uses of Pluralism in America* (1998) 48–49. Taking a sledgehammer to social institutions that create and maintain large stores of real and figurative capital is a recipe for a very impoverished polity. The hard question resolves on the extent to which religious, cultural and linguistic communities – or any strong bonding network – can engage in justifiable forms of discrimination in the furtherance of constitutionally legitimate ends and the extent to which the state and other social actors can make equally legitimate claims on the kinds of goods made available in these communal formations that cannot be accessed elsewhere.

[61] See, eg, *S v Mamabolo* [2001] ZACC 17, 2001 (3) SA 409 (CC), 2001 (1) SACR 686 (CC), 2001 (5) BCLR 449 (CC)(Speaks of constellation of expressive rights – FC s 15 through FC s 18 – and how they serve the three conjoined, reciprocal and covalent values' or grundnorms of dignity, equality and freedom.) See, generally, D Milo, G Pennfold & A Stein 'Freedom of Expression' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 58.

[62] See , eg, *Taylor v Kurtstag No & Others* 2005 (1) SA 362 (W), [2004] 4 All SA 317 (W)(Court upheld the right of the Beth Din to issue a Cherem – an excommunication edict – against a member of the Jewish community who had violated the terms of the association's ruling regarding the refusal by the plaintiff to abide by an order of the Jewish ecclesiastical body.) See S Woolman and D Zeffertt 'Judging Jews: Court Interrogation of Rule-Making and Decision-Taking by Jewish Ecclesiastical Bodies' (2012) 28 *South African Journal on Human Rights* 196.

[63] See, eg, *Head of Department, Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another* [2009] ZACC 32, 2010 (2) SA 415 (CC), 2010 (3) BCLR 177 (CC).

V Whose Tshivenda? Whose Sesotho? Are the First Additional Language Policy and the Incremental Implementation Language Policy Equitable, Practicable, Reasonable and Justifiable?

In this section, we reaffirm the proposition that members of South Africa's still nascent constitutional project will be more likely to flourish when all of us, especially members and descendants of historically elite classes, make an effort to understand one another as best as we possibly can, in various African languages we all ought to make some effort to master.

'Ought' does not imply 'can'.

It definitely doesn't mean 'must' in terms of our Constitution.

Yet why should we be relatively circumspect in giving the FAL and IIAL policies – viewed collectively – the imprimatur of constitutional approval? We have already seen how a powerful constellation of constitutional rights, values and principles appear to vouchsafe their passage into law and practice.

The answer. Were it so straightforward, it would have been done. This article would have been unnecessary. These policies raise difficult questions of 'can?' and 'how?' In standard constitutional nomenclature, those questions are about practicability, equity, historical redress, reasonableness and justifiability. Each requirement – whether articulated under FC s 29(2) or FC s 36(1) – should give us pause. The next two sections adumbrate some of the arguments that might be made on behalf of these well-intended initiatives.

A Meaningful Engagement

Throughout its burgeoning body of meaningful engagement jurisprudence, the Constitutional Court has demonstrated how we can go about solving complex, polycentric problems in a manner that more closely approximates pareto-optimal outcomes – rather than the usual zero sum results of binary litigation.[64] By

[64] The promise of such a process is that each participant adopts a reflexive stance toward his or her own views and attempts 'to make the interests of others their own, [and to recognize] the circumstances in which they should give moral priority to what is good for others or for the polity as a whole.' Meaningful engagement *qua* participatory bubbles facilitate processes of institutional reform that proceed within the vocabulary and the norms of the relevant institutions and communities, instead of via fiat by judicial authority. The reflexive stance of the bubbles' participants should both foster a deeper commitment to social movement based politics (and not mere court initiated change) and enhance individual and group aptitudes for experimentation and error-correction. The *Occupiers of 51 Olivia Road* Court's ingenuity at the outset of the hearing distinguished itself from its many of its previous socio-economic rights (but not only socio-economic rights) decisions. See *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others* [2008] ZACC 1, 2008 (3) SA 208 (CC), 2008 (5) BCLR 475 (CC). See also *Abahlali baseMjondolo Movement SA & Another v Premier of the Province of KwaZulu-Natal & Others* [2009] ZACC 31, 2010 (2) BCLR 99 (CC). Rather than impose a decision on the parties framed by *Grootboom*-based criteria, the Court ordered the residents and the City of Johannesburg to repair to the negotiating table in order to reach a settlement that would lead to a more optimal outcome for both sides. The parties did. Their settlement then became an order of the Court. In *Joe Slovo I*, Justice Ngcobo offered the following justification for meaningful engagement as an alternative dispute mechanism in constitutional matters: 'The requirement of engagement flows from the need to treat residents with respect and care for their dignity. … It enables the government to understand the needs and concerns of individual households so that, where

setting the normative content of rights at a fairly high level of abstraction (but of sufficient content that they create discernible contours for mediation), the Court has allowed all of the litigants, affected parties and interested entities (such as legal NGOs or Chapter 9 Institutions) to repair to the problem-solving table to work out a settlement that does as much justice as possible to all concerned. The justice done takes multiple forms. The large, and broadly representative,

possible, it can take steps to meet their concerns. … . The goal of meaningful engagement is to find a mutually acceptable solution to the difficult issues confronting the government and the residents in the quest to provide adequate housing. This can only be achieved if all sides approach the process in good faith and with a willingness to listen and, where possible, to accommodate one another. … Ultimately, the decision lies with the government. The decision must, however, be informed by the concerns raised by the residents during the process of engagement.' See *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others;* [2009] ZACC 16, 2010 (3) SA 454 (CC), 2009 (9) BCLR 847 (CC) (*'Joe Slovo I')* at paras 238 and 244 (Ngcobo J, concurring). See also *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others;* [2011] ZACC 8 (*'Joe Slovo II')* at paras 114, 175, 260–261, 313, 326 and 409. (The *Joe Slovo II* Court remarkably rescinds its original order in *Joe Slovo I*, at the request of the parties, because the parties discovered – after a year of working things through – that an *in situ* upgrade was to be preferred to the 15 km move to Delft. The Court recognised that the parties had greater normative legitimacy and possessed more information about the desirability of the move than any Court of 11 women and men sitting in Braamfontein could ever hope to have.) Political process reinforcement concerns were not originally what drove the Court into developing in this doctrine. The Constitutional Court has held that courts must be willing to articulate rather abstract, but still tangible, constitutional norms that enable less powerful stakeholders to have a meaningful role to play in a polycentric decision-making process. The Constitutional Court has, on numerous occasions now, set out a *very* general normative framework within which 'meaningful engagement' between conflicting parties can take place. The Court's commitment to meaningful engagement possesses three features that deserve closer attention. First, they may not (necessarily) be limited to the initial parties to the litigation. Other interested stakeholders – *amici et al* – may participate in the problem-solving process. The aim, again, is two-fold: greater elicitation of information; greater normative legitimacy of any decision ultimately taken. Second, the other salient feature of these participatory bubbles is that they may not remain within the domain of the courts. We can easily imagine greater community participation in hearings called by the South African Human Rights Commission, other Chapter 9 Institutions, national or provincial legislatures, or school governing bodies in other social and political fora. The Constitutional Court has shown itself alive to the need for participatory bubbles when provincial legislatures take decisions that affect the lives of the denizens within their boundaries. South Africa, despite the limits imposed by what remains a largely one party dominant state, has the tools available to make meaningful engagement qua participatory bubbles the norm in norm-setting environments. Third, participatory bubbles lose their cohesion – and the pressure to produce better than zero-sum outcomes – if the courts fail to articulate the norms within which a preferred solution is meant to occur. If experimental constitutionalism is judged to be an attractive set of principles by which to establish constitutional norms (by widespread public agreement) and to assess best practices (by inviting as many stakeholders as possible to design an optimal remedy for a specific social problem) then the jurisprudence of avoidance in the South African vernacular must be one of the first judicial doctrines to go. Several of the Constitutional Court's judgments in 2011 – including *Glenister* and *Blue Moonlight* – demonstrate the potential of a Constitutional Court that sets its horizons beyond a largely process-driven jurisprudence and alights upon something more substantial. *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) SA 347 (CC), 2011 (7) BCLR 651 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* [2011] ZACC 33, 2012 (2) SA 104 (CC), 2012 (2) BCLR 150 (CC). These decisions model rational discourse (in a country sorely in need of it) by offering a thicker vision of the basic law that initiates discussion, engagement and action in other quarters of the Republic.

number of parties increases the normative legitimacy of the solution reached.[65] More importantly, however, the participation of a diverse group of interested organisations is likely to elicit information that will enable all concerned to reach results vastly superior to adversarial settings. The results should have a two-fold effect. At the level of shared constitutional interpretation, it allows the courts, the co-ordinate branches of government, private actors and other institutional players to determine, in tandem, the content of our basic law. At the level of the participatory bubble, court-structured and enforced settlement should allow best practices to take shape with respect to particular kinds of problems and thereby enable other similarly situated groups to learn from the experiences of others. The norms formed are both rolling and reflexive, as the parties look laterally to what others are doing, and forward in order to identify both the means and the ends that work better and best: even when 'best' sometimes means embracing who we already are.[66]

We can see how such an approach offers an attractive solution to problems associated with FAL and IIAL policies. While language conflicts will rarely be identical from school to school, and community to community, the manner in which parents, learners, principals, SGBs and HoDs go about solving a given dispute will provide insight into how other schools and communities can best go about solving their own FAL and IIAL policy problems. Over time, once again, two things happen. First, the normative content of principles of equal citizenship and official languages, as well as rights to dignity, equality and linguistic and cultural community practices, are filled out through their engagement with FAL and IIAL policies. Second, parties who must regularly confront such disputes can learn from successful interventions elsewhere.

It would be Pollyannaish to assume that a robust form of meaningful engagement is sufficient to provide all the answers thrown up by current FAL disputes and potential IIAL clashes. Such processes do not determine outcomes. What they might well do is give parties currently at odds with one another an

[65] See *Shilubana v Nwamitwa* [2008] ZACC 9, 2009 (2) SA 66 (CC), 2008 (9) BCLR 914 (CC)(Though not technically/strictly a meaningful engagement matter, the enormous number of parties, including amici and intervenors, who participated in the Constitutional Court proceedings gave the proceedings greater normative legitimacy, and facilitated the privately ordered, democratic decision of the Valoyi community to recognise that a woman could be a Hosi ('chief' or 'leader'.) See also See R Cover '1982 Term Foreword: Nomos and Narrative' 97 *Harvard Law Review* 4, 28 (1983)(Commenting on the American Mennonites' *amicus curiae* brief in *Bob Jones University v United States*, Cover characterises the 'Mennonite understanding of the first amendment as not simply the "position" of an advocate – though it is that [as well].' According to Cover, 'the Mennonites inhabit an ongoing nomos that must be marked off by a normative boundary from the realm of civil coercion, just as the wielders of state power must establish their boundary with a religious community's resistance and autonomy.')

[66] See *Joe Slovo I* (note 64 above) and *Joe Slovo II* (note 64 above)(Court learns from both the experience of the parties and its own experience as to the form and substance of meaningful engagement that works best.) Compare *Occupiers of 51 Olivia Road* (note 64 above) with *Blue Moonlight* (note 64 above) (Court learns, over the course of three years, that it must create an intermediate step between meaningful engagement and the realisation of a court order in a housing/eviction matter. The right to receive adequate immediate and intermediate housing, while new forms of adequate housing are created post-eviction order results, finally, in a minimal form of core content of the right to housing.) For more on the relationship between shared constitutional interpretation and participatory bubbles, see S Woolman *The Selfless Constitution* (note 12 above).

opportunity to regularly work through problems together *and* see how other successful parties confronted with similar difficulties acted and cooperated in a manner that resolved their disputes.[67] Over time, we might hope to see FAL and IIAL disputes take on a far less acrimonious cast. Somewhere down the road, when FAL and IIAL disputes are understood as normal curriculum problems to be resolved amicably, we may find ourselves on the way to living in a far more integrated nation where we can truly say that we understand one another.

But before we get there … somewhere down the road, hard questions of law will have to be forthrightly answered.

B Adequacy, Equity, Practicability, Reasonableness, Justifiability under FC s 29(2), FC s 29(1) and FC s 36(1)

First, let's interrogate the requirement of equity in FC s 29(2). It's a term distinct in meaning from historical redress, though some conceptual overlap certainly exists.

So far FAL disputes have taken place in higher echelon schools where middle and upper class parents jostle with one another in a manner designed to provide the best outcome for their own children – as they understand it. Such disputes are highly unlikely to occur within schools *selected* for the IIAL pilot programme. That may change, however, if the IIAL initiative is deemed to be sufficiently efficacious to warrant enshrinement as law.

Does the request for equity – shorn of issues surrounding historical redress – make philosophical sense?

Consider Charles Taylor's ruminations on the 'Politics of Equal Dignity' and the 'Politics of Difference'.[68] A politics of equal dignity is predicated on the idea that each individual human being is equally worthy of respect. A politics of difference tends to revolve primarily around the claim that every group of people ought to have the right to maintain its own equally respected community. The first claim focuses on what is the same in all of us – that we all have lives and hopes and dreams, and that we should all be granted a *real* opportunity, and thus the means, to pursue them. The second claim focuses on a specific aspect of our identity, our membership in a group. According to this second demand, the body politic ought to nurture or to foster that particularity. The power of this second form of liberal politics springs largely from its involuntary character – the sense that we have no capacity to choose this aspect of our identity. It

[67] One must be careful not to confuse the 'meaningful engagement' of multiple stakeholders with an SGB's statutory obligations to consult parents, learners, educators and other members of the community before it takes decisions regarding the LOLT of the school. In addition, the recent decision in *Rivonia* would appear to make the meaningful engagement contemplated in this section a constitutional obligation when various parties – parents, learners, the SGB, the provincial government and the national government – do not initially agree upon a LOLT, an FAL or an IIAL. See *Member of the Executive Council for Education in Gauteng Province & Others v Governing Body of the Rivonia Primary School & Others (Equal Education, Centre For Child Law, Suid-Afrikaanse Onderwysersunie, Amici)* [2013] ZACC 34, 2013 (6) SA 582 (CC) at para 49.

[68] See C Taylor 'The Politics of Recognition' in A Gutmann (ed) *Multiculturalism and the Politics of Recognition* (1996) 1.

chooses us.[69] One of the problems South Africa faces is that it is difficult, if not impossible, to accommodate both kinds of claim. As Taylor notes, while 'it makes sense to demand as a matter of right that we approach … certain cultures with a presumption of their value … it can't make sense to demand as a matter of right that we come up with a final concluding judgment that their value is great or equal to others.'[70]

It might appear that the advocates of FAL and IIAL policies are making the second argument – grounded in a politics of difference – when it comes to linguistic equity. Equal treatment of all 11 official languages is required in our public schools simply because these languages exist, continue to exist, and are recognised (at least notionally) as having equal status in the Constitution. However, Taylor's powerful argument puts paid to the demand that certain languages – and only pure versions of 11 official languages – can 'demand as a matter of right that we come up with a final concluding judgment that their value is great or equal to others.' Fortunately, that's not our contention here.

Our argument in support of FAL and IIAL draws its support, as we noted earlier, from a politics of equal dignity. The politics of equal dignity supports two distinct foundations for FAL and IIAL policies. First, a group of learners and parents have a legitimate basis for requesting that SGBs alter their existing FAL policy (where a sufficient number of learners articulate the request) because tuition in a home language speaks directly to dignity *qua* self-actualisation. Second, FAL and IIAL policies reflect the obligation of the state and its citizens to make good on dignity qua mutual respect by ensuring that African language tuition becomes more widely accessible to those learners (and other persons) who do not, as yet, speak an African language.

What of FC s 29(2)'s requirement of *practicability*? One doesn't need to be an advocate of revanchist and insular cultural politics to recognise that delivering LOTL in three languages in the foundation phase of schooling is a 'big ask'. So understood, the two policies in tandem would require all quintile 5 schools – black, white, Indian, coloured or some mix of the four – to introduce an African language at the Foundation Phase of learning (Grades R to 3) .

But that's not what FAL and IIAL require, jointly or severally, when refracted through the prism of FC s 29(2).

First, FC s 29(2) grants schools and SGBs an opportunity to explain why practicability, historical redress and equity concerns do not warrant tuition in three languages. (Grounds for non-implementation of FAL and/or IIAL – as the case law reflects – certainly exist: eg, tuition in the languages of choice in another readily accessible, equally adequate school.) Secondly, all the FAL policy actually demands is that learners be given the choice of either Afrikaans *or* African language tuition. The current curriculum policy environment requires learners to be able to read and to write in the FAL – only a *single* additional language. While the new IIAL policy may complicate matters, it's important to recall that it is designed primarily to ensure conversational competence.

[69] See M Walzer 'On Involuntary Association' in A Gutmann (ed) *Freedom of Association* (1998) 64, 67.
[70] Taylor 'The Politics of Recognition' (note 68 above) at 16.

Remember as well that the FAL and IIAL policies are tied to *demand* – and are not dictated curriculum outcomes irrespective of demand. In instances in which the demand exists, primary schools as diverse as Parkview Junior and Yeoville Boys – oh so different in terms of race, ethnicity, sex, and class – have demonstrated that the implementation of FAL and IIAL policies results in multilingual tuition that's feasible, affordable, practicable and adequate. (Again, IIAL's current status as a pilot programme lowers the threshold for reasonableness and justifiability even further – at least for the present moment.) Concerns that the number of teachers, the kinds of materials, and the costs of post provisions will make compliance with FAL and IIAL a prohibitively expensive endeavour seem somewhat overwrought.

The feasibility, affordability, practicability and adequacy of FAL and IIAL initiatives at a broad range of existing schools also dispatch concerns emanating from nascent social movements and well-established legal NGOs that we have more pressing matters when it comes to the delivery of a basic adequate education for all learners. Equal Education, the Legal Resources Centre, Equal Education Law Centre, Section 27 and the Centre for Child Law have identified a host of 'adequacy' obligations that the state must meet in order to discharge its responsibilities under FC s 29(1): (1) Textbooks; (2) Workbooks; (3) Teachers; (4) Non-educator personnel; (5) Infrastructure; (6) Sanitation; (7) Transport; (8) Furniture and (9) Libraries. Thus far, the demands of FAL and IIAL on the fiscus do not appear to have created a hindrance to the delivery of these other essential goods. Indeed, the rather extensive (if not fully comprehensive) acceptance of FAL and IIAL in principle and practice suggests that while the fight against language, culture and race-based exclusion may continue, here and there with respect to a small minority of schools, the state's push for enhanced home language tuition will meet rather limited resistance.

What of any argument articulated in terms of FC s 36(1) that these policies are neither reasonable nor justifiable? As a formal or logical matter, if we can satisfy the practicability, redress and equity desiderata of FC s 29(2), questions regarding the reasonableness and the justifiability of FAL and IIAL ought never to arise.

But let's imagine that they did.

First, let's take the title of IIAL seriously. If the state places proper emphasis on the 'incremental implementation' – and the pilot programme status of IIAL smacks of the socio-economic rights discourse of 'progressive realization' – then the courts ought to give this nascent policy initiative their imprimatur of approval.

Second, if both FAL and IIAL are read, literally, in terms of FC s 6 – and the *elevation* and the *advancement* of historically marginalised languages are taken seriously – then the more potentially demanding requirements of redress and equity found in FC s 29(2) either never arise or can be readily finessed.

Third, given the studies undertaken by the state and academic authorities, it should not be all that difficult to convince a post-*Ermelo* court that learners (in numbers that satisfy SASA's statistically significant cohort) will not receive an adequate basic education in terms of FC s 29(1) if they are denied tuition in both English and their home language. On this account, FAL and IIAL look more than eminently reasonable.

We therefore remain committed to our opening gambit. Learning the language of the 'other' is part of a broader process of making good on the Constitution's commitment to equal citizenship. However, this commitment comes with a strong caveat: we would never claim that it is of greater import than rights to adequate food, water, healthcare, social security or housing. Hillel's rhetorical injunction – 'if I am not for others, then who am I?' – speaks directly to the capacity of our children to create, for themselves, a society in which they are able to negotiate future relationships with one another as (relative) equals. The state's current FAL and IIAL policies provide a part, *and only part*, of the answer to Hillel's ethical imperative.