CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO CCT 46/95

DISPUTE CONCERNING THE CONSTITUTIONALITY OF CERTAIN PROVISIONS OF THE NATIONAL EDUCATION POLICY BILL, NO 83 OF 1995.

Heard on: 7 March 1996

DELIVERED ON: 3 April 1996

JUDGMENT

[1] **CHASKALSON P:** The Speaker of the National Assembly, acting in terms of sections 98(2)(d) and 98(9) of the Constitution, has referred a dispute concerning the constitutionality of certain provisions of the National Education Policy Bill (B83-95) to this Court for its decision.

[2] At the hearing of the matter three political parties, the National Party, the Democratic Party, and the Inkatha Freedom Party, whose members had signed the petition, were represented by counsel. Counsel for the Inkatha Freedom Party also represented the Minister of Education of the KwaZulu-Natal Province, who is the member of the KwaZulu-Natal Executive Council responsible for education in that province, and

who had been admitted as an amicus.

The National Education Policy Bill

[3] The objectives of the Bill are set out in clause 2. They are:

> (a) the determination of national education policy by the Minister in accordance with certain principles;
> (b) the consultations to be undertaken prior to the determination of policy, and the establishment of certain bodies for the purpose of consultation;
> (c) the publication and implementation of national education policy;
> (d) the monitoring and evaluation of education.

[4] The Minister referred to in the Bill, and to whom I will refer in this judgment as the Minister, is the Minister of Education in the national government. Clause 3 of the Bill makes provision for the determination of national education policy by the Minister. Clause 3(1) requires the Minister to do so in accordance with the provisions of the Constitution and the other provisions of the Bill, and clause 3(2) directs him or her to take into account "the competence of the provincial legislatures in terms of section 126 of the Constitution, and the relevant provisions of any provincial law relating to education". Clause 3(4) obliges the Minister to determine national policy for:

> the planning, provision, financing, staffing, co-ordination, management, governance, programmes, monitoring, evaluation and well-being of the education system,

and contains sub-paragraphs identifying "without derogating from the generality" of the section, specific matters for which national policy may be determined. Clause 4 sets out "directive principles of national education policy" which specify the goals to

which such policy shall be directed. Clause 5 makes provision for the consultation that must be held before policy is formulated and clause 6 provides for consultation that is necessary before legislation is enacted. Clause 7 deals with a requirement to publish the policy instrument in which the national education policy will be set out after it has been determined. Clause 8 makes provision for the monitoring and evaluation of education and clauses 9 to 13 for the establishment and functioning of various consultative bodies. Clause 14 amends the National Policy for General Education Affairs Act, 1984, in respects that are not the subject of any objection.

The constitutional challenge

[5] In their written arguments the members of the National Party challenged the constitutionality of clauses 3(3), 3(4), 4 and 8 of the Bill; the members of the Inkatha Freedom Party (supported by the amicus) challenged clause 3(3) read with clauses 8(6) and 8(7) of the Bill; and the members of the Democratic Party challenged clauses 3(3), 8(6), 8(7), 9(1)(c) and 10(1)(c) of the Bill. An objection in the petition that the provisions of section 247 of the Constitution had not been complied with, was correctly not persisted in. There was no substance in the objection, as the Bill does not interfere with the "rights, powers and functions" of the bodies referred to in that section. The other signatories to the petition did not submit argument to the Court in support of their objections.

[6] Mr. Trengove who represented the Democratic Party was the first to argue. Whilst accepting that it would be competent for Parliament to enact legislation establishing

consultative structures and enabling the department of national education to procure information from the provincial education departments, he contended that the provisions of the Bill read together went further than that: they would oblige members of provincial executive councils to promote policies that might be inconsistent with provincial policy, require them where necessary to amend their laws to bring them into conformity with national policy, and in effect would empower the Minister to impose the national government's policies on the provinces. It was argued that in so far as the Bill imposed such obligations on the provincial administrations, it would be inconsistent with the Constitution. He acknowledged, however, that there was at least some uncertainty as to whether the Bill had such a meaning. In the written argument on behalf of the Democratic Party it had been said:

> It is not clear that the disputed provisions oblige provincial governments to implement and assist in the implementation of the minister's national education policy. We will submit that they do. If this court should however hold that they do not and that provincial governments are at liberty to ignore the minister's national education policy, then the Democratic Party's constitutional objections would fall away.

This position was adhered to by Mr. Trengove at the hearing of the matter.

[7] Mr. Puckrin who appeared on behalf of the National Party associated himself with Mr. Trengove's arguments, but accepted that the Bill was capable of a narrower construction which would bring it within the Constitution. He sought a declaration, consistent with the narrower construction, that the Bill did not empower the Minister to compel the provinces to implement national education policy.

[8] Mr. Richings appeared on behalf of the Inkatha Freedom Party and the Minister of Education for KwaZulu-Natal. In his written argument it was contended that if the "policy" referred to in the Bill:

> was used in the sense of a mere wish or expectation on the part of the National Minister it would be unobjectionable, but the term as used appears to go beyond this as it is given a sanction in the form of enforcement mechanisms.

It was further contended that the Bill could have no application to KwaZulu-Natal because it was in a position to formulate and regulate its own policies and the imposition of a national policy would encroach upon its autonomy. At the hearing Mr. Richings also associated himself with Mr. Trengove's argument. He too contended that the Bill imposed national education policy on the provinces but accepted that if it was capable of a narrower construction the objection on these grounds would fall away. He also contended that the Bill encroached upon the autonomy of the provinces and their executive authority.

The provisions of the Bill to which objection was taken

[9] The specific provisions of the Bill to which objection was taken in argument were clauses 3(3), 8(6) and (7), and 9 and 10.

[10] Clause 3(3) of the Bill provides that:

> Whenever the Minister wishes a particular national policy to prevail over the whole or a part of any provincial law on education, the Minister shall inform the provincial political heads of education accordingly, and make a specific

> declaration in the policy instrument to that effect.

This has to be read with clause 8 which deals with the monitoring and evaluation of education. Clause 8(5) requires the Department of Education to report on investigations undertaken by it, and clauses 8(6) and (7) go on to provide:

> (6) If a report prepared in terms of subsection (5) indicates that the standards of education provision, delivery and performance in a province do not comply with the Constitution or with the policy determined in terms of section 3(3), the Minister shall inform the provincial political head of education concerned and require the submission within 90 days of a plan to remedy the situation.
> (7) A plan required by the Minister in terms of subsection (6) shall be prepared by the provincial education department concerned in consultation with the Department [of Education], and the Minister shall table the plan in Parliament with his or her comments within 21 days of receipt, if Parliament is then in ordinary session, or, if Parliament is not in ordinary session, within 21 days after the commencement of the first ensuing ordinary session of Parliament.

The provincial political head of education is defined as meaning the member of the [provincial] Executive Council responsible for education in a province.

[11] Clauses 9 and 10 establish a Council of Education Ministers and a committee called the Heads of Education Departments Committee. The Council consists of the Minister of Education and the Deputy Minister, if such an office is established, and the provincial political heads of education. The functions of the Council are to share information and views on education, to co-ordinate action on matters of mutual interest to the provinces and the national government, and to:

> promote a national education policy which takes full account of the policies of the government, the principles [of national education policy] contained in clause 4 [of the Bill], the education interests and needs of the provinces, and the respective competence of Parliament and the provincial legislatures in

terms of section 126 of the Constitution.[1]

The Heads of Education Departments Committee consists of senior officials of the national and provincial education departments, and has functions similar to those of the Council of Education Ministers.

[12] None of the objectives of the bill is inconsistent with the Constitution. Parliament has the competence to make laws in respect of education, and the determination of policy is clearly necessary for this purpose. There can be no objection to providing that consultation shall take place prior to the formulation of policy. This serves to restrict rather than to increase the Minister's powers. And if regard is had to our history of disrupted education and to the present constitutional structure which vests concurrent powers to make laws for education in Parliament and the provinces, consultation with educational bodies, including provincial education departments, is essential for the proper exercise of the power to make policy. The publication and implementation of national education policy and the monitoring and evaluation of education are also not open to objection, unless they are done in a way which infringes the powers of the provinces. This was accepted by all counsel in argument, and the constitutional challenge was limited to a contention that the Bill authorised the Minister to implement policy in a way that infringed the powers of the provinces, and to that extent, was inconsistent with the Constitution.

The powers of Parliament and the provincial legislatures

[1] Clause 9(3)(a)

[13] In terms of section 37 of the Constitution Parliament has the power to make laws for the Republic. It is a general plenary power and is not confined to specific functional areas. The legislative competence of the provincial legislatures is different. It is derived from section 126(1) of the Constitution which empowers them to make laws with regard to all matters set out in schedule 6 to the Constitution. This must be read with Section 126(2) which provides that they can also make laws which are reasonably necessary for or incidental to the exercise of such legislative competence. Education is a schedule 6 functional area in respect of which the provinces have legislative competence. This is not, however, the exclusive domain of the provinces, but one which they exercise concurrently with Parliament. This is made clear by section 126(2A) of the Constitution which provides:

> Parliament shall be competent, subject to subsections (3) and (4), to make laws with regard to matters referred to in subsections (1) and (2).

[14] Section 126 of the Constitution does not restrict this power; what it does is to provide in subclauses (3) and (4) how a conflict or potential conflict that may exist between an Act of Parliament and provincial legislation is to be resolved.[2]

[15] Section 126(5) of the Constitution requires that if it is possible to do so an Act of

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[2] *Premier of KwaZulu-Natal and Others v President of the Republic of South Africa* 1995 (12) BCLR 1561(CC) at para 25; *The Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (10) BCLR 1289(CC) at para 90.

Parliament and a provincial law should be construed as being consistent with each other. If, or to the extent that, this cannot be done, then the provisions of sections 126(3) and (4) determine which of the conflicting provisions is to prevail. The solution provided is as follows. To the extent that the criteria specified in subsections (a) to (e) of section 126(3) are met the provisions of an Act of Parliament that is of general application will prevail; if, or to the extent that, such criteria are not met the provisions of the provincial law will prevail.

[16] The legislative competences of the provinces and Parliament to make laws in respect of schedule 6 matters do not depend upon section 126(3). Section 126(3) comes into operation only if it is necessary to have resort to it in order to resolve a conflict. If the conflict is resolved in favour of either the provincial or the national law the other is not invalidated; it is subordinated and to the extent of the conflict rendered inoperative. There is an important difference in this regard between laws that are inconsistent with each other and laws that are inconsistent with the Constitution. Section 4 provides that a law inconsistent with the Constitution is "of no force and effect", and in terms of section 98(5) such law has to be declared by this Court to be invalid to the extent of the inconsistency. Section 126(3), which deals with laws that are consistent with the Constitution but inconsistent with each other, does not stipulate that either law will be invalid as a result of the inconsistency; only that the provisions of one of the laws shall prevail over the other.[3]

[3] Although section 126(3) refers to circumstances where a provincial law prevails over an Act of Parliament, it is clear from the provisions of section 126(5) that the section applies to provisions that are

inconsistent and not the entire law.

[17] *Hogg*,[4] discusses the difference between inconsistency and invalidity in Chapter 16. He concludes that:

> Once it has been determined that a federal law is inconsistent with a provincial law, the doctrine of federal paramountcy stipulates that the provincial law must yield to the federal law. The most usual and most accurate way of describing the effect on the provincial law is to say that it is rendered inoperative to the extent of the inconsistency. Notice that the paramountcy doctrine applies only to the extent of the inconsistency. The doctrine will not affect the operation of those parts of the provincial law which are not inconsistent with the federal law, unless of course the inconsistent parts are inseparably linked with the consistent parts. There is also a temporal limitation on the paramountcy doctrine. It will affect the operation of the provincial law only so long as the inconsistent federal law is in force. If the federal law is repealed, the provincial law will automatically "revive" (come back into operation) without any reenactment by the provincial Legislature.[5]

[18] A similar conclusion has been reached by the High Court of Australia in respect of conflicts between state laws and laws of the Commonwealth Parliament. Section 109 of the Australian Constitution provides that a state law that is inconsistent with a Commonwealth law shall to the extent of such inconsistency be "*invalid*". The High Court has held that section 109 does not nullify the inconsistent provisions of the state law; it simply renders them "inoperative and ineffective" as if they had been suspended. They would revive and be of full force and effect if the Commonwealth law were to be repealed, or amended in a manner that removed the inconsistency.[6]

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[4] Hogg PW, *Constitutional Law of Canada,* 3 ed (Supp 1992).

[5] *Id*. at para 16.6 (footnotes omitted).

[6] *Butler v Attorney-General (Vict.)* (1961) 106 C.L.R. 268, 286; *Western Australia v The Commonwealth* (1994-1995) 183 CLR 373, 464.

[19] This reflects in my view the way in which our Constitution requires inconsistencies that cannot be resolved by the application of the provisions of section 126(5) to be dealt with. Neither Parliament nor a provincial legislature has the competence to invalidate laws of the other passed in accordance with the Constitution; nor does the Constitution lay down that a consequence of inconsistency will be the invalidity of one of the laws. It follows that a law that is subordinated by virtue of the application of section 126(3) is not nullified; it remains in force and has to be implemented to the extent that it is not inconsistent with the law that prevails. If the inconsistency falls away the law would then have to be implemented in all respects.

[20] Thus, even if the National Education Policy Bill deals with matters in respect of which provincial laws would have paramountcy, it could not for that reason alone be declared to be unconstitutional. This disposes of the argument put forward in the written submissions made on behalf of the Inkatha Freedom Party and the Minister of Education for KwaZulu-Natal that "none of the so-called 'overrides' set out in section 126(3) of the Constitution ... can be held to apply to the Province of KwaZulu-Natal" because it is capable of regulating any matter relating to education within the province. The argument seems to be premised on a construction of section 126 as meaning that as long as a province is capable of regulating a schedule 6 matter it has the exclusive right to do so. But that is not what the section says. The application of section 126(3)(a) to (e) to resolve conflicts between Acts of Parliament and provincial legislatures may give rise to difficult questions; none of them arise, however, in the present matter for the simple reason that the constitutionality of the Bill does not

depend upon an application of the provisions of section 126(3).

The argument

[21] In support of the challenge to the constitutionality of the Bill on the grounds that it obliges provinces to adhere to national education policy, Mr. Trengove placed considerable reliance on the majority judgment of the United States Supreme Court in *New York v United States*.[7] This case was concerned with a 1985 congressional statute which dealt with the disposal of radioactive waste. The statute was enacted after negotiations involving the affected states. At that time there were three regional disposal facilities and in terms of earlier legislation those facilities would have been entitled as from the beginning of 1986 to exclude waste from non-members. The 1985 statute extended the period during which the existing three sites would accept waste from non-members until 1992, and dealt with the obligations of states after the expiry of that deadline. The legislative scheme was as follows. Each state was made responsible for disposing of waste generated within its territory either by itself or in co-operation with other states. States were authorised to enter into compacts for the establishment of regional disposal facilities, and three sets of incentives were offered to states to encourage them to comply with their obligations under the statute. One set consisted of monetary incentives; one set authorised states with disposal sites to gradually increase the cost of access to their sites and ultimately to deny access to waste generated in the states which did not meet federal deadlines. The third set required a state which had not made arrangements for the disposal of waste either to

[7] 505 U.S. 144 (1992).

regulate the disposal of the waste in accordance with the instruction of Congress, or, if required to do so by the generator or owner of the waste, to assume ownership, possession and ultimately responsibility for the waste and any damage caused by it. The validity of the legislation making provision for the incentives was disputed on the grounds that it interfered with state rights. The Court was divided. The majority judgment in the *New York* case is based in the main on the importance of the states' powers under the Tenth Amendment. They concluded that:

> while Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to compel the States to do so.[8]

In the result it was held that the first two incentives were within the Constitution, but the third was not. As the provisions relating to the third incentive could be severed from the rest of the statute, the Act containing only the two incentives remained operative and served:

> Congress' objective of encouraging the States to attain local or regional self-sufficiency in the disposal of low level radioactive waste.[9]

The minority took a different view, holding that:

> principles of federalism have not insulated States from mandates by the National Government

[8] *Id*. at 149.

[9] *Id*. at 187.

and that the Courts have upheld "congressional statutes that impose clear directives on state officials."[10] Stevens J, concurring in the dissenting judgment, said that:

> [t]he notion that Congress does not have the power to issue "a simple command to state governments to implement legislation enacted by Congress" ... is incorrect and unsound.[11]

[10] *Id*. at 207, note 3.

[11] *Id*. at 211.

[22] It was pointed out in *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* [12] that the powers of Parliament depend ultimately upon "the language of the Constitution, construed in the light of [our] own history." Our history is different to the history of the United States of America, and the language of our Constitution differs materially from the language of the United States Constitution. The history and structure of the United States Constitution are discussed in the judgment of O'Connor J in the *New York* case.[13] The Constitution addressed a situation in which several sovereign states were brought together in a federation. The constitutional scheme agreed upon was that each state would surrender part of its sovereignty to the federal government and retain that part which had not been surrendered. This is reflected in the language of the Constitution. Congress has only those powers specifically vested in it by the Constitution. All other power is vested in the states.[14] Congress can make laws which encroach upon state sovereignty through the supremacy clause,[15] commerce clause,[16] the spending power[17] and the power to make all laws which may be necessary and proper for the implementation of its powers,[18] but cannot otherwise interfere with the rights vested in the states under the Tenth Amendment.

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[12] 1995(10) BCLR 1289 (CC) at para 61.

[13] *Ibid*. at 155-8 and 161-6.

[14] U.S. Const. amend. X.

[15] U.S. Const. art. VI, cl. 2.

[16] U.S. Const. art. I, section 8 cl. 3.

[17] U.S. Const. art. I, section 8 cl.1.

[18] U.S. Const. art.I, section 8 cl.18.

[23] Unlike their counterparts in the United States of America, the provinces in South Africa are not sovereign states. They were created by the Constitution and have only those powers that are specifically conferred on them under the Constitution. Their legislative power is confined to schedule 6 matters and even then it is a power that is exercised concurrently with Parliament. Decisions of the courts of the United States dealing with state rights are not a safe guide as to how our courts should address problems that may arise in relation to the rights of provinces under our Constitution. And this is so whether the issue arises under the provisions of section 126 or any other provision of the Constitution.

[24] Although the Bill establishes structures and procedures which are directed to developing a national policy that will be adhered to by all provinces, and contains provisions which are calculated to persuade the provinces to do so, it does not in my view go so far as to require this to be done. In the circumstances the argument that the Bill empowers the Minister to override provincial law or to compel the provinces to amend their laws must be rejected. My reasons for rejecting this interpretation of the Bill are as set out below.

The interpretation of the Bill

[25] The provisions that are challenged must be seen in the context of the Bill as a whole which addresses policy issues in a situation in which Parliament exercises concurrent legislative power with the provincial legislatures in respect of schedule 6 matters.

[26] Clause 3(1) of the Bill provides that national education policy is to be determined by the Minister in accordance with the Constitution and the other provisions of the Bill. Clause 3(2) of the Bill requires that in the formulation of national education policy the Minister shall take account of the provisions of section 126 of the Constitution and the relevant provisions of any provincial law relating to education. This is a clear indication that national education policy should not contradict provincial law, save where it would be permissible for Parliament to authorise this through legislation which in terms of section 126 would prevail over provincial law. Clause 6 contemplates that such legislation may be necessary and provides that it may not be introduced into Parliament without prior consultation with the Council of Education Ministers.

[27] The vesting of concurrent lawmaking powers in Parliament and the provincial legislatures is an arrangement which calls for consultation and co-operation between the national executive and the provincial executives. The Commission on Provincial Government[19] and the Financial and Fiscal Commission,[20] which are important constitutional structures, contemplate that there will be consultation between representatives of the provinces and the national government in regard, *inter alia*, to the allocation of funds and the rationalisation of statutory enactments. The Bill, which makes provision for such consultation and co-operation in the field of

[19] As to which, see sections 163 to 173 of the Constitution.

[20] As to which, see sections 198 to 206 of the Constitution.

education, is wholly consistent with the constitutional scheme. Indeed, where both Parliament and the provincial legislatures have exercised or wish to exercise schedule 6 competences such consultation and co-operation would appear to be essential. It is necessary to enable the national government to obtain the information it may require to enable it to take decisions in regard to educational matters falling within the ambit of sections 126(3)(a) to (e) of the Constitution; it is necessary to avoid conflicting legislative provisions and to rationalise the legislation applicable to schedule 6 matters; and it is necessary to enable provincial and national governments to formulate their plans, including budgetary allocations, for the future. The setting up of a parallel national administration in a province to procure the information that the national government needs, and to implement legislation enacted pursuant thereto, would be neither cost-effective nor efficient, and moreover, would be likely to be more intrusive of provincial structures than legislation which calls for cooperation.

[28] One of the purposes of the Bill is to make provision for the development of a national education policy which will accommodate differences between the national government and the provinces. Thus clause 9(3)(a) refers to a policy that takes full account of the policies of the government and the needs and interests of the provinces, and the respective powers of Parliament and the provincial legislatures. In so far as the Bill makes provision for consultative structures to be established for this purpose, or for the provision of information by provincial education departments to the national education department, it does not in my view offend any of the provisions of the Constitution.

[29] Clause 3(3) of the Bill requires the Minister to give notice to the relevant provincial political heads of education if he *wishes* national education policy to prevail over provincial law. Such notice does not enable the Minister to require the provinces to act in conformity with national policy; it merely informs them that it is the Minister's *wish* that they should do so, and lays the ground for the necessary consultation that must take place with the Council. There is, no doubt, an implication that the Minister may take action to secure the implementation of national policy if the expressed wish is not met, but that would depend on further steps including if necessary the enactment of legislation as contemplated by clause 6. The response to the Minister's notice, or the consultation called for under clause 6, could lead to the Minister changing tack, or to consensus between the different administrations as to how differences between them should be resolved.

[30] The provisions of clauses 8(6) and (7) of the Bill also give rise to no obligation on the part of the provinces to adopt national education policy in preference to their own policy, or to amend their legislation to bring it into conformity with national policy. The provincial political head of education can be called upon to prepare a plan to bring standards of education in his or her province into line with what may be required by the Constitution or national policy, if a report has been made under clause 8(5) that such standards are not being met. There is, however, no obligation imposed on the province by the Bill to implement that plan if it chooses not to do so. That obligation could possibly be imposed by other legislation which passes the test of sections 126(3) and (4), but the Bill itself makes no specific provision for that to be done. It contemplates that such legislation may be enacted, but only after

consultation has taken place in terms of clause 6.

[31] Nothing in the Bill imposes an obligation on the provinces to act in conformity with national education policy. That may possibly be achieved by Parliament through the passing of legislation which prevails over provincial law in terms of section 126(3). Whether such laws will or will not be enacted depends on Parliament; and if enacted, whether they will prevail over any provincial laws that are inconsistent with them, is a matter that should only be determined if and when such laws are passed. I shall assume for the purposes of this judgment that such laws, if enacted in an appropriate form, could be made to prevail over provincial laws in terms of section 126 of the Constitution and that it is implicit in the Bill that the Minister might call upon Parliament to take such action if the co-operation of a particular province is not secured. It is, however, not necessary for the purposes of the decision in the present matter to express a definite opinion as to whether or not Parliament has that power; all that is necessary for present purposes is to say that such an obligation would depend on action by Parliament, and is not imposed by the provisions of clauses 3(3), 8(6) or (7), or any other provision of the Bill.

[32] The opportunity to participate in the Council and Committee and to be heard on adverse reports was not objected to. The objection was to being required to formulate a remedial plan, or to promote national policy. The word "require" which is used in clause 8(6) has a peremptory connotation, and this is also true of clause 8(7) which provides that the remedial plan:

> shall be prepared by the provincial education department concerned in consultation with the [national] Department.

[33] It was suggested in argument that the cooperation of a provincial political head of education who wishes to ignore a request made for the submission of a remedial plan, could be secured through a mandamus, or through a threat to withhold financial support for the province's education system, or through some other coercive action. It is by no means clear that a political obligation such as that contemplated by clause 8(6) could be made the subject of a mandamus, particularly if the province is not willing to implement the plan;[21] nor is it clear that the offering or withholding of financial incentives (if otherwise lawful) would be open to objection. If the financial incentives or other action taken to persuade the provinces to agree to national policy are not legitimate they can be challenged under the Constitution or under the well established principle that a power given for a specific purpose may not be misused in order to secure an ulterior purpose;[22] if they are legitimate, then they are not open to objection.[23] These are not, however, issues that need trouble us in this case. It can be assumed that provincial administrations will act in accordance with a law which is consistent with the Constitution. If a law requires a provincial administration to act in a particular manner and that requirement is not constitutional, the law cannot be saved from constitutional challenge simply because there may be inadequate forensic mechanisms under the Constitution for its enforcement. It is therefore necessary to

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[21] *The King v The Governor of the State of South Australia* (1907) 4 C.L.R. 1497, 1511; *Reg. v Employment Secretary, Ex p. E.O.C.* [1993] 1 W.L.R.872 *(C.A.)*, 877 E-F, 895H-896C; 907G-908G.

[22] *Van Eck NO and van Rensburg NO v Etna Stores* 1947(2) SA 984 (A).

[23] In the *New York* case it was held that there was no constitutional objection to the use of financial incentives by Congress to secure the co-operation of the states in the implementation of the plan for the disposal of the waste.

confront and answer the question: can an Act of Parliament require a provincial political head of education to cause a plan to be prepared as to how national standards can best be implemented in the province?

[34] Where two legislatures have concurrent powers to make laws in respect of the same functional areas, the only reasonable way in which these powers can be implemented is through cooperation. And this applies as much to policy as to any other matter. It cannot therefore be said to be contrary to the Constitution for Parliament to enact legislation that is premised on the assumption that the necessary cooperation will be offered, and which requires a provincial administration to participate in cooperative structures and to provide information or formulate plans that are reasonably required by the Minister and are relevant to finding the best solution to an impasse that has arisen.

[35] Clauses 8(6) and (7) of the Bill contemplate a situation in which a provincial political head of education may be called upon to secure the formulation of a plan to bring education standards in the province into line with the Constitution or with national standards. All education policy, national or provincial, must conform with the Constitution. If national standards have been formulated and lawfully made applicable to the provinces in accordance with the Constitution, those must also be complied with. The effect of clauses 8(6) and (7) is therefore to give the province concerned an opportunity of addressing the alleged shortfall in standards itself, and of suggesting the remedial action that should be undertaken. And this is so even if the national standards have been formulated, but have not yet been made the subject of

legislation. The alternative would be for the government to act unilaterally and to take decisions without allowing the province this opportunity.

[36] It was also argued that the Bill interferes with the executive authority of the provincial political heads of education in that clauses 9 and 10 require them and their administrations to participate in structures in which they may not wish to participate and to promote a policy that they may not wish to promote. Clauses 9 and 10 establish the Council of Education Ministers and the Committee of Heads of Education Departments. These are fora for the discussion of mutual problems and for the development of national policy along lines that would be acceptable to the national government and the provinces. The decisions of these bodies are not binding on the provinces or the national government, and any participant is free to distance his or her government from such decisions. The fact that the functions of these bodies include the development and promotion of a national education policy, does not give rise to any obligation on the part of a provincial administration to approve of or adopt such a policy. Provinces are free to develop and implement their own education policies. If they do so in a way that conflicts with national education policy, and that conflict is in respect of matters falling within the purview of section 126(3)(a) to (e) of the Constitution, the provinces concerned may possibly be required by the Minister to amend their policies. But, in the absence of agreement or legislation lawfully enacted by Parliament that requires them to do so, they have no obligation to comply with any demand that might be made by the Minister, the Council or the Committee for them to implement national policy.

[37] The executive authority vested in the provinces by section 144 of the Constitution is to administer their own laws. Clauses 9 and 10 do not interfere with this authority in any way. What they do is to establish bodies for the purpose of formulating mutual policies, co-ordinating action on matters of mutual interest, and exchanging information. There is no compulsion on the provincial political heads of education or the officials of their departments to participate in the affairs of the Council or the Committee. The Bill gives them the right to do so; but if they choose not to, the only sanction is that national education policy and other plans that may be relevant to them, may be formulated without any input from them and without their particular concerns being adequately taken into account. Neither the Council nor the Committee can require a province to change its laws or to implement national policy; nor can they require the provincial political head of education or members of the provincial education department to refrain from implementing provincial laws or policies. The most that they can do is to give advice or make recommendations which may or may not be followed by the provinces.

[38] There are no provisions of the Bill that oblige the provinces to follow national education policy, or that empower the Minister to require them to adopt national policy or to amend their own legislation. The objection founded on the assumption that this is what the Bill meant is based on an incorrect assumption and cannot be sustained. The Bill calls for cooperation between the provinces and national government and responses by the provinces to requests directed to them in terms of the Bill; Parliament is entitled to make provision for such cooperation and coordination of activities in respect of schedule 6 matters, and the objection to such

provisions on the grounds that they encroach upon the executive competence of the provinces can also not be sustained.

The order to be made

[39] We were informed during the hearing that certain amendments, said not to be material to the disputed issues, had been effected to the Bill after it had been submitted to this Court by the Speaker. We are concerned only with the Bill in the form in which it was submitted to us by the Speaker. The amendments were not the subject of the petition and this Court has no jurisdiction to deal with them.

[40] The National Party submitted that this Court should make an order declaring that the Bill is not unconstitutional, and that it does not empower the Minister to compel the provinces to implement the policy set out in clause 3 of the Bill. The Democratic Party asked for a similar order in the event of it being held that the Bill did not empower the Minister to compel the provinces to implement national policy. The only question referred to this Court is whether the Bill is unconstitutional. The provisions of section 7(4)(a) of the Constitution authorising this Court to make declarations of rights applies to infringements of Chapter Three and not to the Court's jurisdiction under section 98(2)(d). The Bill is not a law; it creates no rights and cannot be made the subject of a declaration of rights. All that this Court is empowered to do is to resolve the dispute as to the constitutionality of the Bill. In the circumstances the only order that can properly be made is that the provisions of the National Education Policy Bill submitted to this Court by the Speaker are not inconsistent with the

Constitution on any of the grounds advanced on behalf of the petitioners.

Costs

[41] In cases where the objection which is the basis for a sections 98(2) and (9) petition has no merit or is shown to have been taken precipitately, this Court has the power under rule 13(5) to order the objectors to pay the costs occasioned by their objection.

[42] Counsel for the Minister did not ask for an order of costs to be made in the present case against the parties who raised the constitutional objection. He did, however, contend that unnecessary documentation had been placed before us by the National Party and that it should be directed to bear the costs occasioned as a result of the lodging of such documentation. The hearing was concluded in one day. The documents referred to were not canvassed in the written arguments and were barely mentioned during the oral argument. Although the documents referred to proved to be largely irrelevant, the additional costs incurred by the Minister as a result of this would not have been of any moment. In the circumstances it would not be appropriate to make a special order concerning the costs of such documents.

The referral

[43] We were asked by counsel for the Minister to lay down guidelines for the referral of issues to this Court under sections 98(2)(d) and (9) of the Constitution. It was submitted that it would have been more appropriate for this matter to have been

referred to the Court after the debate on its provisions had been completed. It appeared at the hearing that the constitutional objection was taken largely because of a mistaken assumption that the Bill was intended to, and in fact compelled the provinces, to comply with the Minister's determination of national education policy. Such an intention and construction of the Bill was disavowed in the written argument lodged on behalf of the Minister. It was pointed out by counsel for the Minister that the fears of the objectors may have been allayed, and uncertainties could possibly have been resolved, if they had been raised during the debate. Had this happened a petition may not have been lodged with the Speaker.

[44] It would no doubt have been better in the circumstances of this case if the objectors had raised the constitutional issue during the debate and deferred lodging the petition with the Speaker until after the government's attitude to the disputed clauses had been clarified. If this procedure had been followed the disputed issues might have been resolved within Parliament. Parliament controls its own proceedings and there may be good reasons for the procedure whereby the petition was lodged at the commencement of the debate. The procedure to be followed in such matters is within the domain of Parliament and in my view it would not be appropriate for this Court to make any suggestions to Parliament in that regard.

[45] The following order is made: The National Education Policy Bill submitted to this Court by the Speaker of Parliament in terms of sections 98(2)(d) and (9) of the Constitution on the 13th September 1995 is not unconstitutional on any of the grounds advanced on behalf of the petitioners.

A. Chaskalson
President Constitutional Court

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

CASE NO: CCT 46/95

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